AMERICAN BANKRUPTCY INSTITUTE

International Caribbean Insolvency Symposium

Judges' Roundtable

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Judge of the Grand Court | Cayman Islands

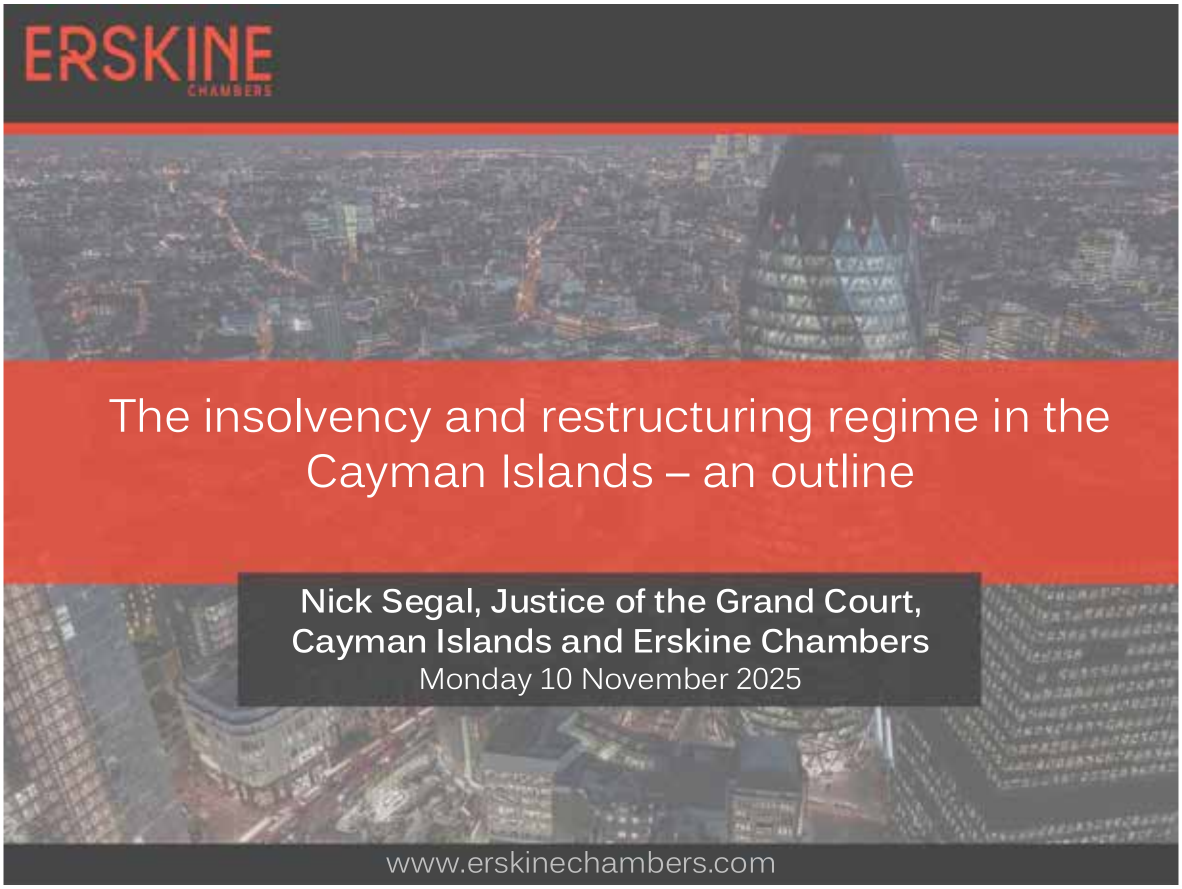
Hon. Bruce A. Harwood (ret.)
San Francisco

Hon. Christopher M. Lopez
U.S. Bankruptcy Court (S.D. Tex.) | Houston

Hon. Robert A. Mark
U.S. Bankruptcy Court (S.D. Fla.) | Miami

Hon. Justice Nicholas A. Segal
Judge of the Grand Court | Cayman Islands

2026



Introduction

1. **The main insolvency and restructuring procedures are:**

   – **the appointment by the Court of a restructuring officer (sections 91A – 91J of the Companies Act (2023 Revision))**

   – **the making of a winding up order by the court (sections 92-115) – both for solvent and insolvent companies on the application of creditors or shareholders**

   – **the appointment by the court, after presentation of winding up petition, of a provisional liquidator (section 104)**

   – **the sanctioning by the court of a scheme of arrangement (section 86)**

2. **The law is based on English law before the reforms introduced in England by the Insolvency Act 1986 – accordingly no administration procedure and no restructuring plan procedure (accordingly no cross-class cramdown).**

3. **The litigation culture is like that in England with some important differences. Insolvency and restructuring cases are assigned to and dealt with the specialist judges in the Financial Services Division (who deal a wide range of corporate, financial, commercial, trust, wills and estates disputes as well as bankruptcy cases). The FSD operates a docketing system so one judge will be assigned to deal with all applications relating to a particular proceeding and debtor but like English judges will only be involved in those aspects of the proceeding which are brought before the court (which will be limited).**

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Eligibility to file

1. **Section 91 - the court jurisdiction to make winding up orders in respect of:**

    (a). a Cayman incorporated company

    (b). a foreign company (any body corporate incorporated outside Cayman) which —

    (i) has property located in Cayman.

    (ii) is carrying on business in Cayman.

    (iii) is the general partner of a limited partnership or

    (iv) is registered as an overseas company and has established a place of business or carries on business in Cayman

2. **Section 91A – the court may appoint a RO in respect of any company which is liable to be wound up under section 91.**

3. **Section 86(5) – the court can sanction a scheme of arrangement in respect of any company which is liable to be wound up under section 91.**

4. **Residual discretion – the sufficient connection test (see my judgment in *Re E-House* (China), unreported, 17 November 2022, at [122])**

3

Winding up – creditor's application

1. **Chapter 7 equivalent.**

2. **Grounds (section 92) – the company is unable to pay its debts (a cash flow test is applied).**

3. **Creditor makes application (presents petition) and a hearing is listed.**

4. **No automatic stay upon presentation of the petition – but the company, a creditor or a shareholder can apply for a stay of domestic proceedings or for an injunction against a person who has commenced proceedings in a foreign court (section 96).**

5. **If a winding up order is made, any disposition of the company's property after the presentation of the petition is void unless an application to the court is made to permit the disposition to proceed and the court has made such an order.**

6. **An official liquidator is appointed with the functions and powers set out in the Companies Act as varied by the court order (section 110).**

7. **The official liquidator can apply to set aside (a) preferences made when the company was unable to pay its debts if within 6 months of the making of the winding up order (section 145) and (b) dispositions of property at an undervalue made with intent to defraud creditors within 6 years of the winding up order (section 147).**

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Winding up – creditor's application for the appointment of a provisional liquidator

1. **At any time after a petition has been presented a creditor can apply for the appointment of a provisional liquidator (section 104).**

2. **Must show that —**

   (a) **there is a *prima facie* case for making a winding up order; and**

   (b) **the appointment of a provisional liquidator is necessary in order to —**

      (i) **prevent the dissipation or misuse of the company's assets;**

      (iii). **prevent mismanagement or misconduct on the part of the company's directors.**

3. **The provisional liquidator must carry out only such functions as the court may confer on him/her and that person's powers may be limited by the order appointing that person (section 104(4)). This wording is needed because the court is appointing a liquidator provisionally (section 104(1).**

4. **The provisional liquidator is appointed where there is a need to displace management before the hearing of the winding up petition.**

5. **There is an automatic (but limited) stay upon the appointment of a provisional liquidator (section 97).**

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Winding up –company's application for the appointment of a provisional liquidator

1. **Before the introduction of the RO procedure, if a company that wished to propose and negotiate a restructuring needed to stay proceedings brought or threatened against it, the company would present a winding up petition and apply for the appointment of a provisional liquidator.**

2. **Under the pre-31 August 2022 law, the company could apply *ex parte* for the appointment of a provisional liquidator on the grounds that (a) it was or was likely to become unable to pay its debts and (b) it intended to present a compromise or arrangement to its creditors (section 104(3)). Court retained a residual discretion even if these grounds were made out. The Company had to show that there was a proper basis for making the order: see my judgment in *Re Midway Resources,* unreported, 30 March 2021**

3. **To allow the debtor's management to conduct the restructuring negotiations and continue to manage the company's business, the company would apply for an order that gave the provisional liquidator a limited role and limited powers only. The order directed that the directors be permitted to cause the company to carry on its business in the ordinary course without the need to obtain approval. This was labelled a light touch provisional liquidation: see *Re Midway Resources.***

4. **It was considered unsatisfactory that a company wishing to propose a restructuring was required to use and first commence a winding up procedure. So, the RO procedure was introduced and intended to become the procedure of choice for company's wishing to propose a restructuring with the benefit of a stay. The wording of section 104(3) was amended to remove the special grounds set out in the old section 104(3) but to retain the jurisdiction for the court to appoint a provisional liquidator on an application by the company if it considers it appropriate to do so.**

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Winding up – shareholder's application

1. **Same procedure as for creditor's application. Shareholders petitions are regular feature of Cayman corporate litigation. Used when shareholders fall out and want to end the corporate relationship.**

2. **Shareholder must show that has an interest in a winding up (standing to petition) – must show that the company is solvent and that there will be surplus available to shareholders after creditors paid.**

3. **Grounds (section 92) – generally that it would be just and equitable to wind up the company. Includes oppression of the petitioning shareholder by majority shareholders, functional deadlock and a justifiable loss of confidence in the probity of the directors.**

4. **The court is required to decide at the outset (and to make case management orders concerning) whether the company should undertake the main defence of the petition or whether the dispute is in substance one between shareholders so that the company's funds should not be expended to cover the cost of an inter-shareholders' dispute (see my judgment in *Laggner v Uphold*, unreported, 16 February 2023).**

5. **Court may make an order for alternative relief (e.g. requiring the other shareholders to buy-out the shares of the petitioner) if the grounds for making a winding up order are made out (section 95(3))**

6. **May be combined with a separate action by the shareholder against the company if the shareholder can establish that a personal right has been breached (see my judgment in *Tianrui v China Shanshui* [2020 (2) CILR 6], which was overturned by the CICA but upheld by the JCPC [2024] UKPC 36).**

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The RO regime - I

1. **Came into force on 31 August 2022.**

2. **Only the company can apply by filing a petition (acting by its directors or pursuant to a shareholders' resolution).**

3. **Low jurisdictional threshold - must show that the company:**

   (a). is or is likely to become unable to pay its debts within the meaning of section 93 and

   (b). intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring.

4. **The company must file evidence of its financial position, an explanation of how it will be funded during the period of the RO's appointment and a statement of the reasons why the directors believe that the appointment of a RO and the moratorium would be in the best interests of the company and, in appropriate circumstances, its creditors.**

5. **The court has a residual discretion – see *Re Oriente Group Limited* (unreported, 8 December 2022)**

6. **The powers and functions of the RO, and the limitations on the powers of the directors, are to be set out in the order appointing him/her – the idea is to retain flexibility and allow ROs to play different roles in different cases. Consent of RO to any restructuring plan is likely to be required.**

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The RO regime - II

7. **Upon presentation of petition, there is an automatic stay on proceedings and winding up petition (section 91G) but not on the enforcement of a security interest (section 91H).**

8. **The RO must be an insolvency practitioner and becomes an officer of the court.**

9. **To effect a restructuring, the company (under section 86) with the consent of the RO or the RO (under section 91I) will need to propose a scheme of arrangement (when a cram down of some creditors is needed). The company or the RO could also propose a consensual restructuring (with the agreement of all impaired parties).**

10. **Can be combined with a chapter 11 proceeding – see Rockley Photonics Holdings Limited.**

11. **If a winding up order is made after the RO is discharged (a) the RO's costs and the expenses and disbursements incurred by or during the term of appointment of any RO are given priority (see the Companies Winding Up Rules, 2023 consolidation, Order 20, rule 1) and (b) any disposition of the company's property between the date of the presentation of the petition for the appointment of the RO and the winding up order is void unless validated by court order (section 100(1)).**

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Schemes of arrangement - I

1. **The company can propose a compromise or arrangement with (a) some or all creditors (or classes of creditors) and/or (b) with its members (section 86). See also the Practice Direction No 2 of 2010.**

2. **The procedure involves:**

   (a). **an application to the court (the convening hearing) for an order that meetings be convened of those creditors to be made parties to the scheme and/or of members. Only those creditors (and shareholders) whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest can be required to vote together, so it may be necessary to convene more than one meeting of creditors (or shareholders) and to separate the creditors/shareholders into different classes**

   (b). **the meetings are held (in person and/or remotely).**

   (c). **if the requisite majority is obtained (either at the single meeting or at the meeting of each class of creditors or at the meeting or meetings of members), an application is made to the court to sanction the scheme (the sanction hearing).**

3. **An application to convene meetings of creditors and/or members can be made by the company acting by its directors, a RO, creditors or shareholders (but will usually be proposed by the company or a RO). At the convening hearing the court will consider a limited number of issues. At the sanction hearing the court will consider whether the statutory requirements have been met and whether it should exercise its residual discretion to approve/ sanction the scheme.**

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Schemes of arrangement - II

5. **The requisite majority for meetings of creditors is a majority in number representing seventy-five per cent in value of the creditors or class of creditors present and voting either in person or by proxy at the meeting (section 86(2)).**

6. **The requisite majority for meetings of members is seventy-five per cent in value of the members or class of members present and voting either in person or by proxy at the meeting (section 86(2A)).**

7. **At the convening hearing the court must decide whether it is appropriate to give the creditors/members an opportunity to vote on the scheme. It will wish to do so unless there is a fundamental flaw in the proposed scheme. Such a flaw will usually arise if the court would not have jurisdiction to sanction the scheme even if was approved at the scheme meetings or if it was so unfair that there is no prospect that the court would exercise its discretion to approve it (see the Practice Direction, para 3 and *Re E-House (China)*). The court will also consider procedural fairness issues – was proper notice of the convening hearing given and is the company's disclosure adequate.**

8. **Classes are an issue going to jurisdiction – the court can only sanction a scheme after a vote by the creditors or classes of creditors if the classes of creditors or members have been properly constituted. Therefore, the court will consider at the convening hearing whether the meetings and classes proposed by the company are appropriate (it is the company's responsibility to propose how many meetings and classes there need to be).**

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Schemes of arrangement - III

9. **The court will also need to consider who are the creditors who are entitled to vote. It is the person in whose favour the covenant to pay is given, which is usually the legal owner of the debt (as the only party entitled to sue on it). Where the legal owner holds the debt on trust for another, the beneficial owner is not the creditor *(Re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446*).***

10. **When the creditors who are to be made parties to the scheme are note or bond-holders, who is entitled and to be given the right to vote? See the Practice Direction, para 4 and *Re E-House (China)*.**

11. **Can the ultimate beneficial owners of the notes (where the notes are held in the form of a global note) be treated as the creditors and given the right to vote? Are they contingent creditors because the holder of the global note can require the company to cancel the global note and issue separate certificates to individual beneficial owners of the notes - see the English judgment of Mr Justice Miles in *Re New Look* [2020] EWHC 2793 where he said:**

> ***"It is well established that beneficial owners of notes held through a clearance system are capable of voting on a scheme of arrangement. It is sufficient if a beneficial holder of notes is a contingent creditor of the issue provided that the security documentation contains a mechanism by which he can upon request or on default become a direct creditor of the issuer (here, the Company). I am satisfied that this applies to the SSNs in the present case. As I have already indicated, the other potential Scheme Creditors, such as the trustee under the Indenture, have indicated in writing that they will not vote, so there is no risk of double counting."***

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Schemes of arrangement - III

12. **But the argument that the ultimate beneficial owner can vote because he can be treated as a contingent creditor has been challenged – in *Re Shinsun Holdings (Group) Co Ltd* (unreported, 21 April 2023) Justice Doyle dismissed a winding up petition on grounds that an ultimate beneficial holder of Notes issued under an indenture governed by New York law did not have standing or authority to present a petition against the issuer of the Notes (followed in Hong Kong in *Re Leading Holdings Group* [2023] HKCFI 1770 but not followed in the BVI in *Re Haimen Zhongnan Investment,* unreported, 19 July 2023).**

13. **At the sanction hearing the court must decide whether the formal statutory requirements have been satisfied and then whether in all the circumstances it should exercise its discretion to sanction the scheme. See the Practice Direction, para 5 and *Re E-House (China)* at paras 105 –106 (the 5 issues).**

14. **International effectiveness – an issue going to the court's discretion to sanction the scheme. The court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose. See *Re E-House (China)* at paras 81-95 and 117-122 and *Re Freeman Fintech* [2021 (1) CILR 426] .**

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Recognition of and assistance to foreign proceedings - I

1. **Cayman has not adopted the Model law.**

2. **But there is a statutory and non-statutory (common law) jurisdiction to recognise and grant assistance to foreign insolvency proceedings. But the statutory jurisdiction only applies to foreign representatives appointed in the country of incorporation of the debtor.**

3. **Under section 241, upon the application of a foreign representative the court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of:**

    (a) **recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;**

    (b) **enjoining the commencement or staying the continuation of legal proceedings against a debtor;**

    (c) **staying the enforcement of any judgment against a debtor;**

    (d) **requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and**

    (e) **ordering the turnover to a foreign representative of any property belonging to a debtor .**

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Recognition of and assistance to foreign proceedings - II

4. **The court is required (by section 242) when determining whether to make an ancillary order under section 241, to have regard to matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with —**

   (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled.

   (b). the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding.

   (c). the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate.

   (d). the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V of the Companies Act.

   (e). the recognition and enforcement of security interests created by the debtor.

   (f). the non-enforcement of foreign taxes, fines and penalties and

   (g). comity.

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Recognition of and assistance to foreign proceedings - III

5. **Official liquidators are under a duty to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder. The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder. Companies Winding Up Rules Order 21, rule 2.**

6. **There is also a non-statutory (common law) power to grant assistance to foreign insolvency officeholders and foreign proceedings – see my judgment in *Re China Agrotech* [2017 (2) CILR 526]**

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MAIN PROVISIONS IN THE CAYMAN COMPANIES ACT (2025 REVISION) DEALING WITH THE JURISDICTION TO APPOINT A RESTRUCTURING OFFICER

Interpretation of "company"

91A. For the purposes of sections 91B, 91C, 91D, 91E, 91F, 91G, 91H, 91I and 91J, "company" means — (a) any company liable to be wound up under section 91; or (b) any other entity or partnership to which the provisions of this Part apply in respect of the entity's or partnership's winding up.

Appointment of a restructuring officer

91B. (1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company —

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Act, the law of a foreign country or by way of a consensual restructuring.

(2) A petition under subsection (1) may be presented by a company acting by its directors, without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing a petition under subsection (1) —

(a) make an order appointing a restructuring officer;

(b) adjourn the hearing conditionally or unconditionally;

(c) dismiss the petition; or

(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

(4) A restructuring officer appointed by the Court under subsection (3)(a) shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company.

(5) Where the Court makes an order under subsection (3)(a), the Court shall set out in the order —

(a) the manner and time within which the restructuring officer shall give notice of the restructuring officer's appointment to — Companies Act (2025 Revision) Section 91C c Revised as at 1st January, 2025 Page 75 (i) the company's creditors, including any contingent or prospective creditors; (ii) the company's contributories; and (iii) the Authority, in respect of any company which is carrying on regulated business;

(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and

(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions.

(6) Where a company which is carrying on a regulated business presents a petition under subsection (1), the directors of the company shall, immediately after presenting the petition, serve notice of the petition on the Authority.

(7) A director who fails to comply with subsection (6) commits an offence and is liable to a fine of ten thousand dollars

THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NUMBER: FSD 51 OF 2021 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF MIDWAY RESOURCES INTERNATIONAL

ON THE PAPERS

Before:	The Hon. Justice Segal
Further evidence/submissions:	17, 23 and 24 March, 2021
Draft Judgment Circulated:	25 March, 2021
Judgment Delivered:	30 March, 2021

HEADNOTE

Application for the appointment of provisional liquidators under section 104(3) of the Companies Act (2021 Revision) on a light touch basis – the evidence that the Company needs to file concerning the proposed compromise or arrangement – the need to provide evidence of the views of creditors – the impact of challenges by creditors to the credibility of the proposed compromise or arrangement and of foreign proceedings which might interfere with the ability of the Company's subsidiary to have its restructuring approved by creditors.

JUDGMENT

Introduction

1. This is my judgment on the application (the ***Application***) of Midway Resources International (the ***Company***), a Cayman Islands company, for the appointment of provisional liquidators (***JPLs***). The principal evidence in support of the Application was given by Mr Peter Worthington, a director and CEO of the Company.

2. The application was initially heard on 15 March 2021 (the ***Hearing***). Ms Shelley White of Walkers appeared on behalf of the Company. For the reasons given below, the hearing was adjourned to enable the Company to provide further evidence and to give further notices to creditors. Those notices were given on 15 March and that further evidence was filed on 17 March.

3. One creditor, Sakson Drilling & Oil Services DMCC (***Sakson***), whose claims were disputed by the Company but who is potentially owed a substantial sum, in response to the notice that I directed be given, indicated that it wished to make representations to and may wish to appear before the Court on any further hearing and another creditor, in a similar position, indicated that it was considering making representations to the Court. I therefore directed that a further hearing of the Application be listed for 25 March at 9am and that any notice of an intention to appear and any written submissions or representations to the Court (together with any evidence) must be filed with the Court and served on Walkers (by email) by 4pm Cayman time on 23 March. I also said that in the event that no such notices and submissions or representations were filed, I would be prepared to deal with the Application on the papers (unless there were issues that required discussion at the hearing with respect to the form of the order) and in that event the new hearing date would be vacated.

4. On 23 March 2021, Sakson sent to Walkers a document headed "*Written Submissions of [Sakson]*" (the ***Sakson Written Submissions***) which was signed by a director of Sakson (which appears to be a corporation incorporated in Dubai), Chaher Sakkal (who I assume to be Mr Sakkal). On 24 March, Walkers filed a further letter setting out the Company's response and submissions in reply to the Sakson Written Submissions and containing an update on recent developments in Kenya and in relation to the Mauritian insolvency proceedings relating to the Company's principal (sub) subsidiary, Zarara Oil & Gas Limited (***Zarara***). On 24 March, shortly after having received that letter and late that evening, I informed (via an email sent by my PA) Walkers and Sakson (and the Cayman attorneys for the other possible creditor mentioned in paragraph 2 above), that I had concluded that the Application could be dealt with without the need for a further hearing, that the hearing listed for 25 March was vacated and that I would circulate an email the following morning explaining my decision on the Application. On the morning of 25 March (today), my PA circulated the following email to Walkers and Sakson:

> *"Following receipt yesterday pm of Walkers' reply submissions, I indicated that I had concluded that the Company's application could be dealt with without the need for a further hearing and had vacated today's hearing. I said that I would circulate an email this morning explaining my decision on the application. This is that email.*

Having reviewed and carefully considered the submissions made by Sakson in its letter dated 23 March in opposition to the Company's application together with the submissions in reply made and the update on further recent developments provided by the Company in its letter dated 24 March, I have concluded as follows:

1. I am satisfied that the requirements of section 104(3)(a) and (b) are met in this case so that Court has jurisdiction to appoint JPLs.

2. I am also satisfied that it is appropriate to exercise my discretion to appoint the JPLs in the present circumstances. I shall therefore grant the application.

3. The draft order filed after the hearing by Walkers is approved subject to the amendments made in the attached draft (which is marked-up to show the changes from Walkers' post-hearing draft). I believe that the amendments are self-explanatory. If Walkers wish to raise any issues on the amendments, they may do so in writing.

4. I shall hand down later today or tomorrow a written judgment setting out the reasons for my decision. At this stage I shall just note that the recent developments in the Mauritian administration and the order made by the High Court of Kenya give rise to serious concerns as to whether it will be possible to proceed with the proposed restructuring of Zarara at all or within the period previously envisaged (and therefore as to whether Emerald's funding will be sufficient and remain available to fund the actions required to facilitate such a restructuring). I am satisfied that these developments do not provide a sufficient reason for dismissing the Company's application (and accept that, as the Company submitted, the appointment of the JPLs may well be helpful by allowing them to use their experience and expertise in restructurings to encourage and facilitate further negotiations and the avoidance of damaging hostile action by creditors) but consider that, in view of their significance, it is important that the JPLs provide an initial report to the Court immediately after the expiry of the 31 March deadline (the revised order provides for the initial report to be filed on 1 April). I would also add that I do not wish any order made by this Court to be considered as interfering with or cutting across the orders made or the exercise of their proper jurisdiction by the courts of Mauritius or Kenya and that, if appropriate, I would be prepared to consider suitable court to court communications with those courts, to the extent that the JPLs consider that this would be helpful and appropriate."

5. This is my judgment setting out the reasons for my decision and explaining the procedural history of the Application.

<u>The Application</u>

6. At a meeting of the Company's board on 1 March, 2021, the board reviewed a draft creditor proposal (the ***Restructuring Proposals***) to be presented to the creditors of its principal operating subsidiary, Zarara. Zarara is a company incorporated in Mauritius. Zarara had been placed into voluntary administration in Mauritius on 2 November 2020 pursuant to a

resolution of its board. The shares in Zarara are held by another Cayman company, MRI Kenya Limited (***MRI Kenya***) which is a wholly owned subsidiary of the Company. At the meeting, the board confirmed that in its view the Company was or was likely to become unable to pay its debts within the meaning of section 93 of the Companies Act (2021 Revision) (the ***Act***), and that it intended that a compromise or arrangement be presented to the Company's creditors and the creditors of Zarara. The board also resolved to issue a unanimous recommendation to its shareholders that they should pass a resolution approving the filing of an application in this Court for appointment of provisional liquidators (***PLs***) and authorising the directors to make the application and take such other steps as may be necessary to appoint PLs for the purpose of seeking to implement a restructuring of the Company and Zarara by way of compromise or arrangement with all of the Company's creditors and those of Zarara (and take all steps necessary to achieve a restructuring of the Company consistent with the Restructuring Proposals).

7. On 3 March 2021, shareholders holding 85.424% of the Company's shares signed written resolutions in the following terms:

> *"Resolution 1*
>
> *IT WAS RESOLVED that the members of the Company hereby require the Company to be wound up by the Grand Court of the Cayman Islands (the Court) under section 92(a) of the Companies Law (2020 Revision) …. (the Law) and authorise [the] board of directors of the Company to present a winding up petition (the Petition) to the Court seeking a winding up order in respect of the Company under section 94(1) of the Law.*
>
> *Resolution 2*
>
> *IT WAS RESOLVED that concurrently with the presentation of the Petition, the board of directors of the Company be directed to issue an application with the Court for the appointment of joint provisional liquidators (the Provisional Liquidators) in respect of the Company under section 104(3) of the Law for the purpose of seeking to implement a restructuring of the Company by way of compromise or arrangement with its creditors*
>
> *Resolution 3*
>
> *IT WAS RESOLVED that, in the event that the compromises or restructuring arrangements proposed by the Provisional Liquidators are rejected by the Court or the Company's stakeholders or are otherwise incapable of being implemented the Shareholders hereby confirm that they revoke their requirement that the Company be wound up by the Court under section 92(a) of the Law and authorise the directors of the Company to take such steps as then deem appropriate to procure the withdrawal of the Petition."*

8. On 4 March, 2021 the Company presented a winding up petition seeking a winding up order on three grounds: that the Company had passed a special resolution requiring the Company to be wound up by the Court, in reliance on section 92(a) of the Companies Act (2021 Revision) (the ***Act***); that the Company is unable to pay its debts, in reliance on section 92(d) of the Act and that it is just and equitable that the Company should be wound up, in reliance on section 92(e) of the Act. On the same day, the Company issued an *ex parte* summons (the ***Summons***) seeking the appointment of PLs pursuant to section 104(3) of the Act on the basis that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Act and intended to present a compromise or arrangements to its creditors. In its evidence in support of the Application filed before the Hearing, the Company referred to the Restructuring Proposals which had been prepared by the Company's board and were shortly, it was hoped, to be presented to the creditors of Zarara by Zarara's Mauritian administrator Mr Thacoor (the ***Administrator***). While the Restructuring Proposals only related to the creditors of Zarara, the Company submitted that they would significantly impact on the Company and its creditors both because it was hoped that they would result in the guarantees given by the Company to certain creditors of Zarara (the ***Guarantee Creditors***) being released and because the economic interest in the shares in Zarara was held by the Company (since MRI Kenya, the registered member of Zarara, had no external creditors and was a substantial debtor of the Company) so that the preservation of the value of Zarara would also benefit the Company. Furthermore, the Company anticipated that if the restructuring of Zarara was successful, and the Restructuring Proposals were accepted and implemented, it would also be possible to effect a restructuring of the balance of the Company's debt.

9. Even though the application for the appointment of PLs was made *ex parte*, the Company nonetheless on 5 March gave notice of the Application (but not the hearing date which had at that time not been fixed) to the Guarantee Creditors. Then on Friday 12 March, one working day before the hearing of the Application, the Company notified all its creditors (including the Guarantee Creditors) of the date and time of the hearing of the Application.

<u>The Company's business, subsidiaries, operations and shareholders</u>

10. The Company is the parent company of a group of companies (the ***Group***). As I have explained, the Company holds the shares in MRI Kenya, which holds the shares in Zarara. Zarara has a branch office in Kenya. The Company also owns the shares in (a) MRI Nigeria Limited, another Cayman Islands company, which holds shares in another Nigerian company, and (b) MRI Exploration (SL) Limited, a company incorporated in Sierra Leone. However, Mr Worthington stated in his evidence that the Company currently had no assets or property

and conducted no material activities in either Nigeria or Sierra Leone. In addition, management services are provided to the Company by its management contractor, MRI Management Company LLP (***MRI Management***).

11. The directors of the Company, in addition to Mr Worthington, are Dr Bristow (Chairman), Dr Nyanteki-Owusu (Deputy Chairman), Willem Jacobs, Mukesh Valabhji and John Barr. Mr Worthington and Dr Bristow and Dr Nyanteki-Owusu are also directors of Zarara.

12. The Company's majority shareholders are Golden Phoenix Investments Limited (holding around 29.4% of the Company issued shares), Emerald Holdings Limited (holding around 28.5% of the Company issued shares) (***Emerald***), and Logistics Tradecorp Limited (holding around 12.8% of the Company issued shares) while minority shareholders hold the other 29.3%.

13. The principal activity of the Group is the evaluation, exploration and development of opportunities in the oil and gas sector. The Company is a pan-Africa focused upstream oil and gas venture with an existing project in Kenya (including onshore/transition zone gas discoveries) (together Mr Worthington said with some business development in pursuit of opportunities in Nigeria). The Kenyan project had been the Company's principal focus and area of Group expenditure and commitments for the past few years. The Company's strategy was to create value through the development of upstream exploration and production opportunities in Africa with a focus on discovered oil and gas resources with early cash-flow and upside potential.

14. In Kenya, Zarara holds a 75% working interest and operatorship in two production sharing contracts (the ***PSCs***). The PSCs are dated 3 September 2008 but only became effective as of 3 December 2008. The PSCs relate to two sizeable exploration blocks, Blocks L4 and L13, which are located onshore in the Lamu basin in Kenya. The PSCs provide for the exploration, development and production of hydrocarbons in the area specified in each PSC. Originally, 90% of the rights and obligations of the contractor in and under the PSCs was held by SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (collectively ***SGD***) while 10% was held by the Kenyan Government. On 4 April 2011, SGD entered into two Farmout Agreements (the ***Farmout Agreements***) with Zarara, which were given effect by deeds of assignment (approved by the Kenyan Government). Under the terms of the Farmout Agreements, SGD assigned and transferred a 75% participating interest in the PSCs for each of Block L13 and Block L4 to Zarara. SGD retained a 15% interest. Thereafter, all subsequent exploration was

to be carried out solely at the cost of Zarara, up until a final investment decision was made to develop any appraised and commercial discovery of oil or gas.

The Group's financial difficulties and the Company's financial position

15. The Company's total subscribed capital is approximately US$79 million. It has invested substantial sums in the Kenya project, amounting to approximately US$60 million since 2012. The funding by the Company of the Kenya project was injected by making loans to MRI Kenya which on-lent the funds to Zarara. MRI Kenya has advanced to Zarara by way of loan all of the funds it required for drilling at the exploration blocks. The loan was interest free and repayable on demand.

16. The Company's financial position came under stress during the third quarter of 2018 and has continued to deteriorate since then. The financial stress was caused by the cost and schedule overruns experienced in the drilling of a technically and operationally challenging deep well on Pate Island, Kenya within Block L4. The drilling ran catastrophically over time and budget. During 2018 – 2020 the Company and Zarara entered into various creditor agreements with creditors of Zarara (which had been referred to as the phase 1 and phase 2 creditor agreements) in order to manage and deal with Zarara's financial difficulties. During this period, Emerald made significant loans to the Company and Zarara and injected further capital into the Company on an interest free basis.

17. However, the discussions with creditors and efforts to find a financial solution were ultimately unsuccessful. There were disputes with some creditors which resulted in proceedings in Kenya and these difficulties ultimately resulted in a decision by the board of Zarara to place Zarara into voluntary administration in Mauritius on 2 November 2020 and the appointment of the Administrator on 3 November 2020.

18. On 25 February 2021 the Company received a demand letter from Emerald demanding the immediate repayment of US$2,556,201 previously advanced by Emerald and on 2 March 2021, the Company received a demand letter from MRI Management demanding the immediate repayment of US$433,922 and £78,542. Mr Worthington says that the Company has no funds and is unable to repay these amounts.

19. It appears that the Company has three categories of creditor. First, trade and other unrelated creditors totalling US$1,257,401 of which at least US$466,130 is due and payable (including sums owed to MRI Management). Secondly, loans totalling US$3,218,305 made by Emerald

and other connected parties. Thirdly, the Guarantee Creditors. There are three Guarantee Creditors. They are each parties to contracts with and involved in the drilling activities of Zarara. They are Sakson, the drilling contractor; Baker Hughes EHO Ltd. (***Baker Hughes***) the principal cement and logging contractor, and Zarara's drilling project management company, North Sea Well Engineering Ltd. (***Norwell***). The Guarantee Creditors have claims totalling US$12.6 million, consisting of claims by Norwell of approximately US$1.1 million; by Sakson of approximately US$6.4 million and by Baker Hughes of approximately US$5.1 million. Each of the Guarantee Creditors has made demand for payment under the guarantees on the Company but the Company denies that any payment is due and owing and that, in the case of Baker Hughes and Norwell, that the guarantees are valid or enforceable. On 28 January 2021, Baker Hughes issued a request for a LCIA arbitration in London in respect of the sums which it claims under the Company's guarantee.

20. As regards the Company's assets, Mr Worthington exhibited a report prepared by Borrelli Walsh (Cayman) Limited (***Borrelli Walsh***), the prospective PLs, which was based on information provided by the Company. This included a statement of the financial position and solvency of the Company (at [23]). The Company's assets include a very small sum in cash together with a debt owed by MRI Kenya in the sum of US$65.116 million, a debt owed by MRI Nigeria Limited in the sum of just over US$7 million and a small debt owed by one of the Company's subsidiaries in Nigeria.

21. Since 3 November 2011, funding for the Company (including funding for the Application and the administration in Mauritius) had generally been provided by Emerald by way of further unsecured loans which were interest free and repayable on demand.

The administration in Mauritius, the watershed meeting to consider the Restructuring Proposals and proceedings in Kenya

22. Mr Worthington has provided certain details of the law and procedure in Mauritius based I presume on the advice of the Zarara's Mauritian counsel or of the Administrator's counsel (in Walkers' most recent letter to the Court, dated 24 March, they stated that certain information had been provided by the Administrator's Mauritian counsel). No expert evidence has been filed for the purpose of the Application.

23. The Administrator is a chartered accountant and an insolvency practitioner registered under the laws of the Republic of Mauritius (and was formerly the managing partner of Grant Thornton, Mauritius).

24. Following his appointment, the first meeting of Zarara's creditors was held on 12 November 2020 (the ***First Creditors' Meeting***). At this meeting the Administrator explained the circumstances surrounding his appointment and that creditors should submit nominations for appointment to a creditors committee. He also explained that it was open to creditors at the meeting to propose and vote on the appointment of a different administrator. However, none of the creditors wished to make such a proposal and accordingly it was confirmed that the Administrator continued in office.

25. On 6 January 2021, the Supreme Court of Mauritius made an order extending until 31 March 2021 the deadline by which time the Administrator was required to hold a further meeting of creditors. The further meeting is called a watershed meeting and its purpose is to allow the creditors to vote on the future of Zarara. It appears that in the event that the watershed meeting is not held on or before that date, the Administrator's appointment and the administration will end (unless the Supreme Court of Mauritius grants a further extension).

26. After the Administrator's appointment an investor (the ***Investor***) had made a confidential approach to the Zarara board and the Administrator. The interest of the Investor had been known to the board (and I assume the Administrator) at the time of the First Creditors' Meeting. On 25 January 2021, a confidential and non-binding expression of interest was provided by the Investor to the Administrator. The Investor has expressed interest in negotiating a restructuring of Zarara based on the Restructuring Proposals. The identity of the investor has not been disclosed in the evidence filed in support of the Application because, for understandable commercial reasons, the Investor does not at this stage wish to have its identity made public pending further progress in discussions with the Administrator and the Company and the further development of the Restructuring Proposals. However, details of the Restructuring Proposals and some of the discussions with the Investor have been disclosed and are discussed below. The Company, as I have noted, prepared the Restructuring Proposals and is closely involved in the discussions with the Investor as part of the Company's overall plans for a restructuring and the survival of the Group.

27. The Administrator is, as I have noted, required to convene the watershed meeting of Zarara's creditors before 31 March, 2021 (unless the court in Mauritius grants an extension of time). At the watershed meeting the Restructuring Proposals will be considered by the creditors who will be invited to vote on whether to approve them.

28. On 16 March 2021, the Administrator wrote to Zarara's creditors inviting them to attend the watershed meeting on 30 March 2021 (this was initially scheduled for 26 March) and attach a report (the ***Administrator's Report***) in which he explained Zarara's financial position, the work he had done, his findings and recommendations.

29. His findings included the following statements (underlining added):

"(vii) <u>Zarara is considered to have value only if further exploration can build upon the Pate-2 ST2 discovery and related regional discoveries at Pate-1 and Dodori-1 wells. However additional funding would be required to solve the present shortage of cash flow and complete the exploration process</u>. Hence new or additional investors will have to be approached to fund in some way the continuing exploration work in and under the PSCs.

(viii). Since my administration began, one potential investor was identified, and a non-disclosure agreement was signed with them. They have in a letter of intent addressed to the administrator expressed interest to invest in Zarara subject to the following conditions:

a. all the creditors of Zarara, including MRI Kenya Limited, Emerald Holdings Limited, should release, waive, and discharge all Zarara's debts and liabilities and in return the creditors of Zarara, save and except MRI Kenya Limited, and Emerald Holdings Limited, would become entitled to an unencumbered free carried 15% direct interest in the two PSC with respect to Blocks L4 & L13. Such free carried interest to continue unless and until a development is agreed as commercial by the Government of Kenya pursuant to the terms of the two PSC.

b. The Government of Kenya should grant an extension of an additional 3-year term for the two PSCs subject to any other conditions as maybe imposed by the Government of Kenya and acceptable to the investor.

c. the shareholders of Zarara should cede/transfer to the potential Investor a majority stake and controlling interest in Zarara, subject to any approval which may be required from the Government of Kenya, no payment would be made to the shareholders of Zarara.

d. The potential Investor would then invest approximately US$15.0million which would be required to fund the future work program for the PSCs as agreed by the Government of Kenya.

(ix) <u>The Directors of Zarara have confirmed to me that the prospective investor has no interest in Zarara or any related company or party and was unknown to them prior to commencement of the administration</u>."

30. The Administrator's recommendations were as follows (underlining added):

"Deed of Company Arrangement (DOCA)

A *<u>Bearing in mind the insolvency of Zarara and in order to avoid Zarara being placed in liquidation, I am of the view that it would be in the Creditors interests for Zarara to secure fresh/additional investment/funding and to execute a Deed of Company Arrangement based on the proposal made by the potential Investor in order to safeguard the rights of the Zarara unsecured creditors so that the latter may be ensured of a realistic prospect of payment of their respective claims</u>.*

B. *I therefore propose that at the watershed meeting, the Creditors considers and approve the hereunder resolution:*

"The Creditors having cognizance of the report of the Administrator and more especially of the fact that Zarara is insolvent, resolve that Zarara enters into a Deed of Company Arrangement (DOCA) under the following terms and conditions:

a. All the creditors of Zarara, including MRI Kenya Limited, Emerald Holdings Limited, agree to release, waive and discharge all Zarara's debts, liabilities and obligations, including any claimed parent company guarantee, and immediately stay and then terminate/withdraw all pending suits/cases lodged against Zarara, its staff, officers or directors and/or any third parties before the Kenyan or any other Courts and in return the unsecured creditors of Zarara, save and except MRI Kenya Limited and Emerald Holdings Limited, be issued shares in SOHI-Gas Lamu Limited and SOHI Gas Dodori Limited (or their common parent company, SOHI Oil and Gas Limited) such that they become entitled to an unencumbered free carried 15% direct interest in the two PSCs with respect to Blocks L4 & L13. Such free carried interest to continue unless and until a development is agreed as commercial by the Government of Kenya pursuant to the terms of the two PSCs.

b. The aforesaid waiver/discharge/withdrawal by the Creditors, the issuing of shares in SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (or its commons parent company) to the Zarara Creditors, excluding MRI Kenya Limited, Emerald Holdings Limited, and the transfer of a majority stake and controlling interest in Zarara to the potential Investor shall become effective and be concluded simultaneously within seven days (7) of Zarara obtaining an extension of an additional 3-year term for the two PSCs subject to any other conditions as may be imposed by the Government of Kenya and acceptable to the investor.

c. As a result of the above, the Zarara Creditors, excluding MRI Kenya Limited and Emerald Holdings Limited, through SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (or their common parent company) would eventually hold and benefit from the 15% Carried Interest (until commerciality as set out above, like the Government of Kenya) in the two PSCs. It is anticipated that the accruing increase in value of the 15% Carried Interest from the PSCs related to Blocks L4 & L13 could be crystallized by creditors, over time as they decide.

d. <u>The Deed of Company Arrangement to be signed by Zarara and other parties within twenty-one (21) days completed from the date of the present resolution being passed and then completed or closed in</u>

> <u>*terms of the above within a period of three (3) months as from the passing of the present resolution."*</u>

C. Alternatively, if the above resolution is not approved by the Creditors at the Watershed Meeting, then it is my recommendation that Zarara be placed in liquidation being given that it is insolvent and have no funds to proceed any further with its business activities. Consequently, the Creditors shall be called upon to approve the following resolution:

> *'Being given that the Resolution for the execution of a Deed under Company Arrangement, as recommended by the Administrator, has not been voted/approved, the Creditors resolve that it would be in their interests that Zarara be placed in Liquidation and the Administrator be and is hereby appointed as Liquidator.'*

D. Finally, I would hasten to add that if neither the resolution for the execution of the DOCA as proposed above nor the resolution for Zarara being placed in liquidation is approved by the Creditors, the administration shall come to an end and the mandate of the Administrator shall lapse ipso facto. Consequently, the Administrator shall hand over the management and control of Zarara to its Directors and the latter may petition the Bankruptcy Division of the Supreme Court of Mauritius for an Order to wind up Zarara and appoint a Liquidator on the ground that Zarara is insolvent and is unable to pay its debts."

31. The Administrator has taken steps to have his appointment recognised in Kenya, where the assets, property and business of Zarara are located. Recognition had been contested by some local creditors of Zarara and various applications to the High Court of Kenya have been required. On 12 March 2021, Kenyan court granted interim recognition of the Administrator's appointment, conditional upon the Attorney-General of Kenya being notified and publication of an advertisement in a national newspaper both of which conditions have been fulfilled (and on the further condition that the Administrator file a weekly report to the Kenyan court). The final hearing of the Kenyan recognition application is scheduled to take place on 19 May 2021.

32. However, as Walkers informed the Court in their letter dated 24 March, it appears that three Kenyan creditors of Zarara (the ***Kenyan Creditors***) recently (on 19 March) sought, and obtained, from a judge of the Kenyan court a direction that the Administrator should not proceed with the watershed meeting (although apparently no formal order to that effect has yet been drawn up or made). In that letter, Walkers explained the position as follows:

> *"26. ..... the Company has been informed by the Administrator's Kenyan legal counsel that:*

> (a). *the recognition matter was mentioned in the Kenyan Court for Friday 19 March, 2021 and at such mention the Three Kenyan Creditors intervened and secured the Direction (which is still yet to be issued by the Kenyan Court);*
>
> (b). *the basis of such creditors' intervention was that they believe their position as Zarara's creditors may be 'prejudiced' at the Watershed Meeting, although no grounds or evidence of this prejudice was advanced to the Kenyan Court (see paragraph (c) below for further details); and*
>
> (c). *at the time the Kenyan Court made the Direction, the Kenyan Court (along with the Administrator's Kenyan Counsel) had not seen, and still have not seen, the application (or any evidence thereto) that had been made by the Three Kenyan Creditors and on which such creditors rely upon.*
>
> 27. *The Administrator is continuing to take legal advice with regard to the Direction, including how best to seek to set it aside. However, unfortunately any such possible action has been delayed because the Kenyan Judge who made the Direction is now on holiday and unavailable, and by the fact that the formal Order is yet to be issued."*

33. On 23 March, in response to the direction given by the Kenyan court, the Administrator wrote to all Zarara's creditors and said as follows:

> *"For avoidance of doubt, let it be clear that:*
>
> a. *if the Resolution set out at paragraph 5(B) of my report is approved by the Creditors, the release and/or waiver of the Creditors' Claims will not be effective until and unless (i) an extension is obtained from the Government of Kenya, (ii) the newly already identified investor (the "Investor") takes over the majority/controlling interest in the Company, and (iii) shares are attributed to the creditors in SOHI Gas Lamu Limited and SOHI Gas Dodori Limited (or their common parent company, SOHI Oil and Gas Limited) ("SOHI") as explained in my report; or*
>
> b. *If this process is not completed within 3 months of the execution of the Deed of Company Arrangement (the "DOCA"), i.e., if no extension from the Government of Kenya is obtained or the Investor does not take over a majority/controlling interest in the Company and the shares in SOHI not transferred within 3 months as stated above, then the Company's Creditors shall not have to waive and/or release their respective claims.*
>
> c. *I have spoken to the identified Investor and he has agreed that this process should be completed within 3 months of the execution of the DOCA, failing which the creditors shall neither have to waive nor release their claims against the Company.*

However, in the meantime, there have been some significant further developments that I deem it my duty to bring to your attention, namely:

a. *Creditor, "Sakson Drilling & Oil Services DMCC", has requested a deferral of the Watershed Meeting, to which I agreed. The meeting was to be deferred to Tuesday 30th March 2021 at 1:00 pm (Mauritius time).*

b. *Unfortunately, before I could provide notification of this deferral, I have been informed that on Friday 19th March 2021, three Kenyan Creditors of the Company, namely Oilfield Movers Ltd, Alterrain Services Kenya Ltd and the Kenya Revenue Authority, have sought and obtained an Order from the High Court of Kenya directing me not to proceed with the Watershed Meeting, on the basis that they would allegedly be 'prejudiced' on some unspecified basis.*

c. *I am given to understand that no written Order has yet been issued by the Court but have been advised by the Kenyan legal counsel that, at the sitting of the 19th March 2021, the Honourable Judge orally stated that if I were to proceed with the Watershed Meeting as proposed, the recognition of the Company's Administration proceedings in Kenya would be revoked and that I would be in contempt of the Kenyan Court. This has placed me in an untenable position.*

As stated in my report, the Company's Administration process automatically terminates on 31st March 2021, and in the absence of the Watershed Meeting being held by such date, the Company will be returned to its directors. Furthermore, the directors of the Company have informed me that if the Administration of the Company were to come to an end on 31st March 2021 by reason of the Watershed Meeting not being held, the Company will be placed in liquidation and in parallel Midway Resources international ("MRI"), the Company's ultimate owner and parent company, will also be placed in liquidation.

In fact, I have been informed that, currently, the directors of MRI have also already applied to the Grand Court of Cayman Islands (MRI's incorporation jurisdiction) for the appointment of provisional liquidators with a view to appointing insolvency professionals to undertake a restructuring of the debts of MRI and the Group, subject to the Company, ZARARA OIL & GAS LIMITED, being salvaged.

In the light of the above, unless the Creditors' Watershed Meeting proceeds on the rescheduled date of 30th March 2021 or no later than 31st March 2021 (subject to the Creditors agreeing to any necessary waiver of notice because of the delays experienced), then the Company will be placed in liquidation and inevitably, so will MRI, as communicated to me by the directors.

My recommendations, as set out in my report, will remain applicable if the Creditors of the Company, acting together, agree to the Watershed Meeting be held on 30th March 2021 or 31st March 2021. In which case, at the Watershed Meeting, the Company's Creditors will have the opportunity, in their wisdom, to resolve that either (i) the Company executes the proposed DOCA, or (ii) the Administration ends and the Company be returned to the directors, or (iii) the Company be placed in liquidation and a liquidator be appointed.

> *I am available to try and assist the Company's Creditors to see if there is an agreement to proceed with the holding of the Watershed Meeting as suggested. Otherwise, I shall have to comply with the Order of the Kenyan Court issued at the request of the three abovementioned Creditors and thus the Administration will slip towards termination as described."*

34. Accordingly, it appears that, pending a possible application to the Kenyan court to set aside the direction, in order to avoid the revocation of the Kenyan's court's order granting the Administrator interim recognition, to avoid being in contempt of the Kenyan court and to avoid a failure to hold the watershed meeting before the 31 March deadline, the Administrator is hoping that Zarara's creditors will meet to or otherwise approve the Restructuring Proposals without his involvement and without him attending or chairing the (and possibly without there being a) the watershed meeting. This is obviously a highly unsatisfactory position for the Administrator to find himself in and it will be necessary to see what further developments occur during the period leading up to 30/31 March.

The Restructuring Proposals – Zarara's creditors

35. As can be seen from the Administrator's Report, the Administrator had concluded that Zarara's creditors should be given an opportunity to consider the Restructuring Proposals and that it was in their best interests to accept and approve the Restructuring Proposals by entering into a deed of company arrangement (***DOCA***).

36. The Restructuring Proposals referred to by the Administrator follow, but elaborate on and provide more detail concerning the mechanics of implementation than, those set out in the document considered by the Company's board at its meeting on 1 March 2021. Essentially they involve the Investor injecting sufficient further funds into Zarara to allow (or at least to provide a reasonable prospect of) Blocks L4 and L13 being further explored and developed so as to result in the extraction and sale of natural gas. In return, the Investor will receive a majority of the shares in Zarara (which will retain its 75% interest in the PSCs) and all Zarara's creditors, including MRI Kenya and Emerald, will release their claims against Zarara. Zarara's external creditors (that is excluding MRI Kenya and Emerald) will then be issued shares (whether that will give them all or only some of the shares is unclear in SGD, which will retain its 15% interest in the PSCs. The Kenyan Government will also retain its 10% interest in the PSCs. Zarara will be debt free and having sufficient funding to allow it to generate value and an income stream (for the benefit of itself, thereby benefitting the Investor and the Company as its shareholders, its former creditors and the Kenyan Government) from Blocks L4 and L13.

37. Mr Worthington in his evidence said that the Company had devised the Restructuring Proposals in order to ensure the survival of Zarara and consequently the Group and to provide a better outcome for the creditors of Zarara and the Group than would otherwise be available if the entities within the Group were to be put into liquidation. He pointed out that natural gas had been discovered in three wells drilled in Blocks L4 and L13 and that the presence of natural gas in these wells, together with some other regional gas discoveries, had considerably reduced the exploration risk associated with Blocks L4 and L13. This gave rise to the possibility of value being realised from the blocks. But this could only be done if there was further exploration work on Blocks L4 and L13 and this required further capital and investment. Hence the need but also the prospects of there being a return for a new investor.

38. Borrelli Walsh reviewed the Restructuring Proposals in their report. They did not undertake an independent review or assessment of the proposals but simply reported what they were told by the Company's directors. They noted that a restructuring of the Group had the potential for unlocking significant future cash-flows that would materially benefit all creditors and investors in the Group but that, absent a restructuring of Zarara and of the Company, both companies were likely to be put into insolvent liquidation. In that event they "*did not anticipate any recoveries from [the loans made by MRI Kenya to Zarara and by the Company to MRI Kenya] and [that] absent any other source of recovery (which [were] presently unknown, recoveries [were] unlikely to cover the costs and expenses of [the Company's] liquidation.*"

39. If the creditors approve the Restructuring Proposals, either at the watershed meeting if held on 30 March or at a subsequently held watershed meeting or otherwise, Zarara and the other parties will need to agree and sign a DOCA within twenty-one days. If and once that has been signed, there will be a further period of over two months during which the conditions to the DOCA can be satisfied and the further documentation required to give effect to the Restructuring Proposals can be negotiated and completed (it appears that the arrangements contemplated by the DOCA must be completed within three months of the passing of the creditors' resolution at the watershed meeting).

The Restructuring Proposals – the Company's creditors

40. As I have noted, the Restructuring Proposals operate at the Zarara level. If successfully approved and implemented in their current form they will result in the substantial claims of the Guarantee Creditors being released and the Company retaining the shares in MRI Kenya. MRI Kenya will own a minority interest in the shares of the restructured and solvent Zarara.

But the balance sheets and debt owed by the Company (and MRI Kenya) will still need to be dealt with.

41. In paragraph 74 of his Second Affidavit, Mr Worthington stated as follows:

> *"The Proposed Restructuring could allow the Company to attract further investment which will return the Company to solvency and allow it to fulfil its purpose of providing funding to the subsidiaries. From any such investment in the Company, the Company intends to reach compromises or agreements with certain of its third party creditors in order for them to be paid as quickly as possible to ensure the Company's continuation as a going concern. Moreover, as part of the Proposed Restructuring, Emerald Holdings Limited and MRI Management LLP, will be asked to compromise their debts in exchange for equity in the Group. Emerald Holdings Limited and MRI Management LLP have indicated that they would be receptive to such a proposal on the condition that the Proposed Restructuring is successfully implemented."*

42. Borrelli Walsh in their report (at [34]) stated that:

> *"34. We understand that the Company and its investors are supportive of initiatives to facilitate the Group's survival. To this end, [the Company's] management has advised that the proposed restructuring [of the Company] would include the following:*
>
> *34.1 debt-to equity conversion of certain connected party claims (we understand that connected party creditors with claims approximating US$3 million are amendable to this proposal):*
>
> *34.2 introduction of new capital to fund the Group's projects; and*
>
> *34,3 a compromise of the remaining creditor claims against [the Company]."*

43. If and once the claims of the Guarantee Creditors and the claims of Emerald are released, there will be a relatively modest balance of claims to be dealt with. While at this stage the detail of what would be offered to such creditors and the willingness of the external creditors to support the Restructuring Proposals and a Company (MRI Kenya) restructuring is unclear, the commercial logic and benefits of agreeing a Company (and MRI Kenya) restructuring once the Restructuring Proposals at the Zarara level have been agreed, are self-evident.

<u>The need for and role of the PLs</u>

44. Mr Worthington said that he and the Company's board believed that it was in the best interests of the Company that PLs were appointed as independent professional advisors and as officers of the Court to support the board in progressing and concluding the negotiations with

creditors at both the Zarara and Company level and in the implementation of the Restructuring Proposals.

45. The Restructuring Proposals were being put forward by the Administrator with the support of the Company's board and management. Mr Worthington considered that the PLs would be able to assist the board in and supervise this process. Furthermore, restructuring proposals, as I have noted, for the Company would need to be further developed and negotiated and the relevant documentation to give effect thereto would need to be prepared. Mr Worthington considered that once again the PLs would be able to assist the board in and supervise this process. Mr Worthington stated that in view of the directors' expertise, detailed knowledge of the Company's and Zarara's business, and their professional relationships with and understanding of the position of the key stakeholders, it was important to allow the board to continue to lead the restructuring process and manage the Company's operations on a day-to-day basis while the restructuring negotiations and the revisions to be made to the Company's and Zarara's activities in light of the restructuring were developed. Mr Worthington said that in his view the support of independent restructuring professionals to act alongside the board when implementing the proposed restructuring would be crucial to its success and that the appointment of "soft touch" JPLs would best achieve this objective, and promote the interests of the Company's creditors and other stakeholders.

46. The Company submitted, in addition, following the action taken by the Kenyan Creditors and the direction given by the Kenyan judge, that there was an even greater need for the appointment of PLs. The PLs, as independent professionals with their experience and expertise in restructurings and in structuring and conducting negotiations with creditors, across different group companies and jurisdictions, could be expected to play a constructive and useful role in facilitating further discussions and negotiations with the Kenyan Creditors and other creditors of Zarara, including the Guarantee Creditors.

<u>The applicable law</u>

47. Section 104(3) of the Act provides that the Court may appoint PLs after the presentation of a winding up petition on the application of the Company where two requirements are satisfied: (a) that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Act and (b) that the Company intends to present a compromise or arrangement to its creditors.

48. If PLs are appointed under section 104(3) of the Act with a view to a restructuring, it will be necessary to adjourn the hearing of the winding up petition. The Court's power to adjourn a winding up petition in order to facilitate such a restructuring is derived from section 95(3) of the Act which enables the Court upon hearing the winding up petition to adjourn the hearing conditionally or unconditionally.

49. The two sub-paragraphs of section 104(3) establish what must be shown to give the Court the statutory power to appoint JPLs on an application by the Company. They go to jurisdiction. If satisfied, the Court has a wide discretion as to whether to appoint JPLs having regard to the purpose of section 104(3) of the Act and the circumstances of the case.

50. The relevant case law relating to section 104(3) of the Act was recently reviewed by the Chief Justice in *Sun Cheong Creative Development Holdings Limited* (unreported, 20 October, 2020) (***Sun Cheong***). The Chief Justice noted that under sections 104(3) and 95(3) of the Act, the Court has a broad and flexible discretion. The breadth and flexibility of the Court's power to appoint PLs to facilitate a restructuring was first described, prior to the enactment of section 104(3), in *In the Matter of the Fruit of the Loom* (unreported, 26 September 2000 but noted at 2000 CILR Note 7) (***Fruit of the Loom***) and the scope of the Court's discretion under section 104(3) had been affirmed by Parker J in *CW Group Holdings Limited* (unreported, 3 August 2018) at [36] (***CW Group Holdings***) and by Kawaley J in *ACL Asean Towers Holdco Limited* (unreported, 8 March 2019) … at [11]. The Chief Justice summarised the matters to which the Court may have regard when exercising this discretion as follows (underlining added):

> *"…… the matters to which the Court may have regard include:*
>
> *a. The express wishes of creditors (though the Court should be cautious not to "count up the claims of supporting and opposing creditors" per Segal J in Grand T G Gold Holdings Limited (Unreported 21 August 2016) .... at [6(f)iv)]);*
>
> *b. Whether the refinancing is likely to be more beneficial than a winding up order; (Fruit of the Loom at p 9-10)*
>
> *c. <u>That there is a real prospect</u> of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; (Re Fruit of the Loom (ibid)); and*
>
> *d. The considered views of the board as to the best way forward. (CW Group Holdings at [72]."*

51. In *Fruit of the Loom*, the Chief Justice had said that (underlining added):

> *"[There] is a three-stage test….: (i) that the [PLs] should be satisfied that a refinancing and/or sale of the [company's business] as a going concern is likely to be more beneficial to the creditors that a liquidation realisation of the [company's] assets; (ii) that there is a real prospect of a refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; and (iii) that in the circumstances it is in the best interest of creditors to try to achieve such a refinancing and/or sale as a going concern."*

52. The Chief Justice noted the following as regards the requirements of section 104(3)(b) (underlining added):

> *"47. Importantly, in that respect, the language of section 104(3) does not impose a requirement on the Company to already have a pre-formulated restructuring plan. Nor does it require the Company to provide evidence of the viability of its restructuring plan.*
>
> *48. The requirements of this limb of the test were considered by Parker J in CW Group Holdings where he specifically considered the language that the Company "intends" to present a compromise or arrangement to its creditors. Parker J accepted (at [70] that "it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the Company." The rationale for this approach was described by him as follows in terms which must now be regarded as settled principle in Cayman Islands law (at [36]:*
>
> > *"The rationale for that language is to give effect to the practice which has developed of appointing provisional liquidators to provide companies with some 'breathing space' before the actions of creditors, acting in their own interests, might interfere with attempts to reach a consensual restructuring or if that should prove not to be possible, a scheme of arrangement – see Esal (Commodities) Ltd [1985] BCLC 450 at page 460 Harman J."*
>
> *49. Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted that it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan."*

53. The Company submitted that:

(a). the Company was demonstrably unable to pay its debts within the meaning of section 93 of the Act. The evidence demonstrated that demands had been made by two substantial creditors in February and earlier this month, that the demands were not disputed and had not been met and that the Company did not have sufficient funds to enable these demands to be met.

(b). the evidence also demonstrated that the Company, in conjunction with and through Zarara, intended to proceed with the Restructuring Proposals; indeed, the Restructuring Proposals had now been presented and provided to Zarara's creditors by the Administrator. The Restructuring Proposals involved or contemplated a restructuring of the whole Group and the evidence showed that a restructuring of the Company's balance sheet was necessary and contemplated once Zarara's creditors had given their approval to the Restructuring Proposals. The Restructuring Proposals involved some of the debt owed by the Company, to the extent that the claims of the Guarantee Creditors were valid. A proposal to deal with the balance of the Company's liabilities and its equity had been outlined and would be further developed as part of the process for implementing or as a consequence of the approval of the Restructuring Proposals.

(c). the Court should, in the circumstances, exercise its discretion to appoint PLs. The Company was in the process of making *bona fide* proposals for a restructuring to the Group's creditors and while the process of consulting and obtaining the support of creditors was still at a relatively early stage, and while there had recently been challenges by and potential difficulties resulting from the action of the Kenyan Creditors, there was a real prospect that the requisite creditor support would be obtained and that the Restructuring Proposals and a restructuring of MRI Kenya and the Company would be successful. In view of the position of the Investor, the attitude and actions of the Administrator, the further time available within the Mauritian administration to allow the DOCA to be documented and implemented, the interim recognition of the Administrator's appointment by the Kenyan court (until 15 May) and the funding provided by Emerald, there were sufficient grounds for concluding that the Restructuring Proposals, and an arrangement with the Company's creditors and shareholders, were capable of being implemented. In addition, it was clear that the Restructuring Proposals were in the interests of Zarara's and the Company's creditors since the alternative was an insolvent liquidation of Zarara and the Company which was likely to result in creditors receiving nothing. As Mr Worthington had said in his Third Affidavit:

> *"... the Company's board (and that of Zarara) strongly believes that a successful Proposed Restructuring of Zarara combined with the provisional liquidation of the Company should provide a stable platform for the Company's group to continue as a going concern and have the best possible chance of repaying creditors and returning to profit, pending the future work program for the PSCs for Blocks 1.4 & L 13, Kenya."*

(d). the appointment of the PLs would assist in and promote the chances of a successful outcome to the restructuring negotiations (particularly, for the reasons I have already mentioned, in light of the recent developments in Kenya). As I have already noted, the Company considered that it was important and appropriate that the PLs be appointed on a soft touch basis to allow the Company's directors to retain a lead role in the negotiations in view of their knowledge and expertise. Mr Worthington's evidence made this clear. In his Second Affidavit he said as follows:

> *"77. I believe it is in the best interests of the Company that JPLs are appointed as independent professional advisors and as officers of this Honourable Court to support the Board through this period and the implementation of the Proposed Restructuring*
>
> *78. The purpose of this application is to allow the Board to continue to manage the Company on a day-to-day basis while its operations are mapped out. I believe the appointment will assist in preserving value for the Group's stakeholders while the details of the Proposed Restructuring are refined. I believe the support of independent restructuring professionals to act alongside the Board when implementing the Proposed Restructuring will be crucial to its success.*
>
> *79. I believe it is in the best interests of the Company that "soft touch" JPLs are appointed as I understand their appointment (subject to the terms of the order) will allow them to work alongside the Board and management who have significant industry experience and detailed first-hand knowledge of the Company's business (a belief which is shared with the Board). The continued involvement of the Board and the Company's management also allows the JPLs to leverage the benefit of their existing professional relationships with key stakeholders which will be invaluable if discussions regarding the Proposed Restructuring are to continue successfully."*

The position at the Hearing

54. At the Hearing, the Court was only presented with limited information concerning the proposed restructuring of Zarara, the status of discussions with the Investor, the attitude of the Administrator, the law and procedure governing the Mauritian administration and the process by and timetable within which the Restructuring Proposals would be considered by creditors and, if approved, implemented. It was unclear whether the Administrator supported the Restructuring Proposals, whether they had any prospect of being approved by creditors (on one reading of the Restructuring Proposals, Zarara's creditors were being asked to agree to release their claims against Zarara in return for a direct interest in the PSC's *before* the Investor had even agreed to invest) and whether there was sufficient time within which to document and implement the Restructuring Proposals, even if agreed (it was suggested that the administration in Mauritius had to be completed and therefore that the detailed terms of

the Restructuring Proposals had to be finalised and documented by 31 March, 2021, that is within just over two weeks after the Hearing). There was also no information as to how the PLs would be funded (the Company was on the evidence completely without funds) and whether they could perform a useful role. In these circumstances, I was not satisfied that it could be said that there was, to use the Chief Justice's phrase, "*a real prospect of*" the Restructuring Proposals being put to Zarara's creditors or of being approved. I therefore directed that the hearing of the petition be adjourned and that the Company file further evidence before 4pm Cayman time on 17 March 2021 to address the deficiencies in the evidence filed prior to the Hearing.

55. Of course, for the purpose of section 104(3), it is the Company's, not Zarara's creditors, that are relevant. The requirement of section 104(3)(b) is that the company intends to present a compromise or arrangement to <u>*its*</u> creditors. As I have noted above, the evidence in support of what type of restructuring was envisaged at the Company level was sketchy (see [74] of Mr Worthington's Second Affidavit, quoted above). However, based on that evidence, it was clear at the Hearing that a restructuring of the Company's debt and equity was dependent on the Restructuring Proposals being first promoted and successfully implemented and on further discussions, in light of the restructuring done at the Zarara level, with creditors and shareholders of the Company. While no precise terms had yet been formulated or discussed with the Company's creditors and shareholders, and there was no timetable established, the evidence showed that the Company intended to present a compromise or arrangement to its creditors once there had been progress in obtaining the requisite support for and approval of the Restructuring Proposals. Furthermore, according to Mr Worthington, the two key creditors, namely Emerald and MRI Management, had been approached and had indicated that they would be receptive to debt for equity swap if Zarara's Restructuring Proposals were successfully implemented. While the Company's ability to achieve a successful restructuring would also depend, *inter alia*, on the willingness of the Guarantee Creditors to release their claims, or on the Company demonstrating that it was not liable under the guarantees, there appeared to be a basis for restructuring negotiations at the Company level and a real (or realistic) prospect of a restructuring being agreed.

56. I also had a further concern. As I have noted, one of the Guarantee Creditors, Baker Hughes, had commenced an arbitration in London and they and the other Guarantee Creditors including Sakson had only been given very short notice of the Hearing. They had been told on 5 March that the Application had been filed but were only told of the date and time of the Hearing on the Friday before the Monday hearing. Other creditors had not been told of the Application until that Friday. While it is permissible for an application under section 104(3)

of the Act to be made *ex parte*, it is in my view important where possible for the views of creditors to be ascertained and for creditors to have a proper opportunity to file representations and submissions to the Court if they wish to do so. Creditors' views are relevant and important for determining the prospects of the proposed compromise or arrangement (are key creditors supportive or likely to support the proposed compromise or arrangement?) and as the Chief Justice said in *Sun Cheong* the wishes of creditors are one of the matters to be taken into account when the Court is exercising its discretion under section 104(3) and deciding whether to appoint PLs. If there is real urgency and a genuine and substantiated reason why creditors have not been consulted or cannot be given reasonable notice of the hearing, the Court can nonetheless proceed to appoint PLs but on this occasion I was not satisfied that the creditors including the Guarantee Creditors had been given adequate notice of the Hearing or that there was a good reason for the short notice or for appointing PLs immediately rather than adjourning the hearing for a short period to give the creditors proper notice of the adjourned hearing and an opportunity to appear at the adjourned hearing or file submissions, should they wish to do so. The evidence available at the Hearing did not indicate that the PLs needed to be appointed before the Administrator sent out the Restructuring Proposals or before the anticipated meeting of Zarara's creditors, or that there was any action which the PLs needed to take urgently before an adjourned hearing could be listed. I therefore directed that creditors be notified that the Hearing had been to provide the Company with an opportunity to file further evidence, that such further evidence had to be filed by 4pm Cayman Islands time on 17 March and that if creditors intended to appear at any adjourned hearing or to make representations or submissions to the Court they must give notice of an intention to appear to the Company's Cayman Islands attorneys and file such representations and submissions before that time.

<u>The further evidence and developments after the Hearing</u>

57. Following the Hearing, the Company filed a further affidavit from Mr Worthington (his Third Affidavit). He provided considerably more information and exhibited documents relating to the Mauritian administration; the extent and nature of the Investor's interest, the reasons why the Investor was considered reliable and the steps that had been taken to contact and have discussions with the Investor and the financial position of MRI Kenya. He also clarified the terms of and the anticipated mechanics for implementing the Restructuring Proposals and the manner in which the PLs would be funded (so that their costs and expenses would be paid). In particular, Mr Worthington confirmed that the Administrator had on 16 March sent his report to Zarara's creditors with a letter inviting them to attend the watershed meeting to vote on the restructuring proposal made in the Administrator's report and that the Administrator

supported the Restructuring Proposals; that the Restructuring Proposals had been updated and amended and that if Zarara's creditors voted in favour of the Restructuring Proposals at the watershed meeting, the parties would have a further twenty-one days in which to agree and execute a DOCA. He further confirmed that the Company's board understood that even after the DOCA had been signed Zarara will need further time in which to satisfy the milestones and conditions that will be set out in the DOCA and arrange for the agreement with the Investor to be finalised and executed. It was likely that this would take a further three months. Mr Worthington confirmed that the Company's board believed that provided that Zarara's creditors voted in favour of the proposals at the watershed meeting on 30 March, Zarara would have access to sufficient funding to enable it to complete the restructuring during that further three-month period since Emerald had confirmed that it was willing to provide further limited funding if there was a clear path towards the survival of the Company and the Group (including Zarara) as a going concern and that such survival was a real possibility; that such path had been determined by no later than 31 March 2021, and that the timetable to complete implementation of the restructuring did not exceed the current estimate (of twenty one days plus three months after the approval of the Restructuring Proposals at the watershed meeting). The funding that Emerald had offered to provide would also cover the anticipated remuneration and expenses of the PLs during this period (as I have noted already Emerald has been providing the funding of the Company and the Mauritian administration since November 2020). But, Mr Worthington pointed out, this funding was only available if the creditors supported the Restructuring Proposals at the watershed meeting including the agreement by the Guarantee Creditors to release the Company from its liability under the guarantees. In the event that this did not happen both Zarara and the Company would be forced into insolvent liquidation with the result that the Company's creditors were unlikely to make any recovery.

58. On 23 March 2021, Sakson filed the Sakson Written Submissions in opposition to the Application. These were in the form of a letter from a director of Sakson. The Sakson Written Submissions commented on the Company's evidence and referred to other facts and matters which were relied on by Sakson. Mr Sakkal stated that the matters "*deponed [sic] to herein-above [were] true to the best of [his] knowledge, and belief save as to matters deponed [sic] to on information and advice sources whereof have been disclosed.*" The Sakson Written Submissions did not state that Sakson intended to instruct attorneys or to be represented and appear at any adjourned hearing of the Application and I therefore concluded that Sakson was satisfied that the Application be dealt with by the Court by reference to the Sakson Written Submissions and the submissions and evidence filed by the Company, without the need for a further hearing.

59. The main points made in the Sakson Written Submissions can be summarised as follows:

(a). the Company had not demonstrated by way of evidence that the funds alleged to have been advanced by Emerald had been actually received and spent. Both Emerald and MRI Management were related parties and their demand letters should not be relied on and did not meet the evidential threshold to make and/or support the Application. The Company should have put in evidence bank statements reflecting receipt of funds and of how the money was spent. "*The Company [had] created fictitious and non-existent loans and expenses with group companies with a view to demonstrating to this Honourable Court that [the Company was] unable to pay [its] debts.*" Furthermore, if the Company had in fact received the funds, it had improperly failed to use the funds to meet its liabilities to Sakson.

(b). Sakson denied any knowledge of and were not parties to the phase 1 creditor agreements referred to by Mr Worthington.

(c). the admission by Mr Worthington that the Company had no assets other than its interest in Zarara "*smacks of fraudulent misconduct by the Company and its directors when it purported to issue the [guarantee in favour of Sakson] knowingly and intentionally aware that it would not perform [thereunder]*."

(d). the Company had never responded to Sakson's demand dated 6 December 2020 and it could not now dispute the amount demanded or assert and rely on counterclaims.

(e). the offer to creditors of a 15% free carrying interest in Block 4 and L13 was dependent on the Kenyan Government agreeing to renew or extend the term of the PSCs, which it had not yet done and could not be guaranteed.

(f). the Application (involving the appointment of PLs on a soft touch basis) was a ploy to shield the Company from creditors while the current board remained in control. It was a ploy to stop Sakson and the Company's other creditors taking steps to recover their debts. This was the sole purpose of the Application and should not be allowed by the Court.

(g). it would not be possible for the Mauritian administration to be recognised in Kenya before the 31 March deadline since the application for recognition would only be heard by the Kenyan court on 19 May.

(h). the watershed meeting had been cancelled by the High Court in Kenya and all creditors had been given a chance to make representations to the court. Sakson intends to make representations to the High Court in Kenya with respect to the debt owed to it by Zarara and the Company.

(i). the Company had not demonstrated that there was a realistic prospect that the Restructuring Proposals would be successful and approved. No details of the Investor had been tabled for consideration and assessment by creditors; Zarara did not have a renewed license from the Kenyan Government and there was no evidence to demonstrate that the Blocks L4 and Ll3 have commercially marketable gas.

(j). it was clear that the Company and Zarara had orchestrated a ploy to "*run away from [their] debts and leave the creditors stranded*". The Company had been paying its related companies to the detriment of independent service providers and the Application designed to prejudice the external creditors. The purpose of section 104(3) of the Act was to assist genuine attempts to restructure a company's liabilities, which was not the position in the present case. The Application was an abuse and should be dismissed by the Court.

60. In Walkers' letter of 24 March setting out the Company's response to the Sakson Written Submissions, the following main points were made:

(a). the Company rejected Sakson's allegations that it had been involved in fraudulent conduct and misled the Court in respect of its debts to MRI Management and Emerald. There was no evidence and no basis whatsoever for such allegations.

(b). the dismissal of the Application and the failure of the restructuring negotiations would not advantage Sakson and the other creditors of Zarara and the Company since it would only result in an insolvent liquidation of both companies and no return to Sakson and such creditors.

(c). the Company accepted that number of issues and matters remained to be satisfied and settled before the Restructuring Proposals could be successfully implemented and these were clearly set out in the Administrator's Report. Contrary to the suggestion made by Sakson, the Company was not required as part of the Application to demonstrate to the Court that the Restructuring Proposals were bound to succeed. Rather it was sufficient that they are shown to have, and Mr Worthington had, on behalf of the Company, explained why the Company's board believed that they had, a real prospect of success.

(d). the Application was not a "*ploy*" to avoid the repayment of debts which would otherwise be recovered by creditors should the Application be dismissed. On the contrary, the Application was made to give the Company (and the Group) the best possible chance of continuing as a going concern, repaying creditors and returning to profit. The alternative, should the Application be dismissed, will be for the Company (and the Group) to be liquidated with minimal recoveries to creditors.

(e). in the circumstances, the Sakson Written Submission did not provide grounds on which to dismiss the Application.

(f). there had been some discussions with Baker Hughes' Cayman attorneys, Kobre & Kim, who had asked for and been provided with the documents filed in these proceedings. On 22 March 2021, Walkers and the Company's onshore solicitors had contacted Kobre & Kim by telephone to confirm that the documents had been received and to ask if Kobre & Kim had any questions. They were told that the documents had been safely received and were being reviewed. They had not heard further from Kobre & Kim.

<u>Analysis and decision</u>

61. It is first necessary to consider whether the two requirements of section 104(3) of the Act, which go to the Court's jurisdiction, are satisfied in this case.

62. The first requirement, as I have noted, is that the Company is unable to pay its debts. I accept the Company's submissions on this point. I have carefully considered the points made in the Sakson Written Submissions but do not consider that they support or justify a different conclusion. Sakson did not formally file evidence in support of its opposition to the Application. Mr Sakkal did not swear an affidavit. Nonetheless, I consider that it is

appropriate to take into account the submissions and statements made in the Sakson Written Submissions. Mr Sakkal did, as I have noted, in substance include a statement of truth in the Sakson Written Submissions and clearly intended that his statements be relied on by the Court. However, in the absence of properly particularised affidavit evidence, supported by appropriate documentation, I do not consider that I can give much weight to the factual statements made in the Sakson Written Submissions, and cannot accept them where they conflict with the evidence filed by the Company. On the question of whether the Company is unable to pay its debts and whether the requirement of section 104(3)(a) is satisfied, there is no proper basis to reject the Company's evidence as to the existence and status of its liabilities to Emerald and MRI Management or as to its failure and inability to pay the sums demanded. The fact that Emerald and MRI Management are related parties does not undermine or preclude reliance on that evidence.

63. The second requirement is that the Company intends to present a compromise or arrangement to its creditors. In my view, this requirement is satisfied on the evidence. As I have noted, what is relevant here is the intention to present a compromise or arrangement to the Company's creditors. A plan to make proposals to the creditors of the Company's subsidiary, such as Zarara, would not be sufficient. But here, some creditors of Zarara are, or at least claim to be, creditors of the Company and a compromise or arrangement with the Company's other creditors is under discussion and contemplated as a necessary consequence of the acceptance of the Restructuring Proposals, since the Company envisages a Group and not just a Zarara restructuring. I am satisfied, following the filing of the Company's further evidence, that the Company has a genuine, *bona fide*, intention to present and negotiate a restructuring both with Zarara's creditors and with its own and that a proper process for conducting those negotiations is now underway. The absence of the identity of the Investor (whose involvement is critical to the credibility and viability of the Restructuring proposals) is a concern but appears to be understandable in view of the commercial sensitivities explained by Mr Worthington. Furthermore, Mr Worthington has confirmed that he considers that the Investor appears to be credible and to have the means to fund the contemplated investment. It also appears that there is no suggestion that the Investor is related to or connected with the Company or its shareholders. I do not consider that Sakson's allegations that the Restructuring Proposals are not being put forward in good faith or properly and that the Application is "*a ploy*" whose purpose is to prejudice and not protect the interests of creditors is made out.

64. Having satisfied myself that the Court has jurisdiction to grant the Application, I must now consider whether I should exercise my discretion to do so. I have concluded, following the filing of the Company's further evidence, that I should do so.

65. As I have noted, I am satisfied that the evidence now shows both that the Company intends to present a compromise or arrangement to its creditors and to promote a restructuring of the Group and that the Restructuring Proposals are coherent and appear to offer Zarara's creditors an apparently attractive alternative to an insolvent liquidation of Zarara (and the Company). There appears to be a rational basis for accepting the Restructuring Proposals, provided that the assumptions on which they were based were validated; in particular, that the Investor proves to be reliable and of substance and prepared to commit the further funds required to allow the necessary further exploration of and work to be done at Blocks L4 and L13 and that the condition and state of those blocks meant (and there was a reasonable expectation) that such exploration and work would result in sufficient revenues and value creation to provide the Investor with a satisfactory return and other creditors with a material recovery. There would also appear to be reasonable basis for putting in place a restructuring of the Company's debt and balance sheet, if the Restructuring Proposals are approved and implemented, to allow the Company's creditors and shareholders to access and have the benefit of the recoveries to be made by MRI Kenya out of its retained minority shareholding in Zarara.

66. As I have noted, the restructuring negotiations are at a relatively early stage. Indeed, in view of the recent developments in Kenya, they are currently at a particularly precarious point. It remains to be seen whether Zarara's creditors (it remains unclear on the evidence whether all or only a particular majority of Zarara's creditors must give their approval) are willing to support the Restructuring Proposals on their current or possibly on revised terms. In particular, it remains to be seen whether the Guarantee Creditors including Sakson, assuming that they can establish that they have valid claims against the Company, will be persuaded and prepared, or can be required by a majority vote, to release their guarantees. They will obviously need to be satisfied that what is on offer is a fair and reasonable deal and a preferable alternative to a liquidation which they may need to fund if they wish to see claims brought against Zarara, the Company and possibly others. I note the allegations made and concerns expressed by Sakson, which for the purpose of the Application have not been proved or established but which will need to be dealt with if Sakson's support for the Restructuring Proposals is to be obtained. I also note that as matters currently stand, there appears to be a serious difficulty in the watershed meeting going ahead before the 31 March deadline (and there is no indication that even in the new and difficult circumstances there is any prospect of the Mauritian court granting and extension of time or of Emerald being prepared to extend its

funding to accommodate such an extension or delay in obtaining creditor approval) and a serious risk that the appointment of the Administrator will terminate. If that were to happen, it is unclear whether the restructuring of Zarara could proceed and whether Zarara's assets in Kenya could and would be protected and preserved. These problems, as I have said, give rise to serious doubts and concerns as to the prospects of success of the Restructuring Proposals. Nonetheless, I am satisfied that all is not yet lost and there remain a number of ways in which the restructuring negotiations could be put back on track. The adverse developments in Kenya occurred only recently and their impact and Zarara's options remain under consideration. It remains possible, and I anticipate that the PLs can play a constructive and useful role in this regard, that there can be discussions with the Kenyan Creditors with a view to alleviating their concerns and for allowing more time in which the restructuring negotiations can progress and proceed (it is unclear whether the Kenyan creditors have a local priority which they are seeking to protect and if they do how that could be accommodated within the Restructuring Proposals).

67. In the circumstances, it seems to be right and appropriate to appoint the PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilise the position and seek to have constructive discussions with the creditors of Zarara, and with Emerald as the funder whose continued support is critical to the process. It is clear that the time is short but that there may be sufficient time to secure a satisfactory result. Because of the possibility that there may be significant developments, and of the need as matters presently stand for approval of the Restructuring Proposals by Zarara's creditors, before 31 March, I have directed that the PLs provide the Court with an initial report on 1 April.

68. I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute "light-touch" for "soft touch", since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!). The form of order submitted by the Company provides for the Company's directors to retain the power to act with respect to matters within the ordinary course of the Company's business without the prior consent of the PLs but to require that they obtain the prior consent of the PLs for matters outside the ordinary course of business, including the restructuring negotiations. While I question (and indeed raised at the Hearing the issue of) whether in this case it is clear what is covered by the Company's ordinary course of business (where as I understand it, the *Company* has no funds save for what is provided by Emerald for the purpose of the restructuring negotiations and the provisional liquidation and is not therefore conducting business in any meaningful sense), I am prepared to make an order

using that terminology in the form proposed, provided it is made clear that the directors' unrestrained powers only allow them to make payments of limited amounts (I have included a threshold of US$10,000 in the order). Paragraph 7 of the order now reads as follows:

> *"Until further Order, the Directors shall retain all powers of management conferred upon them by the Company immediately prior to the date of this Order, subject to the JPLs' oversight and monitoring of the exercise of such powers pursuant to paragraph 5 hereof. In relation to matters related to the ordinary course of business of the Company, the Directors may exercise these powers without the approval of the JPLs. In relation to matters outside of the ordinary course of business of the Company (to include all matters related to the Company Restructuring and the Group Restructuring and the payment of any creditors save for payments of less than US$10,000), the Directors may only exercise these powers with the JPLs' prior approval. In the event that the JPLs and the Directors cannot agree upon a proposed action outside the ordinary course of the Company's business, the JPLs and the Directors have liberty to apply to this Court for directions. Specifically, and without limitation but subject to the foregoing, the Directors may continue to exercise the following powers:*
>
> *(a). to continue to conduct the ordinary, day-to-day, business operations of the Company;*
>
> *(b). to continue to operate and maintain the bank accounts of the Company in the ordinary course of the Company's business; and*
>
> *(c). subject to the approval and consent of the JPLs, to open and close bank accounts on behalf of the Company."*

<u>A footnote point</u>

69. I should briefly mention one further point. I have referred to above and quoted from the written resolutions signed by the Company's shareholders on 3 March. Resolution 3 was in the following terms (underlining added):

> *"Resolution 3*
>
> *IT WAS RESOLVED that, in the event that the compromises or restructuring arrangements proposed by the Provisional Liquidators are rejected by the Court or the Company's stakeholders or are otherwise incapable of being implemented <u>the Shareholders hereby confirm that they revoke their requirement that the Company be wound up by the Court under section 92(a) of the Law and authorise the directors of the Company to take such steps as then deem appropriate to procure the withdrawal of the Petition</u>."*

70. At the Hearing, I pointed out that this resolution in my view gave rise to a number of questions and issues. It must at least be strongly arguable that it precludes the Company seeking a winding up order in reliance on section 92(a) of the Act (that the Company had

passed a special resolution *requiring the Company to be wound up by the Court*). The decision to wind up appeared to be qualified and conditional. It was also unclear to me whether such a qualified authority to present a petition (or an authority subject to a condition subsequent) tainted or affected the petition more generally. Obviously, the shareholders' intention (and the intention of those who drafted the resolution) was to indicate that the Company was only using the winding up jurisdiction for the purpose of promoting a restructuring and compromise or arrangement with creditors as permitted by section 104(3) of the Act, and it might be said that resolution 3 was unobjectionable since it only gave the directors the authority, as between themselves and the shareholders, to apply to withdraw the petition at a later date if the restructuring negotiations failed. However, I would just note that there may be difficulties with this approach which may need to be considered on another occasion. In the absence of the point being taken by any opposing creditor I do not consider that I need to delve further into the issue, save to note that in this case, resolution 3 appeared to be inconsistent with the Company's evidence that if the restructuring negotiations failed, the Company would be wound up immediately.

Segal

HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2022 (NSJ)

IN THE MATTER OF SECTION 86 OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF E-HOUSE (CHINA) ENTERPRISE HOLDINGS LIMITED

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Nick Herrod, Mr Ryan Hallett and Ms Allegra Crawford of Maples and Calder (Cayman) LLP for the Company**
Convening hearing:	**15 September 2022**
Sanction hearing:	**9 November 2022**
Draft judgment distributed:	**10 November 2022**
Judgment Delivered:	**17 November 2022**

HEADNOTE

Creditors' scheme of arrangement pursuant to section 86 of the Companies Act (2022 Revision) – decision at convening hearing and sanction hearing – voting by creditors who are affected by sanctions on Russia – scheme discharging New York law governed debt – availability and effect of relief under chapter 15 of the US Bankruptcy Code and under New York private international law – effect of the scheme under Hong Kong and BVI law

JUDGMENT

Introduction

1. In July 2022 E-House (China) Enterprise Holdings Limited (the ***Company***) applied for an order (the ***Convening Order***) giving it permission to convene a single meeting (the ***Scheme Meeting)*** of certain of its creditors (all of whom are holders of notes issued by the Company) who were to be parties to a scheme of arrangement under section 86 of the Companies Act (2022 Revision) (the ***Companies Act***) for the purpose of considering and if thought fit approving the scheme.

2. On 28 July 2022, the Company filed a petition seeking the sanction of the proposed scheme and a summons (the ***Convening Order Summons***) pursuant to which it applied for the Convening Order. On 7 September 2022 the Company filed a further summons seeking permission to amend the petition in the manner set out in the amended petition attached to the further summons (the ***Amended Petition***).

3. The Convening Order Summons was heard on 15 September 2022. I was satisfied that it was appropriate to permit the Company to convene a meeting of the creditors to be parties to the scheme, although, as I explain below, I declined to permit the Company to exclude from voting certain creditors affected by sanctions against The Russian Federation (***Russia***). The Convening Order was made on 20 September 2022. The meeting was to be held on 12 October 2022. I explain below the issues that arose at the convening hearing and my reasons for making the Convening Order.

4. On 4 October 2022 the Company filed a summons (the ***Scheme Meeting Summons***) seeking an urgent order that the date of the meeting be changed to 2 November 2022. The Company, in its evidence in support of the Scheme Meeting Summons, explained that scheme documents had been sent to creditors but the Company had recently found that creditors were taking longer than expected to submit their voting instructions. As a result, the Company considered that creditors should be given more time to submit voting instructions so that as many creditors as

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possible had the opportunity to vote and participate in the meeting. The Company also sought an order that the record date for the meeting be amended and that certain other consequential orders be made (including a direction that it give notice to creditors of the change to the date of the meeting and the other orders made). The Company also filed a Re-Amended Petition (the ***Re-Amended Petition***) which included various minor updating amendments to the Amended Petition. The Company requested that I deal with the Scheme Meeting Summons on the papers without the need for a further hearing. In view of the urgency and subject matter of the Scheme Meeting Summons, I was prepared to do so. On 5 October 2022, I ordered (the ***Further Convening Order***) that the Company had permission to amend and reschedule the date of the meeting to 2 November 2022 and made the necessary consequential orders. I also gave the Company permission to amend the scheme document in the form appended to the Fourth Affirmation of Zhou Liang (***Mr Zhou***).

5. On 6 October 2022 the Company sent to scheme creditors and published the notice of the date of the reschedule meeting and an update letter explaining the reasons for the change to the date of the meeting, explaining the further proposed amendments to the scheme and providing an update on progress in the restructuring and certain further information which I directed be provided to scheme creditors.

6. The meeting of scheme creditors was held in the Cayman Islands on 2 November 2022 at the offices of the Company's Cayman Islands attorneys (Maples and Calder). Creditors were able to attend in person or via a Zoom link. Over 93% in value of the notes subject to the scheme attended in person or by proxy and creditors representing 99.96% by value and 99.87% by number voted in favour of the scheme. The scheme therefore achieved the support of a very substantial proportion of affected scheme creditors.

7. On 9 November 2022, the Company's application for an order sanctioning the scheme was heard. At the end of the hearing I confirmed that I would grant the order sought and that I would subsequently set out in writing, in addition to my reasons for making the Convening Order, my reasons for making the order sanctioning the scheme. This judgment now sets out those reasons.

The evidence

8. The main evidence filed in support of the Convening Order Summons was as follows. The First Affirmation (***Zhou 1***) of Mr Zhou (who is the Company's CFO), the Second Affirmation of Mr Zhou (***Zhou 2***), the Third Affirmation of Mr Zhou (***Zhou 3***), the First Affidavit of Yeung King Shan Fanny (***Ms Yeung***) (who is an associate director of D.F. King Limited, the Company's information agent (the ***Information Agent***)), the Second Affidavit of Ms Yeung, the Affidavit of Edward Lam (***Mr Lam***) (who is a partner in Skadden, Arps, Slate, Meagher & Flom, the Company's onshore legal advisers) and the Affidavit of Allan Gropper (***Judge Gropper***) (who is a well-known and highly respected retired Bankruptcy Judge for the Southern District of New York). Zhou 1 exhibited a copy of the form of explanatory statement (the ***Explanatory Statement***) that the Company proposed to send to the creditors who were to be parties to the proposed scheme. The formal terms of the proposed scheme were set out at Appendix 4 of the Explanatory Statement (the ***Scheme***).

9. The following further evidence was filed in support of the Company's application for an order sanctioning the scheme. The Fifth Affirmation of Mr Zhou (***Zhou 5***); the Third Affidavit if Ms Yeung; the First Affidavit of Mr Alexander Lawson (the chairperson at the meeting of scheme creditors); the First Affirmation of Zhang Xing (***Zhang 1***) (Mr Zhang is an officer of China International Capital Corporation Hong Kong Securities Limited (***CICC***), the Company's financial adviser) and the Third Affidavit of Ms Rachel Catherine Baxendale of Maples and Calder. Shortly before the sanction hearing, the Company also filed the Sixth Affirmation of Mr Zhou (***Zhou 6***).

The Company, its financial position, and the notes which are to be subject to the scheme

10. The Company is a holding company. Its shares and notes have been listed on the Hong Kong Stock Exchange (***HKSE***). Its principal assets are the shares that it holds in its subsidiaries, in

particular Fangyou Information Technology Holdings Limited (***Fangyou***), a company incorporated in the BVI (through which it indirectly owns a number of operating entities including Hong Kong Fangyou Software Technology Company Limited (***Hong Kong Fangyou***) a company incorporated in Hong Kong), and TM Home Limited (of which the Company owns 70.23%, and which is incorporated in the Cayman Islands and ultimately controls a number of other operating entities). The Company is in the business of real estate agency services, real estate data and consulting services and real estate brokerage network services in the People's Republic of China (***PRC***), through its indirect operating subsidiaries there (I refer to the Company, its subsidiaries and its indirect subsidiaries as the ***Group***).

11. There are two note issues which are to be subject to the scheme (together the ***Old Notes***). The notes are all governed by New York law:

(a). senior notes with an aggregate principal amount of US$298,200,000, a coupon of 7.625% per annum and a maturity date of 18 April 2022 (the ***2022 Notes***).

(b). senior notes with an aggregate principal amount of US$300,000,000, a coupon of 7.60% per annum and a maturity date of 10 December 2023 (the ***2023 Notes***).

12. The 2022 Notes were listed on the HKSE but were delisted following maturity. The 2023 Notes remain listed on the HKSE but trading was suspended on 19 April 2022. I refer to the holders of the 2022 Notes and the 2023 Notes together as the ***Noteholders***.

13. The Old Notes are held in global form through the Hongkong and Shanghai Banking Corporation Limited (***HSBC***) acting through its nominee HSBC Nominees (Hong Kong) Limited as common depositary (the ***Depositary***) for the clearing systems (who are identified below). HSBC is the trustee of the Old Notes (the ***Old Notes Trustee***).

14. The Old Notes are guaranteed by certain direct and indirect subsidiaries of the Company (the ***Subsidiary Guarantors***), namely Fangyou , CRIC Holdings Limited (***CRIC***) (incorporated in the British Virgin Islands), Hong Kong Fangyou and CRIC Holdings (HK) Limited (***CRIC Hong Kong***) (incorporated in Hong Kong).

15. The Company has liabilities in addition to those arising under the Old Notes. These include sums owing under a convertible note (the ***Convertible Note***) issued on 4 November 2020 to Alibaba.com Hong Kong Limited (***Alibaba***) in the principal amount of HK$1,031,900,000 (US$135,000,000). In addition, there are liabilities owed to other members of the Group of RMB 1,423,300,000 (US$223,347,000) and other payables of RMB 12,200,000 (US$1,914,000).

16. The Company's financial position deteriorated in the second half of 2021 and the first half of 2022 as a result of various factors described in Zhou 1, including the downturn in the PRC property market. The Company was unable to repay the principal due on 18 April 2022 in respect of certain of the Old Notes. This default caused a cross-default under the Convertible Note but Alibaba agreed to waive this default subject to certain conditions which included a term that if the Company's proposed restructuring had not become effective by 31 October 2022 (which was later extended to 15 December 2022), then the waiver would be automatically and immediately revoked and Alibaba would become entitled to enforce the Convertible Note. Despite this waiver, sums remain due and owing under both the 2022 Notes and the 2023 Notes which the Company cannot pay. The Company's position is that it was therefore cashflow insolvent at the time of the filing of the petition and remains so and that absent the approval of the scheme by Noteholders and the sanction of the scheme by the Court, it was likely to go into insolvent liquidation.

17. According to Mr Zhou, the Company's financial position as at 31 March 2022 can be summarised as follows:

(a). it had assets with a net book value of approximately RMB 8,967,000,000 (approximately US$1,407,118,000). It had total liabilities of approximately RMB 5,981,189,000 (approximately US$938,579,000).

(b). the value of its assets (valued at book value) exceeded its liabilities. However, a majority of the Company's assets were not readily realisable and were unlikely to be recoverable in full or, in some instances, at all.

(c). the Company held cash and cash equivalents of approximately RMB13,380,000 (approximately US$2,100,000).

(d). the Company was, as noted above, unable to repay the principal sum of US$298,200,000 due on the maturity of the 2022 Notes on 18 April 2022. The failure to pay the amounts due under the 2022 Notes constituted an event of default under the relevant indenture, and as already noted, a cross-default (but without giving rise to an automatic acceleration) under the terms of the Convertible Note, which in turn constituted a cross-default under the 2023 Notes. The default under the Convertible Note has been, as I have also already noted, waived by Alibaba in exchange for the Company entering into various undertakings and agreements. However, the amounts due under the 2022 Notes and the 2023 Notes remain payable and outstanding.

18. As at the date of the Explanatory Statement, the Company's most recent audited accounts were those for the period ending 31 December 2020, as the audited accounts for 31 December 2021 were still in preparation (see the Explanatory Statement at [2.14(b)]). A copy of the unaudited consolidated financial statements of the Group for the year ended 31 December 2021 and the interim unaudited consolidated financial statements of the Group as at 30 June 2021 were attached in Appendix 8 to the Explanatory Statement and Mr Zhou provided further financial information in Zhou 1 based on and extracted from the Group's unaudited management accounts as at 31 December 2021. Mr Zhou stated that there had been some significant movements in relation to certain assets and liabilities during the period from 1 January 2022 to 31 March 2022 and confirmed that these had been taken into account in the information provided and statements made regarding the Company's financial position in Zhou 1 and that the updated information had been provided to Kroll (HK) Limited (***Kroll***) for the purpose of its liquidation analysis (which was attached as appendix 3 to the Explanatory Statement).

19. The Explanatory Statement (at [2.14(a)]) also noted that the figures for 31 March 2022 provided in it were based on the Group's unaudited management accounts as at 31 December 2021 with the necessary amendments to reflect the updated information provided to Kroll. Mr

Zhou further confirmed in Zhou 1 that there had been no significant changes to the Company's financial position since these updated figures. He also explained why the Company had been unable to finalise its 2021 and interim 2022 financial statements in time for inclusion in the Explanatory Statement. This, he said, had been primarily due to the fact that the progress in preparing the financial statements of the Group had been negatively affected by the strict COVID-19 prevention and control measures in the PRC, as well as staff turnover within the Group and a change in the Company's auditor. The Company had made announcements in July 2022 and August 2022 on the HKSE regarding the delays in finalising its financial statements and the reasons for the delays.

The restructuring negotiations and communications with Noteholders regarding the scheme process in advance of the hearing of the Convening Order Summons

20. The Company has been in discussions for some time regarding how to deal with its financial problems and the terms of a restructuring of the Old Notes.

21. In March 2022, the Company appointed a financial adviser (CICC) to evaluate the capital structure and liquidity position of the Company and its subsidiaries, and to explore options for the restructuring of the Old Notes.

22. On 31 March 2022, the Company announced on the HKSE website the commencement of an offer to exchange the outstanding principal amount of the Old Notes and a solicitation of consents from the Noteholders (the ***Exchange Offer***) which exchange was subject to certain conditions being met, including acceptance of the Exchange Offer by holders of at least 90 per cent of the outstanding principal amount of the Old Notes (the ***Minimum Acceptance Amount***).

23. Given the conditions attached to the Exchange Offer, concurrent with announcement of the Exchange Offer, the Company also invited the Noteholders (through an announcement on the HKSE website) to accede to a restructuring support agreement (the ***RSA***) by 4.00 p.m. London time on 11 April 2022 (the ***Exchange Expiration Deadline***). The Company's announcement also stated that the restructuring may be implemented through a scheme of arrangement if the Exchange Offer was not successfully completed, and provided a copy of the RSA, which

appended a term sheet setting out the terms of the proposed restructuring (the ***RSA Term Sheet***).

24. On 11 April 2022, the Exchange Expiration Deadline was extended to 4.00pm London time on 13 April 2022 and the Company announced this on the HKSE's website.

25. On 14 April 2022, the Company announced on that website that it had terminated the Exchange Offer due to the Minimum Acceptance Amount condition not having been satisfied and that it was preparing to implement the restructuring by way of a scheme of arrangement and that therefore it was extending the deadline for accession to the RSA, in accordance with the terms of the RSA, to 4.00 pm London time on 22 April 2022 (the ***Instruction Fee Deadline***).

26. On 5 August 2022, the Company sent a letter to Noteholders (as creditors who would be subject to the scheme). This letter is referred to as the ***PSL*** (an abbreviation of practice statement letter). The purpose of the PSL was (as contemplated by [3.1] of the Practice Direction No 2 of 2010 (the ***Practice Direction***)) to give notice to Noteholders of the terms of the proposed Scheme and of the restructuring, of the relevant background, that the Company intended to apply to the Court for an order permitting it to convene a meeting of Noteholders and to give notice of the issues that the Court would need to consider at the hearing of the Convening Order Summons. The PSL stated that the hearing of the Convening Order Summons had been listed for 5 September. It also explained that the commencement of the Scheme proceedings had been delayed for various reasons including (as discussed in more detail below) difficulties resulting from the effect of sanctions on Russia and the need for negotiations with Alibaba. The PSL noted that the terms of the scheme provided that the date on which the scheme became effective (the ***Restructuring Effective Date***) must occur by a certain date (the ***Longstop Date***) which had initially been 13 October 2022 but which the Company wished to amend to 31 October 2022. The PSL was notified to Noteholders via various different methods. These were posting the PSL on the website established by the Company to upload relevant information and documents relating to the scheme; circulating the PSL electronically through the clearing systems (Euroclear Bank S.A./N.V. and Clearstream Banking, S.A.) and sending the PSL via email

directly to each Noteholder who had registered with the Information Agent or had otherwise notified the Company or the Information Agent of its email address.

27. As noted above, the petition and the Convening Order Summons were then filed on 28 July 2022. The hearing of that summons was originally listed for 5 September 2022. However it subsequently became necessary to delay the hearing until 15 September 2022. Noteholders were notified of this change by letter dated 2 September 2022 (the ***2 September 2022 Letter***) which was distributed using the same methods of communication that had been used for giving notice of and circulating the PSL.

28. The Company had planned to circulate on 2 September 2022 or shortly thereafter an update to Noteholders to inform them of the changes that had been made since the PSL to the terms and structure of, and the process for voting on, the scheme. The 2 September 2022 Letter stated that "*Further details on the Scheme will follow early next week*." But unfortunately, because of further delays in finalising aspects of the restructuring, in particular delays in obtaining confirmation from the Old Notes Trustee that it would be prepared to act as a trustee of the new notes to be issued under the scheme (the ***New Notes***) and that it would assume other roles in connection with the New Notes, the update was further delayed. On 12 September 2022, three days before the hearing of the Convening Order Summons, the Company eventually sent out the update (the ***Additional PSL***) once again using the same methods of communication as had been used for the PSL. The Additional PSL explained the revisions to the scheme and the restructuring that had been made since the PSL and attached copies of the amendments to the scheme documents required to give effect to those changes.

The terms of the RSA and the high level of Noteholder support for the Scheme

29. A detailed overview of the RSA is set out at [5.10] of the Explanatory Statement. Its terms can be summarised as follows. Under the RSA, any Noteholder who accedes to the RSA by the Instruction Fee Deadline, votes in favour of the Scheme at the Scheme meeting and does not exercise its rights to terminate the RSA or breach any provision of it in any material respect, will be a ***Consenting Creditor***, and will receive a cash fee on the Restructuring Effective Date

in an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline (the ***Instruction Fee***). Mr Zhou confirmed in Zhou 1 (at [49]) that as at the date of his affirmation (9 September 2022) approximately 89.07% by value of Noteholders had signed or acceded to the RSA and therefore had undertaken to vote in favour of the Scheme at the Scheme meeting.

The terms of the Scheme

30. The terms of the Scheme were summarised in Zhou 1 at [61] to [87] and in further detail in section 7 of the Explanatory Statement and, as I have noted, set out in Appendix 4 to the Explanatory Statement. The Scheme will only affect the rights of the Company, the Subsidiary Guarantors and the "*Scheme Creditors*."

31. Scheme Creditors are defined as "*without double counting, the Noteholders, the Old Notes Trustee and the Depositary*." As regards voting, however, the Old Notes Trustee and the Depositary have agreed not to vote at the scheme meeting. The Noteholders are defined as "*those Persons with an economic or beneficial interest as principal in the Old Notes held in global form or global restricted form through the Clearing Systems at the Record Date, each of whom has a right upon the satisfaction of certain conditions, to be issued with definitive registered notes in accordance with the terms of the Old Notes*." A Released Claim is defined as "*any Scheme Claim, Ancillary Claim, or any past, present and/or future Claim arising out of, relating to or in respect of: (a) the Old Notes Documents; (b) the preparation, negotiation, sanction and implementation of [the] Scheme and/or the RSA; and/or (c) the execution of the Restructuring Documents and the carrying out of the steps and transactions contemplated in [the] Scheme …"* An Ancillary Claim is a claim against a Released Person. The following are defined as a Released person: the Company; the Subsidiary Guarantors, the Group, their Affiliates, Personnel and Advisers; the Old Notes Trustee and its connected parties and advisers; the New Notes Trustee and its connected parties and advisers; the Holding Period Trustee (whose role I discuss below); the Scheme Supervisor (who is Mr Lawson, who is appointed by the Board to act in such capacity); the Information Agent and the Cayman Islands Information Agent (which is Alvarez & Marsal Cayman Islands Limited).

32. Under the Scheme, on the Restructuring Effective Date:

(a). Scheme Creditors will release in full the Released Claims, in exchange for the New Notes and the Cash Consideration (which means 6% of the outstanding principal amount of the Old Notes held by the relevant Noteholder together with interest on the Old Notes accrued up to but excluding 18 April 2022).

(b). the Old Notes will be released, cancelled, fully compromised and forever discharged, and the respective rights and obligations of the Scheme Creditors, the Company, the Subsidiary Guarantors and the Old Notes Trustee towards one another under the Old Notes Documents will terminate and be of no further effect.

(c). Noteholders who are Consenting Creditors will be paid the Instruction Fee.

(d). the New Notes will be issued to Scheme Creditors in tranches which mature on the first anniversary and then in six-month increments from the date of the issue of the New Notes. The interest rate on the New Notes will be 8% per annum. The first principal payment of 10% of the aggregate principal amount of the New Notes will be due one year after the Restructuring Effective Date. The New Notes will mature on the third anniversary of the date that they are issued.

(e). the liability of the Subsidiary Guarantors will be released.

The Kroll liquidation analysis

33. An estimated outcome for Scheme Creditors of a liquidation of the Company was prepared by Kroll. They prepared a written liquidation analysis (dated 29 July 2022) which was discussed in Zhou 1 at [93] to [97] and set out, as I have said, at appendix 3 to the Explanatory Statement. In summary, the return to Scheme Creditors in an insolvent liquidation was estimated by Kroll to be in a range from 25.8% (low case) to 36.1% (high case). The liquidation analysis assumed

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that all entities in the Group are put into liquidation. It assessed the likely realisable value of each of the companies in the Group on what is described as a segmented based approach. Kroll explained what this means in [3.2] of their analysis:

> *"E-House has over 300 major subsidiary entities within the Group. Given the significant number of subsidiaries and the complexity of the Group's corporate structure, we have sought to conduct our analysis on a consolidated basis for each Segment level. Based on the information provided by Management, we have aggregated the assets and liabilities of each Segment. For this Liquidation Analysis, we have assumed that upon the liquidation of each Segment, the proceeds from the aggregated realisation of assets for any specific Segment will be used to repay the aggregated debts recognised in the same Segment."*

34. The six segments identified by Kroll were as follows: the Company; 125 subsidiary entities that are principally engaged in real estate agency and consultancy; 17 subsidiary entities that are principally engaged in the provision of real estate related education services; 7 subsidiary entities that are engaged in offshore financing and marketing activities; 54 subsidiary entities that are principally engaged in digital marketing and brokerage; and 104 entities controlled by Leju Holdings Limited, a NYSE-listed entity that is principally engaged in the provision of online-to-offline real estate services. The liquidation analysis assumed that each company in the Group will cease operations upon liquidation and as a result that its assets will be sold at discounted prices rather than at prices that might be achieved if they were sold on a going concern basis.

The impact of Russian sanctions

35. The UK Government, the US Government and the European Union have imposed sanctions on Russia including sanctions in response to Russia's invasion of Ukraine. The UK's sanctions have been extended to and apply in the Cayman Islands. The Company was required to consider the effects, and to modify the terms of the scheme to deal with issues arising because, of these sanctions. The Company had to consider whether any Noteholders were subject to these sanctions regimes (in particular the asset freezes imposed thereby) in order to decide whether sanctions prohibited the discharge of the Old Notes, the issue of the New Notes and the payment of fees to Noteholders. Furthermore, as the Company discovered, it was also necessary

to consider whether any Russian banks or custodians through whom Noteholders hold their Old Notes (which banks and custodians are participants in and hold accounts with the clearing systems) were subject to sanctions and the impact of sanctions on the operation of the clearing systems. Sanctions may have an impact on the means by which the clearing systems communicate with and distribute documents to their participants and account holders. This could extend to the process by which the Explanatory Statement and related documents are to be distributed to Noteholders, the blocking by the clearing systems of transfers of and dealings in the Old Notes and the process for obtaining voting instructions from Noteholders.

36. Where notes are held through a clearing system the identity of the beneficial holders of the notes will generally not be known to the issuer of the notes and may be impossible to ascertain otherwise than with the assistance of the clearing system. The issuer relies on the clearing systems to facilitate communications with (both to and from) noteholders. The issuer sends a notice or other communication to the clearing system who transmits it to its account holders, who in turn submit it to those who hold accounts with them. The clearing system will also transmit voting instructions back from the ultimate beneficial owner to the issuer. The issuer also depends on the clearing system to ensure the integrity of the voting process by blocking trading in and transfers of the notes during the period in which noteholders are voting. The issuer also depends on account holders in the clearing system to provide confirmation and verification that a person claiming to be a scheme creditor is a holder of notes and the amount of notes they hold. The position role of the clearing systems and their involvement in communications with Noteholders and the voting process is explained in Ms Yeung's First Affidavit.

37. The sanctions regimes I have identified are relevant to the Company's scheme for the following reasons:

(a). the Cayman Islands sanctions regime is engaged because the Company is a Cayman Islands exempted company. As a British Overseas Territory the UK's sanction regulations (The Russia (Sanctions) (EU Exit) Regulations 2019) are applied to and in the Cayman Islands by The Russia (Sanctions) (Overseas Territories) Order 2020 (as amended).

(b). the United States sanctions regime is potentially engaged because the Old Notes are governed by New York law and denominated in US$.

(c). the European Union sanctions regime is engaged because the clearing systems through which the Old Notes are held are subject to certain sanctions imposed by the European Union. This includes, since March 2022, the blocking and suspension of settlement services provided by the clearing systems in respect of accounts held by certain Russian banks and financial intermediaries, including the National Settlement Depository (***NSD***) which is the central securities depository for the Russian Federation.

38. Consequently, the Company considered and took advice on the impact on the scheme process and the nature and scope of these sanction regimes. Mr Zhou dealt with this in his evidence. He summarised the position in Zhou 2 as follows (see also Zhou 1 at [86]):

> *"6. Various financial sanctions have been imposed in response to Russia's invasion of Ukraine. As a result of such sanctions, the Clearing Systems (through which the Old Notes are settled) have blocked all transfers with accounts held by certain Russian banks and financial intermediaries. These restrictions have affected approximately 6.65% of the Noteholders (by value) who acceded to the RSA.*
>
> *7. The Company has been advised that the Scheme does not constitute a breach of the applicable financial sanctions regimes of the United States, the United Kingdom, the Cayman Islands and the European Union.*
>
> *8. Nevertheless, it is a matter for all stakeholders in the Scheme …to take their own commercial position on sanctions."*

39. A summary of the steps taken and advice received by the Company was set out by Mr Lam in his Affidavit. He noted that the Company had made various inquiries, with the assistance of the Information Agent, to ascertain whether any Noteholders were subject to or affected by the sanctions regimes. The Company deduced, based on information provided by the clearing

systems and obtained from the process for obtaining Noteholders' agreement to accede to the RSA, that approximately 6.65% of those Noteholders who acceded to the RSA hold their Old Notes through the NSD. The clearing systems have blocked transfers from the accounts of NSD's held by them. Mr Lam explained (at [22]) that:

> *"I have been informed by D.F. King, the information agent engaged by the Company, that Euroclear and Clearstream, through which the 2022 Notes and the 2023 Notes are settled, have blocked all transfers with accounts held by certain Russian banks and financial intermediaries, including Russia's National Settlement Depositary (the* ***"NSD")*** *from March 2022 (prior to the time the RSA was entered into in April 2022). I have also been informed by D. F. King that approximately 6.65 per cent of the holders of the 2022 Notes and the 2023 Notes who acceded to the RSA did not submit instructions through Euroclear or Clearstream. The Company was provided with a lock-up report containing the identity those holders that had acceded to the RSA, including those who did not submit instructions through Euroclear or Clearstream (the* ***"Lock-up Report").*** *So far as the Company can determine, the Lock-up Report contains the identity of all the holders of the 2022 Notes and 2023 Notes that did not submit instructions through Euroclear or Clearstream (the* ***"Blocked Noteholders")****. The Company has informed us that it believes, after due inquiry with D.F. King, that all of its Blocked Noteholders hold their 2022 Notes and/or 2023 Notes through the account of the NSD. As a result of the transfer block imposed by Euroclear and Clearstream, the Company believes there has been no change to the list of Blocked Noteholders since the time the RSA was entered into."*

40. Accordingly, some Noteholders are unable to receive documents or give instructions via the clearing systems (I refer to all such Noteholders as the ***Blocked Noteholders***). It appears that the Blocked Noteholders are Noteholders who hold their Old Notes through accounts with NSD or with other custodians who themselves have accounts with NSD. Some of the Blocked Noteholders have, despite these difficulties, been contacted by the Company and acceded to and agreed to be by bound the RSA. I refer to these Noteholders as the ***RSA Blocked Noteholders***. There may be other Blocked Noteholders but the Company currently does not know whether any exist or if they do exist who they are.

41. 89.07% by value of all Noteholders have acceded to the RSA and, as I have said, the RSA Blocked Noteholders constitute approximately 6.65% of all such acceding Noteholders. The alternative method for contacting the RSA Blocked Noteholders was discussed in Zhou 1 at [53]. The PSL and other documents and notices were posted on the scheme website so that any

Blocked Noteholder could access them and were sent by email to each Blocked Noteholder whose email address was known to the Company or the Information Agent (see Zhou 1 at [102]).

42. Therefore, so far as the Company was able to ascertain, all the RSA Blocked Noteholders held their Old Notes through NSD and none of the Noteholders were themselves subject to the asset freezes or other provisions of the sanctions regimes. The Company had also, as Mr Lam confirmed, verified that none of the RSA Blocked Noteholders were listed or treated as designated or blocked persons under the regulations governing the relevant sanctions.

43. As a further precaution to ensure that no Noteholder who is prevented by sanctions from voting on, from having the Old Notes discharged by or from receiving the scheme consideration under the scheme, from doing so, the Company will require Scheme Creditors to execute a distribution confirmation deed. This contains various sanctions related confirmations to be made by and on behalf of each Scheme Creditor to confirm that they are not subject to sanctions. If any Scheme Creditor fails to give the required affirmative confirmations then Company will check that Scheme Creditor's details against the lists of designated sanctioned persons in the Cayman Islands, the United Kingdom, the European Union and the United States to ensure that the Scheme Creditor is not on a sanctioned person.

44. In these circumstances, the Company is satisfied that, based on and following what it considers to be reasonable inquiries, the promotion and implementation of the scheme will not give rise to a breach of any applicable sanctions regime.

The Company's approach before the hearing of the Convening Order Summons to voting by Blocked Noteholders

45. Thus the clearing systems' decision to suspend settlement services and communications through accounts held by NSD has had an impact on the process for obtaining the approval of and implementing the scheme. As a result, the Company has been unable to give notices to or obtain voting instructions from the Blocked Noteholders via the clearing systems in the usual way (or make payments or transfer the scheme consideration to Blocked Noteholders). In

addition, the Company's bank has advised that it cannot make direct payments to the Blocked Noteholders (see Zhou 1 at [58]) and the Information Agent has indicated (in light of comments made by the clearing systems) that it is unable to collect information and voting instructions from the Blocked Noteholders outside the clearing systems.

46. The difficulties associated with sanctions were not addressed prior to the RSA being signed because the Company was not aware of them at the time. The need to investigate and resolve these difficulties and to prepare amendments to the scheme documents caused delays in finalising the terms and structure of the scheme and were mainly responsible for the need to delay the hearing of the Convening Order Summons. The amendments that the Company decided were needed to address the problems caused by sanctions were summarised in the Additional PSL as follows (underlining added):

> *"5. Since the [PSL], the Scheme Company has been working through the mechanics of the Restructuring and, following discussions with Euroclear and Clearstream, it has <u>been agreed that the new notes</u> to be issued pursuant to the Restructuring (the **"New Notes")** <u>can take a global form and will be on the same terms as the Term Sheet to the RSA</u>, subject to the amendments shown in Appendix B to this PSL. The trustee of the New Notes will be an independent and professional provider of note trustee services that will be confirmed by the Scheme Company as soon as possible. <u>The Scheme and Restructuring are also subject to the amendments set out below</u>.*
>
> *6. First, <u>the Scheme Consideration due to those persons or entities who hold the Old Notes through accounts held by certain Russian banks and financial intermediaries, including the [NSD],</u> whose settlement services have been suspended and blocked by Euroclear and Clearstream, (the **"Blocked Scheme Creditors")** <u>will need to be first held by a trustee in accordance with the terms of the Holding Period Trust Deed</u> (the **"Holding Period Trustee")** on trust for the Blocked Scheme Creditors until the maturity date of the New Notes or the lifting of the applicable sanctions, whichever is earlier. If applicable sanctions are still in place upon the expiry of the Holding Period Trust, the Scheme Company will undertake in the Scheme to create a successor trust (the **"Successor Trust")** for Blocked Scheme Creditors' Scheme Consideration to be held until the earlier of (i) the expiry of the perpetuity period of the Successor Trust or (ii) the lifting of applicable sanctions, with the Blocked Scheme Creditors being given a reasonable period thereafter to recover their entitlement to the Scheme Consideration in accordance with the terms of the Successor Trust. The same will apply to the Instruction Fee, which is to be paid to those Blocked Scheme Creditors who*

are also Consenting Creditors. The Holding Period Trustee will be Ultrex Holdings (HK) Limited, a Hong Kong incorporated subsidiary of the Scheme Company.

7. *Further and on account of the same sanctions regulations of the European Union, the Information Agent is not able to collect information, including voting instructions, from the Blocked Scheme Creditors. <u>As a result, the Blocked Scheme Creditors will not be permitted to attend or vote at the Scheme Meeting</u>. However, Blocked Scheme Creditors who are also Consenting Creditors will still be eligible to receive the Instruction Fee, on the terms set out in paragraph 6 above.*

8. *Finally, as anticipated in the [PSL], <u>the Scheme Company proposes an amendment to the RSA to extend the Longstop Date until 31 October</u> 2022. The Scheme Company now also proposes a further amendment to the RSA to provide the Scheme Company with the right (at its sole discretion) to extend the Longstop Date to 30 November 2022 (together with the initial extension until 31 October 2022, the **"Longstop Date Extension")** should additional time be required to complete the Restructuring. Consenting Creditors who vote in favour of the Scheme will be treated as having voted in favour of the Longstop Date Extension."*

47. As this extract makes clear, the Company decided, in order to deal with the impact of sanctions, that the New Notes could be issued in global form; that the New Notes could not be issued to Blocked Noteholders but would need to be held on their behalf by a trustee and Blocked Noteholders could not and would not be allowed to vote at the scheme meeting.

48. The arrangements for voting at the scheme meeting were set out in the Explanatory Statement and the documents attached to it, including the solicitation package. These explained what steps needed to be taken by a Scheme Creditor in order to be entitled to attend and vote at the scheme meeting. In the case of intermediated securities such as the Old Notes held through clearing systems, as I have noted, the clearing systems play a critical role since they pass on documents to their account holders (who then forward the documents to sub-custodians and thereby to Noteholders), block dealings in the Old Notes while voting is taking place and transmit back voting instructions executed by such account holders on behalf of Noteholders.

49. The Company prepared a form of document to be used by account holders for the purpose of recording and evidencing the Old Notes held and the voting instructions given by Noteholders.

This is the Account Holder Letter which must be signed by an Account Holder, who is defined in the Scheme as a person who has an account with the clearing systems and is recorded in the books of the clearing systems as holding in that account a book-entry interest in the Old Notes. The Account Holder in the Account Holder Letter identifies and provides the name of the person who is the to be treated as the Scheme Creditor in respect of a specified amount of the Old Notes and on whose behalf the Account Holder is acting. This ensures that the ultimate beneficial owner of the relevant Old Notes can attend and vote at the Scheme Meeting in accordance with the "Looking through the Register" approach set out in the Practice Direction (see [4]). The Account Holder in the Account Holder Letter gives various confirmations (representations) and voting instructions on behalf of the Scheme Creditor and provision is made in the Account Holder Letter for the appointment of a proxy by the Scheme Creditor. Appendix 2 to the Account Holder Letter attaches a distribution confirmation deed (to which I made reference above) which all Scheme Creditors must execute in order to be entitled to receive and before receiving their share of the New Notes. Annex B to the distribution confirmation deed sets out various securities law and sanctions confirmations and undertakings to be given by the relevant Scheme Creditor. The sanctions confirmations, in summary, confirm that the Scheme Creditor and its affiliates and associates are not subject to sanctions or acting for Russia and will not use the proceeds of the New Notes to fund or facilitate the business of any sanctioned person or of Russia.

50. The Explanatory Statement and the solicitation package confirmed and expanded on what was said in the Additional PSL regarding the position of the Blocked Noteholders. Blocked Noteholders (including the RSA Blocked Noteholders) would be excluded from voting. The Company considered that this was necessary because the Blocked Noteholders could not receive documents or give voting instructions via the clearing systems and because the Information Agent was also unable to send documents to or receive voting instructions from them. However, to ensure that the RSA Blocked Noteholders (who had acceded to the RSA and thereby agreed to submit an Account Holder Letter and vote in favour of the Scheme at the scheme meeting, and who were only entitled to the Instruction Fee if they did so) would be financially no worse off by being unable to vote, the Company agreed to waive the RSA Blocked Noteholders' obligation to submit an Account Holder Letter and agreed that the RSA

Blocked Noteholders should nonetheless still be paid their Instruction Fee if the Scheme was approved and sanctioned. This would be paid to the Holding Period Trustee.

Third Parties

51. The Scheme also provides that by no later than the date of the sanction hearing, various non-parties to the Scheme will give undertakings to the Company and the Court to be bound by the terms of the Scheme. These include the Subsidiary Guarantors, the subsidiaries who will guarantee the New Notes, the Old Notes Trustee, the Depositary, the Old Notes Paying and Transfer Agent, the New Notes Trustee,, the New Notes Paying and Transfer Agent, the Holding Period Trustee, the person appointed to act as the supervisor of the Scheme and the Information Agent.

The issues arising on the convening hearing

52. It is now well settled that the function of the Court at a scheme convening hearing is not to consider the merits or fairness of the proposed scheme. These issues arise for consideration at the sanction hearing if the scheme is approved by the requisite majority of creditors. At the convening hearing the Court is concerned with a narrower range of issues when determining whether to give directions for the convening of the scheme meeting and if so what those directions should be. The issues for consideration are referred to in the Practice Direction (at [3]). They are now frequently summarised as covering three main areas, namely first, any issues which may arise as to the constitution of the meeting or meetings of creditors; secondly, any issues as to the existence of the Court's jurisdiction to sanction the scheme and thirdly, any other issue (not going to the merits or fairness of the scheme) which might lead the Court to refuse to sanction it (which will usually include a review of the extent to which the scheme will be effective abroad in other relevant jurisdictions).

53. In addition, the Court will consider whether adequate notice has been given to creditors of the purpose and effect of the proposed scheme and of the convening hearing. The Practice Direction (at [3.1]), as noted above, states that:

> *"….practitioners should consider giving notice to persons affected by the scheme in cases where class or other issues referred to in paragraph 3.3 below arise and where it is practical to do so. Such notice should include a statement of the intention to promote the scheme and of its purpose, and also of the proposed composition of classes and of the intention to raise any issue as referred to in paragraph 3.3 below."*

54. Paragraph 3.3 of the Practice Direction states that:

> *"At the first hearing, the Court will also consider any other issue which is relevant to the jurisdiction of the Court to sanction the scheme, and any other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the Court to refuse to sanction the scheme."*

55. In this case, there is no issue as to jurisdiction. The Company is a Cayman Islands incorporated company and is therefore liable to be wound up under the Companies Act. Accordingly, pursuant to section 86(5) of the Companies Act the Court clearly has jurisdiction to convene a scheme meeting (and sanction a scheme) in respect of the Company (I discuss below the relevance of the connections to the jurisdiction for the purpose of the Court's exercise of its discretion to sanction the Scheme). The Scheme is also clearly an arrangement within the meaning of section 86 of the Companies Act.

56. Issues do however arise in relation to the following matters: the notice of the convening hearing; class composition; the extent to which there are doubts as to the international effectiveness of the Scheme; the adequacy of the disclosure in the Explanatory Statement and the directions to be given for the convening and conduct of the Scheme meeting. I deal with each of these issues in turn.

Notice of the convening hearing and amendments to the Scheme

57. As I have noted above, Scheme Creditors were first given notice of the proposed scheme on 5 August 2022 in the PSL. The PSL said that the convening hearing was listed on 5 September 2022. They were notified on 2 September 2022 that the date of the convening hearing had been put back to 15 September 2022. They were then notified shortly before the convening hearing,

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on 12 September 2022, that certain amendments to the Scheme were to be made with respect to the treatment of the Blocked Noteholders and that the Company would seek to be granted the power to extend the Longstop Date to 30 November 2022.

58. The question of the timing and adequacy of notice to Scheme Creditors has been considered by a number of authorities. As Mr Justice Zacaroli noted in *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) (***Lecta***) at [10] "*The essential question, as posed by Norris J in Re NN2 Newco Ltd [2019] EWHC 1917 (Ch), at [22]-[23] is whether in all the circumstances of the case (including the complexity of the scheme, the degree of prior consultation with creditors and the urgency of the scheme) creditors have been given sufficient notice of the basic terms of the scheme and an effective opportunity to raise any concerns*." As Mr Justice Meade said in *Re Nostrum Oil & Gas Plc* [2022] EWHC 1646 (Ch) (***Nostrum***) at [25] "*the appropriate period of notice is a fact-sensitive matter*."

59. In this case, leaving to one side the position of the Blocked Noteholders, I am satisfied that adequate notice has been given. The basic terms of the Scheme were notified on and have not materially changed since 5 August 2022. The PSL in early August gave notice that the convening hearing would be in early September and the subsequent notice dated 2 September gave just under two weeks' notice of the revised hearing date (of 15 September). Furthermore, a substantial proportion of the Noteholders have been involved in the restructuring negotiations and have become parties to the RSA. The precise dates on which Noteholders acceded to the RSA have not been disclosed but it is clear that they did so some time in advance of the PSL. In the PSL the Company confirmed (at [39]) that Noteholders holding approximately 90% of the Old Notes had already by 5 August 2022 entered into or acceded to the RSA.

60. But what about the position of the Blocked Noteholders? Some of the Blocked Noteholders acceded to the RSA. They will have been fully informed of the terms of the Scheme. But there may be others who have not come forward. They cannot receive notices through the clearing systems and so must rely on making their own searches of the Company's website and the HKSE website. This may result in some delays in their picking up and finding out about developments. However, the PSL was uploaded to the Company's and the HKSE's website in

early August 2022 and therefore it is reasonable to expect that even these other Blocked Noteholders will have been aware of the restructuring proposals, the terms of the Scheme and the timetable for implementing it, including there being a convening hearing in early September. I had a concern that they will only have found out that the Company was proposing that they would not have the right to vote at the Scheme meeting a matter of days before the convening hearing. It is possible that some of the Blocked Noteholders may have wished to object to the Company's proposal and to have made representations at the convening hearing but were unable to do so in view of the very short notice given of the amendments. However, in this case I do not consider that there is a need to find or justification finding that the Company failed to give adequate notice to the Blocked Noteholders of important amendments to the Scheme so that the convening hearing should be adjourned. First, as I shall explain shortly, I directed at, and the Company has agreed following the convening hearing that Blocked Noteholders be permitted to vote at the Scheme meeting and that arrangements be made that will give them an opportunity to do so outside the clearing systems. Therefore, the main cause of concern that the Blocked Noteholders would have had has been dealt with. Secondly, and most importantly, the Blocked Noteholders will have an opportunity to raise any concerns and objections to sanction of the Scheme at the sanction hearing. In view of the very short notice they were given of the amendments to the Scheme affecting them, they will be given greater leeway than creditors would usually have to raise at the sanction hearing issues that could and should have been brought forward at the convening hearing. Thirdly, the Company is clearly under serious time pressure in view of the Alibaba deadline and an adjournment of the convening hearing would potentially have serious and damaging consequences for the restructuring and the interests of Noteholders.

Class composition

61. The Court's approach to considering the question of class composition was neatly summed up recently by Meade J in *Nostrum* as follows:

> *"The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see Sovereign Life Assurance v Dodd [1892] 2 QB at [573] and many cases since, including e.g. Re Telewest Communications Plc [2004] BCC*

> *342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority."*

62. In this jurisdiction the test to be applied is also summarised in the Practice Direction (at [3.2]).

63. When dividing creditors or members into classes, two considerations are relevant: the rights that the creditors or members would have if the scheme were not implemented, and the rights that the creditors or members have if the scheme is implemented. As Chadwick LJ said in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [30]:

> *"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."*

64. The Company submitted that in the present case, the Scheme Creditors should vote in a single class:

(a). the Court needed to consider the rights of Scheme Creditors under the Scheme and under the alternative to the Scheme. The Company submitted that the Scheme Creditors have the same rights and are treated equally under the Scheme and would have the same rights under the alternative to the Scheme.

(b). the Scheme Creditors will, subject to the two differences discussed below, be given identical legal rights under the Scheme. Once the restructuring is implemented, each Scheme Creditor will be entitled to receive the same package of Scheme consideration pro rata to their existing claims. There is no relevant difference of treatment and therefore no difference in the rights acquired by Scheme Creditors under the Scheme.

(c). the Company also submitted that the evidence indicated that the alternative to the Scheme (the comparator) was an insolvent liquidation. If the Scheme is not approved the Company is very likely to enter into insolvent liquidation. In that situation, all Scheme Creditors would have the same legal rights against the Company. They would have unsecured claims ranking *pari passu*, and would receive (based on the Kroll liquidation analysis) the same estimated pro rata return of approximately 25.8% to 36.1%. The Company submitted that the Kroll liquidation analysis had been properly prepared and set out a realistic and reasonable estimate of the recoveries that Scheme Creditors would make if the Company and other members of the Group were forced in liquidation upon the failure of the Scheme.

65. The Company accepted that there were some differences of treatment between Scheme Creditors but that these differences were said to be immaterial and did not fracture the class:

(a). some, but not all, Scheme Creditors have signed the RSA and will receive the Instruction Fee although all Noteholders were offered the opportunity to accede to the RSA and receive the Instruction Fee.

(b). the Blocked Noteholders will not be able to receive the Scheme consideration on the Restructuring Effective Date, but instead the Scheme consideration to which the Blocked Noteholders would otherwise be entitled will be held on trust by the Holding Period Trustee, and subsequently the trustee of the Successor Trust until the applicable sanctions are lifted or for the duration of the two trusts. Furthermore, the Company's position at the convening hearing was that the Blocked Noteholders would not be entitled to attend or vote at the Scheme meeting.

66. As regards the fees, the Company argued that the fact that creditors had entered into a lock-up agreement did not give rise to a class issue. Rather, it was relevant to the exercise of the discretion of the Court when deciding whether to sanction a scheme (citing *Telewest Communications* [2004] BCC 342 at [53]). The Company argued that it was well-established that fees paid in connection with lock-up agreements of a type similar to the RSA (commonly

referred to as consent fees) did not fracture a class merely because some members of the class will not receive the fee (*In Re DX Holdings Ltd and other Companies* [2010] EWHC 1513 (Ch) at [7]). Two factors were important: first, whether or not the consent fee was offered to all scheme creditors and secondly, whether the consent fee was likely to exert any material influence on creditors' voting decisions (*Re Magyar Telecom* [2014] BCC 448 at [12]; *Re PrimaCom Holdings GmbH (No.1)* [2013] BCC 201 at [55]-[57] and *Re Privatbank* [2015] EWHC 3186 (Ch) at [30]). In this case, as already noted, the Instruction Fee had been offered to all Noteholders who acceded to the RSA by the Instruction Fee Deadline and all Noteholders were given the opportunity and sufficient time to accede to the RSA after the announcement of the RSA on 31 March 2022; the Instruction Fee was small, being only 1% of the outstanding principal amount of the Old Notes held by Noteholders who are Consenting Creditors; under the Scheme, the Noteholders were expected to receive 100% of the sums due under the Old Notes (albeit at a later date) but in a liquidation, the return was expected to be between 25.8% (low) and 36.1% (high) so that in these circumstances it was highly unlikely that a Noteholder who would otherwise have intended or planned to vote against the Scheme would have been persuaded and incentivised to vote in favour in order to obtain the Instruction Fee and a small additional 1% return.

67. As regards the treatment of the Blocked Noteholders:

(a). the Company noted that the Blocked Noteholders were receiving the same benefits under the Scheme as other Scheme Creditors (including, where they had acceded to the RSA, the Instruction Fee) but at a later date. The Company submitted that the delay in the Blocked Noteholders having access to their Scheme consideration was not unusual where parties to a scheme were subject to regulatory or other requirements that made it unlawful for them to receive the scheme consideration immediately. The Company relied on the following recent statement of the applicable principle by Mr Justice Marcus Smith in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch) (***Haya***) at [72(3)]:

> "*Scheme Creditors will be required to make certain customary confirmations with respect to US securities legislation in order to certify their ability to*

receive their allocation of New SSNs and New Shares. If a Scheme Creditor is unable to make such customary confirmations, it may nominate a person to receive its allocation of New SSNs and New Shares on its behalf. If a Scheme Creditor fails to nominate such a person, then the New SSNs and New Shares for that Scheme Creditor will be transferred into a "holding trust" for up to 12 months. If the New SSNs and New Shares still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant creditor. This structure does not, in my judgment, fracture the class. It is a customary feature of schemes that involve the issuance of new debt or equity securities. The Scheme Creditors have the same rights in relation to the New SSNs and New Shares under the Scheme. An inability to give the customary confirmations required to be given to receive an allocation of New SSNs and New Shares goes merely to the enjoyment of those rights, creating a potential fairness, not class, issue: see Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19] per Zacaroli J; Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [28] per Adam Johnson J; Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [82]-[83] per Trower J."

(b). as regards the prohibition on the Blocked Noteholders from attending or voting at the Scheme Meeting, the Company noted that the issue had arisen in *Nostrum*, another sanctions case, but had not affected Meade J's decision that it was appropriate to convene a scheme meeting of a single class of scheme creditors. Meade J had noted at [42] of his judgment, the Company said, that the scheme creditors affected by sanctions had signed a lock-up agreement prior to their being sanctioned, and this strongly indicated that they did not object to the scheme. The Company submitted that the restrictions on the Blocked Noteholders' right to attend and vote at the Scheme meeting, if relevant at all, related only to the fairness of the Scheme, which was not a question to be decided at the convening hearing. If the Blocked Noteholders had any objections to the Scheme, related to the effect of sanctions or the mechanisms put in place to deal with them, then they would be able to raise these objections at the sanction hearing.

68. I accept that the entitlement of Consenting Creditors to be paid the Instruction Fee does not require that they be put in a separate class. But in my view the proper approach to be followed by the Court was that set out by Marcus Smith J in *Haya*. He said this (at [72(4)] (underlining added):

*"Consent payment. A consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 5pm on 31 March 2022 (the **Consent Payment**). The Consent Payment is a sum equal to 0.5% of the principal amount of the New SSNs to be received by the relevant Scheme Creditor under the Scheme. The Consent Payment will be payable in cash upon the implementation of the Scheme. Consent fees of this type are common, and at this level do not – given the value at risk - fracture the proposed class. Of course, this is a matter that is fact dependent, and the fees incurred in bringing forward a scheme, and the basis on which they are to be paid, are always going to be matters the court ought to bear in mind. More specifically:*

(a) Some of the authorities suggest that, where a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class: see Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [72] per Trower J, among many other cases. I am a little doubtful as to the weight of this point, since the critical question is how the class will vote at the meeting, and the factors that might impair that vote.

(b) Some of the authorities suggest that even if a consent fee was made available to all, it is necessary to consider whether the quantum of the consent fee is material. On this view, if a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator to the scheme and the value of the rights conferred by the scheme), then the fee does not fracture the class: see Re Primacom Holding GmbH [2013] BCC 201 at [57] per Hildyard J, among other cases.

It is this, second, factor that is persuasive – at least in the present case, although I would be troubled if the potential for a consent fee were not available to all members of the class. To that extent, selectivity may be a negative factor, requiring of explanation. In the present case, all of the financial creditors were given an opportunity to sign the Lock-Up Agreement and receive the Consent Payment (if they acceded by 5pm on 31 March 2022). More importantly, the Consent Payment (which represents only 0.5% of the New SSNs to be received by the relevant Scheme Creditor) would not, in my judgment, exert a material influence on the Scheme Creditors' voting decisions. The difference between the "Scheme outcome" and the "comparator outcome" is far greater than 0.5% and it would be fanciful to suppose that anyone would vote for the Scheme in order to receive the Consent Payment."

69. The Court is required, when addressing the question of whether the class of Scheme Creditors has been fractured, to have regard to the rights given to Scheme Creditors pursuant to or in connection with the Scheme and consider whether there are material differences in those rights that prevent the Scheme Creditors from being able to consult together with a view to their common interest. It seems to me that rights have to be assessed at the date of the Scheme Meeting and include rights granted under documents that are entered into in connection with and for the purpose of obtaining creditor support for the Scheme. Accordingly, Consenting Creditors are to be treated as having different rights from other Scheme Creditors. But where all Scheme Creditors have been given an equal opportunity to obtain the consent fee (by acceding to a lockup agreement such as the RSA) and all Scheme Creditors are otherwise treated equally, the difference in rights is self-induced, in the sense that it arises from a choice made by those Scheme Creditors who have decided not to accede to the lockup agreement. Furthermore, the difference in rights is not of a kind that can reasonably be expected materially to affect Scheme Creditors' decision making at the Scheme Meeting, if the amount of the consent fee is so small that no reasonable and properly informed Scheme Creditor would be likely to change his/her vote (to vote in favour of the scheme) because of the entitlement to be paid the consent fee or be likely to regard that entitlement as having a substantial effect on his voting decision.

70. In the present case, all Scheme Creditors were invited to become parties to the RSA. This included the Blocked Noteholders, a significant number of whom acceded to the RSA. The Instruction Fee is an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline. The fee is not calculated by reference to the scheme consideration, as was the case in *Haya*, but that is not unusual or determinative. The amount of the Instruction Fee is not *de minimis* or trivial but it is not of such an amount that Scheme Creditors who are entitled to it can reasonably be expected to have a materially different view of the benefits of the Scheme over the alternative (an insolvent liquidation). There is no evidence to indicate, nor is the amount of the Instruction Fee inherently and of itself so large as to indicate, that a reasonable and properly informed Scheme Creditor would be likely to change his/her vote because of the entitlement to be paid the Instruction Fee or be likely to regard that entitlement as having a substantial effect on his voting decision. The Instruction Fee is being paid as an incentive for an early commitment to support the Scheme,

and represents reasonable compensation for a commitment to support the Scheme in advance of the Scheme meeting.

71. It is also worth noting that the payment of a consent fee may also be relevant to a different issue at the sanction stage. If fees are paid to secure the support of Scheme Creditors and have the effect of manipulating the vote at the Scheme Meeting, such fees can affect and undermine the integrity of the vote and be a ground for refusing to sanction the scheme. But no issue on this ground arises in this case.

72. I accept the Company's submissions with respect to the effect of the arrangements made in relation to the Blocked Noteholders' Scheme consideration. As pointed out by Marcus Smith J in *Haya* there is a fundamental distinction between a scheme conferring different rights on different groups of creditors and a scheme conferring the same rights on all creditors but with some creditors being unable to enjoy those rights (immediately) by virtue of some personal characteristic that they possess. The latter situation should not fracture the class, as it involves a difference in interests rather than rights.

Preventing Blocked Noteholders from attending or voting at the Scheme meeting

73. However, I do not accept that it would be permissible to deprive the Blocked Noteholders of the right to attend and vote at the Scheme meeting. While it might be said that by establishing arrangements and obtaining directions for the conduct of the Scheme meeting that prevented Blocked Noteholders (who were nonetheless Scheme Creditors whose rights were discharged and varied by the Scheme) from attending and voting, the Blocked Noteholders were being granted different rights from other Scheme Creditors under or in connection with the Scheme (so that they should be in a different class), it seems to me that this issue does not go to class composition. It goes to an even more fundamental point, namely the rights given by the Companies Act to parties to a scheme and to the fairness of the Scheme (leaving aside the

impact of the Bill of Rights). It therefore raises an issue which might lead the Court to refuse to sanction the Scheme at the sanction stage.

74. Blocked Noteholders are unable to receive documents and give voting instructions via the clearing systems. There is no evidence that attendance of any Blocked Noteholder or voting by a Blocked Noteholder at the Scheme meeting would be unlawful and a breach of relevant sanctions. If that were the case, the position would be different. It is just that the usual method of communicating with and obtaining instructions from the ultimate and unidentified holders of the Old Notes is not available because of the effect of sanctions and the action taken by the clearing systems in response to such sanctions.

75. Parties to a scheme of arrangement whose rights are to be varied or discharged thereby are entitled to attend and vote at the Scheme meeting. In my view, that is what is envisaged and required by the relevant provisions of the Companies Act.

76. Section 86 of the Companies Act states that:

> *"(1) <u>Where a compromise or arrangement is proposed between a company and its creditors or any class of them</u> ... <u>the Court may ... order a meeting of the creditors or class of creditors .... to be summoned</u> in such manner as the Court directs.*
>
> *(2) <u>If a majority in number representing seventy-five per cent in value of the creditors or class of creditors</u> as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.*

77. The Court is to summon a meeting of all those creditors who are made parties to the scheme and such creditors are entitled to vote. The Blocked Noteholders are to be made parties to the Scheme. They must be summoned to the Scheme meeting and allowed to vote.

78. As I pointed out to the Company at the convening hearing, parties to a scheme must be given the right to vote on it and if there are practical problems which make it difficult for them or limit their ability to exercise that right and vote then the company must do (and must show that it has done) everything which it can reasonably be expected to do to give the scheme creditors concerned the opportunity to exercise the right to vote. In this case, it seemed to me that Blocked Noteholders could be given the opportunity to vote. They had already been notified of the Scheme and arrangements for the Scheme Meeting and could access the Scheme documents via the Company's scheme website and it seemed to me that it must also be possible for the Company to make arrangements, as had been done with the RSA, for Blocked Noteholders to submit voting instructions and evidence of their status as Noteholders outside the clearing systems to suitable persons identified and appointed by the Company for the purpose. After the convening hearing, and following consultations with its advisers and the clearing systems, the Company confirmed that indeed this was possible and the Scheme documents and the arrangements for attendance and voting at the Scheme meeting were amended to allow Blocked Noteholders to attend and vote at the meeting.

79. The Company relied on the judgment of Meade J in *Nostrum* and it is worth noting precisely what the learned judge had said on this topic in his judgment (underlining added):

> *"13. There are certain regulatory approvals that the Company must obtain in order to implement the Restructuring, which arise due to certain of the Scheme Creditors being direct or indirect targets of sanctions in the UK, EU or US. <u>Such Scheme Creditors ("the Sanctions Disqualified Persons") are currently prohibited from dealing with the Existing Notes.</u> Approximately 7.1% by value of the Notes are held by Sanctions Disqualified Persons.*
>
> *14. <u>The Restructuring may require licences to be granted by the sanctions authorities in the UK, the Netherlands and the US. I understand from Mr Allison QC, who appeared for the Company, that there is a possibility that the relevant authorities will indicate that no such licence is required (although this is less likely with the US). There is uncertainty as to when such licences (or confirmation that licences are not required) will be provided, which is why the moratorium is necessary to provide the Company with breathing room to implement the Restructuring</u>.*
>
> ….

> 42. *Sanctions Disqualified Persons will not, because of their status as such, be able to vote on the Scheme. I note however that the (current) Sanctions Disqualified Persons signed up to the Lock-Up Agreement prior to their being sanctioned and this strongly indicates that they did not object to the Scheme and would be unlikely to do so now.*
>
> 43. *In any event, in my opinion the issue of sanctions relates, if anything, to the fairness of the Scheme, which is not a question I need to decide at this stage. I therefore agree with Mr Allison that the fact that there are Sanctions Disqualified Persons, and the mechanisms put in place to deal with sanctions, do not fracture the class. For completeness, I record that I slightly misunderstood the voting position in relation to Sanctions Disqualified Persons at the hearing because I was at cross-purposes with Mr Allison. The paragraphs above have been corrected following a helpful communication from the Company's Counsel after seeing my judgment. I am confident that my misunderstanding did not affect the result and I would have announced the same decision at the hearing anyway."*

80. It therefore appears that in *Nostrum* the Sanctions Disqualified Persons were prohibited by sanctions from dealing with their notes. That appears to have meant that it would have been unlawful for them to vote at the scheme meeting. That is not the position in this case. In addition, it appears that all the Sanctions Disqualified Persons had agreed to support and be bound by the scheme, so that their assent did not need to be established or confirmed by a vote at the scheme meeting. I do not need in this case to decide whether the Court would be willing to sanction a scheme where creditors who are made parties to the scheme cannot vote. I would say however that I am not currently satisfied that this is an issue which only goes to fairness.

International effectiveness of the Scheme

81. At the convening hearing, the Court also needs to consider, at that stage on a preliminary basis, whether there is no point in convening a meeting of creditors because even if scheme creditors were to vote in favour and the Court were to sanction the scheme it would ultimately be ineffective since the scheme would not bind creditors and would be of no effect in other jurisdictions in which the company concerned had valuable assets or could be subject to insolvency proceedings (and there was a real risk that dissenting creditors might take action there). The Court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose.

82. In this case the Old Notes are governed by New York law. While as a matter of Cayman law, the Scheme will be effective to discharge the Old Notes and Noteholders will be bound by the Scheme if sanctioned, the question arises as to whether the Scheme will be effective as a matter of New York law and whether Noteholders will be bound so that they cannot bring proceedings to enforce the Old Notes or to wind up the Company in another jurisdiction in which the Company has valuable assets or could be wound up (and whether there is a real risk that dissenting creditors would take such action). As I have noted, the Company is a holding company and its principal assets are the shares it holds in its subsidiaries, in particular Fangyou (a BVI incorporated company) and TM Home Limited (a Cayman incorporated company).

83. In order to ensure that the Scheme is binding and given effect as a matter of New York law, the Company intends to apply, if the Scheme is sanctioned, for relief under chapter 15 of the US Bankruptcy Code. As regards the prospects of obtaining and the effect of chapter 15 relief the Company relied on Judge Gropper's evidence. Judge Gropper, as I have noted, is a hugely experienced and highly respected former US Bankruptcy Judge for the Southern District of New York. He summarised his evidence at [9] and [10] of his Affidavit as follows:

> *"9. I have been asked to state whether in my opinion (i) a United States Bankruptcy Court with appropriate jurisdiction, including the United States Bankruptcy Court for the Southern District of New York, would recognize the Cayman Islands' judicial process of obtaining approval of the Scheme (the* ***"Proceeding"****) as a foreign main proceeding under chapter 15; (ii) relief could be obtained to ensure that the Scheme would be enforced in the United States, given the Indentures are governed by New York law, and in accordance with such principles, a creditor would or could be prevented from bringing legal proceedings in the United States against the Company in contravention of the terms of the Scheme; (iii) the grant of appropriate relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes affected by the Scheme for the purposes of U.S federal and state law; and (iv) the third-party waivers and releases and exculpation provisions set out in substantially the same form as the draft Scheme would be enforceable in the United States. I have also been asked to address whether the Cayman Islands would be recognized as the center of main interests (****"COMI"****) of the Company such that the Proceeding would be*

recognized as a "foreign main" proceeding under chapter 15 of the Bankruptcy Code.

10. Based on the facts provided in the documents identified below and the analysis set forth herein, and subject to the qualifications stated, it is my opinion that (i) the Cayman Proceeding would be recognized as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code; (ii) the Scheme will be effective in the United States in practice to bind Scheme Creditors in relation to the variation of their rights; (iii) relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes and related guarantees for the purposes of U.S. Federal and State law; and (iv) the third-party waivers, releases and exculpation provisions set out in substantially the same form as the draft Scheme will be enforceable in the United States. I can also confirm that principles of international comity remain important considerations for courts in the United States when considering applications to give effect in the United States to foreign proceedings."

84. Judge Gropper's Affidavit sets out a fully reasoned analysis with reference to relevant authorities to support his conclusions. He dealt in depth with the test under the chapter 15 jurisprudence for determining COMI and said this at [24]:

"Based on the statute as construed by the cases discussed above, it is my opinion that the Proceeding in the Cayman Islands would be recognized by a U.S. bankruptcy court as a foreign main proceeding. As stated above, section 1516(c) of chapter 15 provides that the place of registration is presumed to be the debtor's COMI, and in the instant case we must start with the presumption that the Cayman Islands is the COMI. This presumption may be rebutted, but here there would be insufficient grounds to do so. The Cayman Islands is undoubtedly the "center of the Company's interests", taking into account the words of the statute as written. Indeed, the Company's future as an entity depends on its efforts to restructure debt that is in default. These efforts are all centered in the Cayman Islands - in the petition to this Court to convene a Scheme Meeting, in that the Scheme Meeting will take place in the Cayman Islands, and in this Court sanctioning the Scheme. I am informed that noteholders who wish to contact the Company in relation to the restructuring and/or the Scheme will be informed through a practice statement letter that they may do so by contacting A&M, a service provider located in the Cayman Islands by: (i) writing to a Cayman Islands address; (ii) sending an email to a Cayman Islands email address; or (iii) by telephoning A&M on a Cayman Islands telephone number. In any event, by the date of the filing of the chapter 15 petition, which is the critical date for chapter 15 purposes, the Company's very existence will depend on activities centered in the Cayman Islands."

85. Judge Gropper relied in particular on the decision of the Second Circuit Court of Appeals in *Morning Mist Holdings Ltd v Kris* 714 F.3d 127 (2d Cir. 2013) (***Morning Mist***) and noted that his conclusions were strongly supported by the recent decision of Judge Glenn, the Chief Judge of the Bankruptcy Court for the Southern District of New York, in *In re Modern Land (China) Co., Ltd* 2022 WL 2794014 (Bankr. S.D.N.Y, July 22, 2022) ("***Modern Land***"). He said this about that decision:

> *"My conclusions as set forth above are strongly supported by the Modern Land decision of Judge Glenn discussed above. In a case involving a company with many relevant similarities to the Company here, the Court held that recognition as a foreign main proceeding would be consistent with the goals of chapter 15, with creditors' expectations and with choice of law principles, among other things. The Court also stressed that the judicial role in that proceeding, like the instant proceeding, was prevalent and that it would not imply the requirement that provisional liquidators or their equivalent would be required in order to meet the standards for recognition. 2022 WL 27940 at *13-14.*

86. In Judge Gropper's opinion, the third party releases in the Scheme would not preclude the US Bankruptcy Court from granting relief under chapter 15 and that the relief which would be granted would include both recognition and enforcement of the discharge effected by the Scheme. The US Bankruptcy Court would "*give full force and effect*" to the provisions of the Scheme.

87. Judge Gropper also referred to the judgment of Mr Justice Harris in Hong Kong in *In re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 16896 (***Rare Earth***). *Rare Earth* was a case involving a Hong Kong scheme in respect of a company incorporated in Bermuda which sought to discharge debt governed by Hong Kong law. But the learned judge made some comments regarding the approach of the Hong Kong courts to the effect and recognition in Hong Kong of chapter 15 relief granted by US Bankruptcy Courts in respect of schemes sanctioned in "*offshore jurisdictions*" which discharged New York law debt. Mr Justice Harris said as follows:

> *"31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under Chapter 15 and granting by the relevant Bankruptcy Court of ancillary relief which prohibited*

enforcement in the United States. As the offshore jurisdictions apply the Rule in Gibbs, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of China Oil.

32. A scheme sanctioned in an offshore jurisdiction and recognised under Chapter 15 in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in Gibbs requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law. In the insolvency context in the United States this is I understand is achieved under Chapter 11 of United States Bankruptcy Code. This is explained by Glenn J (who dealt with the Chapter 15 application in Winsway) in his judgment in In re Agrokor d.d. In pages 184 to 185 Glenn J explains the position as follows:

> *"The Supreme Court concluded in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an in rem proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an in rem proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"*

33. As a matter of United States law a confirmed Chapter 11 plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under Chapter 15 does not operate as a discharge and that Glenn J acknowledges this.

34. On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement Glenn J was asked to *recognise was governed by English law and the arrangement arose under Croatia's Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia.*

"From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the Gibbs rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law. That would be unfortunate, indeed."

35. *The material distinction between Chapter 11 and Chapter 15 proceedings is explained on page 187:*

*"Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property that is located within the territorial jurisdiction of the United States. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. See, e.g., Atlas Shipping, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located in the United States. Id***.***" (emphasis added)*

36. *It is clear from this passage that recognition under Chapter 15 operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under Chapter 11 which purports to have*

worldwide effect, recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which Gibbs is concerned) and a court within its jurisdiction recognising, pursuant to a process such as Chapter 15, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under Chapter 15 does not constitute a compromise of debt governed by United States law, which satisfies the Rule in Gibbs. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under Chapter 15. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and Chapter 15 recognition will not protect them.

88. Judge Gropper noted that Judge Glenn in *Modern Land* had considered that Mr Justice Harris' summary of applicable US law had not been correct. Judge Gropper made the following comments in his Affidavit (at [19]) (underlining added):

"In regard to these issues, mention should be made of the recent decision of a Hong Kong Court in a case captioned In the Matter of Rare Earth Magnesium Technology Group Holdings Limited, [2022] HKCFI 1686. There, the Court, taking it upon itself to construe United States law and quoting from the decision in the Agrokor case cited above, stated in dictum that it did not believe that an order under chapter 15 recognizing and enforcing a foreign proceeding discharges the underlying debt. With respect, I believe the Court's discussion of chapter 15 and its effect erred, and Judge Glenn, the author of the decision in Agrokor, stated his disagreement with the Hong Kong decision in his recent decision in Modern Land. Judge Glenn said that the Hong Kong Court had misinterpreted his Agrokor decision and, in the plainest terms, said:

*"To be clear in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes [in Modern land's Cayman scheme] is "binding and effective." 2022 WL 2794014 at *5 (footnote omitted)."*

Therefore, as stated above, it is my opinion that an order of a court in a foreign insolvency proceeding under chapter 15 that meets the requirements of chapter 15 will be enforced in the United States and the relief granted will have the effect of discharging the debt and releasing guarantee claims against the Old Notes Subsidiary Guarantors for U.S. purposes, regardless of whether the debt is governed by U.S. law. If a court in Hong Kong or elsewhere refuses, for whatever reason, to give similar effect to a foreign scheme or liquidation, it will do so for its own reasons, not because of any issue arising under chapter 15 or other provision of U.S. law."

89. The Company also relied on an opinion on Hong Kong law provided by Mr Ian De Witt, a partner in Tanner De Witt and a solicitor qualified in Hong Kong. His opinion dated 19 August 2022 was exhibited to Zhou 1. Mr De Witt opined (as I understood it) that if the Old Notes were treated as discharged in accordance with New York law, they would be treated as discharged as a matter of Hong Kong law. He relied on Judge Gropper's evidence for the proposition that the relief to be granted on the Company's application under chapter 15 would discharge the debts under the Old Notes and the obligations of the Subsidiary Guarantors and that therefore that such discharge would also be given effect under the law of Hong Kong as a result of the well-known rule in *Anthony Gibbs and Sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399 (***Gibbs***). As regards *Rare Earth*, Mr De Witt noted that Mr Justice Harris' "*analysis [did] not accord with the opinion given by [Judge] Gropper*" and that:

"In any event, the potential impact of Harris J's decision in respect of the effect of a Chapter 15 recognition is minimal as his statements are obiter and non-binding. This is because:

(a). The debts compromised by the scheme of arrangement in [Rare Earth] did not concern any United States governed law debts….. It is unclear [how the effect of chapter 15 relief in a case involving the discharge of New York law debts by a foreign scheme] arose in the written decision.

(b). It is not apparent from the written decision that his Lordship considered any expert opinion on New York law.

> (c). *The sanction of the scheme of arrangement in [Rare Earth] was unopposed, thus any expert opinion adduced by the scheme company would not have been challenged."*

90. At the convening hearing I asked where the restructuring negotiations had taken place and Mr Herrod confirmed that they had largely taken place in the PRC including Hong Kong. I then asked whether this was a fact that Judge Gropper had considered and whether this might be relevant to his assessment of the location of the Company's COMI. Mr Herrod said that this was a matter that the Company would raise with Judge Gropper in advance of the sanction hearing.

91. Further, the Company also relied on the advice it had received from Maples' BVI attorneys as to applicable BVI law. In an email dated 5 August 2022, Mr Matthew Freeman, a partner of Maples in the BVI, noted that two of the Subsidiary Guarantors were incorporated in the BVI and that their guarantees were governed by New York law. He confirmed that in his opinion if sums due under the Old Notes and liability under the guarantees were discharged in accordance with New York law, then such discharge would be given effect in the BVI.

92. In view of these opinions and advice, I was satisfied that there were good grounds for concluding (and that it was reasonably likely) that the discharge effected by the Scheme would be given effect and be binding on Scheme Creditors under and as matter of New York law. It appeared that the Company would be seeking, following and in the event of the sanction of the Scheme, an order from the Bankruptcy Court for the Southern District of New York under chapter 15 (or pursuant to New York private international law applying comity) to the effect that the Released Claims would be treated as discharged under and as a matter of New York law and that there were good grounds for concluding (and that it was reasonably likely), based on Judge Gropper's evidence and recent authority (*Modern Land*), that the New York court would grant such relief.

93. It also appeared that there were good grounds for concluding (and that it was reasonably likely) that, applying the chapter 15 jurisprudence to the facts of the present case, the Company's COMI is to be treated in the Cayman Islands at the date of the filing of its chapter 15 petition.

94. I was also satisfied that in these circumstances, and applying *Gibbs*, the discharge under and resulting from the Scheme should be given effect and recognised as a matter of Hong Kong and BVI law. However, I recognise and respect the fact that Mr Justice Harris has taken a different view of the effect of relief under chapter 15 and do not disregard the importance of the *dicta* in his judgment in *Rare Earth*. It seemed to me that Mr De Witt had rather too heavily discounted the significance of those *dicta*. Nonetheless, in view of the clear decision of Judge Glenn in *Modern Land* and the strong opinion of Judge Gropper in his evidence in this case, I concluded that there were good grounds for concluding that a properly drafted order (which confirmed that the relevant debt was treated as discharged by the Scheme) did mean that under and as a matter of the law of New York the Released Claims would for all purposes be regarded as discharged and extinguished by the Scheme so that for the purpose of the rule in *Gibbs* the Released Claims would treated as having been discharged and extinguished in accordance with, as a matter of and under their proper law. I also concluded that Mr Justice Harris may wish (of course recognising that this is a matter entirely for him and the Hong Kong court) at least to review and revisit his analysis of the effect of relief under chapter 15 (with the benefit of Judge Glenn's opinion and in light of the terms of the orders made by the US court) and that, while the issue was likely to come before and require further consideration by the Hong Kong courts, the evidence before me was that the discharge of the Old Notes and the liabilities of the Subsidiary Guarantors under the Scheme would be effective in and under New York law and therefore should be given effect in Hong Kong law (once again recognising that it is for the Hong Kong court to determine questions of Hong Kong law and not for this court to do so). I can see that it might be the case that the Hong Kong court would wish to form its own view and be entitled to make its own decision as to the location of the Company's COMI when deciding whether itself to give common law assistance to Cayman appointed provisional liquidators or liquidators but it was not argued nor does it seem to me to be right to say that when the *Gibbs* rule is being applied the Hong Kong court can or should go behind and mount a collateral attack on the New York court's finding with respect to COMI and its order granting chapter 15 relief.

95. The position is the same as a matter of BVI law, which is clearly of considerable practical significance in this case since the Company has assets (shares in a major subsidiary) and two of the Subsidiary Guarantors are incorporated there.

Adequacy of the Explanatory Statement

96. I was generally satisfied that the Explanatory Statement provided adequate disclosure to Scheme Creditors. However, there were three issues which arose.

97. First, I noted that the Explanatory Statement did not provide Scheme Creditors with any details of the costs of the restructuring and Scheme process. It seemed to me that Scheme Creditors should have this information and I directed that it be provided.

98. Second, there was an issue whether the financial information contained or referred to in the Explanatory Statement was sufficiently up to date or could be considered to be stale, and whether audited financial statements should have been included. I have explained above the financial information which the Company included and referred to and the Company's explanation as to why it had not been possible or practicable to include audited financial statements or more recent financial information. I was satisfied that in the circumstances the financial information was sufficiently up to date to allow Scheme Creditors to make a properly informed decision as to how to vote on the Scheme and that the Company's explanations as to why audited financial statements were not available was reasonable.

99. Thirdly, there was an issue as to whether Kroll's liquidation analysis had been properly prepared and was sufficiently reliable. As I have noted, Kroll's liquidation analysis was not based on a company by company analysis of the likely outcome of a liquidation of each company. Instead Kroll adopted what they described as a segmented based approach under which Kroll put the Group's over three hundred companies into six sub-groups (segments) and aggregated the assets and liabilities of each sub-group (segment) for the purpose of estimating their estimate of the return to creditors of each company in the sub-group in the event of a liquidation of all the companies concerned. Kroll assumed that it was sufficient to give Scheme Creditors an analysis that based estimated returns for creditors of each company in a sub-group

on the *pro rata* amount that all creditors of all companies in the sub-group would receive if the proceeds from realisation of all assets of all such companies were aggregated and distributed among all such creditors to discharge the aggregate of all liabilities of all such companies. It appears that membership of the sub-groups was based on the companies concerned being part of the same business sector. I did have some concerns about this methodology which did not appear to be based on the impact of intercompany indebtedness between particular companies (a company in one segment might owe or be owed large sums by a company in another segment so that value would flow from or to such companies otherwise than through the segment) but concluded that it was not wholly unreasonable to assess the impact of the liquidation of a company by reference to and with the effect of a liquidation of other companies operating in the same business sector and that Kroll's approach was reasonable having regard to the number of companies concerned and the need to establish a workable and cost-effective methodology for the liquidation analysis.

Directions for the convening and conduct of the Scheme meeting

100. I was satisfied that the arrangements for convening and conducting the Scheme meeting were satisfactory. The Scheme meeting was to take place in the Cayman Islands at a time and in a manner that would allow Scheme Creditors from across the world, in particular from Asia, the UK and the US east coast to participate. Scheme Creditors were able to attend and vote at the Scheme Meeting by video conference using dial-in details which could be obtained on request from the Information Agent. Scheme Creditors who attended via video conference would be able to see and hear and be seen and heard by other Scheme Creditors attending the Scheme meeting so as so ensure that there would be an adequate "*coming together*" of Scheme Creditors and an ability for them to consult among themselves (see Trower J's judgment in *Re Castle Trust Direct PLC* [2021] BCC 1 at [42]). At the convening hearing I indicated that it would be necessary for the chairperson at the Scheme meeting to confirm in his report to the Court on the outcome of the Scheme meeting for the purpose of the sanction hearing that the technology had worked properly and that Scheme Creditors were in fact able to see and hear each other and consult in this way.

101. As I have noted, following the convening hearing the Convening Order was amended to allow the Blocked Noteholders to attend and vote at the Scheme meeting. A form of voting form (the ***Blocked Scheme Creditor Voting Form***) was prepared for use by the Blocked Noteholders and the Convening Order provided that votes cast by Blocked Noteholders using the Blocked Scheme Creditor Voting Form were to be counted by the chairperson at the Scheme meeting.

The outcome of the Scheme meeting

102. The Scheme meeting was duly held on 2 November 2022 in accordance with the terms of the Convening Order and the Scheme Creditors in attendance at the Scheme Meeting overwhelmingly approved the Scheme. Of those Scheme Creditors present and voting at the Scheme Meeting, 99.96% by value and 99.87% by number voted in favour of the Scheme. In particular, of those Blocked Noteholders present and voting at the Scheme meeting, all Blocked Noteholders voted in favour of the Scheme and none voted against. All of the Blocked Noteholders who voted in favour of the Scheme were Consenting Creditors.

Further amendment to the Scheme

103. Shortly before the sanction hearing, the Company filed Zhou 6. In that affirmation, Mr Zhou explained that Deutsche Bank AG, Hong Kong, who has been engaged to act as the New Depository, had recently informed the Company that it would not sign the deed of undertaking on the basis that it had no direct contact with the Company. Its role and relationship was only with the clearing systems. Mr Zhou said that Deutsche Bank AG had no obligations under the Scheme and so did not need to be party to the deed of undertaking. Nonetheless, it had been necessary to amend the form of deed of undertaking to remove Deutsche Bank AG as a party and to make minor amendments to the Scheme to reflect the fact that Deutsche Bank AG would not be a party. The Company indicated that it would be seeking the sanction of the Scheme with this amendment and submitted, and I accept, that it had the power to make this minor change pursuant to clause 17 of the Scheme.

Longstop Date

104. At the sanction hearing, the Company confirmed that it would be exercising the power under clause 10.1(a) of the Scheme of extending the Longstop Date to 14 December 2022 and would, if the Scheme was sanctioned, give notice to this effect to Scheme Creditors in the Scheme Effective Notice.

The issues arising at the sanction hearing

105. In my judgment in *Re Freeman FinTech Corporation Ltd* (unreported, 4 February 2021) (***Freeman FinTech***) I set out and summarised the law regarding the function of, and the approach to be adopted by, the Court at the sanction hearing (see [16] – [17]). I also set out the approach to be taken where there were issues as to the international effectiveness of the scheme (see [31]). I also note that the approach to be adopted and issues to be considered by the Court at the sanction hearing were well summarised even more recently by Mellor J when sanctioning the scheme in *Re Nostrum* [2022] EWHC 2249 (Ch) at [15] – [18].

106. The issues to be considered can be summarised as follows:

(a). first, that the Company has complied with the terms of the Convening Order and the Further Convening Order in convening the Scheme meeting and that the requisite statutory majorities under section 86(2) of the Companies Act were achieved at the Scheme meeting (***Issue One***).

(b). secondly, that the class of Scheme Creditors was fairly and adequately represented by those who attended the Scheme meeting and that the statutory majorities were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent (***Issue Two***).

(c). thirdly, that the Scheme is a scheme of arrangement that is fair, in the sense that an intelligent and honest person, being a member of the class concerned and acting in respect of his/her interest, might reasonably approve of it and that, as a matter of its residual discretion, the Court should sanction the Scheme (***Issue Three***).

(d). fourthly, that there is no other blot or defect in the Scheme which would warrant the Court refusing to sanction the Scheme (***Issue Four***).

(e). fifthly, in the case of a scheme with an international element, that the Court will not be acting in vain if it sanctions the Scheme. This requires consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions. This was, as I have noted above, addressed in a preliminary way without the benefit of the results of the Scheme Meeting, at the convening hearing but needs to be reviewed again at the sanction stage (***Issue Five***).

Issue One

107. As regards Issue 1, I am satisfied that the additional evidence filed by the Company in advance of the sanction hearing demonstrates that the Scheme meeting was convened and conducted in accordance with the Convening Order and the Further Convening Order (and was quorate). I note in particular the evidence in Zhang 1 regarding the effectiveness of the video conference facilities. All Scheme Creditors who could not, or did not, wish to attend at the Scheme meeting venue including the Blocked Noteholders who were invited to vote by lodging duly completed Blocked Scheme Creditor Voting Forms and to attend the Scheme meeting, provided that they were able to have their identity/authority, status as Noteholder, and the size of their note holding verified by the Company prior to the Scheme Meeting. CICC provided and hosted the video conference facilities for the Scheme meeting using Zoom. One Scheme Creditor attended the Scheme meeting by video conference and no Blocked Noteholders indicated they would like to attend or attended the Scheme meeting. The person who joined via video conference could see and hear the proceedings at the Scheme Meeting venue, they could see each other and be seen by those at the Scheme Meeting venue and had the opportunity to ask questions or express opinions by using the chat function.

Issue Two

108. The Court is bound to assess whether the vote at the Scheme meeting was representative of the class of Scheme Creditors. In *Re BTR plc* [2000] 1 BCLC 740 at 747 Chadwick LJ stated that:

> *"The way in which Parliament's intention is to be given effect – as it seems to me and as it has seemed to judges over the century or so since Bowen LJ considered the matter in 1892 – is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. That, as it seems to me, is the check or balance which Parliament has envisaged."*

109. Similarly, in *Re The Scottish Lion Insurance Co Ltd* [2010] SCLR 107 at [37] Lord Glennie stated that:

> *"[T]he grounds upon which an opposing creditor may seek to oppose the scheme are clearly wider than perversity, dishonesty and irrationality. The opposing creditor is entitled to seek to prove that the voting was unfair, unrepresentative or affected by special interests."*

110. I accept the Company's submission that in this case there is no reason to believe, and no evidence, that the views of those Scheme Creditors who voted at the Scheme meeting do not fairly represent the views of the Scheme Creditors as a whole. Neither is there any reason to believe or evidence that they were not acting *bona fide* or that they were being coerced.

Issue Three

111. The Court must also be satisfied that the proposed Scheme is fair such that as a matter of discretion it is appropriate to sanction the Scheme. Putting the same point another way, the

Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

112. In *Re SPhinX Group of Companies*, [2014] (2) CILR 152 at [3] Chief Justice Smellie summarised the role of the Court at the sanction hearing as follows:

> *"At the third stage of the process, it is apparent that the role of the court is a limited one. Although it is often referred to as the stage at which the court will consider issues relating to the "fairness" of the proposed scheme, the task of the court at the sanction stage is not to pass its own subjective judgment on the merits of a scheme. The court takes the view that in commercial matters, members or creditors are much better judges of their own interests than the court."*

113. In applying this test, the Court is required to consider the relevant comparator to the Scheme. In the present case, the evidence shows that the Scheme is likely to produce or at least facilitate a considerably better recovery for Scheme Creditors than a liquidation.

114. It seems to me that the Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The commercial purpose of the Scheme was clearly explained in the Explanatory Statement and it appears that the Scheme offers material benefits to Scheme Creditors. Furthermore, Scheme Creditors have, both as regards the terms of and the procedure of voting on the Scheme, as a result of the directions given to permit Blocked Noteholders to attend and vote at the Scheme meeting, been treated fairly and I see nothing unfair in the Company agreeing to pay the Instruction Fee only to Consenting Creditors.

115. I also accept the Company's submission that the arrangements relating to the Holding Period Trust and, potentially, the Successor Trust for Blocked Noteholders are necessary, reasonable and fair in the circumstances. As the Company pointed out, the structure it adopted mirrors and responds to the block currently imposed by the clearing systems. The position of the Blocked Noteholders under the Scheme is no different from their position as holders of the Old Notes in that they are unable to receive consideration until that block is lifted. Furthermore, the Company has not arbitrarily imposed this structure on the Blocked Noteholders but explored,

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under considerable time pressure, a number of alternatives. The Company will be able to review the status of sanctions and the position of Blocked Noteholders after three years at the end of the Holding Period Trust and before setting up and if required transferring the Blocked Noteholders' Scheme consideration to the Successor Trust. I also note that none of the Blocked Noteholders have objected to these arrangements.

Issue Four

116. The Court must also be satisfied that there is no blot on or defect in the Scheme that would warrant refusal to sanction the Scheme. I accept the Company's submission that no question of a blot or other defect arises in this case.

Issue Five

117. In *Freeman FinTech* I explained at [31] the Court's approach when considering the international effectiveness issue:

> "31. *In my view, the following points summarise the approach which the Court should adopt in the present and similar cases:*
>
> *(a). the Court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.*
>
> *(b). the Court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the Company had considered whether the Macau Creditor could obtain a judgment in a jurisdiction in which the Cayman Scheme was not recognised and enforce that judgment or otherwise obtain execution in a jurisdiction in which the Company had assets and which would also not recognise the Cayman Scheme. I indicated that there should be evidence as to the nature and extent*

of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman Scheme. In this connection, I note the following comments of Snowden J in Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) at [71], after referring to Sompo Japan (underlining added):

"In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. <u>The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain.</u>"

(c). the Court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The Court will consider, as Lloyd J put it in his judgment at first instance in Garuda (2001 and WL 1171948, which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the Court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In Sompo Japan, a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the Court will be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the Court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in China

Lumena, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in Garuda.

(d). it also seems to me that the Court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by Scheme Creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in Garuda."

118. I have already discussed at some length the approach I took to this issue at the convening hearing. But something further briefly needs to be said on the point since the Company filed further evidence from Judge Gropper after the convening hearing, the outcome of the Scheme meeting is now known and the issue falls to be reconsidered and assessed in the context of the exercise of the Court's discretion to sanction the Scheme.

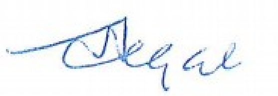
119. On 28 September 2022 Judge Gropper wrote a letter to the Company, which was adduced into evidence by being exhibited to Zhou 5. In that letter Judge Gropper confirmed that he had been told that the restructuring negotiations leading to the proposed Scheme had taken place in the PRC including Hong Kong and that his opinions and conclusions set out in his Affidavit were unaffected. He noted, *inter alia*, that in *Morning Mist* the critical factor confirming that BVI was the COMI of the company was the fact that the scheme was considered and sanctioned there. Judge Gropper also noted the criticisms of the decision by Professor Jay Westbrook, a well–respected academic and bankruptcy law specialist from the University of Texas, but confirmed his view that *Modern Land* was correctly decided and that in his view Professor Westbrook's views were unpersuasive.

120. Accordingly, Judge Gropper has strongly reiterated his opinion and the analysis of the applicable law that I applied for the purpose of the convening hearing remains unaffected. Furthermore, the very substantial vote in favour of the Scheme by Noteholders and the

complete absence of any opposition to the Scheme means that, applying the test I set out in *Freeman FinTech*, it must be right to conclude that the risk of a successful challenge to the effectiveness is very low. There is a risk that the very small percentage of Noteholders who did not vote in favour of the Scheme could, even assuming that the New York Bankruptcy Judge grants the relief sought under chapter 15, seek to take action in Hong Kong but it is far from clear that they would be entitled to do so as a matter of law or that any action would prevent the Scheme being implemented. In any event, there is no evidence that any such Noteholders are considering or would wish to do so.

121. There is of course the risk that New York Bankruptcy Judge will decline to grant the relief sought by the Company. It is a condition to the effectiveness of the Scheme that such relief is granted. I was told at the sanction hearing that the Company's chapter 15 petition is due to be heard by The Honorable John P. Mastando III on Monday (14 November). It will, obviously, be a matter for Judge Mastando. The Company pointed out at the sanction hearing that this condition is one that it is permitted to waive and that should the relief it seeks not be granted it will need to consider its position and whether to waive the condition. This would be a possibility in this case in view of the very high level of support that the Scheme has obtained. Of course, in this event, the Company has the ability under the Scheme to apply for directions from this Court (see clause 19 of the Scheme). As I noted in *Re China Agrotech* [2019 2 CILR 356] at [35] the Court has the power to sanction a scheme subject to the satisfaction of conditions to implementation which are unsatisfied at the hearing date (following the reasoning of Henderson, J. in *Lombard Medical* [2014] EWHC 2457 (Ch)) and will do so where those conditions can reasonably be expected to be satisfied within a reasonably short time. I was satisfied in the present case that it was reasonably likely that the chapter 15 petition would be granted and in any event that since it was due to be heard very shortly after the sanction hearing any difficulties would emerge and could be dealt with promptly; that the conditions that needed to be satisfied in order to allow the Restructuring Effective Date to occur were administrative or otherwise likely to occur and that the amended Longstop Date was in the near future and reasonable in the circumstances.

122. I have also considered, in the context of the exercise of my discretion to sanction the Scheme, whether there are any grounds for concluding that the use of a Cayman scheme in the present case represents an abuse of process or improper forum shopping, having regard in particular to the fact that the debt subject to the Scheme is governed by New York law and the Company's strong connections with Hong Kong and the PRC. I note that no Scheme Creditor has raised any objection to a Scheme being promoted in this jurisdiction; in fact the position is the reverse. Virtually all the Noteholders have supported and voted in favour of the Scheme. In those circumstances, and generally in the circumstances of this case, it seems to me that the application for a scheme in this jurisdiction was proper and justifiable. I must say that I sometimes have a concern that when courts seek to be overly prescriptive as to when and whether it is legitimate for foreign courts to exercise jurisdiction in respect of cross-border restructuring or insolvency proceedings they do so without regard to whether creditors have objections. It seems to me that we need to adopt a flexible approach that gives companies the opportunity properly to make use of procedures in jurisdictions with which they have a sufficient and appropriate connection, where that is done in the interests of and with the support of creditors and adopt a case by case and fact sensitive basis that involves the rejection of attempts by companies to use foreign proceedings which harm or are objected to by creditors but not to intervene where they do not.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
17 November 2022

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 231 OF 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION) (AS AMENDED)

AND IN THE MATTER OF ORIENTE GROUP LIMITED

IN COURT

Appearances:

Mr Matthew Goucke, Ms Siobhan Sheridan and Ms Fiona MacAdam of Walkers on behalf of Oriente Group Limited (the "Company"/the "Petitioner")

Mr Jamie McGee of Bedell Cristin on behalf of Liu Chak Kwan Kelvin and Tsangs Group Holdings Limited (the "Creditors")

Before:	**The Hon. Justice Kawaley**
Heard:	**11 November 2022**
Date of decision:	**11 November 2022**
Draft Judgment: Circulated	**28 November 2022**
Judgment Delivered:	**8 December 2022**

HEADNOTE

Petition to appoint restructuring officers presented by company-whether prior filing of creditor's petition within the jurisdiction deprived the company of the right to commence and/or prosecute a restructuring petition-automatic stay triggered by presentation of restructuring petition-implications of creditor commencing foreign winding-up proceedings after the commencement of local restructuring proceedings-requirements for appointing restructuring officers- Companies Act (2022 Revision) as amended by Companies (Amendment) Act, 2021, sections 91A-91J, 94(a)-Companies Winding Up Rules 2018, as amended by Companies Winding Up (Amendment) Rules 2022, Order 1A

Introduction and Summary

1. The Company's Petition was presented on 21 October 2022 pursuant to section 91B of the Companies Act (2022 Revision) as amended by the Companies (Amendment) Act, 2021 (the "Act"). It was said to be the first petition to seek the appointment of restructuring officers under the new Part V of the Act[1]. According to the Petition, the Company was the parent company of a group of companies which was "*a leading Southeast Asian financial technology platform established by the co-founders of revolutionary internet companies Skype and Lu.com (NYSE: LU), and also Atomico, one of the leading global venture capital firms*" (paragraph 2). It sought the appointment of restructuring officers on the grounds that the Company:

> "*(a) is presently unable to pay its debts and is therefore insolvent within the meaning of section 93 of the Act; and*
>
> *(b) intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to section 86 and/or section 91I of the Act, the law of a foreign country, or by way of a consensual restructuring*" (paragraph 5).

[1] The new Part V of the Act introduced by the Companies (Amendment) Act, 2021 entered into force on 31 August 2022 under the Companies (Amendment) Act, 2021, (Commencement) Order, 2022.

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2. In the Company's Written Submissions, it was asserted that the "*Company has taken steps to, and intends to take further steps with the assistance of the Proposed Restructuring Officers, to develop and propose a holistic and viable restructuring plan to restructure the Group's financial indebtedness*"[2]. In the Company's evidence, the broad parameters of the "*Proposed Restructuring*" were sketched out and it was confidently asserted that this would generate a better return for unsecured creditors than would be yielded through a traditional liquidation. It was also submitted (and supported through evidence) that "***24 Noteholders** (representing approximately **46% by value of the Notes**) have expressed their support for the Proposed Restructuring*".[3] This evidence was not challenged by the Creditors, who appeared in opposition to the Petition. However, the Creditors noted that one of the 24 Noteholders was a related party as he was a director of the Company. The Proposed Restructuring appeared to have attracted at a very early stage very significant creditor support, a factor which provided powerful support for the application to appoint restructuring officers to be granted. It was clear from Mr Goucke's clear, comprehensive yet concise Written Submissions and the supporting evidence that the legal and evidential requirements for granting the Company's application had been met.

3. The only opposition which was ultimately advanced rested on a technical jurisdictional challenge which seemed to me to be a tactical ploy. The point seemed designed to discredit the apparently straightforward proposition that the Creditors' filing of a winding-up petition in Hong Kong the day before the present hearing (seemingly without the knowledge of local counsel) was a flagrant breach of the automatic stay triggered by the filing of the present Petition. Be that as it may, I concluded that the jurisdictional challenge was clearly misconceived and, having rejected it, the sole objection raised by the Creditors to the substantive application to appoint restructuring officers fell away. I accordingly granted the Company's application on 11 November 2022 in the following terms substantially based on the draft form of order submitted by counsel to the Court and set out in full by way of appendix to this Judgment.

[2] Paragraph 30.
[3] Written Submissions, paragraph 40(a).

4. These are the reasons for that decision to appoint Mr Kenneth Fung of FTI Consulting (Hong Kong) and Mr Andrew Morrison and Mr David Griffin of FTI Consulting (Cayman) Limited as joint restructuring officers ("JROs") of the Company.

The jurisdiction to appoint restructuring officers

<u>The statutory regime</u>

5. Section 91B of the Act so far as is relevant provides as follows:

> "*1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company:*
>
> > *a) is or is likely to become unable to pay its debts within the meaning of section 93; and*
> >
> > *b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to [the Companies Act], the law of a foreign country or by way of a consensual restructuring.*
> >
> > …
>
> *(3) The Court may, on hearing a petition under subsection (1) —*
>
> > *(a) make an order appointing a restructuring officer;*
> >
> > *(b) adjourn the hearing conditionally or unconditionally;*
> >
> > *(c) dismiss the petition; or*

(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

(4) A restructuring officer appointed by the Court ... shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the powers to act on behalf of the company."

6. The only issues which arose for consideration as regards these statutory provisions were: (a) whether the two preconditions for presenting a petition had been met; (b) whether restructuring officers should be appointed; and, if so, (c) what powers should be conferred on them. The Companies Winding Up Rules, 2018 as amended by the Companies Winding Up (Amendment) Rules, 2022 (the "CWR") introduce, inter alia, the following new procedural requirements applicable to restructuring petitions:

"***Presentation, Filing and Advertisement of Petition (O.1A, r.1)***

1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Act shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.

(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.

(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers."

<u>Practical application of the statutory regime</u>

7. In the Company's Written Submissions, the following important argument was advanced:

"*43. It is respectfully submitted that given that certain of the statutory provisions regarding the appointment of restructuring officers in the Cayman Islands are substantially similar to the statutory provisions previously in force regarding the appointment of provisional liquidators for the purposes of implementing a compromise or arrangement with creditors (or classes thereof) (that is, 'light touch' provisional liquidation proceedings), case law* *authorities in respect of restructuring or 'light touch' provisional liquidation are likely to be both relevant and persuasive.*"

8. I gratefully adopt those submissions for two principal reasons. Firstly, the grounds upon which a restructuring petition may be presented under section 91B (1) are expressed in the same terms as the grounds for appointing provisional liquidators for restructuring purposes under the former provisions of section 104(3) of the Companies Act (2022 Revision) before the restructuring officer regime became operative on 31 August 2022. The solvency test for restructuring purposes is the same as that applicable to winding-up proceedings as well (section 93 of the Act, "*Definition of Inability to pay debts*"). Secondly, and less technically and more practically, the cases under the former regime record valuable judicial and legal experience in essentially the same commercial sphere. Lady Mary Arden, delivering a Distinguished Guest Lecture in the Cayman Islands earlier this year, sagely stated:[4]

> "*The common law is the language of commerce. Commercial law is widely considered to be much more flexible and facultative under the common law system because under that system the courts take one case at a time and focus on the facts to see if the rule that was laid down in case A applies in case B. There is a constant process of refining the law in the light of experience, not of refining the law in terms of abstract intellectual analysis. Or as one of my former colleagues recently put it, as a broad generalisation, the courts tend to oil the wheels of commerce rather than throw grit in the engine*[5]." [Emphasis added]

9. Two passages from cases under the old 'light-touch' provisional liquidator regime, which were placed before me, I considered to be of particular assistance in the present case. Firstly, and most authoritatively as regards the governing legal principles, the following dicta of Anthony Smellie CJ (as he then was) in *In re Sun Cheong Holdings* [2020 (2) CILR 942] lucidly paints an instructive

[4] '*Taking Stock of Recent Case Law of the Judicial Committee of the Privy Council –its Breadth and Depth',* 25 March 2022, paragraph 84: https://www.judicial.ky/news-publications/speeches.

[5] *Procter v Procter* [2021] EWCA Civ 167, [2021] Ch 395 para 8 per Lewison LJ.

portrait of the old statutory scheme which applies with equal force to the restructuring officer regime:

> "*35 Under ss. 104(3) and 95(1) of the Companies Law, the court has a broad and flexible discretion. The breadth and flexibility of this discretion was first described by this court in In re Fruit of the Loom (11) ("Fruit of the Loom"). The breadth of the court's discretionary power under s.104 (3) to facilitate the rescue of a company was described as follows (Cause 823 of 1999, at 7–8):*
>
> *'The discretionary power vested in the Court by section 99 [as it then was] of the Companies Law is very wide. As the orders already made herein recognise, the power admits of a discretion which the Court will be prepared to use to appoint provisional liquidators as the basis for the rescue of a company. This is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interests in the company to be rescued. This Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors' prior interests, the benefit of shareholders. In the absence of jurisdiction given by specific statutory powers in the Courts for the making of administration orders over the affairs of companies, it is apt that the flexible discretionary power given in section 99 for the appointment of provisional liquidators be used to enable the rescue of a company where it is just to do so in the sense described above.' [Emphasis added.]*
>
> *36 This discretion was affirmed more recently by Parker, J. in CW Group Holdings Ltd. (4) (Cause No. FSD 113 and 122 of 2018, at para. 36) ('CW Group Holdings'), and by Kawaley, J. in In re ACL Asean Towers Holdco Ltd. (1) ('ACL Asean') (Cause No. FSD 171 of 2018, at para. 11).*
>
> *37 As to how the court's broad discretion is to be exercised, there is no prescriptive list of factors to be taken into consideration. However, matters to which the court may have regard include:*

(a) The express wishes of creditors (though the court should be cautious not to 'count up the claims of supporting and opposing creditors,' per Segal, J. in In re Grand TG Gold Holdings Ltd. (12) ("Grand TG Gold") (Cause No. 84 of 2018, at para. 6(f) (iv));
(b) Whether the refinancing is likely to be more beneficial than a winding-up order (Fruit of the Loom (Cause 823 of 1999, at 9–10));
(c) That there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors (Fruit of the Loom (ibid.)); and

(d) The considered views of the board as to the best way forward (CW Group Holdings (Cause No. FSD 113 and 122 of 2018, at para. 72))."

10. Secondly, and more recently, helpful practical guidance as to how to evaluate the evidence relating to a proposed restructuring was given by Nicholas Segal J in *In re Midway Resources International*, FSD 51 of 2021, Judgment dated 30 March 2021 (unreported):

"*65. As I have noted, I am satisfied that the evidence now shows both that the Company intends to present a compromise or arrangement to its creditors and to promote a restructuring of the Group… There appears to be a rational basis for accepting the Restructuring Proposals, provided that the assumptions on which they were based were validated…*

66. As I have noted, the restructuring negotiations are at a relatively early stage. Indeed, in view of the recent developments in Kenya, they are currently at a particularly precarious point…These problems…give rise to serious doubts and concerns as to the prospects of success of the Restructuring Proposals. Nonetheless, I am satisfied that all is not yet lost and there remain a number of ways in which the restructuring negotiations could be put back on track…

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> *67. In the circumstances, it seems to be right and appropriate to appoint the PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilize the position and to seek to have constructive discussions with the creditors…*"

11. Construing the terms of section 91B (1), (3) and (4) in light of previous cases dealing with the largely similar now-repealed provisional liquidation for restructuring regime, it may confidently be stated that the jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction to be exercised where the Court is satisfied that:

    (a) the statutory preconditions of insolvency or likely to become insolvent are met by credible evidence from the company or some other independent source;

    (b) the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and

    (c) the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company petitioning for the appointment of restructuring officers.

<u>The effect of the statutory stay on other proceedings and related procedural concerns</u>

12. The new '*Company Restructuring*' section in Part V of the Act contains statutory stay provisions which might be said to turbo-charge the degree of protection filing a restructuring petition affords to the petitioning company in contrast with the former remedy of presenting a winding-up petition for restructuring purposes. The presentation of a winding-up petition only definitively stays

proceedings (and dispositions of company property etc.) when a provisional liquidator is appointed or a winding-up order is made. When a restructuring petition is presented and has not been withdrawn or dismissed, all civil proceedings against the petitioning company are stayed even before a restructuring officer has been appointed. Section 91G provides:

> "***Stay of proceedings***
>
> *91G. (1) At any time —*
>
> *(a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and*
>
> *(b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged,*
>
> *no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.*
>
> *(2) Where at any time referred to in subsection (1), there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —*
>
> *(a) the company acting by its directors;*

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(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on regulated business, may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(3) In this section —

(a) <u>references to a suit, action or other proceedings include a suit, action or other proceedings in a foreign country</u>; and
(b) <u>references to other proceedings include any court supervised insolvency or restructuring proceedings against the company</u>." [Emphasis added]

13. On a preliminary analysis it seems clear that once a petition is presented under section 91B (1) of the Act, "*no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company*" here or abroad. Because section 91G (1) adds to these words "*and no winding up petition may be presented against the company*", this initially suggests that the "*other proceedings*" previously referenced do not include a winding-up petition presented within the jurisdiction against the restructuring petitioning company. Yet section 91G (3) explicitly provides that "*In this section…other proceedings include… <u>any</u> court supervised insolvency or restructuring proceedings*" [Emphasis added].

14. Mental gymnastics appeared to be required to construe the section as providing by necessary implication, as the Creditors contended, that either:

(a) a section 91B petition cannot validly be presented when a creditor's winding-up petition is already pending before this Court; or

(b) the section 91G stay of proceedings simply does not 'bite' on winding-up proceedings previously commenced against the restructuring petitioner.

15. The new procedural regime introduced by Order 1A (enacted by the Rules Committee chaired by the Honourable Nicholas Segal) in two notable respects appears to recognise the need to mitigate the potentially extensive reach of the new statutory stay provisions. Order 1A provides:

"***Presentation, Filing and Advertisement of Petition (O.1A, r.1)***

1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Act shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

(3) <u>Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands</u>. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.

(4) In addition, <u>unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors</u> (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.
(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers."
[Emphasis added]

The Company's factual case

16. The Company's primary substantive evidence was provided through the First Affirmation of Chu Lawrence Sheng Yu affirmed on 21 October 2022 ("First Chu"). The affiant is a co-founder of the Company and its direct and indirect subsidiaries and also a director of, *inter alia*, the Company's corporate director. He avers that the Company is the parent company of a group of companies incorporated in, *inter alia*, the Philippines, Indonesia and Vietnam. The main business is financial technology and microfinance sold through cash lending and buy-now-pay-later products. Since the Company's incorporation on 15 March 2017, its technology platform has acquired more than 8 million registered users, 1000 merchant partners and transacted business worth more than US$350 million. The Company and the Group have been adversely affected by the impact of the Covid-19 pandemic on Southeast Asian economies and consumers and, more recently, global negative factors including rising interest rates.

17. As regards the Company's financial position, it is averred in First Chu that it is balance sheet solvent. The Company has issued 34 Convertible Notes to 34 holders with the latest maturity date being 23 February 2023. As at 30 June 2022, US$36,657,567 was due and outstanding to Convertible Noteholders. In addition, 69 Promissory Notes were issued to Promissory Noteholders to whom US$54,154,067 was due and outstanding as at 30 June 2022. Roughly US$3 million is owed under separate notes and the affiant himself is owed US$3 million under a shareholder loan. The Company and certain members of the Group have defaulted on certain secured and unsecured loans. Various statutory demands have been served under Cayman Islands and Hong Kong law, winding-up proceedings commenced in the Cayman Islands and arbitration proceedings commenced in Hong Kong, by various Noteholders.

18. The Company addressed the need for a Note Restructuring in May 2022 and the Board initially hoped an out of Court resolution could be found. However, the various payment demands caused the Board to seek the assistance of the Court. The Board believes (for reasons which the affiant plausibly explains) that the Company can continue as a going concern and return to profitability if a restructuring occurs. Although the precise legal vehicle for implementing the restructuring has not yet been worked out, the broad outlines of the proposal (as set out in First Chu) were summarized in the Company's Written Submissions (at paragraph 32) as follows:

> "...
> *(a) a debt for equity swap: 60% of all outstanding principal, accrued interest and late penalty fees on the Notes will be converted into new preferred shares in the capital of the Company;*
>
> *(b) revision to certain key terms and conditions of the Notes, including extensions to principal and interest payment schedules and applicable interest rates: 20% of all outstanding principal, accrued interest and late penalty fees on the Notes shall be subject to a 2 year extension of the maturity date with the applicable interest rate being 8% per annum. Additionally, relevant noteholders will also have the option to convert their*

interest into new preferred shares in the capital of the Company (at a discount of 25%); and

(c) payment in cash: 20% of all outstanding principal, accrued interest and late penalty fees on the Notes will be repaid in cash (if available following completion of the latest fundraising round…"

19. In October 2022, the Company informed Noteholders (except those who had taken actions against the Company, who represent only 1.7% of all Notes) of their plans to file the Petition and of the Proposed Restructuring: "*in response, twenty-four Noteholders expressed support for the Proposed Restructuring generally and the appointment of the JROs, representing approximately 46% of the Notes*" (First Chu, paragraph 59 (a)). The affiant also deposes that "*advanced discussions have occurred and are ongoing with a strategic investor to fund the cash element of the Proposed Restructuring and inject capital for the future business operations*" (paragraph 66 (c)). Because of, *inter alia*, existing management's strong connections with both customers and founders and financial interest in the success of the Group, the best interests of creditors lay in a restructuring taking place " *under the control of existing management with the assistance of, and subject to the supervision of, the proposed JROs and this Honourable Court*" (paragraph 67).

20. The First Affirmation of Geoffrey Prentice, another director, explained advertisement of the Petition and also how a circular was sent directly to all creditors of the Company between 31 October 2022 and 7 November 2022 including a link to the Petition.

Findings on Creditors' preliminary point: was the Petition improperly presented by the Company because a winding-up petition was pending before the Court?

21. The Creditors' Skeleton Argument summarized their preliminary objection as follows:

> "*3. It is the Creditors' position that the provisions of the Companies Act (2022 Revision) (the 'Act') and the Companies Winding Up Rules (the 'Rules') do not permit the presentation of an RO Petition in circumstances where a Winding Up Petition in respect of the Company has already been presented, served and advertised by a creditor and is extant.*
>
> *4. Alternatively, even if an RO Petition could be presented in such circumstances, the Court should not in any event permit an RO Petition to be presented in circumstances where (i) the Company has failed to respond to a statutory demand validly served; (ii) has failed to make any offer, compromise or arrangement for its debts; (iii) the Winding Up Petition has been presented, a hearing date has been appointed, and it has been advertised in accordance with the Rules; and (iv) where it is therefore plain that the filing of the RO Petition has been undertaken for the purpose of obstructing the Winding Up Petitioner by improperly obtaining the benefit of the moratorium conferred by section 91G of the Act.*"

22. It was easy to accept that if a petition could validly be filed for restructuring purposes while the petitioning company was itself the respondent to an extant winding-up petition, this would interfere with the winding-up proceedings in a significant way which was unthinkable under the longstanding pre- 31 August 2022 legal position. This point was vividly supported by the following submission about the timing of the Company's filing:

> "*14.…It is not appropriate because the petitioning creditor is put to the costs of the Winding Up Petition, on which he is ordinarily entitled to a winding up order as of right (Re Demaglass Holdings Ltd (Winding Up Petition: Application for Adjournment) [2001]*

2 B.C.L.C. 633), and the Winding Up Petition is left in a state of limbo in direct contradiction of the Rules, which require the Winding Up Petition to proceed to hearing on the appointed hearing date."

23. This was, forensically, an effective way of advancing a difficult point. It encouraged one to begin the statutory analysis on the well-trodden terrain of winding-up law as it has always been rather than to tread gingerly on the unfamiliar statutory path of the new legislative regime. When one focusses on the new legislative provisions as a whole, it is difficult to find any literal or contextual support for the proposition that a restructuring petition was not intended to be presented when a winding-up petition was already before the Court. Mr McGee correctly identified the best possible textual support for his client's construction of section 91G:

"*17…The Company asserts that 'no suit, action or other proceedings … shall be proceeded with' captures the Petition filed by the Creditors. That is plainly wrong. If 'suit, action or other proceedings' was meant to include winding up petitions presented in this Court then the words 'no winding up petition may be presented against the company' would be wholly redundant. Therefore, the moratorium conferred by section 91G clearly only applies to restrain winding up petitions being presented 'after the presentation of a petition for the appointment of a restructuring officer under section 91B' and not one presented before the presentation of an RO Petition.*"

24. It is tempting to allow the tail of the past to wag the dog of the present; but that would involve abandoning all attempts to undertake any recognised form of statutory interpretation. It is clear that section 91G imposes a stay on broadly defined civil proceedings which have already been commenced against a company which subsequently petitions to appoint restructuring officers. The primary question of construction is whether the term "*other proceedings*" expressly or by necessary implication includes winding-up proceedings. Mr Goucke submitted that it was clear that this included winding-up proceedings. I agreed, because that term is itself expressly defined by section

91G (3) in terms which include winding up proceedings: "*references to other proceedings include any court supervised insolvency or restructuring proceedings against the company.*"

25. The second question of construction is why section 91G (1), after stating in general terms that no proceeding shall be continued or commenced against the company petitioning for restructuring officers, goes on to further state "*and no winding up petition may be presented against the company*". It is true that these words may be viewed as superfluous if the earlier term "*other proceedings*" is read as already capturing winding-up proceedings. But this potential ambiguity was in my judgment insufficient to override the clear terms in which the word "*other proceedings*" are explicitly defined.

26. In fact, the 'superfluous' express reference to the prohibition on presenting winding-up proceedings after the filing of restructuring petition may also be seen as reinforcing the legislative intention that once a restructuring petition has been filed (and not withdrawn or dismissed), it takes precedence over the traditional creditor's remedy of presenting a winding-up petition, even if the character of the proceeding is restructuring in nature. The words may therefore be understood as added for emphasis, and perhaps in part to meet the point Mr McGee validly made about the traditional expectations of unpaid creditors in relation to petitioning to wind-up an insolvent company. This would also be consistent with the drafters of the restructuring officer regime being mindful of the sea change the new stay provisions were introducing. A winding-up petition's presentation does not trigger the protection of an automatic stay of proceedings; this only occurs when a provisional liquidator is appointed or a winding-up order is made under section 97 (1) of the Act. An automatic stay on filing a section 91B petition is a significant innovation.

27. The Creditors' counsel also sought to deploy alleged inconsistencies between the Rules and the construction of section 91G for which the Company contended. It is rarely possible to use subsidiary legislation as an aide to construing primary legislation. But if one is anxiously searching

for some sense of legislative purpose which may be reflected in the CWR, it is to the new provisions of Order 1A that one must turn. The following arguments were advanced in this regard:

"*18. The Rules also support the Creditor's contended interpretation of the RO Regime:*

a. O.1A, r5 sets out the procedure that applies where a winding up petition is presented after an RO Petition is presented. That rule is quite clear in its terms and could not be interpreted as applying to the converse situation that exists here.

b. Notwithstanding the detailed provisions of O.1A, r5, there is absolutely nothing in the Rules that refer to, or set out, the procedure that applies where a winding up petition is presented before an RO Petition. If it was intended that an RO Petition could be filed after a winding up petition had been presented then the absence of any provision whatsoever for the procedure that is to apply would be extraordinarily remiss."

28. CWR Order 1A provides as follows:

"***Concurrent Petitions (O.1A, r.5)***

5. (1) An application for leave to present a winding up petition in respect of a company to which section 91G of the Act applies shall be made by summons and heard by the judge assigned to the proceedings commenced under section 91B of the Act.

(2) If leave is granted to present a winding up petition pursuant to section 91G of the Act, the winding up petition will be assigned to the same judge assigned to the proceedings commenced under section 91B of the Act.

(3) In circumstances where leave to present a winding up petition has been granted pursuant to section 91G of the Act and the petition for the appointment of a restructuring

officer has not been heard, the Court may hear the winding up petition and the petition for the appointment of a restructuring officer at the same time.

(4) In circumstances other than those specified in Order 1A, rule 5(3), the Registrar shall fix a date for the hearing of the winding up petition in consultation with the judge assigned to the proceedings commenced under section 91B of the Act.

(5) Where a petition for the appointment of a restructuring officer has been presented and a restructuring officer (or an interim restructuring officer) has not been appointed under section 91B or 91C of the Act, the company shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the directors to be most expedient for the purpose of bringing the petition to the notice of such parties.

(6) In circumstances other than those specified in Order 1A, rule 5(5), the restructuring officer (or interim restructuring officer) as applicable, shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to him to be most expedient for the purpose of bringing the petition to the notice of such parties.

(7) In circumstances where a petition for the appointment of a restructuring officer has been presented or a restructuring officer (or an interim restructuring officer) has been appointed pursuant to section 91B or 91C of the Act, the Court may give directions as to

> *the manner in which the winding up petition is to be advertised or dispense with the requirement to advertise the winding up petition.*"

29. It is obviously correct that Order 1A, rule 5 deals exclusively with the procedure for obtaining leave to "present" a winding-up petition and does not explicitly deal at all with applications for leave to continue winding-up petitions presented before a petition to appoint restructuring officers was filed. Taking this point at its highest, it supported the following potential conclusions about the legislative policy underpinning the relevant rules: the drafters of Order1A must have assumed that there was no need to deal with applications for leave to continue winding-up petitions presented before a section 91G petition was filed, because it was not legally possible for a restructuring petition to be filed once a winding-up petition had been presented against the same company. It is precisely to avoid Evel Knievel-scale leaps of logic such as this, that subsidiary legislation must be construed in conformity with the primary legislation under which the subsidiary legislation was made and cannot be used as aide for ascertaining the meaning of the primary statute. In any event, Order 1A must be read as a whole.

30. The tight default time limits for advertising under Order 1A, rule 1 mandate: (a) advertising within 7 business days after filing; and (b) a hearing 21 days after filing are not applicable to winding-up petitions. This suggests that the learned drafters of the new CWR provisions were keenly aware of the practical implications of the broader stay provisions applicable to restructuring petitions. These provisions appear to be designed to protect the rights of creditors by conferring an opportunity to be heard in relation to a restructuring petition as soon as possible. The need to consider introducing such safeguards which are not found in the procedural regime for winding-up petitions only arises because the section 91G stay (unlike the winding-up stay) operates from the date of filing of a petition to appoint restructuring officers.

31. In my judgment construing the intended scope of section 91G according to the natural and ordinary meaning of the words in their context does not result in any absurdity and is not inconsistent with

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the entirely rational legislative purpose of ensuring that any pending civil proceedings should be stayed if a section 91B petition is filed. The legal effect of the unambiguous provisions of section 91G (1): "*no suit, action or other proceedings…shall be proceeded with…against the company…except with the leave of the Court…*", cannot be nullified because no express provision is currently made in the CWR for an application for leave to proceed with proceedings which are clearly intended by the terms of the Act to be automatically stayed when a restructuring petition is filed. Seeking to construe Order 1A, rule 5 in conformity with the primary legislation under which it was made, rather than with a view to undermining the primary legislative scheme, it seemed reasonable to assume that section 91G in any event confers a sufficient statutory power on the Court to grant leave for pre- section 91B petition proceedings to be proceeded with against the relevant company irrespective of any governing rules under Order 1A, rule 5 of the CWR. Further and in any event, in my experience it is entirely unremarkable for there to be changes introduced by primary legislation that are not comprehensively dealt with in the related rules[6].

32. For these reasons I ruled before considering the merits of the present application that the presentation of the Company's Petition was not invalidated because it was presented after the Creditors' winding-up petition had been filed.

[6] In *New Skies Satellite BV-v- FG Hemisphere Associates LLC* [2005] Bda L.R. 59, the Court of Appeal permitted enforcement of a foreign arbitral award under a 1993 statute despite the absence of any rule of court permitting leave to serve out in respect of such awards.

Findings: the merits of the Company's section 91B Petition

Advertising requirements

33. The Company was unable to comply strictly with the requirement under Order 1A, rule 1 (5) that the Petition be advertised within 7 business days of the date of filing and not less than 7 business days due to delays on the part of the Court. It was submitted:

> "*12. In our respectful submission, the creditors and shareholders of the Company have not been unfairly and/or unduly prejudiced as a result of the failure to strictly comply with the requirement to advertise the RO Petition 'not more' than 7 business days following the filing of the RO Petition and 'not less' than 7 business days before the hearing of the RO Petition in circumstances where the Company distributed a detailed circular to all creditors and shareholders of the Company variously between 31 October and 7 November 2022, which included details of the hearing of the RO Petition.*"

34. I had little difficulty in accepting that since the Company had directly notified all unsecured creditors of the Petition and its contents together with the hearing date at least 7 calendar days before the hearing, no material prejudice was caused by the failure to comply with the formal advertising requirements. The manifest legislative function of the advertising requirements is to bring the proceedings to the attention of as many creditors as possible; it is inherently improbable that each creditor in every case will read the prescribed notice. The actual notice given to each creditor through the emailed Circular in the present case was in real world terms more effective notice than would have been achieved through strict compliance with the advertising requirements.

35. Advertising is a default notice requirement, not an inflexible rule and the Court is expressly empowered to dispense with advertising a restructuring petition. The purpose of the rule is to ensure that creditors are aware that a petition has been filed and when it will be heard. Advertisements do not serve any abstract ritual function in and of themselves. Where petitioners have reliable

electronic contact information for creditors, it may well be appropriate for applications to be made on the papers to dispense with the need for advertising in whole or in part. Had it been necessary to do so in the present case, I would have retrospectively waived the advertising requirements under the relevant rule. In the event, I simply accepted the submission that the failure to comply strictly with advertising requirements in relation to the Petition provided no grounds for declining to proceed with the hearing on its merits.

Was the company unable to pay its debts or likely to become unable to pay its debts?

36. Section 91B petitioners are likely in most cases to have little difficulty in establishing this limb of their petitions. It is unlikely that management's admissions as to cash-flow or balance sheet insolvency will lack credulity. Typically it is petitioning creditors' assertions of insolvency which are denied by overly optimistic and/or unrealistic managers. There is rarely any commercial advantage to be gained by a solvent company falsely professing its insolvency. In the present case the Company's own detailed disclosures of its financial difficulties were not only entirely credible but corroborated by the fact that, *inter alia*, the Creditors had presented a winding-up petition based on an unsatisfied statutory demand to this Court. The Company was accordingly deemed as a matter of law to be insolvent under section 93(a) of the Act.

Did the Company intend to propose a compromise or arrangement to its creditors?

37. Although the Creditors' Skeleton Argument suggested that they proposed to oppose the Petition on its merits, Mr McGee realistically abandoned any opposition after his clients' technical objection to the Petition had been rejected. The Creditors being in breach of the section 91G stay through presenting a second winding-up petition against the Company in Hong Kong, it would have been difficult for the Court to hear them or place much reliance on their objections as to the merits of the Petition.

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38. The Company's unchallenged evidence was in any event compelling. A coherent proposal, admittedly only in outline at this stage, had already been put to the Noteholders and nearly 50% of all Noteholders had already communicated positive support for the idea of a restructuring and the appointment of the JROs. This preliminary support lent further credence to the Company's management's view that value for creditors would most likely best be served by ensuring that the Company and the Group continued as a going concern rather than being wound-up. It also supported the inferential conclusion that the Restructuring Proposal had realistic prospects of success. The fact that the Company was facing individual debt collection proceedings tangibly demonstrated the practical need for the protection of the section 91G stay which a restructuring under the supervision of the JROs and this Court would provide.

Summary of findings on merits of Petition

39. In summary, I considered that the grounds for appointing restructuring officers were very strongly made out in a case where the evidence showed that all Noteholders (the main unsecured creditor class) had been notified of the hearing and:

(a) 46% in value had signified their positive support for the application; and

(b) 0% (save for the Creditors) positively opposed the application on its merits.

Conclusion

40. For the above reasons on 11 November 2022, I made an Order appointing the JROs in the terms set out in the Appendix hereto.

____

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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APPENDIX

(body of Order dated 11 November 2022)

"***IT IS ORDERED*** *that:*

1 Mr Kenneth Fung of FTI Consulting (Hong Kong) Limited of Level 35, Oxford House, Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong, and Mr Andrew Morrison and Mr David Griffin, both of FTI Consulting (Cayman) Ltd, Suite 3212, 53 Market Street, Camana Bay P.O. Box 30613, Grand Cayman KY1-1203, Cayman Islands be appointed as Restructuring Officers of the Company.

2 The Restructuring Officers shall not be required to give security for their appointment.

*3 The Restructuring Officers, acting jointly and severally, and without prejudice to the powers retained by the Company's board of directors (the '**Board**') pursuant to paragraph 5 below, are hereby, until further Order, authorised to take the following actions, within and outside of the Cayman Islands, without further sanction by the Court:*

3.1 monitor, oversee and supervise the Board in its management of the Company, and take all necessary steps to develop and implement a restructuring of the Company's financial indebtedness in consultation with the Board and under the general supervision of the Court:

(a) in a manner designed to allow the Company and its subsidiaries or such joint-ventures, associated company or other entities in which
*the Company has an interest (the '**Group**') to continue as a going concern;*
(b) with a view to making a compromise or arrangement with the Company's creditors or any class thereof and any corporate and/or capital reorganisation of the Company and/or the Group (including but not limited to any share subscription and placement of shares in the Company and/or the Group); and
*(c) including (without limitation) by way of a scheme of arrangement between the Company and its creditors or any class thereof pursuant to section 86 and/or 91I of the Companies Act (2022 Revision) (the '**Act**' and a '**Scheme**') and/or by way of an analogous process available in any other foreign jurisdiction and/or by way of a consensual process which may include disposal of certain of the assets of the Company and/or the Group with a view to maximising value and returns for the creditors of the Company,*
*(the '**Restructuring**');*

*3.2 seek recognition of these proceedings (the '**Restructuring Proceedings**') and/or the appointment of the Restructuring Officers in any jurisdiction that the Restructuring Officers consider necessary, together with such other relief as they may consider necessary for the proper exercise of their functions within that jurisdiction;*

3.3 review the actions and activities of the Board and the continuation of the business of the Company and/or the Group (and attend Board meetings of Group entities) so as to ensure that the Board is acting *with a view to protecting the position of, and maximising returns to, the creditors and other stakeholders of the Company;*

3.4 review and approve in advance filings to be made by the Company with regulatory bodies, and responses to quasi-governmental bodies as appropriate;

3.5 seek out investors and financiers for the purpose of investing in and/or providing finance to the Company;

*3.6 monitor, consult with and otherwise liaise with the creditors and shareholders of the Company to determine whether the Restructuring will be successfully approved and implemented, including the establishment of a creditors' committee if deemed appropriate by the Restructuring Officers (in their absolute discretion) with such committee to operate as if it were a creditors' committee under Order 9 of the Companies Winding Up Rules, 2018 (as amended) (the '**Rules**');*

3.7 review the financial position of the Company and the Group, and, in particular, assess the feasibility of proposals for the Restructuring;

3.8 operate and open or close any bank accounts in the name of and on behalf of the Company and to be joint (and not several) signatories on such bank accounts should the Restructuring Officers determine that it is appropriate or necessary to do so, and to receive funds for the purpose of paying the costs and expenses of the Restructuring Proceedings and the related Restructuring;

3.9 act in the name and on behalf of the Company, and execute all agreements, deeds, receipts and other documents and, for that purpose, to use the Company seal when necessary;

3.10 subject to the sanction of the Court for transactions in excess of US$1 million, draw, accept, make and endorse any bill of exchange or promissory note or borrow funds for the purpose of the day to day expenses of the
Restructuring Proceedings, in the name and on behalf of the Company, with the same effect in respect of the Company's liability as if the bill or note had been drawn, accepted, made or endorsed or the loan had been entered into by or on behalf of the Company in the course of its business;

3.11 prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against the estate of such contributory, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt, insolvent or sequestrated contributory and rateably with the other separate creditors;

3.12 make payments to creditors which may have the effect of preferring such creditors, in order to minimise the interruption to the day to day activities of the Company;

3.13 to authorise the Board to exercise such of the above powers relating to the Company on such terms as *the Restructuring Officers consider fit;*

3.14 to take such steps as the Restructuring Officers may consider necessary or appropriate in respect of any and all proceedings to which the Company is party in the Cayman Islands and/or elsewhere, including but not limited to, the proceedings in respect of the Cayman Islands Winding Up Petition, the Hong Kong Winding Up Petition and the arbitration commenced on or about 27 May 2022 at the Hong Kong International Arbitration Centre; and

3.15 do all other things which are incidental to the exercise of the powers set out above.

4 The Restructuring Officers are hereby directed to:

4.1 notify all known creditors and shareholders of the Company, of their appointment in such manner as the Restructuring Officers shall determine in accordance with Order 1A, rule 7(3) of the Rules;

*4.2 prepare a report about the financial condition of the Company within 28 days of the date hereof and at least every three months thereafter or as the Court may otherwise request from time to time (the '**Reports**'), including but not limited to the matters in Order 1A, rule 8(2) of the Rules;*

4.3 file the Reports with the Court, and serve the Reports on all known creditors and shareholders of the Company, in a manner to be determined by the Restructuring Officers in their absolute discretion;

4.4 if deemed appropriate by the Restructuring Officers, to enter into a protocol with a foreign officeholder and/or the Board which sets out the terms upon which the foreign officeholder/Restructuring Officers and/or the Board shall cooperate with respect to the management of the Company. If entered into, such protocol to be included with the Restructuring Officers' next Report to the Court;

4.5 prepare and advise upon the Restructuring, including a Scheme if appropriate and/or in respect of any other proposal in respect of the Company's indebtedness; and

4.6 without limiting their powers hereunder, to discuss and consult with the Board (or any relevant sub-committee thereof) in respect of the exercise of the powers conferred on them pursuant to this Order relating to matters concerning the Company and/or the Group prior to the exercise of the same (if circumstances permit).

*5 The Board is hereby authorised to continue to manage the Company's day-to-day affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association ('**M&A**'):*

5.1 subject to the Restructuring Officers' oversight and monitoring of the exercise of such powers in relation to matters relating to the ordinary course of business of the Company pursuant to paragraph 3 hereof;

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5.2 subject to the Restructuring Officers granting prior approval of the exercise of such powers and to matters outside the ordinary course of business of the Company;
provided always that should the Restructuring Officers consider at any time that the Board is not acting in the best interests of the Company and its creditors, the Restructuring Officers shall have the power to report the same to the Court and seek such directions from the Court as the Restructuring Officers are advised to be appropriate;

5.3 save that, for so long as the Restructuring Officers are appointed:

(a) any change to the members of the Board and the members of the Board's subcommittees, other than by resignation, shall be approved by the Restructuring Officers before such change becomes effective, provided that the Restructuring Officers shall not unreasonably withhold their approval; and
(b) no new shares shall be issued nor shall any rights attaching to shares be altered without the prior approval of the Restructuring Officers in relation to the Company;

5.4 without limitation to the foregoing, the Board continues to retain the following powers:

(a) to continue to conduct the ordinary, day to day, business operations of the Company;
(b) subject to paragraph 3.8 above, to continue to operate the bank accounts of the Company in the ordinary course of the Company's business; and
(c) subject to the approval and consent of the Restructuring Officers (which will not be unreasonably withheld), to open and close bank accounts on behalf of the Company.

6 The Board is hereby directed to:

6.1 provide the Restructuring Officers, within 3 business days of a request for the same, with such information as they may require in order that the Restructuring Officers should be able to properly carry out their duties and functions and exercise their powers under this Order and as officers of the Court, without purporting to impose any conditions as to the confidentiality of such information or its use, including, without limitation, such information as the Restructuring Officers may reasonably require to enable them to monitor the cash-flow of the Company and the Group and to prepare the Report; and

6.2 provide the Restructuring Officers with advance materials, advance notice of all of the Company's Board meetings and such meetings of management or subcommittees of the Board as the Restructuring Officers may request, and to permit the Restructuring Officers to attend such meetings at their discretion and to provide promptly upon their request copies of the minutes of all such meetings.

7 That notwithstanding the presentation of the Petition and the Winding Up Petition, in the event an Order for the winding up of the Company is subsequently made on the Winding Up Petition:

7.1 payments made into or out of the bank accounts of the Company;

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7.2 dispositions of the property of the Company; and

7.3 any transfer of shares or alteration in the status of the Company's members,
in each case, by or with the authority of the Restructuring Officers (made between the date of presentation of the Winding Up Petition and the date of any winding up order), and in the course of the Restructuring Officers carrying out their duties and functions and/or the exercise of their powers under any Order granted pursuant to the Petition, shall not be voided by virtue of section 99 of the Act.

8 Pursuant to section 91G of the Act, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the Company, no resolution shall be passed for the Company to be wound up and no winding up petition may be presented against the Company, except with the leave of this Honourable Court and subject to such terms as this Honourable Court may impose.

*9 With respect to liabilities incurred and falling due during the period in which the Restructuring Officers are in office, in addition to the powers at paragraph 3 above, the Restructuring Officers are hereby be empowered to (subject to sections 91D and 109 of the Act, Order 20 of the Rules and the Insolvency Practitioners' Regulations 2018 (as amended) (the '**Regulations**')):*

9.1 discharge debts incurred by the Company (acting by the Board and/or the Restructuring Officers) after the commencement of these Restructuring Proceedings (including those of the Company's legal and professional advisors) as expenses or disbursements properly incurred in the Restructuring Proceedings;

9.2 render and pay invoices with respect to the Restructuring Officers' remuneration at their usual and customary rates on account out of the
assets of the Company on the basis of and subject to the requirements of the Regulations;

9.3 appoint and engage clerks, servants, employees, managers and agents (whether or not as employees of the Company and whether located in the Cayman islands or elsewhere) to assist them in the performance of their duties for the purpose of the Restructuring Proceedings, and to remunerate them out of the assets of the Company as an expense of the Restructuring Proceedings on the basis of and subject to the requirements of the Regulations; and

9.4 appoint, retain and employ attorneys, barristers, solicitors or other lawyers and professional advisors either (a) jointly with the Board for and on behalf of the Company; or (b) by the Restructuring Officers personally, in the Cayman Islands, Hong Kong and/or elsewhere as the Restructuring Officers may consider necessary the purpose of advising and assisting the Restructuring Officers in the execution of their powers and the performance of their duties in accordance with Order 25 of the Rules, and to remunerate such attorneys, barristers, solicitors or other lawyers and professional advisors for their reasonable fees and expenses out of the assets of the Company as an expense of the Restructuring Proceedings on the basis of and subject to the requirements of the Regulations.

10 The title of these proceedings be appended with the words '(Restructuring Officers Appointed)'.

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11 The costs of and incidental to this Petition shall be paid forthwith out of the assets of the Company as an expense of the Restructuring Proceedings.

12 The Restructuring Officers be at liberty to apply generally.

13 A case management conference shall be listed for hearing on or about 11 March 2023 for the purpose of the Court assessing the progress made with respect to the formulation of any compromise or arrangement."

[2017 (2) CILR 526]

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED

GRAND CT. (Segal, J.) September 19th, 2017

Companies — liquidators — recognition of foreign liquidator — court has common law power to recognize and assist foreign liquidator appointed in jurisdiction other than that in which insolvent company incorporated — court to apply principle of modified universalism — foreign liquidators not to be given powers "as if" appointed as provisional liquidators by domestic court

Companies — liquidators — recognition of foreign liquidator — foreign-appointed liquidators of Cayman incorporated company authorized to apply under Companies Law (2016 Revision), s.86(1) for meeting of creditors to consider proposed scheme (parallel to foreign scheme), and to consent to scheme on company's behalf — company had substantial connection with overseas jurisdiction — no likelihood of Cayman winding up

Foreign liquidators applied for recognition and assistance.

The company was incorporated in the Cayman Islands but had very significant connections to Hong Kong where its shares had been listed on the Hong Kong Stock Exchange and where it was administered and registered. In 2014, a creditor of the company had presented a winding-up petition in Hong Kong on the ground that the company was insolvent and unable to pay its debts. In 2015, the High Court of the Hong Kong Administrative Region had granted a winding-up order and appointed liquidators.

The liquidators considered that the best option for maximizing recoveries for the company's creditors was to reorganize the company and give effect to a resumption proposal in order to allow the company's shares to be relisted on the HKSE. Pursuant to the resumption proposal, a capital reorganization of the company's share capital would take place so as to facilitate the issue of new shares in the company. Funds raised would be used to fund a settlement for the company's creditors under the proposed schemes of arrangement.

In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions, the liquidators would apply on behalf of the company to the Hong Kong court for the approval and sanctioning of a scheme of arrangement. In addition, they deemed it necessary for a parallel scheme to be implemented in the Cayman Islands, being the place of the company's incorporation. They considered it undesirable for a winding-up petition to be presented in this jurisdiction and for an application then to be made for the appointment of provisional liquidators who could promote the Cayman scheme.

On the liquidators' application, the Hong Kong court issued a letter of request seeking an order that the liquidators be recognized by the Grand Court and treated in all respects as if they had been appointed in this jurisdiction. The liquidators wished to be able to promote the Cayman scheme and to apply to the court for an order under s.86(1) of the Companies Law (2016 Revision) convening a meeting of creditors. An order was also sought that s.97 of the Law applied so that no action could be proceeded with or commenced against the company except with the leave of the court and on such terms as might be imposed. The liquidators applied *ex parte* for the orders sought.

The liquidators submitted *inter alia* that (a) the court had an inherent jurisdiction to recognize the powers given to, and to grant assistance to, foreign liquidators appointed in a country other than that in which the company was incorporated; and (b) such jurisdiction could and should be exercised at least where there would not be, or was unlikely to be, a winding up in the country of incorporation; probably also in any case in which the relief sought by the foreign liquidator would also be available to a Cayman official liquidator if appointed and there was no reason why, having regard to the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and where the company had submitted to the jurisdiction of the relevant foreign court.

Held, ruling as follows:

(1) Under Part XVII of the Companies Law, the court had a statutory jurisdiction to recognize and assist foreign representatives appointed in the place of a company's incorporation. In addition, the court had a common law power to recognize and assist foreign court appointed representatives. If the circumstances justified the use of that common law power, and subject to the limitations on its use, the power could be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of a company's affairs by the territorial limits of its powers. In deciding whether and if so how to exercise the power, the court would have regard to and apply the approach known as the principle of modified universalism. Suitable orders included any order that the court could make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to the proceedings before it). The court would use and rely on domestic law to fashion and find a form of relief for the foreign liquidator that achieved the purpose for which the power could

be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Therefore, the court could not grant relief by making an order that could only be made in reliance on a domestic statutory power which, by its terms, did not apply in the circumstances (*e.g.* by making an order that could only be made if a domestic scheme of arrangement had been applied for and approved but where there was no such scheme). Nor could the court make an order that granted relief to the foreign liquidator that depended on there being a domestic law right which did not exist in the circumstances. In each case the court must start by considering the nature and form of relief sought by the foreign liquidator. Sometimes the foreign liquidator would be asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There might well be no need to rely on the common law power in such a case. Sometimes, the liquidator would be asking the requested court to exercise its case management powers in proceedings before it by adjourning or staying them or the execution of a domestic judgment arising therefrom (the exercise of such case management powers could be said to involve an exercise of the common law power). Sometimes, the foreign liquidator would seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needed to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there would be no need to rely on the common law power. Where the cause of action was vested in the foreign liquidator, or he was seeking additional relief in reliance on his powers as liquidator, then the common law power to recognize and grant assistance to the foreign liquidator would come into play. Where the foreign liquidator was appointed in the country of incorporation of the company concerned, the domestic private international law of the requested country would apply so that the liquidator was treated as being entitled to act for and on behalf of the company. To that extent he would be entitled to recognition of his powers. Therefore, technically, he would not need to rely on the exercise of the common law power (at least when he was only taking action in the name and on behalf of the company and those seeking to challenge the action were claiming through the company). However, if the foreign liquidator was not appointed in the country of incorporation, he could not rely on this rule of private international law and must instead invoke the common law power in order to be permitted to act on behalf of the company (paras. 20–26).

(2) In the present case, the liquidators wished to be able to promote a Cayman scheme and in particular to apply for an order under s.86(1) of the Companies Law convening a meeting of creditors. The liquidators could apply if they were entitled or permitted to act for and on behalf of the company. They were not entitled under Cayman private international law to act on behalf of the company because they had not been appointed

in the company's country of incorporation. Under Cayman law, having regard to the company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the company were the company's directors and shareholders. The winding-up order, as an order of a foreign court, was not binding or enforceable in the Cayman Islands and did not prevent these corporate organs having the authority to act for and bind the company. The court would, however, exercise its common law power to recognize and assist the liquidators. The conditions for the exercise of the power were satisfied for the following reasons: (a) The relief that the liquidators required and which should be granted was an order authorizing them to make an application under s.86(1) of the Companies Law and to consent to the proposed scheme on the company's behalf. (b) The liquidators wished simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process, which could be achieved by the court making an order on the above terms and by making a direction to the effect that any proceedings commenced or any winding-up petition presented against the company be assigned to the present judge (who could ensure that appropriate case management orders were made). (c) In the present case the court was in substance dealing with a governance question, namely whether to permit the liquidators to act on behalf of the company in presenting an application under s.86(1) and consenting to the proposed scheme on behalf of the company. No issues arose involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they sought. It appeared that the company's board and directors were currently unable or unwilling to act. It also appeared that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the liquidators' application. (d) There was no likelihood of an application being made for a winding-up order in Cayman. (e) It was clear from the evidence that the company had substantial contacts with Hong Kong. (f) There appeared to be no need for or reason why creditors or members would benefit from a Cayman winding up or from the appointment of a provisional liquidator in Cayman. (g) There were also no local reputational, regulatory or policy reasons requiring a local winding up. In the present case, the Hong Kong liquidation was the only proceeding that had been or was likely to be commenced in respect of the company and was taking place in a jurisdiction with which the company had substantial connections. The company's centre of main interests (as the term was used in EU insolvency law) was probably Hong Kong, which was a consideration of considerable weight when deciding whether the foreign, non-place of incorporation liquidation should be treated as competent and justifying assistance. In these circumstances, the purpose for which the power to recognize and assist might be exercised was fully engaged and justified the exercise of the power (paras. 29–30).

(3) The court expressed its preliminary view that the submission by a company to the jurisdiction of a foreign court in which a winding-up order was made and a foreign liquidator appointed could in principle be a sufficient basis for the recognition of the foreign liquidator's powers to act for the company. The court was not in a position to form a concluded view as to whether registration of a company in a foreign jurisdiction was sufficient to constitute submission for these purposes (para. 33).

(4) In a case such as the present in which the court was proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up would be made, that the company's directors and shareholders had not sought and did not intend to exercise any residual powers and rights that they might have to act on behalf of the company and that the relief sought by the liquidators was demonstrably in the interests of all stakeholders, it was important that the directors, stakeholders and creditors were notified of the summons and given an opportunity to notify the liquidators and the court of any objections, to make submissions and to apply to the court if they wished to do so. The court therefore proposed to make an order that authorized the liquidators to apply under s.86(1) of the Companies Law but that also required the liquidators to notify, by a suitable means and within an appropriate timescale, the directors, stakeholders and creditors of the summons and to make available copies of the summons and supporting evidence to any person who wished to receive a copy before the liquidators made any such application. If there were objections or submissions, or if a person wished to be heard, there would be a further hearing of the summons. The directors, stakeholders and creditors would thus have adequate notice and opportunity to object, without unduly delaying the scheme process by holding a further hearing which might not be necessary (paras. 36–37).

(5) The court was unable, in the exercise of the common law power, to grant the order sought by the liquidators which would recognize them and treat them as having all the powers of provisional liquidators appointed by the Grand Court, as it was contrary to the principle outlined in English case law that it was impermissible to grant relief that was only available to provisional liquidators appointed by this court in circumstances in which no such provisional liquidators had been appointed, and to grant relief "as if" provisional liquidators had been appointed. Nor could the court make the order sought pursuant to s.97 of the Companies Law, as that section could not apply in the absence of a provisional liquidator appointed by the court. The liquidators' objectives could, however, be achieved by an order in a different form, authorizing them to convene the scheme meetings, to make such other applications as were required and to consent to the scheme on behalf of the company. Furthermore, relief having the same effect as s.97 could be achieved by a direction that required all proceedings commenced or to be commenced against the company to be allocated to and heard by the present judge, which would enable him to make

suitable case management orders for adjournments or stays (paras. 38–42).

Cases cited:

(1) *African Minerals Ltd. (Joint Administrators)* v. *Madison Pacific Trust Ltd.*, HCMP 865/2015; [2015] HKEC 641, referred to.
(2) *Anderson, In re*, [1911] 1 K.B. 896, *dicta* of Phillimore, J. considered.
(3) *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)*, [1997] HKLRD 304, considered.
(4) *Basis Yield Alpha Fund (Master), In re*, 2008 CILR 50, referred to.
(5) *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)*, 2005–06 MLR 297; [2006] UKPC 26; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2006] 2 All E.R. (Comm) 695; [2006] BCC 962; [2007] 2 BCLC 141, considered.
(6) *Davidson's Settlement Trusts, In re* (1873), L.R. 15 Eq. 383; 37 J.P. 484; 42 L.J. Ch. 347; 21 W.R. 454, considered.
(7) *Dickson Group Holdings Ltd., Re*, [2008] Bda LR 34, followed.
(8) *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.*, [1927] A.C. 95, considered.
(9) *Felixstowe Dock & Ry. Co.* v. *U.S. Lines Inc.*, [1989] Q.B. 360; [1989] 2 W.L.R. 109; [1988] 2 All E.R. 77; [1987] 2 Lloyd's Rep. 76, referred to.
(10) *Fu Ji Food & Catering Servs. Holdings Ltd., In re*, Grand Ct., FSD Cause No. 222 of 2010, unreported, followed.
(11) *HIH Casualty & Gen. Ins. Ltd., In re*, [2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] 3 All E.R. 869; [2008] Bus. L.R. 905; [2008] BCC 349; [2012] 2 BCLC 655; [2008] BPIR 581; [2008] Lloyd's Rep. I.R. 756, considered.
(12) *Hooley Ltd., Re*, [2016] CSOH 141; 2017 SLT 58; [2016] BCC 826, distinguished.
(13) *International Tin Council, In re*, [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890; (1987), 3 BCC 103; [1987] BCLC 272, referred to.
(14) *Kilderkin Invs. Grand Cayman* v. *Player*, 1984–85 CILR 63, referred to.
(15) *Lee Wah Bank Ltd., Re*, [1926] 2 M.C. 81, considered.
(16) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 2 All E.R. 943; [1973] F.S.R. 365; [1974] R.P.C. 101; (1973), 117 Sol. Jo. 567, referred to.
(17) *Opti-Medix Ltd., Re*, [2016] 4 SLR 312; [2016] SGHC 108, considered.
(18) *Picard* v. *Primeo Fund*, 2013 (1) CILR 164, considered.
(19) *Queensland Mercantile & Agency Co. Ltd.* v. *Australasian Inv. Co. Ltd.* (1888), 15 R. 935, considered.
(20) *Rome* v. *Punjab National Bank (No. 2)*, [1989] 1 W.L.R. 1211; [1990]

1 All E.R. 58; [1989] 2 Lloyd's Rep. 354; (1989), 5 BCC 785; [1990] BCLC 20, considered.

(21) *Rubin* v. *Eurofinance SA*, [2012] UKSC 46; [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2013] 1 All E.R. (Comm) 513; [2013] Bus. L.R. 1; [2012] 2 Lloyd's Rep. 615; [2013] BCC 1; [2012] 2 BCLC 682, followed.

(22) *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers*, [2014] UKPC 36; [2015] A.C. 1675; [2015] 2 W.L.R. 971; [2015] BCC 66; [2014] 2 BCLC 597, followed.

(23) *Stewart & Matthews Ltd., Re* (1916), 10 WWR 154; 26 Man. R. 277, considered.

(24) *Stichting Shell Pensioenfonds* v. *Krys*, [2014] UKPC 41; [2015] A.C. 616; [2015] 2 W.L.R. 289; [2015] 2 All E.R. (Comm) 97; [2015] BCC 205; [2015] 1 BCLC 597, followed.

Legislation construed:

Companies Law (2016 Revision), s.86(1): The relevant terms of this sub-section are set out at para. 27.

C. Stanley, Q.C. and *S. Maloney* for the liquidators.

1 **SEGAL, J.:**

The application, the relief sought and a summary of the orders to be made

I have before me an *ex parte* summons ("the summons") issued by the Hong Kong liquidators of a Cayman company, China Agrotech Holdings Ltd. ("the company"). In the summons, the Hong Kong liquidators seek orders from this court giving them certain powers and the authority to act on behalf of the company for the limited purpose of presenting a petition for a scheme of arrangement between the company and its creditors in Cayman as part of a corporate rescue of the company involving a parallel scheme of arrangement with creditors to be filed in the High Court of the Hong Kong Administrative Region ("the Hong Kong court") and a restructuring of the company's capital with shareholder approval.

2 The summons was supported by two affirmations made by Chan So Fun ("Mr. Chan"), a solicitor in Hong Kong in the firm of solicitors advising the Hong Kong liquidators (Michael Li & Co.), two affidavits made by David Yen Ching Wai (one of the Hong Kong liquidators and a managing director of Ernst & Young Transactions Ltd.), one affirmation made by Stephen Liu Yiu Keung (the other Hong Kong liquidator and also a managing director of Ernst & Young Transactions Ltd.) and one affidavit made by David Andrew Freeman (a paralegal with Ogier, the firm of attorneys acting for the liquidators). David Yen Ching Wai and Stephen Liu Yiu Keung are referred to as the liquidators. As I have said, this was an

ex parte summons and so no notice has yet been given to the company's directors, shareholders or creditors.

3 The summons was issued pursuant to a letter of request dated July 19th, 2017 from the Hong Kong court addressed to this court, which was issued pursuant to an order of Harris, J. ("the letter of request"). The letter of request sets out the orders which this court is requested to make. I shall explain and discuss the precise terms of the proposed orders shortly.

4 For the reasons explained below, I have concluded that I can and should permit the liquidators to apply in the name and on behalf of the company for and promote a parallel scheme in Cayman and that I should take steps that will ensure that proceedings commenced against the company pending the consideration and sanctioning of the scheme can be adjourned or stayed in order to allow the scheme process to be completed. However, I consider that the order to be made should be in a different form from and grant relief in a different manner from that detailed in and set out in the letter of request (although the order will be in accordance with and respond to the letter of request, which invited this court to give such further or other relief by way of cross-border judicial assistance at common law as this court considers just and convenient). I also consider that the liquidators should only be permitted to apply for an order convening the scheme meeting(s) after the company's directors, shareholders and creditors have been notified of the summons and given an opportunity to file objections or submissions and be heard by this court. If no such objections or submissions are filed, and if no one notifies the liquidators of their intention to appear and be heard, the liquidators may proceed to file the company's petition for an order convening the scheme meeting(s) without the need for a further hearing.

The background to the summons

5 The company has various significant connections with Hong Kong. In particular, its shares have been listed on the Main Board of the Hong Kong Stock Exchange (HKSE) since January 14th, 2002. However, since September 18th, 2014 the company's shares have been suspended from trading. Furthermore, the corporate business of the company has been administered from Hong Kong and the company was registered under Part XI of the former Companies Ordinance (*cap.* 32) on November 4th, 1999.

6 On November 11th, 2014, a creditor of the company presented a winding-up petition on the ground that the company was insolvent and unable to pay its debts. On August 17th, 2015, the Hong Kong court made a winding-up order ("the winding-up order") and appointed the liquidators.

7 Since their appointment, the liquidators have considered what action to take in order to maximize recoveries for and protect the interests of the

company's creditors. They have concluded that the best option available involves giving effect to a resumption proposal and reorganization of the company. The company, with Fine Era Ltd. ("the vendor"), which is a BVI company, submitted a resumption proposal to the HKSE on August 24th, 2016. The purpose of the resumption proposal is to permit the company to satisfy the HKSE's conditions for allowing the company's shares to be re-listed, and to inject into the company an active and profitable business, sufficient funds to permit the company to make a payment to its creditors and for working capital and the payment of the fees involved in the process.

8 The resumption proposal involves an agreement between the company and the vendor with various terms and steps. Under the agreement, the company will purchase from the vendor for a consideration of HK$400,000,000 the entire equity interest in Yu Ming Investment Management Ltd. ("Yu Ming"). Yu Ming is a licensed corporation carrying on various regulated activities including dealing in securities, advising on securities and asset management. Following the acquisition by the company of the equity interests in Yu Ming there will be a capital reorganization of the share capital of the company (comprising a capital reduction, share consolidation and increase in the company's authorized share capital) so as to facilitate the issue of new shares in the company under a placing and open offer. The placing will raise funds of approximately HK$462,222,000 which will be used for the partial settlement of the consideration payable by the company for the acquisition of the equity interests in Yu Ming and also to fund a settlement to be offered to the company's creditors under the proposed schemes of arrangement. Further funds of approximately HK$78,137,000 will also be raised under the proposed open offer. The company will transfer HK$80,000,000 from the placing to the proposed schemes of arrangement for distribution to the company's creditors in settlement of their debts. In addition, the vendor will provide a cash advance to the company and additional funding to finance fees.

9 In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions, the liquidators will apply on behalf of the company to the Hong Kong court for the approval and sanctioning of a scheme of arrangement and will also apply for the permanent stay of the Hong Kong winding up upon the successful implementation of the scheme. In addition to the Hong Kong scheme, the liquidators wish to promote a Cayman scheme. After consulting legal advisers in both Hong Kong and Cayman, the liquidators concluded that it was necessary for an inter-conditional scheme to be implemented in the company's place of incorporation, that is the Cayman Islands, in parallel with the proposed Hong Kong scheme.

10 The liquidators also concluded that it would not be possible or appropriate in the present case for a winding-up petition to be presented in Cayman in respect of the company and for an application to be made in Cayman for the appointment of provisional liquidators who would then promote the Cayman scheme. Such an approach has, of course, been taken in a number of other cases in the past—in which a company subject to a foreign insolvency proceeding and proposing to implement a corporate reorganization or rescue has, following the presentation of a winding-up petition, applied for the appointment of a provisional liquidator under s.104(3) of the Companies Law (2016 Revision) ("the Companies Law") so that the provisional liquidator, working in conjunction with the foreign representative, could apply under s.86(1) of the Companies Law on behalf of the company for the convening of meetings of creditors to approve and the sanction by the court of a Cayman scheme (with the benefit of the statutory stay and moratorium). The liquidators took advice from Richard de Lacy, Q.C. (who sadly died recently and to whom I should like to pay tribute as a fine Cayman and English lawyer and a true gentleman). Based on this advice they concluded that there were various uncertainties that made it undesirable to seek to present a winding-up petition in Cayman, particularly if an alternative option was available. Mr. de Lacy had expressed a concern that before the company's directors could present a winding-up petition they would need to obtain a special resolution from the company's shareholders, which would not only be time consuming and costly but would create difficulties for a listed company the trading of whose shares had been suspended (although I note that it does appear that the company's articles of association give the directors the power to petition without shareholder approval). Mr. de Lacy also noted that it was unclear whether the directors would be treated by this court as having the power and authority to present a winding-up petition following the appointment of the liquidators. He had therefore recommended that the liquidators apply to the Hong Kong court for the issue of a letter of request to this court in which the Hong Kong court would ask this court to make orders in a suitable form that would allow the liquidators to promote the proposed scheme in Cayman.

The letter of request

11 The liquidators, as I have noted, did apply to the Hong Kong court for the issue of a letter of request and Harris, J. ordered that a letter of request be issued. The letter of request was issued on July 19th, 2017. The following points emerge:

(a) The letter of request recited the appointment of the liquidators and that—

"the Liquidators have demonstrated to the satisfaction of this Court that it is necessary and desirable for the purposes of implementing the rescue and restructuring of the Company for the benefit of the Company's creditors and shareholders and that it is in the interest of justice to assist the Lliquidators in exercising all the powers, duties and discretions afforded to them by the [winding-up order] (and applicable law); and that it is just and convenient that [the letter of request] be issued."

(b) The letter of request requested this court "pursuant to its inherent jurisdiction and all other powers vested in it, to assist and act in aid of the Hong Kong court" in the winding-up proceedings in respect of the company by making the orders requested.

(c) The orders requested were as follows:

"1. Making an order if [this court] thinks fit that the Liquidators . . . be recognised by [this court] and be treated in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by [this court], including recognition of the powers and authority of the Liquidators to act on behalf of the Company, amongst other things:

(1) to secure the alteration [of] or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

(2) to pay a class or classes of creditors in full;

(3) to make a compromise or arrangement with—

(a) creditors or persons claiming to be creditors;

(b) persons having or alleging themselves to her of [*sic*] any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the Company may be rendered liable.

(4) to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and—

(a) a contributory;

(b) an alleged contributory; or

(c) any other debtor or person apprehending liability to the Company.

(5) to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

(6) to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(7) to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

(8) to appoint an agent to do any business that the Liquidator is unable to do in person; and

(9) to employ legal advisers to assist the Liquidators in performing the liquidators' duties.

2. If thought fit, making such further or other Orders as may be required in accordance with such recognition and, in particular, an Order (having the same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) [Ordinance] (CAP 32)) that section 97 of the Cayman Islands Companies Law (2016 Revision) shall apply to the company so that no action or proceeding shall be proceeded with or commenced against the company within the jurisdiction of [this court] except by leave of [this court] and subject to such terms as [this court] may impose;

3. Giving such further or other relief or assistance by way of cross-border judicial assistance at common law as [this court] may think just and convenient; and

4. The Liquidators [to] have liberty to apply for further relief to [this court]."

The summons and the draft order

12 The summons seeks orders in similar terms as follows:

"1. That the [order of the Hong Kong court dated August 17th, 2015 appointing the liquidators (the appointment order)] and [the liquidators] be recognised by this Court such that the Appointment Order be treated in all respects in the same manner as if the Appointment Order had been made and [the liquidators] had been appointed as the joint and several provisional liquidators of the company by this Court, including recognition of the powers and authority of [the liquidators] to act on behalf of the Company, including, inter alia;

a. to alter or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

b. to pay a class or classes of creditors in full;

c. to make a compromise or arrangement with—

i. creditors or persons claiming to be creditors;

ii. persons having or alleging themselves to her of [*sic*] any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the Company may be rendered liable.

d. to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and—

1. a contributory;

2. an alleged contributory; or

3. any other debtor or person apprehending liability to the Company.

e. to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

f. to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

g. to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

h. to appoint an agent to do any business that the Liquidator is unable to do in person; and

i. to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.

2. [That in accordance with such recognition as set out in para. 1 above and for the avoidance of doubt] section 97 of the Companies Law (2016 Revision) shall apply to the Company so that no action or proceedings shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this Court may impose.

3. That the [liquidators] shall have liberty to apply to this Court in respect of any matter concerning the Company and arising during the

period of the appointment of the [liquidators] as Joint Provisional Liquidators of the Company and by doing all such things as may be necessary to assist the [liquidators] (or one or more of them) in connection with their appointment as the joint and several provisional liquidators of the Company."

13 The draft order filed by the liquidators sets out the orders sought in the summons in the same form, save that the words in square brackets at the beginning of para. 2 were omitted.

The liquidators' submissions

14 The submissions of Ms. Stanley, Q.C. for the liquidators can be summarized as follows:

(a) The court has an inherent jurisdiction (at common law) to recognize the powers given (and to grant assistance) to a foreign liquidator appointed by an order of a competent court and to send and receive letters of request relating to the recognition of such court-appointed liquidators (citing in support, in relation to letters of request,)).

(b) The common law jurisdiction to recognize (and assist) foreign insolvency officeholders appointed in the country of incorporation of the company is well established in Cayman—see, for example, in relation to the recognition of a receiver appointed by a foreign court in the company's place of incorporation, –83) and also) (Ms. Stanley notes that the Cayman legislature has, in Part XVII of the Companies Law, also codified and extended the court's powers in relation to foreign representatives appointed in the country of incorporation).

(c) But the non-statutory jurisdiction is not limited to foreign insolvency officeholders, including liquidators, appointed by a court in the country of incorporation of the relevant company. The court has jurisdiction to recognize and grant assistance to liquidators appointed by other courts in certain circumstances.

(d) Such jurisdiction can and should be exercised—

(i) at least where the evidence establishes that there will not be, or that it is unlikely that there will be, a winding up in the country of incorporation;

(ii) probably also in any case in which the relief sought by the foreign liquidator would be available to a Cayman official liquidator if appointed and there is no reason why, having regard to the interests of the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and

(iii) where the company concerned has submitted to the jurisdiction of the relevant foreign court.

(e) As regards (d)(i), in the present case the evidence demonstrates that it is unlikely that any application will be made for a Cayman winding up. Accordingly, the basis for exercising the jurisdiction to recognize and assist on the first ground is established. The court should exercise the jurisdiction because the company has the right under the Companies Law to apply to the court and commence the scheme approval process and since the liquidators are acting on behalf of the company, their action is in accordance with the statutory power and Cayman law; it is manifestly in the interests of all the company's stakeholders to permit the liquidators to proceed with the Cayman scheme and granting the relief sought involves the court cooperating, in accordance with the principle of comity, with the Hong Kong court and the liquidators it has appointed (as the only proceeding commenced and to be commenced in relation to the company and a court with which the company has substantial and significant connections) in circumstances where there are no policy or other reasons which require a local winding up or which would require and justify refusing the relief sought by the liquidators.

(f) As regards (d)(ii), a local liquidator would be able to petition the court to convene meetings of creditors to vote on the scheme but a local winding up is unnecessary as it would involve unnecessary expense and no additional benefits to creditors and members (unless, of course, a Cayman winding up is necessary in order for there to be a Cayman scheme).

(g) A Cayman winding up is unlikely because none of those with standing to present a winding-up petition are able or willing to do so. As David Yen Ching Wai stated in his second affidavit, the company's directors (those directors who have not resigned) have been unwilling to contact and cooperate with the liquidators and appear unwilling to exercise any residual power which the directors might retain to act on behalf of the company and present a petition. Indeed, it was arguable that the directors could not exercise any such power (at least without the consent of the liquidators) following the making of the winding-up order. Furthermore, it was unlikely that the shareholders would wish or be prepared to present a petition. In addition, the company's creditors (many of whom had already participated and filed proofs in the Hong Kong liquidation) also have not indicated any intention to present a petition for or wish to have a Cayman winding up. The winding-up order was made over two years ago and no creditor has sought a Cayman winding up since then.

(h) A Cayman winding up is unnecessary because it has already been determined that the resumption proposal is in the best interests of the company's creditors and shareholders and a Cayman winding up is not needed to implement that proposal or to protect the interests of creditors or other stakeholders (the resumption proposal will not require a distribution by the liquidators to creditors and will involve a stay of the Hong Kong liquidation so that there will be no risk of any differences between the rules regulating distributions or avoidance actions in Hong Kong and Cayman giving rise to differences of outcomes for creditors or members). The liquidators with the support of the Hong Kong court have concluded that they should give effect to the resumption proposal and exit from the Hong Kong liquidation without the need for a Cayman winding up by obtaining the approval of creditors to and the sanction of the Hong Kong and Cayman courts for the schemes (and to a capital reduction and reorganization).

(i) As regards (d)(iii), since the company submitted to the jurisdiction of the Hong Kong court by registering as an overseas company in Hong Kong, this court should recognize and give effect to the winding-up order, at least the powers of the liquidators thereunder or resulting therefrom to act on behalf of the company (including the power to act on behalf of the company for the purpose of presenting a petition under s.86(1) of the Companies Law for an order convening a meeting of creditors and for the sanctioning of a scheme of arrangement in respect of the company).

(j) The company registered under Part XI of the former Companies Ordinance (*cap.* 32) on November 4th, 1999 (Part XI has now been superseded by Part 16 of the Companies Ordinance (*cap.* 622), to which the company is now subject). Part XI (and Part 16) relate to overseas companies, that is companies incorporated outside Hong Kong, which have established a place of business in Hong Kong. According to Mr. Chan (see para. 9 of his second affirmation):

> "By registering under Part XI of the former Companies Ordinance (Cap 32), the company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the company is 'within the jurisdiction' and can therefore be served with a winding up petition in accordance with Order 10, rr.1–5 of the Rules . . . and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014) . . ."

15 Ms. Stanley relied on a number of textbooks and cases in support of her submission that the court had jurisdiction to and could recognize the

appointment and powers of a liquidator appointed by a court in a jurisdiction other than the place of incorporation. In particular, she noted and relied on a judgment of Kawaley, J. in the Supreme Court of Bermuda (in 2008, *Re Dickson Group Holdings Ltd.* (7)) in a case which was based on similar facts and circumstances to the present case in which the learned judge had permitted a Hong Kong liquidator appointed in respect of a Bermudian company to summon a meeting of creditors to consider a scheme of arrangement in Bermuda. She also noted and relied in particular on an unreported judgment of this court (*In re Fu Ji Food & Catering Holdings Servs. Ltd.* (10)), delivered by the Chief Justice, involving a provisional liquidator appointed in Hong Kong in respect of a Cayman company and in which the Chief Justice made orders recognizing the provisional liquidator's powers to alter and deal with the capital structure of the company and staying proceedings against the company.

16 Ms. Stanley's submissions on the grounds I have identified in para. 13(d)(i) and (ii) above can be summarized as follows:

(a) Ms. Stanley referred to the discussion in Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed. (2012) and submitted that the starting point in the analysis was Rule 179 (para. 30R–100, at 1581) which is in the following terms: "… [T]he authority of a liquidator appointed under the law of the place of incorporation is recognised in England."

(b) But, Ms. Stanley pointed out, in the commentary on Rule 179, Dicey, Morris & Collins amplify their analysis and suggest that the non-statutory jurisdiction to recognize and assist may extend beyond liquidators appointed in the place of incorporation. The commentary suggests that recognition may be permissible where the appointment is made in (under the law of) the country where the company concerned carries on business or, where there is no likelihood of a liquidation in the country of incorporation, in another country. The relevant parts of the commentary are as follows (paras. 30–102 – 30–104, at 1581–1582):

"30–102

The effect of a foreign winding-up order in England has seldom been before the courts. Rule 179 is however justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here.

30–103

Rule 179 should not, however, be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law. It merely states the position which has been established to date. First, and generally, in determining whether to exercise its jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition, that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company. *More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.*

30–104

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. The protagonist of recognition in such a case could urge that 'it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves.' However, even if an appeal to comity has any force in this context (which is doubtful), it has been rejected in the context of company insolvency, though it is possible that the liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. *Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of liquidation in the country of incorporation.*" [Emphasis added. Footnote omitted.]

(c) Ms. Stanley noted that in *Rubin* v. *Eurofinance SA* (21) ("*Rubin*") Lord Collins had referred to Rule 179 and said ([2012] UKSC 46, at para. 13) that—

"the general rule is that the English court recognises at common law *only* the authority of a liquidator appointed under the law of the place of incorporation: *Dicey*, 15th ed, para 30R-100. That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) ('the EC Insolvency Regulation') and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties)." [Emphasis added.]

However, she submitted, this statement was not inconsistent with the commentary set out above since a general rule need not be, and should not be treated as, the exclusive rule (I also note Lord Collins's comment (*ibid.*, at para. 31) that "the common law assistance cases . . . [had] involved cases in which the foreign court was a court of competent jurisdiction in the sense that the . . . company, was incorporated there.")

(d) Ms. Stanley also noted that in *In re HIH Casualty & Gen. Ins. Ltd.* (11) Lord Hoffmann had indicated (*obiter*) that a test other than the place of incorporation test might be more appropriate for determining whether the foreign court was competent for recognition purposes ([2008] 1 W.L.R. 852, at para. 31):

"I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the 'centre of a debtor's main interests' as a test, with a presumption that it is the place where the registered office is situated: see article 3(1). That may be more appropriate."

While Lord Collins in *Rubin* (21) had referred to this passage ([2012] UKSC 46, at para. 121) and refused (*ibid.*, at para. 129) to change the settled law on the recognition and enforcement of foreign judgments by formulating a judge-made, common law rule which would recognize judgments in foreign insolvency proceedings where the foreign court conducting the insolvency proceeding was to be regarded as being competent by reason of the connections between the court and company concerned (such as the country where the insolvent entity has its centre of interests or the country with which the judgment debtor has some other sufficient or substantial connection), his judgment and analysis did not affect this part of Lord Hoffmann's judgment or the cogency of the comments he had made as they relate to the scope of the common law jurisdiction to recognize foreign liquidators.

(e) Ms. Stanley noted that another leading English law textbook dealing with cross-border insolvency also supported the view that recognition should be granted to a liquidator appointed by a court outside the place of incorporation in a case where there was no likelihood of a liquidation being commenced in the country of incorporation. In Sheldon *et al.* (eds.), *Cross-Border Insolvency*, 4th ed., ch. 6 (2015), the point is made as follows (para. 6.81, at 281):

> "If the English rules on recognition were restricted to the place of incorporation and an insolvency proceeding has not or even cannot there occur, then no foreign insolvency whatsoever could be recognised. Plainly this would be most unsatisfactory. Accordingly, it is suggested that recognition is possible 'where there is no likelihood of a liquidation in the country of incorporation.'"

(f) Ms. Stanley, as I have mentioned, relied on the judgment of Kawaley, J. in Bermuda in *Re Dickson Group Holdings Ltd.* (7). The decision in *Dickson Group* and Ms. Stanley's submissions based on the decision can be summarized as follows:

(i) In this case, *Dickson Group Holdings Ltd.* was a company incorporated in Bermuda in respect of which a winding-up order had been made in Hong Kong. Although the company had been incorporated in Bermuda, no business activities took place there but instead the main focus of the company's business was Hong Kong and the People's Republic of China. The liquidators wished to promote a scheme of arrangement which would restructure the company's affairs and leave it in a solvent position. They had decided that there was no need for a winding up in Bermuda but there was a need for a Bermudian scheme as well as a scheme in Hong Kong. Accordingly, a summons was issued by the company acting by the Hong Kong liquidators under s.99 of the Bermuda Companies Act 1981 for leave to summons a meeting of creditors to consider the scheme.

(ii) The liquidators did not separately and explicitly seek an order recognizing their appointment and powers under the Hong Kong winding-up order but Kawaley, J. considered that recognition was required. The learned judge considered ([2008] Bda LR 34, at para. 6) recognition to be necessary even though the company's directors had "remained in place for Bermuda law purposes, and . . . had passed a resolution supporting the . . . application." While the directors might, from a Bermudian perspective, retain powers to bind the company, the scheme and the application were in substance controlled by the liquidators and therefore it would be artificial to proceed on the basis that the company was effectively acting, in making the application, just by its directors (an argument which Kawaley, J. labelled (*ibid.*, at para. 28) "a Temple point"!) and grant the company leave to summon a meeting of creditors without deciding that it was permissible and appropriate to recognize the liquidators' appointment and powers to act on behalf of the company.

(iii) Counsel for the liquidators argued that there was an exception to the requirement that the foreign liquidator be appointed in the place of incorporation in a case in which there was no likelihood of a winding up taking place there, and that this was such a case. After noting that—

> "it seemed to be unprecedented, however, for this Court to recognise and enforce insolvency orders of a foreign court in respect of a Bermudian company in circumstances where (a) no parallel insolvency proceedings have been commenced in Bermuda, and (b) the Bermudian company has not only been placed into a restructuring proceedings abroad, but has been placed into 'full-blown' liquidation in what amount to primary (as opposed to ancillary) proceedings abroad"—

Kawaley, J. referred to the commentary on Rule 179 in *Dicey, Morris & Collins* (*op. cit.*) which I have set out above (although in 2008 Lord Collins was yet to be recorded as a co-author and the textbook was referred to as *Dicey & Morris*, and was in its 12th edition, with r.179 being r.160), to a passage in the second edition of Philip Wood's *Principles of International Insolvency* (2005) (in which Mr. Wood had said that there was a disadvantage to recognizing only a liquidation in the country of incorporation as many companies were incorporated in one jurisdiction but carried on their principal place of business elsewhere so that it would seem odd to refuse to recognize a liquidation where the main assets are located) and to a passage in Professor Ian Fletcher's *Insolvency in Private International Law* (2007), in which Professor Fletcher stated that where there were no winding-up proceedings in the place of incorporation, insolvency proceedings taking place in another jurisdiction might be considered to be the most appropriate way to wind up the company.

(iv) After referring to the "high judicial authority" and the analysis of the court's "common law discretion" in the judgment of Lord Hoffmann in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)* (5) ("*Cambridge Gas*"), Kawaley, J. concluded ([2008] Bda LR 34, at para. 19):

> "All of this learning suggests the following principles which I adopt: (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding-up proceeding in relation to a local company which is not being wound-up at all its own domicile [*sic*]; and (b) the main practical consideration

is whether or not a foreign primary proceeding is the most convenient means of winding-up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand. These two broad considerations must in my judgment be applied having regard to two fundamental principles of insolvency law: (a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company's liquidation to a single coherent regime so that all creditors share ratably, irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance with the law of the company's place of incorporation, irrespective of the accidental location of assets outside of that jurisdiction. The application of all of these guiding principles will vary depending on the facts of the specific case."

(v) Kawaley, J. noted that since it was no longer intended to wind up the company (the winding up was to be stayed and the company rescued) it was unnecessary to consider in depth the circumstances in which a Bermudian court would decline to recognize a foreign winding-up proceeding in respect of a Bermudian company (and insist on a local Bermudian liquidation). He stated however (*ibid.*, at para. 24) that there should not be an expectation that the court in Bermuda would rubber stamp and always give recognition to such foreign proceedings. In any liquidation of substance, it will be impossible for the place of incorporation to be ignored because, for example, absent a local winding up, creditors not subject to limitation constraints could apply for a local winding up after and despite the foreign winding up, the directors remain in office and there may be local reputational, regulatory and policy reasons requiring a local proceeding.

(vi) The learned judge in exercising his discretion concluded as follows (*ibid.*, at paras. 34–37):

"34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.

35. The aim of the Scheme, most directly, is to eliminate the Company's existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company's share capital become[s] effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company's shares. The purchase monies will fund the creditors' Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.

36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here. As I observed in the context of parallel receivership proceedings:

> 'In the present case, with its centre of gravity clearly more in Hong Kong than Bermuda, this Court has, in my view rightly, been content to accord a leading role as regards assessment of costs and otherwise to the High Court of Hong Kong. In cases where Bermuda-based office holders subject to the primary supervisory jurisdiction of this Court were involved, this jurisdiction would logically expect to play a larger role.'

37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda-incorporated company."

(g) Ms. Stanley noted and accepted that Kawaley, J.'s approach had been based on and followed the analysis of Lord Hoffmann in *Cambridge Gas* (5) and that his judgment had been delivered before the decision of the Supreme Court in *Rubin* (21) and the important decision of the Privy Council (sitting on appeal from Bermuda) in *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers* (22) ("*Singularis*"). Both decisions had (as is well known amongst insolvency lawyers and practitioners) included comments critical of Lord Hoffmann's approach and reasoning (in *Singularis*, Lord Sumption had noted ([2014] UKPC 36, at para. 18) that *Cambridge Gas* had "[marked] the furthest that the common law courts [had] gone in developing the common law powers of the court to assist a foreign liquidation [and had] proved to be a controversial decision"). However, Ms. Stanley submitted that none of the criticisms and *dicta* declaring that *Cambridge Gas* was (at least in part) wrongly decided meant that Kawaley, J.'s decision was wrong and should not be followed. The challenge to *Cambridge Gas* affected the decision in so far as it held that a foreign insolvency judgment could be recognized and enforced at common law even when the normal common law rules did not permit this and that the court could by way of common law assistance order that foreign liquidators could rely on and exercise rights under local statutes that did not otherwise apply (by acting as if a local statutory insolvency or restructuring procedure had been commenced and the related statutory powers had been available and applied). But Kawaley, J. had relied on neither of these aspects, nor on any of the other aspects of the *Cambridge Gas* judgment that had been criticized in *Rubin* and *Singularis*.

(h) Ms. Stanley also relied, as I have mentioned, on the 2010 decision of the Chief Justice in *In re Fu Ji Food & Catering Servs. Holdings Ltd.* (10). She pointed out that this is another pre-*Rubin* and pre-*Singularis* case. The judgment is not reported but the Chief Justice gave a helpful summary of the facts and his decision in an article published in 2 *Beijing Law Review* 145–154 (2011) ("A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-operation"). The following is the relevant section in the Chief Justice's article (*ibid.*, at 150–151):

> "*The Matter of FU JI Food and Catering Services Holdings Limited* (FSD Cause No: 222 of 2010, Grand Court of the Cayman Islands) involved an unusual request for judicial assistance from the High Court of Hong Kong to the Grand Court.
>
> Fu Ji Food and Catering Services, is a Cayman Islands holding company which has subsidiaries operating a substantial business in the People's Republic of China (PRC). The group's underlying business interests—principally in food production, restaurants and related services—experienced massive strain in 2009 and the trading of the company's shares on the Hong Kong Stock Exchange (HKSE) was suspended.
>
> As the company was also registered in Hong Kong, the High Court there was persuaded to place it into provisional liquidation to allow for its capital restructuring, an eminently attainable objective, given the substantial underlying value of the company and the then active interest of potential buyers.

This objective would not have been realised, however, if, despite its provisional liquidation in Hong Kong, creditors remained able to petition for the winding up of the company in the Cayman Islands, the place of its incorporation and domicile, or remained able otherwise to sue the company for recovery of indebtedness before the Cayman Courts.

The company therefore needed the protection of a stay of proceedings by the Cayman Courts and the ability of its provisional liquidators (the JPLs) to act for the company in the Cayman Islands. Hence the request from the High Court of Hong Kong.

The Grand Court first noted the existence of its inherent jurisdiction at common law to send or receive letters of request for judicial assistance.

Recognising and accepting that the objectives of the restructuring involved the protection of the interests of all the creditors of the company and its subsidiaries, as well as the interests of the company itself (in being allowed to resume listing and trading on the HKSE and so to be divested as a going concern), the request of the High Court was regarded as justified. In granting the request, the Grand Court accepted that, although it was asked to act in aid of the provisional liquidation order of a foreign court over a Cayman Islands company, doing so in the circumstances presented no public policy objections but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality. The following further dicta from *Cambridge Gas* was noted and applied:

> 'The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum (para 22, page 518).'

In accepting the request, the Grand Court also accepted that the company (Fu Ji Food Ltd) had a real and substantial connection to Hong Kong, being the jurisdiction from which its underlying business interests in the PRC were administered and in which its financing and working capital were raised. The restructuring was aimed at restoring the company to the HKSE and, with the new investor, to enable it to carry on its business in Hong Kong, where the provisional liquidation would close without a winding up.

It was ordered that the JPLs and their Appointment Order be recognized in all respects as if appointed and made by the Grand Court, including, in particular, the power and authority of the JPLs to alter or otherwise deal with the capital structure of Fu Ji Food in accordance with the terms of the Appointment Order.

It was further ordered, therefore, that section 97 of the Cayman Islands Companies Law shall apply in relation to the company so that no action or proceeding shall be commenced or proceeded with against the company within the jurisdiction of the Grand Court except by leave of that court and subject to such terms as it may impose. It was additionally ordered that the JPLs have liberty to apply to the Grand Court in respect of any matter concerning the company and arising during the period of the JLPs' appointment.

Difficulties in deciding whether to accede to foreign insolvency proceedings may, however, arise when there are compelling reasons for winding up in the Cayman Islands or where there are already insolvency proceedings underway before the Cayman Courts involving the same company or involving related companies. These difficulties are likely to be addressed on the case-by-case basis, although the emergent principles of private international law, as recognised in Article 29 of the UNCITRAL Model Law, would maintain the pre-eminence of local insolvency proceedings over foreign proceedings."

(i) Ms. Stanley also relied on the recent decision of Aedit Abdullah, J.C. sitting in the High Court of Singapore in *Re Opti-Medix Ltd.* (17) in which the Singapore court recognized a Japanese liquidation of BVI companies. This is a post-*Rubin* (21) case.

(i) The case involved two BVI companies in respect of which bankruptcy orders had been made by the Tokyo District Court. The companies had assets (in the form of funds credited to bank accounts) in Singapore and the Japanese trustee wanted to exercise his powers under the Japanese bankruptcy orders to deal with, collect in and remit to Japan the funds in the bank accounts. For this purpose he sought an order recognizing his appointment and for the appointment of a foreign bankruptcy trustee by the Singapore court. The trustee also gave an undertaking to pay all preferential debts and other debts in Singapore before remitting any funds out of Singapore.

(ii) The Japanese trustee argued that since there were no competing claims by liquidators from different jurisdictions, the Singapore court should recognize his appointment (no prejudice would be suffered as there were only three Singapore creditors, the notes issued by the company had been sold only in Japan, any debts in Singapore were incurred only for administrative services and notice of the liquidation had also been advertised in Singapore, and no one had contacted the trustee's solicitors). Accordingly, the trustee submitted that his appointment should be recognized even though he was not a liquidator appointed in the place of incorporation of the companies because there was no likelihood of insolvency proceedings in the BVI. He relied in particular on Rule 179 and the commentary thereto in *Dicey, Morris & Collins* (*op. cit.*) (at that date Rule 166 of the 14th edition (2006)) and Tom Smith, Q.C.'s chapter in *Cross-Border Insolvency* (ch. 6, in particular para. 6.81 (*loc. cit.*)).

(iii) The learned judge granted the relief sought. He noted that the Singapore court had in the past recognized foreign liquidators (citing *Re Lee Wah Bank Ltd.* (15), which appears to be a case involving the recognition of a liquidator appointed in a jurisdiction other than the country of incorporation); referred to and agreed with Lord Hoffmann's statements in *HIH* (11) ([2008] UKHL 21, at para. 31) and noted Lord Collins' conclusion in his judgment in *Rubin* ([2012] UKSC 46, at paras. 129–130) that it was not open to the courts to introduce a new basis for recognition of foreign judgments by reference to the connection between the judgment creditor and the jurisdiction in which the foreign insolvency proceedings had been commenced in respect of it) and cited and agreed with the following passage from *Cross-Border Insolvency* (*op. cit.*, para. 6.80, at 281):

> "... there is a measure of authority that the law of the place of incorporation does not occupy an exclusive position; other foreign insolvency proceedings may also be granted recognition in the English court. However, the issues which arise in light of the comments of Lord Collins in *Rubin* are, first, whether the existing authorities do provide sufficient support for a test of recognition based on factors other than the place of incorporation; and, secondly, whether there is any ability for the common law to develop in this area without legislative intervention.
>
> As to the first issue, it is suggested that Lord Collins in Rubin may well have overstated the extent to which the existing common law authorities give an exclusive role to the place of incorporation in determining whether foreign insolvency proceedings should be recognised. As to the second issue, it is difficult to see why the common law could not develop a broader test based on the concept of 'centre of main interests', as envisaged by Lord Hoffmann in *HIH*."

(iv) So Aedit Abdullah, J.C. concluded that he was able to recognize the Japanese trustee even though not appointed in the BVI and was prepared to use, as the test for determining whether the Japanese court was competent for these purposes, the centre of main interests test (which he held was satisfied since Japan was essentially the sole place in which actual business was carried on). He noted ([2016] 4 SLR 312, at para. 18):

"A consequence of a greater sensitivity to universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality. The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there."

(v) But he also considered that it was also possible to justify the recognition of the Japanese trustee on other "practical grounds." He said (*ibid.*, at para. 26):

"Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking . . . and there was no competing jurisdiction interested in the winding up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both *Re Lee Wah Bank* . . . and *Re Russo-Asiatic Bank* . . . could perhaps be explained on this practical basis."

(j) Ms. Stanley also noted that Harris, J. in the Hong Kong court in *African Minerals Ltd. (Joint Administrators)* v. *Madison Pacific Trust Ltd.* (1) had been prepared to assume without deciding that the Hong Kong court could in principle recognize liquidators or (administrators) appointed in a jurisdiction other than the place of incorporation (although he noted that the point was open to argument, citing Millett, J. in *In re International Tin Council* (13) ([1987] Ch. at 447) and Lord Collins in *Rubin* (21)). She also referred to the various cases discussed in *Cross-Border Insolvency*, *op. cit.*, at paras. 6.68–6.80, at 275–281, under the sub-heading "Place of incorporation not exclusive," in which courts had recognized the effect of a liquidation taking place in a jurisdiction other than that of the place of incorporation. She referred in particular to the following cases:

(i) *Queensland Mercantile & Agency Co. Ltd.* v. *Australasian Inv. Co. Ltd.* (19), a decision of the Court of Session (Inner House) involving liquidations both in the place of incorporation and another jurisdiction. The case related to a Queensland incorporated company which was being wound up in Queensland but there was also a subsequent (ancillary) winding-up order made in England. In the course of the English proceedings, the English court made an order staying proceedings in Scotland against the company. The effect of this order was considered by the Court of Session in Scotland, which gave effect to the English order and thus recognized a liquidation other than that under the law of the place of incorporation.

(ii) *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)* (3), a decision of the Hong Kong court. BCCI (Overseas) Ltd. was incorporated in Cayman and had opened a branch in Macau. The officers of the Macau branch placed funds from the branch on deposit with a Hong Kong bank. Subsequently the company was put into liquidation pursuant to an order of this court and then the branch was ordered to be liquidated out of court pursuant to an order of the Governor of Macau. Under the law of Macau, the assets recovered by the Macau liquidator would be ring-fenced. Both the Cayman liquidator and the Macau liquidator claimed the funds held on deposit in Hong Kong. The Hong Kong court allowed the Macau liquidator, as the representative of creditors entitled to prove in the Macau liquidation, to be a party to the proceedings in Hong Kong and to that extent the Macau liquidation was recognized but the rights to the funds on deposit in Hong Kong were governed by Hong Kong law as the *lex situs.* The Hong Kong court ordered the funds to be paid to the Cayman liquidator.

(iii) *Re Lee Wah Bank Ltd.* (15), a decision (as was noted in *Re Opti-Medix Ltd.* (17)) of the High Court of Singapore. Here a Hong Kong bank had a branch in Saigon. The branch had an account in Singapore at a time when winding-up proceedings were commenced in Hong Kong and Saigon. The Hong Kong liquidator and the Saigon liquidator both claimed the money. The Singapore court held that either liquidator could give a good receipt for the money and that the court had a discretion to direct payment to either liquidator.

(iv) I note that it is stated at para. 6.74 of *Cross-Border Insolvency* with reference to *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)* (3) and *Re Lee Wah Bank Ltd.* (15) (*op. cit.*, at 278) that—

> "although the results in both these cases are by no means surprising, the important point to note is that the liquidator of the relevant branch was recognised: the courts did not take the

approach that, because there was a liquidation in the place of incorporation, that in itself automatically put an end to any dispute."

(v) *Re Stewart & Matthews Ltd.* (23), a Canadian case. In this case a company incorporated in Manitoba carried on all of its business in Minnesota. The company petitioned the bankruptcy court in Minnesota and a trustee in bankruptcy was appointed. Subsequently a winding-up order was made in Manitoba. On an application supported by the majority of the company's creditors, the Canadian court stayed the Manitoban winding up in favour of the US bankruptcy. In *Cross-Border Insolvency*, *op. cit.*, para. 6.78, at 280, it is suggested that "it can only be that the court of the domicile of the company was prepared to grant recognition to the foreign (American) liquidation; otherwise, Canadian assets would not have been transferred to America."

(k) Finally, Ms. Stanley drew to my attention a Scottish case in which Lord Tyre in the Court of Session (Outer House) refused to grant relief in support of a foreign liquidation taking place outside the country of incorporation of the company concerned. The case is *Re Hooley Ltd.* (12). Ms. Stanley pointed out that since Lord Tyre's judgment contained certain *dicta* that, and because his decision, might be considered to be inconsistent with her submissions, she considered it necessary to refer the court to the case:

(i) As Ms. Stanley explained the case involved three Scottish companies. One of the companies (T Ltd.) was placed into insolvent winding up by the Indian court. In 2012, an administration order was made by the Scottish court in relation to T Ltd. The administrators agreed and entered into contracts for the sale of T Ltd.'s underlying assets to Hooley Ltd. (the petitioner), and then Hooley Ltd., having paid the purchase consideration, sought a declaration from the Scottish court as to its rights under the agreement and that the agreements were valid and enforceable and that the administrators had been entitled to enter into the agreements (without the need for the Scottish court's approval). The respondent to the petition was a creditor of T Ltd. It objected to the order sought and argued that "the court should refrain from hindering the Indian winding up by making any order which appeared to confirm the effectiveness of the exercise by the administrator of any power regarding assets in India or governed by Indian law."

(ii) The administrator's response was summarized by Lord Tyre as follows (2017 SLT 58, at para. 30):

". . . [I]t was not suggested on behalf of Hooley that this court should not apply the principle of modified universalism as defined by Lord Sumption in *Singularis* (above). The principle was, however subject to domestic law and public policy, and the court could only act within the limits of its own statutory and common law powers. Most importantly, its purpose was to assist a court exercising insolvency jurisdiction *in the place of the company's incorporation* to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. The principle could not be applied to winding up proceedings in a country other than the place of incorporation. That indeed would hinder universalism. The Scottish courts could recognise and assist ancillary windings up (i.e. winding up processes taking place other than in a court in the place of incorporation), but they did not and could not defer to such ancillary windings up." [Emphasis in original.]

(iii) Lord Tyre accepted the administrators' submissions and granted the declarations sought (confirming that the administrators had been authorized and entitled to sell and refusing to require the Scottish administrators to refrain from exercising their powers so as to avoid any interference with the Indian insolvency proceeding). Lord Tyre said as follows (*ibid.*, at para. 35):

"The principle of modified universalism has not, to date, been the subject of examination by a Scottish court. For present purposes it is sufficient for me to say that nothing was placed before me that might indicate that it should not be recognised. There is nothing new in a Scottish court lending assistance to foreign winding up proceedings: see e.g. *The Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd.* The same case demonstrates that Scots law has long recognised that there may be a principal liquidation in the country of the company's incorporation and an ancillary liquidation in another jurisdiction. In my opinion, however, Hooley is well founded in its submission that *the principle of modified universalism has not been recognised by the Supreme Court or the Privy Council as applying beyond the situation where winding up proceedings are taking place in the jurisdiction in which the company is incorporated.*" [Emphasis added.]

(iv) Ms. Stanley submitted that *Hooley* (12) was distinguishable from the present case, in particular because Lord Tyre was required to deal with a very different type of fact pattern. *Hooley* involved an asserted inconsistency or conflict (asserted by a creditor rather than the foreign liquidator or foreign court) between a domestic (Scottish) insolvency proceeding (taking place in the country of incorporation of the companies concerned) and the foreign liquidation and an application for relief that challenged and sought to limit the powers of the Scottish officeholder. In stark contrast, in the instant case there is no conflict and no question of subordinating the Cayman court (or its officeholder) to the Hong Kong court; rather, the court is being asked to recognize the Hong Kong orders with a view to promoting a single coordinated process via parallel schemes of arrangement.

17 Ms. Stanley's arguments as to the ground I have identified in para. 13(d)(iii), based on the company's submission to the jurisdiction of the Hong Kong court, can be summarized as follows:

(a) In the circumstances of this case, the company has submitted to the jurisdiction of the Hong Kong court, and it could not be heard to say that it was not bound by the winding-up order and the order appointing the liquidators (including the liquidators' powers to act on behalf of the company for the purpose of applying for orders under s.86(1) of the Companies Law).

(b) The analysis set out in *Cross-Border Insolvency*, *op. cit.*, correctly summarized the applicable law. Paragraph 6.88 states as follows (at 284):

> "However, the Privy Council in *Cambridge Gas* had plainly proceeded on the basis that submission would be sufficient, and it is suggested that there is no reason for regarding this part of the reasoning as having been overruled by *Rubin*. Accordingly, where a corporation invokes the insolvency jurisdiction of a foreign court, or otherwise validly submits thereto, the proceedings may be accorded recognition by the English court."

(c) As is stated in para. 6.84 of *Cross-Border Insolvency* (at 283), it is clearly established as a matter of personal bankruptcy law that foreign proceedings may be recognized if the debtor submitted to the jurisdiction of the foreign court. Ms. Stanley relied on *In re Davidson's Settlement Trusts* (6). This case involved the bankruptcy in Queensland of Walter Davidson based on his own petition, and the subsequent application to the English court by the official assignee appointed in Queensland for an order that he be entitled to withdraw and remit to Australia funds held in court in England for Mr. Davidson (representing funds settled on Mr. Davidson by his deceased father). After Mr. Davidson had presented his own bankruptcy petition to the Queensland court, he died intestate, leaving a widow; his widow was appointed to represent Mr. Davidson's estate and she opposed the official assignee's application. Ms. Stanley referred me to the following passage from the judgment of James, L.J. (L.R. 15 Eq. at 385–386):

> "Whether the domicil of the insolvent was English or colonial, for the purpose of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in *Queensland* cannot be disputed by the representative of the insolvent, who became an

insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony, and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in Court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts, and a surplus here is only in the imagination."

(d) Lord Hoffmann in *Cambridge Gas* (5) had referred to *In re Davidson's Settlement Trusts* and confirmed the principle on which the decision was based as follows ([2006] UKPC 26, at para. 19):

"The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English movables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in *Solomons v Ross*, or in which he submitted to the jurisdiction: *Re Davidson's Settlement Trusts* . . . It may be that the criteria for recognition should be wider, but that question does not arise in this case. *Submission to the jurisdiction is enough.* In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property." [Emphasis added].

(e) The effect of submission should, in principle, be the same in the case of a corporate insolvency as in the case of a personal bankruptcy (although, as is acknowledged in para. 6.84 (*ibid.*) of *Cross-Border Insolvency*, "submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon"). The only material difference between bankruptcy and corporate insolvency is that there is no need for a vesting order in the latter because the foreign assets of the company remain in the company, whereas in the case of a trustee in bankruptcy those assets need formally to be vested in him. Ms. Stanley submitted that this difference does not, and should not, lead to different rules for recognition.

(f) Submission by the company to the jurisdiction of the foreign court prevented anyone claiming through the company from challenging or denying the foreign liquidators' powers to act on behalf of the company, which powers were granted by or resulted from (in a case in which the powers were granted by a foreign statute following the making of) the foreign court's order.

(g) Ms. Stanley noted that in *Cambridge Gas* (5) the issue of submission had arisen but the discussion in that case related to submission not by the company but by a shareholder, who was treated as a third party. In *Cambridge Gas*, the issue was whether the New York Bankruptcy Court's confirmation order in the chapter 11 proceedings relating to Navigator Holdings plc ("Navigator"), a Manx corporation, pursuant to which the shares in Navigator held by Cambridge Gas Transport Corporation ("Cambridge Gas"), a Cayman company, were to be transferred to Navigator's chapter 11 creditors' committee, was to be recognized. In these circumstances, there was, for the purpose of deciding whether the common law rules for recognizing and enforcing foreign judgments applied, an issue as to how to characterize the Bankruptcy Court's confirmation order (as well, of course, as to whether these common law rules applied differently to judgments obtained in the course of bankruptcy and insolvency proceedings). Was it an *in personam* order against Cambridge Gas (as shareholder) so that Cambridge Gas must have submitted to the chapter 11 proceedings for it to be bound or was it to be characterized in some other way which avoided the need to find a submission by Cambridge Gas? If the confirmation order was to be treated as an *in personam* order against Cambridge Gas under the ordinary common law rules regulating the recognition of foreign judgments, Cambridge Gas would have had to submit. It had not directly done so and had not participated directly in the chapter 11 proceedings (but its parent company had done so, perhaps on its instructions) and therefore the Deemster in the High Court of the Isle of Man concluded that Cambridge Gas had not submitted. His decision on this point was not appealed. But it seems that Lord Hoffmann thought this result surprising (presumably because he thought, on the facts, that Cambridge Gas's involvement in the chapter 11 proceedings albeit indirect was on the evidence sufficient to give rise to a submission (*ibid.*, at para. 10)). In any event, submitted Ms. Stanley, *Cambridge Gas* did not involve a decision on or analysis of the effect of a submission by the company on the recognition of the powers of a foreign liquidator to act on behalf of the company (and of other corporate organs, such as the board of directors, to act on the company's behalf). Furthermore, Ms. Stanley submitted that there was nothing in the Supreme Court's judgment in *Rubin* (21) that was inconsistent with or undermined the validity of the proposition that where the company submitted to the foreign court the powers of the foreign liquidator to act for the company would be recognized.

(h) Further, even though in the present case the Hong Kong winding up had not been commenced by a petition presented by the company, the company's registration under Part XI of the former Companies Ordinance (*cap.* 32) was sufficient to constitute a submission to any order made by the Hong Kong court, including the winding-up order. Ms. Stanley relied on the statement made by Mr. Chan in his second affirmation, which I have quoted above, as to the effect of the registration as a matter of Hong Kong law. Ms. Stanley did not appear (nor on the evidence did it appear possible for the liquidators) to rely on participation by the company's directors or shareholders in the Hong Kong liquidation, which should be treated as sufficient to amount to a submission to those proceedings.

Discussion and decision—the issues to be decided

18 It seems to me that the following four main issues arise:

(a) Does the court have jurisdiction or the power to grant the relief sought by the liquidators in the present circumstances (the jurisdiction or power issue)?

(b) If it does have jurisdiction or the power, should the court make an order and exercise the jurisdiction or power in the present circumstances (the exercise of discretion issue)?

(c) Assuming the court is otherwise able and willing to grant the relief sought, should the court do so without notice being, and before notice is, given of the summons to the company's directors, shareholders and creditors (the notice issue)?

(d) What form of relief should the court grant and order should the court make (the nature of the relief issue)?

The jurisdiction or power issue

19 The first question is whether the court is able to grant the relief sought in the present circumstances. There are three sub-issues:

(a) What is the juridical nature and scope of the court's non-statutory jurisdiction to recognize and assist foreign court-appointed liquidators?

(b) What is the relief being sought by the liquidators?

(c) Is that relief within the scope of the court's jurisdiction or powers?

20 The juridical nature and scope of the court's non-statutory jurisdiction to recognize and assist foreign court-appointed liquidators has, as is well known, been the subject of much judicial comment and academic and practitioner commentary and has generated a voluminous body of secondary literature, in particular since the decisions in *Rubin* (21) and *Singularis* (22). Some, but not all, of the decisions and only a small proportion (thankfully) of the literature have been cited to me on this application and I will confine my comments (with limited exceptions) to the materials which have been cited to me.

21 It seems to me that the most recent, detailed and significant analysis of the juridical nature and basis of the non-statutory jurisdiction to recognize and assist is to be found in the majority judgments in *Singularis*, in particular the judgment of Lord Sumption. For this reason, this seems to me the proper place to start any discussion of this jurisdiction.

22 Before considering the decision and approach taken in *Singularis*, I should make two preliminary points. First, as I have noted, in Cayman we have a statutory jurisdiction to recognize and assist foreign representatives under Part XVII of the Companies Law. This statutory jurisdiction is only available where the foreign representative is appointed in the place of incorporation (see the definition of "debtor" in s.240, which states that "debtor" for the purposes of the definition of a foreign representative—a liquidator appointed in respect of a debtor—means a foreign corporation or other foreign legal entity subject to a bankruptcy proceeding in the country in which it is incorporated or established—"established" in this context appears only to be the equivalent of the place of incorporation in cases of, and is to be applied to, other foreign entities and not foreign corporations). But the statutory jurisdiction has not pre-empted or removed the non-statutory, common law based jurisdiction. This was the view of Jones, J. in), where the learned judge said as follows: "Part XVII [of the Companies Law] supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision." This seems to me to be correct. Secondly, *Singularis* is, as I have noted, a decision of the Privy Council (on appeal from Bermuda). Ms. Stanley did not address the question as to the extent to which this court should follow *Singularis* but for the purpose of this application I intend to treat the decision and analysis as authoritative albeit not technically binding on me.

23 The analysis in *Singularis* (22) (as well as in *Rubin* (21)) used a particular terminology to describe the jurisdiction that the court was exercising—there are repeated references to common law powers to be applied having regard to common law principles. The following extracts from the core parts of Lord Sumption's judgment illustrate the use of this terminology and his analysis of the basis, nature and scope of the jurisdiction ([2014] UKPC 36, at paras. 10–12, para. 19, para. 23 and para. 25):

> "10 The English courts have for at least a century and a half exercised a *power* to assist a foreign liquidation by taking control of the English assets of the insolvent company. The *power* was founded partly on statute and partly on the *practice* of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations . . .
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> 11 . . . The question [of] what if any *power* the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First the proceedings are a

'mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established', to use the expression of Lord Hoffmann in *Cambridge Gas* . . . Inherent in this function of a winding up is the statutory trust of the company's assets . . . and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction . . . Fourth, it brings into play procedural powers generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities . . .

12 . . . *[E]ven without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation.* For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed, rules 216 and 217 . . .

19 . . . In the Board's opinion, the *principle of modified universalism* is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? *In the absence of a relevant statutory power*, they must depend on the common law, including any proper development of the common law. *The question how far it is appropriate to develop the common law so as to recognise an equivalent power* does not admit of a single, universal answer. *It depends on the nature of the power that the court is being asked to exercise* . . .

23 . . . *The principle of modified universalism is a recognised principle of the common law.* It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets

and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can . . .

25 In the Board's opinion, *there is a power at common law to assist a foreign court of insolvency jurisdiction* by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. *In recognising the existence of such a power*, the Board would not wish to encourage the promiscuous creation of *other common law powers* to compel the production of information. *The limits of this power are implicit in the reasons for recognising its existence.* In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, *it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers.* It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, *the power is subject to the limitation* in *In re African Farms Ltd* and in *HIH* and *Rubin*, *that such an order must be consistent with the substantive law and public policy of the assisting court*, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* (at both levels) shows, *common law powers of this kind* are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, *as with other powers of compulsion exercisable against an innocent third party*, its exercise is conditional on the applicant being prepared to

pay the third party's reasonable costs of compliance." [Emphasis added.]

24 In *Singularis* (22), Lord Collins also referred to the court's common law power (*ibid.*, at paras. 51–58):

"51 The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 that *at common law the court has power to recognise and grant assistance to foreign insolvency proceedings*: para 29 . . .

53 *The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.*

54 Most of the cases fall into one of two categories. *The first group consists of cases where the common law or procedural powers of the court* have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA*, para 33. They include (subject to what is said below) *In re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency) . . .

58 A second group of cases is where *the statutory powers of the court have been used in aid of foreign insolvencies*. The best known example is the use of *the long-standing power to wind up foreign companies* which are being wound up (or even have been dissolved) in the country of incorporation." [Emphasis added.]

25 Lord Collins also used the power terminology in *Rubin* (21) and summarized the position in this way ([2012] UKSC 46, at para. 29):

"Fourth, at common law *the court has power* to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element." [Emphasis added.]

26 It seems to me that, based on these statements concerning the nature and scope of the non-statutory jurisdiction to assist, the following points can be made:

(a) The court is to be treated as having a power to recognize and grant assistance to foreign proceedings and liquidators (at least where those proceedings are commenced in and the liquidators are appointed by a court). This is a power of the court. If the circumstances justify its use, and subject to the limitations on its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. This is the purpose for which the power can be exercised.

(b) The court's power as so described is in substance a non-statutory jurisdiction which is based on and justified by the public interests identified by Lord Sumption. In deciding whether and how to exercise the power, the court has regard to and applies the approach which has been labelled the principle of modified universalism. This term is a convenient shorthand for the approach that the court takes when exercising the power which recognizes both the purpose for which the power is to be exercised (to allow a foreign liquidator appointed by a competent court to conduct the liquidation across borders despite the territorial limitations to which his powers are otherwise subject) and also the applicable limitations which apply to the power or condition or qualify its exercise. (I would, for myself, note that there appears to be an unhelpful tendency in the writings of some commentators to mischaracterize the status and effect of this guiding and flexible principle by elevating it into a rigid rule of law that independently generates rights and remedies and is to be treated, and applied, as if it were a doctrine in metaphysics or theology.)

(c) Suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it). The court is using and relying on its domestic law to fashion and find a form of relief for the foreign liquidator that achieves the purpose for which the power can be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Accordingly, the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory power which, by its terms, does not apply in the circumstances—for example by making an order which could only be made if a domestic scheme of arrangement had been applied for and approved where no such scheme can be or has been applied for. Nor can the court make an order that grants relief to the foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist—for example, in the view of both the majority and the minority in *Singularis* (22), the court cannot order that an auditor subject to the *in personam* jurisdiction of the court provide information to the foreign liquidator when the auditor is not subject to a domestic law duty or obligation in the circumstances to provide it and when there is no right under domestic law for a party in the position of the foreign liquidator to such information. It is an interesting question, which I do not need to resolve on this application, whether the Privy Council created—or recognized—a special common law right or remedy enforceable by the Cayman liquidators which responded to and arose out of the liquidators' need to have the information sought or whether the Board was merely recognizing a right, which was analogous to the *Norwich Pharmacal* right or remedy (see *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (16)) available to any litigant in a similar position (of course the Board refused to grant the relief sought because the Cayman liquidators were said—or perhaps more accurately on the case as argued, assumed—not to have the power under Cayman law to obtain the relevant information from the auditors, although one wonders why, if the common law of Bermuda recognized their entitlement to the information, or the Bermudian court's power to make an order requiring the information to be provided, such an entitlement or power was not available under Cayman law and in this court).

(d) The court must in each case start by considering the nature and form of relief sought by the foreign liquidator. This can take a number of different forms and the legal analysis varies depending on the nature of the relief sought. Sometimes, the foreign liquidator is asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There may well be no need to rely on or exercise the common law power in this case. Sometimes, the foreign liquidator is asking the requested court just to exercise its case management powers in proceedings before it by adjourning or staying those proceedings or the execution of a domestic judgment arising therefrom. The exercise of such case management powers can be said to involve an exercise of the common law power. Sometimes the foreign liquidator will seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needs to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there will be no need to rely on the common law power. Where the cause of action is vested in the foreign liquidator or he is seeking additional relief in reliance on his powers as liquidator then the common law power to recognize and grant assistance to the foreign liquidator comes into play.

(e) Where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company. To that extent he will be entitled to recognition of his powers. As I have pointed out, the principles of domestic private international law produce that result. Therefore, technically, the foreign liquidator does not need to rely on, and this result does not depend on the exercise of, the common law power (at least when the foreign liquidator is only taking action in the name of and on behalf of the company and those seeking to challenge the foreign liquidator's action are claiming through the company). However, when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company.

(f) The limitations on the common law power (both as to its scope and the circumstances in which it will be exercised) are those described by Lord Sumption and those I have set out above.

27 In the present case, the liquidators wish to be able to promote a Cayman scheme and in particular to apply to the court for an order under s.86(1) of the Companies Law convening a meeting of creditors. Section 86(1) states:

> "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, *on the application of the company* or of any creditor or member of the company, or where the company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs." [Emphasis added.]

28 Accordingly, the liquidators can apply if they are able or permitted to act for and on behalf of the company. Two main questions therefore arise. First, are the liquidators able—are they treated under Cayman private international law as being entitled—to act on behalf of the company (and therefore able to cause the company to make an application under s.86(1) of the Companies Law)? If not, can and should the court exercise its power to recognize and assist so as to permit them to do so, and if so how?

The position under private international law rules where the foreign liquidator is not appointed in the place of incorporation

29 As regards the first question, the answer is no:

(a) Because the liquidators are not appointed in the company's country of incorporation they are not, as a matter of Cayman private international law, treated as being empowered to act on behalf of the company. As Professor Briggs notes in *Private International Law in English Courts*, paras. 10.15, 10.16 and 10.22, at 804–805 and 808 (2014):

> "10.15 A corporation is an artificial creation, a legal person. The question whether, and with what powers, a body corporate has been created can only be determined by the law under which its creation took place, which for the common law rules of private international law means the *lex incorporationis*.
>
> 10.16 Likewise, the question who is empowered to act on behalf of the corporation, and in what circumstances, is a matter for the *lex incorporationis* to specify . . .
>
> . . .
>
> 10.22 Likewise, the question of who is entitled to sue in the company's name . . . is almost inevitably a matter for the *lex incorporationis* . . ."

(b) Under Cayman law, having regard to the company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the company are the company's directors and shareholders. The winding-up order without more does not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the company. The winding-up order is not, as an order of a foreign court, of itself binding or enforceable in Cayman (see *Felixstowe Dock & Ry. Co.* v. *U.S. Lines Inc.* (9) ([1989] Q.B. at 375)). Of course, before taking any action the directors would need to consider the effect (both legal and practical) of the winding-up order and would be unlikely to act, and are likely to be advised not to act, without the consent of the liquidators, certainly where they are subject to the *in personam* jurisdiction of the Hong Kong court and save in a case where there was some proper justification for not acting as directed by the liquidators.

(c) It was no doubt the Hong Kong liquidators' lack of authority, as a matter of Bermudian private international law, which resulted in the directors in *Re Dickson Group Holdings Ltd.* (7) remaining in place for Bermuda law purposes and passing a resolution supporting the Hong Kong liquidators' application for leave to summon a meeting of creditors. This meant that, under the law of incorporation, a corporate organ recognized as having authority to act for the company, and to authorize the company to apply for an order to convene a meeting of creditors, had approved and authorized the issue of the summons. At the very least, this was a prudent belt and braces approach (the application in the *Dickson Group Holdings Ltd.* case had been issued by and in the name of the company). This step has not been taken in the present case because, as the second affidavit of David Yen Ching Wai makes clear, despite the liquidators' best efforts, the directors are not cooperating and have failed to respond to the liquidators' efforts to contact them (it appears that one director has been disqualified from acting while others have resigned—including the two Hong Kong based directors—or indicated that they intend to resign from the board).

The exercise of discretion issue

30 As regards the second question:

(a) It seems to me that the power to recognize and assist arises and applies even in a case where the foreign liquidator has been appointed in a place other than the country of incorporation. It is true that, as I have explained, the private international law rule which requires recognition of the power of a foreign liquidator appointed in the country of incorporation to act for the company does not apply. But, in light of the nature and scope of the power to recognize and assist, as I have explained it above, I see no reason for concluding that the power is wholly unavailable and cannot be used just because the foreign liquidator has been appointed in a place which is not the country of incorporation.

(b) The significance and impact of the appointment being made in the country of incorporation was also discussed in *Stichting Shell Pensioenfonds* v. *Krys* (24) ("*Stichting Shell*"), another important and recent decision of the Privy Council (sitting on appeal from the Eastern Caribbean Court of Appeal in a case involving the BVI). In that case, the advice of the Board was given in a judgment of Lord Sumption and Lord Toulson. They commented as follows ([2014] UKPC 41, at para. 14):

> "In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute . . . In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court but all assets world-wide . . . *It reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets.* They will fall to be distributed in the BVI liquidation . . ." [Emphasis added.]

(c) This confirms that at least one of the important reasons why an appointment in the place of incorporation is significant is because it brings with it the effects under private international law that I have already mentioned. Liquidators appointed by a court in the place of incorporation can take advantage of these rules of private international law (which are applied in many jurisdictions), and therefore in practice expect to be able to conduct the liquidation and be effective, and act for the company, in multiple jurisdictions.

(d) I also note that there are some highly respected commentators who suggest that the powers of a liquidator appointed in a country other than the place of incorporation should be limited to dealing with the assets of and acting on behalf of the company in that territory and not beyond it. For example, Professor Ian Fletcher says the following in the latest and recent edition of *The Law of Insolvency*, 5th ed., para. 30–057, at 959 (2017):

> "A liquidator appointed under the law of the company's place of incorporation will be recognised at English law as having authority to wind up the company and to [be] represented in legal proceedings brought either against or on behalf of the company provided that such representative authority is conferred upon him by the law governing his appointment. Conversely, there is no reported incidence of recognition having been accorded in England to a liquidator appointed under the law of some other jurisdiction than that in which the company underwent incorporation. With respect to liquidations of this kind, the inference which most readily suggests itself is that, the effects of such a liquidation being regarded as of necessity, confined to the territorial limits of the jurisdiction in which the winding up is taking place, the liquidator's capacity to act on the company's behalf and to deal with its assets must be deemed to be similarly restricted so as to be limited to property situate[d] within the jurisdiction of the foreign court."

(e) But it seems to me that the inapplicability of the rules of private international law that treat a foreign liquidator appointed in the country of incorporation as having proper authority to act for and to bind the company or as effecting in substance a universal succession to the company's assets does not preclude the court exercising its non-statutory power to assist a foreign liquidator appointed outside the place of incorporation where the conditions for the exercise of that power are satisfied. The power is capable of having a wider application than these rules of private international law so that the power can be exercised even when the rules of private international law do not apply to require recognition of the foreign liquidator's powers or status.

(f) It seems to me that in the present case the conditions for the exercise of that power are in principle satisfied for the following reasons:

(i) It seems to me that the relief that the liquidators need and should be granted is an order authorizing them to make an application under s.86(1) of the Companies Law and to consent to the proposed scheme on the company's behalf.

(ii) The liquidators wish (as Ms. Stanley confirmed during the hearing) simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process. This can be achieved by the court making an order in the terms I have just mentioned and by making a direction to the effect that any proceedings commenced or any winding-up petition presented against the company be assigned to me (so that I can ensure that appropriate case management orders are made to stay or adjourn such proceedings pending the completion of the scheme process save in exceptional circumstances which would justify a different approach).

(iii) In the present case, the court is in substance dealing with a governance question, namely whether to permit the liquidators to act on behalf of the company in presenting an application under s.86(1) of the Companies Law and in consenting to the proposed scheme on behalf of the company. The issue is who should be entitled to act and bring proceedings for a scheme on behalf of the company (in the context of a corporate rescue or reorganization—albeit not one that involves all creditors being paid in full). No issues arise involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they seek. It appears that currently the company's board and its directors are unable or unwilling to act (while the directors could, I assume, act and support or authorize the making by the company of an application under s.86(1), with the consent of the liquidators they have shown no sign that they will take any steps to support or oppose the liquidators' plans or this application). It also appears that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the liquidators' application (although as I explain below, I think that it is important to ensure that there really is no objection and to give all those affected an opportunity to be heard, to give notice to the directors and shareholders of the liquidators' plan to promote a parallel scheme in Cayman, the summons and the order that I make on this application).

(iv) It also appears to be the case that there is no likelihood of an application being made for a winding-up order in Cayman. The winding-up order was made on February 9th, 2015. As David Yen Ching Wai explains in his second affidavit, creditors have participated in the Hong Kong liquidation and 39 proofs of debt have been lodged. If creditors considered it to be in their interests to have a Cayman winding up they are expected to have made that clear and either applied in Hong Kong for permission or taken steps in Cayman to present a petition in Cayman. They have not done so in over two and a half years and it appears from the evidence filed in support of the summons that creditors are aware of and not objecting to the proposed schemes of arrangement (although, once again, as I explain below, I think it important to ensure that creditors are given proper notice of the liquidators' plan to promote a parallel scheme in Cayman, the summons and the order that I make on this application).

(v) It is clear on the evidence that the company has substantial contacts with Hong Kong. As I have already noted, the company's shares have been listed and are to be relisted on the Main Board of the HKSE; the corporate business of the company has been administered from Hong Kong (with all the directors having addresses in Hong Kong or the PRC); the company was registered under Part XI of the former Hong Kong Companies Ordinance on November 4th, 1999; virtually all the company's shareholders have addresses in Hong Kong (the company's largest registered shareholder, HKSCC Nominees Ltd., which owns and operates the Hong Kong Central Clearing and Settlement System (CCASS), held as at August 17th 99.02% of the company's shares and all CCASS participants were registered with Hong Kong addresses) and 2.7% of the value of all proofs of debt lodged in the Hong Kong liquidation have been filed by persons located in Hong Kong and 74.9% of proofs have been lodged by persons located in the PRC.

(vi) There appears on the evidence to be no need for or reason why creditors or members would benefit by a Cayman winding up or from a provisional liquidator being appointed in Cayman. The liquidators consider that a Cayman liquidation or provisional liquidation would just incur additional cost and result in unnecessary delays and there is no risk of prejudice to stakeholders in not having such a proceeding. This, on the evidence, seems right to me.

(vii) This is also not a case in which there are any local reputational, regulatory and policy reasons requiring a local proceeding. I agree with, and wholeheartedly endorse, the approach explained and the caveats identified by Kawaley, J. in his judgment in *Dickson Group* (7) ([2008] Bda LR 34, at para. 29). In appropriate cases, the requested court may have to refuse to grant assistance and the relief sought by a foreign liquidator where a local liquidation or provisional liquidation is needed (and I also note that the Chief Justice made the same point in his summary of his judgment in *Fu Ji Food* (10) and expressed the same reservations, commenting that there may be cases in which there are "compelling reasons" for a Cayman winding up).

(g) Therefore, in the present case the Hong Kong liquidation is the only proceeding which has been or is likely to be commenced in respect of the company and is taking place in a jurisdiction with which the company has substantial connections. I note that the company's centre of main interests, as that term is used in the EU Insolvency Regulation or the UNCITRAL Model Law, is probably in Hong Kong and that seems to me to be a consideration of considerable weight to be taken into account when deciding whether the foreign, non-place of incorporation liquidation should be treated as competent and justifying assistance, although I do not consider it to be determinative. There is therefore a foreign liquidation taking place in a jurisdiction which should be treated as competent, no other insolvency proceeding in prospect and a proper need (endorsed and supported by a well-respected foreign court) for the foreign liquidator to be able to exercise his powers to represent the company in the local court and jurisdiction in order to be able effectively to conduct and achieve the purposes of the liquidation in the interests of creditors and other stakeholders. It seems to me that in these circumstances the purpose for which the power to recognize and assist may be exercised is fully engaged so as to justify the exercise of the power (and the authorities relied on by Ms. Stanley support its exercise in the present case).

(h) None of the limitations which Lord Sumption identified applies in the present case to prevent the exercise of the power to recognize and assist the liquidators. They have a power as a matter of Hong Kong law to act for and on behalf of the company and to promote schemes of arrangement. Furthermore, while the liquidators wish to use and rely on the statutory jurisdiction to apply for a Cayman scheme (under s.86(1)) that jurisdiction (and the applicable statutory provision) is available in the circumstances. Section 86(1) permits an application to be made by the company and the liquidators can be authorized by the court to make such an application on the company's behalf. This does not involve the heresy or impermissible exercise of the common law power identified by Lord Collins in *Singularis* (22) ([2014] UKPC 36, at paras. 78–83) in which the court applies legislation which otherwise does not apply "as if" it applied. Provided that the liquidators can properly make an application in the company's name and are authorized to do so on the company's behalf, the statutory jurisdiction to apply for an order convening a meeting of creditors may be invoked in accordance with its terms. It seems to me that the court may without the need to rely on a statutory power not otherwise available and in a manner that is in accordance with domestic law make an order against and in respect of a Cayman company authorizing a foreign liquidator to make such an application and giving him powers to act on behalf of the company for that purpose.

(i) In my view, *Re Dickson Group Holdings Ltd.* (7) was correctly decided and I see myself as following in general terms the approach taken in that case by Kawaley, J., although I have sought to update and modify the analysis of the common law power and how it is to be applied to reflect the judgments in *Rubin* (21) and *Singularis* (22). I also consider that I can rely on and am following the approach of the Chief Justice in *Fu Ji Food* (10) subject to a similar updating of and adjustment to the analysis of the common law power (and consequently to the form and nature of the relief to be granted to the foreign liquidator). I also agree with the result in *Re Opti-Medix Ltd.* (17) although I have sought to provide a different and more detailed analysis of the common law power. I agree with Ms. Stanley that the result and reasoning of Lord Tyre in *Hooley* (12) is not inconsistent with the approach I have adopted or the liquidators' application. It is hardly surprising that a Scottish court would refuse to interfere with a sale agreed and entered into by Scottish administrators (whom it had appointed) on a post-transaction application made by a creditor rather than the foreign liquidator and without a request of the Indian court. The present case is very different and presents wholly different issues. I also regard the commentary in both *Dicey, Morris & Collins* and *Cross-Border Insolvency* to be helpful and broadly correct and take comfort from the various cases cited in those texts and by Ms. Stanley in which courts, in admittedly different contexts, have been prepared to recognize and assist foreign liquidators appointed outside the country of incorporation.

The submission to jurisdiction point

31 Ms. Stanley, as I have noted, also argues that submission by the company to the jurisdiction of the foreign court in which the winding-up order is made and the foreign liquidator is appointed is a separate ground which justifies the requested court recognizing (and indeed requires the requested court to recognize) the powers of the foreign liquidator to act on behalf of the company and that the company has submitted to the jurisdiction of the Hong Kong court in the present case.

32 It seems to me that two main issues arise:

(a) Is submission a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company?

(b) If so, what constitutes submission for these purposes—in particular is registration as an overseas company sufficient or is it necessary that the company applies for the commencement of (or actively participates in) the foreign liquidation?

33 As regards the first issue, I would make the following comments, subject to the caveat that my views are preliminary since, as the textbooks cited to me make clear, the issue has not been the subject of a full consideration by any previous decision and this has been an *ex parte* application in which the counter-arguments have not been aired and tested:

(a) In my view, submission can in principle be sufficient for certain purposes.

(b) At para. 6.84 of *Cross-Border Insolvency*, Mr. Smith notes, prior to reaching the conclusion relied on by Ms. Stanley and quoted above, that there is no clear authority on the effect on a foreign liquidator's application for recognition or assistance of a submission by the company to the jurisdiction of the foreign court (at 283):

> "In the case of bankruptcy, it is clearly established that foreign proceedings may be recognised in England if the debtor submitted to the jurisdiction of the foreign court. However, submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon."

(c) But it does appear that (in addition to Lord Hoffmann in *Cambridge Gas* (5) in the passage referring to *In re Davidson's Settlement Trusts* (6) relied on by Ms. Stanley and quoted above) both Lord Collins and Lord Mance in *Rubin* (21) accepted, or perhaps assumed, that submission by a corporate debtor (as well as an individual bankrupt) would be sufficient.

(i) In *Rubin*, when discussing *Cambridge Gas*, Lord Collins said as follows ([2012] UKSC 46, at para. 46):

> "The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. *At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (Dicey, 15th ed, vol 2, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation (Dicey, 15th ed, para 30R-100).* Under United States law the US Bankruptcy Court has jurisdiction over a 'debtor', and such a debtor must reside or have a domicile or place of business, or property in the United States. *From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.*" [Emphasis added.]

(ii) The second italicized passage is quoted and relied on by Ms. Stanley. I think that the first quoted passage is also worth noting. (I also think that Ms. Stanley is right to say that there is nothing in the subsequent criticisms of Lord Hoffmann's analysis or the result in

Cambridge Gas which prevents a court concluding that a submission by a company would be a sufficient ground for recognizing the foreign liquidator's powers to act for the company.) The significance of submission has been highlighted and strengthened by the Board's judgment in *Stichting Shell* (24). Furthermore, there is an argument that the result in *Cambridge Gas* can be justified on the basis of there having been a submission—the submission by Navigator having been sufficient to constitute a submission by its shareholders, at least to the extent of preventing them challenging the orders of the foreign court: see Briggs, "Judicial assistance still in need of judicial assistance" ([2015] 2 LMCLQ 179–193).

(iii) Lord Mance said the following in his dissenting judgment in *Rubin* ([2012] UKSC 46, at para. 189):

> "Lord Clarke takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having 'jurisdiction to entertain' bankruptcy proceedings or, if one were (wrongly in my view) to treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings . . . *The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in Dicey (in para 31–064 in the 14th and 15th editions) as a 'vexed and controversial' question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction.* On Lord Clarke's analysis, in such a case (of which *Rubin v Eurofinance* is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law." [Emphasis added.]

(iv) The personal bankruptcy rule in Dicey, Morris & Collins, *op. cit.*, to which Lord Mance was referring (para. 31R–059, at 1750) states that—

> "(2) . . . English courts will recognise that the courts of any other foreign country have jurisdiction over a debtor if—
>
> (a) he was domiciled in that country at the time of the presentation of the petition or

(b) he submitted to the jurisdiction of its courts, whether by himself presenting the petition or by appearing in the proceedings."

Paragraph 31–064 states as follows (at 1751):

> "Clause (2) of the Rule . . . must be regarded as somewhat speculative, because the question is a vexed and controversial one which English courts have had few opportunities of considering. It was at one time supposed that English courts would recognise the bankruptcy jurisdiction of a foreign court only if the debtor was domiciled in the foreign country. But it has since become clear that they will also do so if the debtor submitted to the jurisdiction of the foreign court, whether by presenting the petition himself, or by appealing against the adjudication, or by appearing in the proceedings at some stage either personally or by his counsel or solicitor."

(v) *Dicey, Morris & Collins, op. cit.*, refers to and relies on *In re Davidson's Settlement Trusts* (6) to support the proposition that the presentation by the personal debtor of his own petition will be sufficient. They also refer to *In re Anderson* (2). In this case a debtor, whose domicile was English and who was entitled to a reversionary interest in personalty (a fund) in England, was adjudicated bankrupt in New Zealand on a creditor's petition. Subsequently, he was adjudicated bankrupt in England. The reversionary interest, which by an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England and he at once gave notice of his title to the trustees of the fund and argued that he was entitled to it as against the New Zealand trustee. Phillimore, J. held that the New Zealand trustee was entitled, as against the trustee in bankruptcy in England, to the reversionary interest. The record in the New Zealand proceedings showed that though not a consenting party, he was a party by his solicitor to the adjudication in bankruptcy and had recognized the adjudication by applying some time afterwards for his discharge and obtaining it. Phillimore, J. said ([1911] 1 K.B. at 902):

> "Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. *If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it, as in In re Davidson's Settlement Trusts . . . and In re*

Lawson's Trusts . . . Therefore I think that the adjudication passed, as against him and, therefore, as against anybody claiming under or through him, his personal property wherever situate . . ." [Emphasis added.]

(vi) It seems to me that Ms. Stanley is right to say that, at least as regards the issue of whether anyone other than the foreign liquidator should be recognized and treated as having the right and power to act on behalf of the company, there is no principled basis for distinguishing between the effect of submission by an individual and a corporate debtor. As Phillimore, J. says, it is the fact that the debtor has become and made itself a party to the foreign proceedings that is key and affects anyone claiming under or through the debtor. The fact that under personal bankruptcy law there is a vesting and transfer of title in the debtor's property to the trustee is of no consequence in this context. The vesting or transfer of property outside the foreign jurisdiction is not recognized as a matter of the private international law of the requested court. In a corporate context, if the company has submitted to the foreign court and the insolvency proceedings by applying for the appointment of the liquidator or participating in the foreign insolvency proceedings, its board or shareholders cannot be heard to deny the effects of the appointment (in a case where the company presents its own petition or application in the foreign court) requested by the company and (in any case in which the company through its proper officers has participated in the foreign liquidation or otherwise acted so as to give rise to a submission) the consequences, as regards corporate authority and the power to act on behalf of the company, that follow from the appointment and the foreign court's order.

34 As regards the second question, I would make the following comments (which once again must also be subject to a caveat to the effect that I express here only preliminary views since not only were the arguments not tested on an *inter partes* hearing but the evidence of Hong Kong law was not detailed and limited and Ms. Stanley did not explore the issue or relevant authorities in any depth):

(a) As I have noted, the liquidators rely on the company's registration under Part XI of the former Companies Ordinance as establishing its submission to the jurisdiction of the Hong Kong court generally and in particular with respect to the Hong Kong winding-up proceedings. As I have already noted, Mr. Chan in para. 9 of his second affirmation says as follows:

"By registering under Part XI of the former Companies Ordinance (Cap. 32), the company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong

> Kong (the Rules), compliance with Part XI means that the company is 'within the jurisdiction' and can therefore be served with a winding up petition in accordance with Order 10, rr.1–5 of the Rules . . . and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014) . . ."

(b) Part XI applies to an overseas company which has established a place of business in Hong Kong (see s.332). In common with similar English statutory and procedural rules, Part XI and the Rules (as defined in Mr. Chan's second affirmation) permit service to be effected in Hong Kong on the overseas company either by service addressed to any person in Hong Kong whose name has been delivered to the Registrar as being authorized to accept service or where the overseas company makes default in filing these details by service at any place of business established by the overseas company in Hong Kong or if the company no longer has a place of business in Hong Kong by sending the document to the company's principal place of business in its place of incorporation or to any place in Hong Kong at which the company had a place of business within the previous three years (see s.338).

(c) The question arises as to the legal effect of these provisions and as to whether they result in mere registration constituting a submission for the purposes of recognition of the foreign liquidator's powers.

(d) As regards what is required for there to be a submission, I note that in their judgment in *Stichting Shell* (24) Lord Sumption and Lord Toulson ([2014] UKPC 41, at para. 31) comment that—

> "a submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the Defendant lodged a proof."

The company must by some voluntary act accept that it is subject to and bound by the jurisdiction of the foreign court pursuant to which the order in question is made. Registration *prima facie* appears to be a voluntary act by which the overseas company concerned allows itself to become subject to the foreign court's jurisdiction and to accept that such jurisdiction may be taken and assumed by service of process on the company's appointed authorized representative. If the applicable rules regulating the effect of registration provide for and permit service of a winding-up petition as well as originating process relating to ordinary civil litigation then it should follow that there is also a voluntary acceptance of the foreign court's winding-up jurisdiction.

(e) However, the difficulty I have is that it appears to be arguable that registration by an overseas company of particulars (of a person authorized to accept service), when required only where the overseas company has established a base of business in the foreign jurisdiction, is to be treated as permitting the foreign court to take and assume jurisdiction by reason of the company's presence in the foreign jurisdiction rather than its submission. Furthermore, the analysis of the legal effect of the registration gives rise to questions of construction of the relevant foreign legislation and requires proper evidence of foreign law (which is not available on this application) and appears, at least by reference to the English authorities of which I am aware (but which were not cited to me or the subject of submissions by Ms. Stanley) to raise difficult issues which may be contested and would require further submissions before I would be prepared to form a view.

(f) In Professor Richard Fentiman's *International Commercial Litigation*, 2nd ed. (2015) he says as follows (para. 9.13, at 324):

> "It has been said that a foreign company having a branch in England submits to the jurisdiction merely by complying with its Companies Act obligation to file an address for service.[35] In such cases, however, the basis for jurisdiction is the defendant's presence in England. By providing an address for service the company is merely ensuring that service may be effected easily. This is confirmed by the rule that such a company may be served at its place of business even if it has provided no address.
>
> [35] *Employers Liability Assurance Corp v Sedgwick, Collins & Co* [1927] AC 95, 104, 107, 114 (HL)."

(g) So, Professor Fentiman considers that registration of particulars by an overseas company does not permit the court of the place where the registration is made to take jurisdiction because the overseas company has submitted generally to the jurisdiction of the foreign court. It is presence through the place of business that is the operative factor. Having a presence or place of business in the country of the foreign court is, of course, in the current context insufficient and is different from submitting to the jurisdiction of the foreign court, which is what is required (I also note that *Dicey, Morris & Collins* (*op. cit.*) state that the statutory and procedural rules relating to overseas companies are "exclusively concerned with *service*" and therefore are perhaps of limited significance and effect—see para. 11–117, at 416).

(h) It does appear, however, that the judgments in *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.* (8) were based on the proposition that the foreign company concerned had submitted to the jurisdiction of the English courts. In that case, as Sir John May noted in the Court of Appeal in *Rome* v. *Punjab National Bank (No. 2)* (20) ([1989] 1 W.L.R. at 1218):

> "The judgment debtor was a Russian company which had carried on business in London before the 1914–1918 war and had registered a Mr. Collins as its agent to accept service. After 1917 the company's business and assets were transferred to the Soviet government under the revolutionary legislation. In 1923 a writ was served on Mr. Collins, and, in default of appearance, judgment was signed against the defendants despite Mr. Collins' protest that the company had ceased to exist. In both tribunals the validity of the service was challenged, but having found that the company continued to exist *both the Court of Appeal and the House of Lords held that the Russian company, by filing Mr. Collins' name and address, had submitted voluntarily to the jurisdiction of the English courts and that so long as his name remained on the register, service on him was good service.*" [Emphasis added.]

(i) In *Rome* v. *Punjab National Bank (No. 2)*, the Court of Appeal held that on a true construction of the relevant provisions of the Companies Act 1985 (s.695(1)) a writ was sufficiently served on an overseas company if addressed to a person whose name and address had been delivered to the registrar of companies and left at or sent by post to that address, notwithstanding that the company had ceased to carry on business in Great Britain, that the persons so named were no longer resident there, and that those facts had been notified to the registrar under the 1985 Act. The decision is not referred to by Professor Fentiman and does, as it seems to me, suggest that the basis for jurisdiction in cases involving overseas companies is not presence (or at least presence alone) in the foreign jurisdiction.

(j) Furthermore, I note that the Hong Kong Companies Ordinance in terms provides for service on the overseas company even if it no longer has a place of business in Hong Kong. This suggests that the existence of a place of business is not the key factor or the only relevant basis on which the Hong Kong court is to be treated as taking jurisdiction.

(k) It seems to me that the basis on which jurisdiction over the overseas company is taken is properly to be treated as statutory and therefore whether registration gives rise to and is to be characterized for present purposes as a submission to the foreign jurisdiction is in part a question of statutory construction and in part a question as to whether as a matter of Cayman law the effects of the foreign statute are to be treated as sufficient to amount to a submission.

(l) My provisional view is that they are but, as I have said, there are doubts and issues which require evidence of foreign law and fuller consideration and I therefore do not wish on this application to express a firm view. I would also wish to consider carefully whether if registration can be treated as a submission it constitutes a submission for the purpose of a liquidation taking place in that jurisdiction. I note that Lord Mance in the passage from *Rubin* (21) quoted above referred to the need for there to be a submission to "the foreign bankruptcy jurisdiction" and it seems to me to be arguable that what is required is that the company apply for the commencement of the foreign liquidation or that its directors or shareholders (or other proper representatives) authorize participation in the foreign liquidation. As I have noted, neither of these conditions is satisfied in the present case.

(m) Accordingly, where the position is not settled and there has only been a limited opportunity for the citation of authority or argument, I do not consider that I am in a position to form a concluded view on this issue. I am reassured by the fact that in this case, in view of the conclusion I have reached regarding the availability of and the justifications for the exercise of the common law power, I am able to grant the relief sought by the liquidators without the need to determine that the company has submitted to the insolvency jurisdiction of the Hong Kong court.

The notice issue

35 As I have noted above, there is a further issue which needs to be considered. This is whether I should grant the relief sought by the liquidators before notice has been given to the company's directors, shareholders and creditors. The summons has been applied for on an *ex parte* basis and while notice of the resumption proposal and the liquidators' plans to promote parallel schemes of arrangement in Hong Kong and Cayman has been given and details notified to shareholders and creditors, the directors, shareholders and creditors have not seen the summons or the evidence in support and have not been given an opportunity to notify the liquidators of any objections or views or to make submissions or appear on the summons.

36 In a case such as the present one, where I am proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up will be made; that the company's directors and shareholders have not sought and do not intend to exercise any residual powers and rights which they may have to act on behalf of the company and that the relief sought by the liquidators is demonstrably in the interests of all stakeholders, it seems to me to be important that the directors, shareholders and creditors are notified of the summons specifically and given an opportunity to notify the liquidators and the court of any objections, to make submissions and to apply to the court should they wish to do so.

37 It would be open to me to direct the liquidators to give notice of the summons before making the order sought and to require a further hearing if any objections are received or to give the directors, shareholders or creditors an opportunity to appear and make submissions. However, this seems to me to be unnecessary. Instead I propose to make an order in the form discussed below which will authorize the liquidators to apply under s.86(1) of the Companies Law and to petition the court for an order convening the meetings required in connection with the proposed scheme but which will also require the liquidators to notify, by a suitable means and within an appropriate timescale, the directors, shareholders and creditors of the summons and to make available copies of the summons and evidence in support to any such person who wishes to receive a copy before the liquidators make any such application. This will ensure that the directors, shareholders and creditors are given adequate notice of the summons and an opportunity to object or to make an application to this court before the liquidators proceed to petition the court for an order convening the scheme meetings. If there are any objections or submissions, or if any such person wishes to be heard, a further hearing of the summons will be listed in order to consider such objections or submissions and hear any person who wishes to appear and the court can then decide how to proceed. If, however, no such objections, submissions or notices of an intention to appear are received before the time to be specified in the order, then the liquidators will be authorized and permitted to proceed thereafter to apply to the court for an order convening the scheme meetings. This will balance the need to ensure that anyone wishing to raise an objection has the opportunity to do so before the liquidators proceed with the scheme without unduly delaying the scheme process by requiring a further hearing, which may be unnecessary.

The nature of relief issue

38 The letter of request and the draft order provided by the liquidators, as I have explained, sought an order which would recognize the liquidators and treat them "in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by this Court . . ." The order would then recognize the powers and authority of the liquidators to act on behalf of the company generally and also for the various purposes set out in the letter of request and draft order.

39 The letter of request and the draft order also sought an order that s.97 of the Companies Law shall apply to the company (and which would have the same or substantially the same effect as s.186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance) so that no action or proceeding shall be proceeded with or commenced against the company within the jurisdiction of this court except by leave of this court and subject to such terms as this court may impact.

40 It seems to me that the court is unable, in the exercise of the common law power, to make either of these orders. Granting relief which is only available to provisional liquidators appointed by this court in circumstances when no such provisional liquidators have been appointed, and granting relief "as if" provisional liquidators had been appointed seems to me to be precisely what Lord Collins in *Rubin* (21) and *Singularis* (22) had said was impermissible. The same applies to an order that would declare that s.97 applies to the company in circumstances where that section does not and cannot so apply in the absence of a provisional liquidator being appointed by this court. It seems that the letter of request and the draft order were drafted so as to reflect the form of order made by the Chief Justice in the *Fu Ji Food* case (10).

41 However it seems to me that the objective of the liquidators can properly be achieved by an order in a different form. I have already outlined above the form of order that I have in mind. The liquidators wish and need to be able to apply to this court for an order convening the scheme meetings, to make such other applications as are required in connection with and to promote the proposed Cayman scheme and to consent to such scheme on behalf of the company. This objective can be achieved by an order which authorizes the liquidators to take this action. Furthermore, relief having the same effect as s.97 of the Companies Law can be achieved by a direction that requires all proceedings commenced or to be commenced (including proceedings for injunctive relief or to execute a judgment) against the company be allocated to and heard by me. This order will ensure that any action taken by creditors or shareholders will become before me and will allow me to make suitable case management orders for adjournments or stays to allow the scheme to proceed (unless there are exceptional circumstances that justify the commencement or continuation of proceedings).

42 Ms. Stanley indicated at the hearing that this approach would be acceptable to the liquidators. Accordingly, I shall make an order in these terms, the precise form of which is to be proposed by Ms. Stanley and approved by me.

Order accordingly.

Attorneys: *Ogier* for the liquidators.

Fossil (UK) Global Services Ltd, Re

	No Substantial Judicial Treatment

Court
Chancery Division

Judgment Date
15 October 2025

Where Reported
[2025] EWHC 2741 (Ch)
[2025] 10 WLUK 217
Judgment

Subject
Company law

Other related subjects
Insolvency

Keywords
Classes of creditors; Creditors' meetings; Restructuring plans; Schemes of arrangement

Judge
Cawson J

Counsel
For the applicant company: Daniel Bayfield KC, Matthew Abraham.
For the retail advocate: Daniel Jukes.

Solicitor
For the applicant company: Weil, Gotshal & Manges (London) LLP.

Case Digest

Summary

(EXTEMPORE) The court convened a single meeting of existing noteholders for the purposes of considering a proposed restructuring plan under the Companies Act 2006 Pt 26A. The plan was designed to introduce $32.5 million of new money into a global fashion group and release $150 million 7.00% senior unsecured notes due on 30 November 2026 by providing the noteholders with the option to subscribe for one of two new notes. The noteholders all had the right to participate in lending the new money and the fact that those opting to do so would receive additional benefits did not fracture the single class.

Abstract

The applicant company applied for an order convening a single meeting of its plan creditors to consider, and if thought fit, approve a restructuring plan under the Companies Act 2006 Pt 26A.

In August 2025, the applicant had been incorporated in England and Wales as a private limited company to establish a basis for jurisdiction in England and Wales. It was part of the Fossil Group, a global fashion company, and an indirect subsidiary of Fossil Group Inc (FGI), which traded on the Nasdaq. The plan creditors were the beneficial holders of US$ 150 million 7.00% senior unsecured notes due on 30 November 2026. The notes had been issued by FGI and were guaranteed by the applicant. Under the plan, the notes would be released as against FGI and the applicant, and noteholders would have the option to subscribe to one of two new notes to facilitate an injection of $32.5 million of new money into the group. A group of noteholders (the supporting holders) had also committed to backstopping the new money in the event there was an insufficient uptake. The new notes comprised (i) 9.500% first-out first lien senior secured notes, due on 1 January 2029, for noteholders who elected to participate in lending the new money and for backstop providers in settlement of the backstop commitment; and (ii) 7.500% second-out second lien senior secured notes, due on 30 June 2029, which would be allocated to noteholders who elected not to participate. The applicant's case was that a single meeting of plan creditors was appropriate on the grounds that the "rights in" of the noteholders as against the applicant were the same and that, at the time of voting, their "rights out" were the same as they all had the option whether to participate or not in lending the new money; and that the relevant alternative was that FGI would enter into Ch.11 of the Bankruptcy Code in the USA, with a "363" sale of the business and that the applicant would be wound up. The objectives of the proposed plan were to restore the applicant and the group to a

stable financial footing, to continue to implement a business plan, and return the group to profitable growth.

The group initially sought to achieve the notes restructuring by launching a private exchange with the supporting holders, and a SEC-registered exchange with the other noteholders. However, at the outset of the convening hearing, only 73.95% of noteholders had tendered their notes in advance of that day's 5pm deadline, which was below the 90% required. The exchange offer transactions were considered unlikely to succeed.

Held
Application granted.

Adequacy of notice of convening hearing - The Practice Statement Letter was sent on 23 September 2025. It contained a clear explanation of the proposals, *Thames Water Utilities Holdings Ltd, Re [2024] EWHC 3310 (Ch), [2024] 12 WLUK 424* applied. Some notice of the plan had also been provided in advance of that letter, in the context of the exchange offer transactions. In the circumstances, adequate notice had been given, *Selecta Finance UK Ltd, Re [2020] EWHC 2689 (Ch), [2021] B.C.C. 168, [2020] 10 WLUK 110* applied.

Jurisdictional requirements - Each noteholder was entitled to receive definitive notes registered in their names, *Noble Group Ltd, Re [2018] EWHC 3092 (Ch), [2019] B.C.C. 349, [2018] 11 WLUK 207* applied. The plan creditors were "creditors" for the purposes of the Act. Condition A in s.901A(2) was met. Although the applicant had been established for the purposes of the scheme, the self-inflicted nature of its financial difficulties was not an impediment to satisfying Condition A, *Gategroup Guarantee Ltd, Re [2021] EWHC 304 (Ch), [2021] B.C.C. 549, [2021] 2 WLUK 252* applied. The financial difficulties requirement was also met, given that the applicant had assumed liability under the original notes, and the projected cashflow forecasts. Condition B in s.901A(3) was also satisfied. There was the necessary element of "give and take" between the applicant and scheme creditors, *Virgin Atlantic Airways Ltd, Re [2020] EWHC 2376 (Ch), [2020] B.C.C. 997, [2020] 9 WLUK 39* and *AGPS Bondco Plc, Re [2024] EWCA Civ 24, [2025] 1 All E.R. (Comm) 26, [2024] 1 WLUK 227* considered. Second, the purpose of the plan was to restore the applicant to financial health and to avoid the negative consequences of the relevant alternative.

Class composition - Applying the test for class composition, on the face of it, all the noteholders had the same rights, *Gategroup* applied. There were no matters giving rise to a reason for fracturing the single class of creditors. There was a right for all the creditors to participate in lending the new money, *Primacom Holdings GmbH v Credit Agricole [2012] EWHC 164 (Ch), [2013] B.C.C. 201, [2012] 1 WLUK 409* applied. The fact that those opting to provide the new money would receive additional benefits did not fracture the single class. On the evidence, the backstop premium did not facture the class, *PizzaExpress Financing 2 Plc, Re [2020] EWHC 2873 (Ch), [2020] 9 WLUK 334* applied. The payment of certain fees, costs and expenses did not provide an additional benefit or bounty; it was to ensure that the noteholders were not left out of pocket. Further, the objections raised by a single creditor through the retail advocate, which included that the supporting holders would receive special benefits, had no merit.

Potential roadblocks - The exclusion of certain liabilities from the scheme had been properly excluded on the basis that they were operational costs and essential to ensure the continuity of the business. The question of whether the plan would have effect in the USA as intended was not a matter for the convening hearing, *ColourOz Investment 2 LLC, Re [2020] EWHC 1864 (Ch), [2020] B.C.C. 926, [2020] 7 WLUK 172* applied. The applicant was relying on expert evidence that the plan was likely to be recognised and given effect in the USA under Ch.15 of the Bankruptcy Code. It might be a matter for the sanction hearing. The use of the UK restructuring process might also be a matter to reconsider at a later stage, *AGPS Bondco* considered.

Practical issues - The explanatory statement did communicate all the matters in a manner which was readily comprehensible to its addressees, *Virgin Active Holdings Ltd, Re [2021] EWHC 814 (Ch), [2021] 3 WLUK 573* applied. The court was satisfied with the proposed timetable.

In the Matter of Fossil (UK) Global Services Ltd

	No Substantial Judicial Treatment

Court
Chancery Division

Judgment Date
10 November 2025

Claim No: CR-2025-007011

High Court of Justice Business and Property Courts of England and Wales
Insolvency and Companies List (ChD)

[2025] EWHC 3058 (Ch), 2025 WL 03237271

Before: Mr Justice Richards

Monday, 10th November 2025

In the Matter of Fossil (Uk) Global Services Ltd

In the Matter of the Companies Act 2006

Representation

Mr Daniel Bayfield KC and Mr Matthew Abraham (instructed by Weil, Gotshal & Manges (London) LLP) appeared on behalf of the Claimant.
Mr William Day (instructed by McCarthy Denning) for the Retail Advocate, Mr Jon Yorke.

Approved Judgment

Mr Justice Richards:

1. On 15 October 2025, Cawson J convened a meeting of a single class of creditors of Fossil (UK) Global Services Limited (the "Plan Company") to consider a plan under Part 26A of the Companies Act 2006 (the "Plan"). I am today asked to sanction the Plan which was passed by the statutory majority at that meeting.

Background

2. Cawson J gave a full judgment at the convening stage that was reported at *[2025] EWHC 2741 (Ch)* (the "Convening Judgment"). I am grateful to him for doing so because it has made my task considerably easier. I will use the defined terms set out in the Convening Judgment and will tend to use the expression "Plan Creditors" and "Noteholders" interchangeably since they are one and the same.

3. No-one suggests that I need to address any matters of background that were not set out in the Convening Judgment to decide whether to sanction the Plan. In those circumstances, I propose not to summarise the relevant background in any great detail, but simply to take the Convening Judgment as read and effectively to incorporate it into this judgment.

4. It is, however, relevant to emphasise that some 25% by value of the single class of Plan Creditors consist of retail Noteholders. The Plan Company has therefore very sensibly appointed Mr Yorke to be the Retail Advocate to look out for the interests of retail Plan Creditors and he, through his counsel, Mr Day, has made submissions today. Mr Yorke has confirmed in his report that he is independent and has had access to the necessary information from the Plan Company. He has confirmed that, in his opinion, retail Plan Creditors understood the choices that they could make in relation to the Plan.

5. Against that background, the meeting that Cawson J ordered (the "Plan Meeting") was held on 6 November 2025. At that meeting the Plan was approved by 99.99% by value of those Plan Creditors present and voting and it now comes

back for today's sanction hearing. In fact, at the Plan Meeting only a single creditor voted against the Plan.

The matters that I must consider

6. As I have said, Plan Creditors voted as a single class following Cawson J's convening order and I am not asked today to impose any "cross-class cram-down". Since this is a Part 26A plan that involves no cross-class cram-down, I should follow the approach set out at [116] and [117] of the judgment of Snowden LJ in *Re AGPS Bondco Plc [2024] EWCA Civ 24 ("Adler")* and consider the familiar four questions that apply in the context of Part 26 schemes namely:

i) whether there has been compliance with the statutory requirements;

ii) whether the single class was fairly represented and whether the majority was acting in a bona fide manner and for proper purposes when voting at the class meeting;

iii) whether the Plan is a fair plan which a creditor might reasonably approve; and

iv) whether there is any "blot" or defect in the Plan that would, for example, make it unlawful or in any way inoperable.

7. As to the third issue, whether the Plan is a fair one, the approach of courts in cases such as this is to tend to respect the commercial judgment of those voting in favour. That is why Snowden LJ, at [122] of his judgment in *Adler,* described the third issue as involving a "limited rationality test" that derives much comfort from the fact that the scheme or plan has been approved at meetings of creditors voting as appropriate classes.

8. In this Plan we have a single class of Plan Creditors. However, without doubting the proposition that this is a single class, it is possible to view it as containing two separate constituencies: one consisting of wholesale Plan Creditors and one consisting of retail Plan Creditors. I will explain later how that affects the assessment of the rationality test and the conclusions that I should draw from it.

9. Another point that I make in relation to overall approach is derived from paragraph 102 of the judgment of Miles J (as he then was) in *Re All Scheme Ltd [2021] EWHC 1401* . There are no special rules for schemes or plans that involve retail investors. Therefore, even though a good proportion of Plan Creditors are retail investors, I should still consider the same four considerations I have outlined above. However, the court's willingness to apply a "limited rationality test" in relation to the third issue described in paragraph 6.iii) above is predicated on Plan Creditors having been given sufficient information, in an accessible way, so that they are equipped to make rational voting decisions. That issue resonates given the presence of retail Plan Creditors since the material involved is complex and must be presented in a clear way, with alternative possible analyses also presented fairly, for retail Plan Creditors to make an informed decision.

10. Finally in terms of overall approach, when considering whether there is a blot or defect in the Plan, I will consider as a discretionary issue whether I should sanction it on the basis that it is sufficiently likely to have substantial effect in the US, recognising that in large measure this Plan seeks to adjust the terms of debt issued by Fossil Group Inc. ("FGI"), a US corporation.

Update on matters that occurred since the Convening Judgment

11. The Consent Solicitation has been approved and therefore the Notes are now governed by English law (rather than New York law), with disputes in relation to the Notes being within the sole jurisdiction of the courts of England and Wales (rather than the courts of New York). In his expert report, Judge Peck confirms that, in his opinion, these changes would be regarded as effective under New York law.

12. As mentioned in the Convening Judgment and the evidence, there has been a concerted attempt by FGI and its wider group to seek to effect exchanges of Notes consensually by means of the Exchange Offer. If 90% by value of Noteholders had accepted the Exchange Offer, FGI might have been prepared to tolerate the continued presence of a small rump of investors holding "old" Notes

and concluded that there was no need for the Plan. However, in the event, the Exchange Offer has to date achieved only 82.67% take-up which FGI has concluded was insufficient commercially to preclude the need for the Plan.

13. The final, and most significant, update since the Convening Judgment is that the Plan Meeting has been held with Plan Creditors voting overwhelmingly in favour of the Plan.

Whether there has been compliance with statutory requirements

14. Under this heading, I consider the following matters:
   i) whether the terms of Cawson J's convening order were met;
   ii) whether other statutory provisions were satisfied: for example whether the jurisdictional threshold in s901A of CA 2006 is present and whether applicable statutory requirements relating to the Explanatory Memorandum have been satisfied;
   iii) whether the statutory majority was indeed achieved; and
   iv) whether the single class that voted at the Plan Meeting was properly constituted.

15. The third witness statement of Mr Greben and the second witness statement of Mr Arena between them satisfy me that the terms of the convening order were indeed met. I note that some quite strenuous requirements were imposed on the Plan Company to send documents to retail Plan Creditors.

16. The section 901A preconditions were considered at the convening stage and I respectfully agree with Cawson J's conclusion that they are met.

17. Cawson J also considered the Explanatory Statement at the convening stage. He considered that it was appropriately explained and suitable for the exercise in hand. I also note that the Retail Advocate also considered it was appropriately accessible and clear for the constituency of retail Noteholders. The Explanatory Statement contains the requisite statement of the interests of directors in the

outcome of the Plan.

18. I see that there were some amendments to the Explanatory Statement from the version that was before Cawson J. However, none of those amendments affected the substance of the Explanatory Statement and therefore were entirely within the scope of paragraph 7 of Cawson J's convening order.

19. There was indeed a valid Plan Meeting at which more than two individuals were present. The statutory majority was amply achieved. Some 364 Plan Creditors attended either in person or by proxy, representing some 82.88% by value of the Notes. 363 of those creditors, representing some 99.99% by value of the Notes represented at the Plan Meeting, voted in favour of the Plan. That is obviously greater than the 75% majority required. Indeed, even if all of those Plan Creditors who did not attend the Plan Meeting had attended and voted against the Plan, the Plan would still have received the necessary majority.

20. Matters of class composition were considered in detail at [95] to [112] of the Convening Judgment. Those paragraphs considered expressly the position of one Noteholder who was opposed to the Plan to the effect that it was not right to have a single class when some creditors would be putting in New Money and so, in the words of that opposing Noteholder, getting "special treatment" so that they would "agree with the restructuring plan". The Convening Judgment considered that issue and concluded that this difference in interests did not fracture the class. I respectfully agree with that conclusion.

21. Today I considered a slightly different formulation of the argument in my discussions with Mr Bayfield KC, namely whether it might be said that in reality, although all members of the class had the right to put in New Money, that right is somehow less available to retail Noteholders than it would be to wholesale Noteholders. I do not consider that this consideration should fracture the class either. The test remains a test of rights and not interests. As Mr Bayfield KC quite rightly pointed out, retail Noteholders have already shown themselves willing to invest in publicly-traded debt. While some might indeed not be willing

(or able) to put in New Money, I am not satisfied that they, as a cohort, would be unable to invest New Money or would be unable to evaluate the benefits or risks of doing so.

22. I am quite satisfied that there was no problem with class composition at the Plan Meeting.

23. Overall, I conclude that the statutory requirements have indeed been met.

Fair representation at the Plan Meeting

24. I am reassured to see from the report of the chair of the Plan Meeting that, although the meeting took place online, there were no technological glitches or similar that prevented it from taking effect as a proper meeting.

25. There was a high turnout at the Plan Meeting: as I have noted, some 83% by value of the Notes were represented. It is right to look critically at that number, especially given the points that I have made about the presence of retail Noteholders in the class. I have, therefore considered whether, although there was a single class, in reality the Plan Creditors attending and voting were not representative. For example, I have considered whether the Plan Meeting might have been disproportionately attended by Supporting Holders who might be benefiting from the Backstop arrangements and payment of their legal advisers' fees and who might, therefore, have a different outlook on the Plan from retail Noteholders.

26. However, even acknowledging that possibility, it remains the case that at least 350 votes in favour of the Plan came from persons other than Supporting Holders. In fact, there was just a single vote against the Plan. That suggests that the Plan attracted broad and representative support at the Plan Meeting, with the support extending beyond Supporting Holders who were obtaining benefits from

the Backstop arrangement and payment of their legal expenses.

27. Moreover, I am reassured to see that, taking matters at their absolute lowest, at least one quarter of retail Noteholders have voted in favour of the Plan. Mr Yorke, with all of his experience in this area, considers that to be a good level of engagement from a retail Noteholder constituency.

28. Finally, I have considered whether the votes in favour of the Plan might have been unduly skewed towards those providing the New Money. However, that is not the case. The report of the chair of the Plan Meeting shows that some 88 votes at the meeting were from creditors who were not providing any of the New Money and 87 of those voted in favour.

29. Overall, I consider that this is a Plan that has been approved both by retail and by non-retail Noteholders, by Noteholders giving New Money and Noteholders not doing so, at a meeting with a very high turnout rate.

30. There is no suggestion that the majority were oppressing a minority, and I am quite satisfied that there has indeed been fair representation at the single class meeting.

Whether Plan Creditors could reasonably approve the Plan

31. I return to the points I prefaced at the beginning of this judgment. This question does, in the ordinary course, involve a “limited rationality check”.

32. In his written and oral submissions, Mr Bayfield KC referred me to [125] to [127] of Snowden LJ’s judgment in *Adler* . One can debate whether at [125] Snowden LJ was suggesting that one should in all cases look behind an

ostensibly single class and seek to dissect out whether there are separate commercial "interests" within that class, as distinct from interests based on difference of rights that might fracture a class. It is quite possible, in my view, to read [125] as simply saying that the existence of a single class, comprising persons with similar rights , provides some reassurance that a "limited rationality test" is appropriate. However, whatever view one takes of [125] read in isolation, it is clear that in [125] to [127] of *Adler* , Snowden LJ is making the point that there are some preconditions to the appropriateness of a "limited rationality test". It is appropriate that I consider whether those preconditions are met when considering what weight to give to the positive vote at the Plan Meeting.

33. I have therefore considered whether the interests of those providing New Money might be different from those not doing so in such a way as to undermine the significance of the strong positive vote at the Plan Meeting. I have considered whether there has been clear communication of the issues to retail Noteholders in particular. I have also considered whether there might be a sense in which some constituency of the single class might be voting to support an extraneous interest that they have beyond their membership of the class.

34. It is quite clear that this is a Plan that a rational creditor could approve. It is certainly complicated. However, it gives a clear prospect of a better recovery than the relevant alternative affords. That obviously is a very important consideration under this heading.

35. When looking at communication and the ability of retail Noteholders to participate in the process, I note that Mr Yorke received some 42 emails from retail Noteholders. They were almost all asking for information on how to navigate the processes and there was just one objection. As Mr Yorke explains in his report, the degree of engagement from the retail Noteholders has been greater than or higher than he would expect in similar kinds of plans or schemes of arrangement.

36. I am greatly reassured by Mr Yorke's conclusion that retail Noteholders

received satisfactory guidance. They also had access to him to help them navigate the process. I am also reassured by his conclusion that the information was presented in a way that enabled retail Noteholders to understand the choices they were being asked to make.

37. This is not a case like *Re All Scheme Ltd* in which the retail creditors were customers of a pay-day lender who might be expected to be in a financially vulnerable state. As I have explained, the retail Noteholders in this case have, in the round, some degree of financial sophistication as they have already chosen to invest in publicly traded debt securities. It would be wrong for me to downplay that level of sophistication and form the view that the retail Noteholders have limited ability to understand the choices they needed to make.

38. The New Money aspect also deserves consideration when considering what weight to give to the positive vote of the single class. There have been cases where, in Part 26A plans, the provision of new money has resulted in significant benefits to those providing it. In many cases, that is justified. The new money might well be desperately needed to enable the company in question to carry on in business. So giving benefits to creditors providing that new money, whether in the terms of higher ranking or an attractive coupon, might well make good sense. However, there might be more scrutiny in cases where the provision of new money enhances, for example, the seniority of existing debt. Put very shortly, conceptually new money can be used as a device to provide benefits to certain classes, or constituencies of creditors over and above a normal commercial return on that money. If that were the position with this Plan, it might undermine the force of the positive vote at the Plan Meeting since Noteholders providing New Money might be voting for an extraneous interest of the kind referred to at [126] of *Adler* .

39. In this case, some comfort can be derived from the general proposition that the opportunity to provide New Money was open to everyone. However, if this were a cross-class cram-down situation, that would not be a complete answer. In *Re Petrofac Ltd [2025] EWCA Civ 821* , the Court of Appeal refused to sanction a Part 26A plan that involved a cross-class cram-down because of concern about the fairness of the terms on which new money was being provided even though

the right to provide new money was ostensibly open to everyone.

40. This is not a case where there is a cross-class cram-down. However, it is still right, in my judgment, to consider whether the Plan might only make sense for Noteholders providing New Money. In that context, it is relevant to consider whether the New Money is some way of providing value to a separate constituency of the single class beyond the ordinary return that could be expected from the provisions of badly-needed liquidity to a borrower in some financial distress.

41. The first point to make in that regard is that the Plan is still modelled to produce an outcome in the relevant alternative that is better for all Plan Creditors whether or not they provide New Money (see [62] to [66] of the Convening Judgment). No Noteholder has challenged the Plan Company's analysis of the relevant alternative or returns that could be expected in that alternative. I see no reason, therefore, to doubt the Plan Company's analysis which counts for a lot when considering this issue.

42. Mr Bayfield KC also referred me to the significant market-testing exercises that took place in relation to FGI's debt as explained in the witness evidence of Roopesh Shah. There has been a rigorous attempt to ensure that the New Money represents a good deal. That can be seen in FGI's considerable efforts to secure good pricing for the ABL Facility and the refinancing of the Notes. Moreover, this was not mere window-dressing. When, having put in lots of work on the market-testing exercise, FGI thought that its financial situation had improved, it took the opportunity to consider afresh whether the pricing it was being offered remained attractive even in the light of what looked like better market conditions. These, in my judgment are not the actions of a company that is seeking to do a "sweetheart deal" which operates to the benefit of the constituency of investors providing New Money. In my judgment, FGI has undertaken a genuine and rigorous exercise to price the New Money and is not seeking to provide disproportionate value to a particular constituency of Plan Creditors.

43. Further reassurance on this matter comes from the fact that the Backstop Providers are content only to backstop the New Money: if its terms really were disproportionately beneficial, they might have been expected to try to take it all up themselves.

44. Overall, I accept Mr Bayfield KC's four key points in relation to the New Money:

i) While this is not a "fairness" issue, as it would be with a Plan involving a cross-class cram-down, it is appropriate to consider the terms of the New Money when deciding how much weight to give to the positive vote at the Plan Meeting.

ii) There is some force in the point that everyone can participate in the provision of New Money and no barriers are placed in the way of particular Noteholders exercising their right to do so. However, that point may not be determinative on its own.

iii) The Plan still provides a better outcome than the relevant alternative even for those who do not choose to provide the New Money.

iv) Following rigorous evaluation, it is realistic to consider that FGI has obtained the best terms that it could for the New Money.

45. Overall, I consider that the pre-conditions referred to in [125] to [127] of *Adler* are satisfied in this case, such that it is appropriate to perform a "limited rationality check" when deciding whether Noteholders could reasonably approve the Plan. Applying that test, the positive vote at the Plan Meeting should be given real weight. In my judgment this is indeed a Plan that could rationally be approved.

Blots

46. Some potential blots were mentioned by Mr Bayfield KC in discharge of the Plan Company's duty to give full disclosure.

47. I see no problem with the fact that the Plan is proposed only with Noteholders and not with the Plan Company's creditors generally. There is clear

precedent for that approach and a clear justification. Some of the creditors excluded from the Plan are those whose working capital and indulgence is necessary for FGI to continue in business. The Plan Company is entitled to decide, in those circumstances, that it does not seek to compromise liabilities owed to trade creditors and similar. I am reassured to see that this approach was recently endorsed in the *Adler* case.

48. The Plan contains no release of directors' liabilities by the Plan Company. However, it does provide for Noteholders to release directors from personal liability to them to the extent such liability would otherwise arise in connection with the Plan. Cawson J considered this issue at [123] of the Convening Judgment and concluded that there was a good reason for this limited release. I respectfully agree with Cawson J's analysis. The release is intended to prevent Noteholders undermining the Plan by suing directors and advisers involved in proposing or implementing it. It is a common feature of plans such as this. I do not regard it as a blot.

49. I have noted that the Plan seeks to restructure the debt of FGI, a US corporation, albeit that the debt in question is, following the Consent Solicitation, governed by English law. The restructuring of that debt could conceivably have been done consensually if the Exchange Offer had been successful. However, given that the Exchange Offer has not been accepted to the extent that FGI wished, it is fair to say that the Plan achieves a result that could not straightforwardly have been achieved under a Chapter 11 process in the United States.

50. Moreover, the result is achieved by a route that could, at a high level, be described as "artificial". The Plan Company has been formed expressly for the purpose of accessing the UK's restructuring regime in Part 26A of CA 2006 . The Plan Company has executed the deed of contribution expressly to enable the "established technique" described at [124] to [128] of the Convening Judgment to be used to enable debt issued by FGI to be restructured by means of a Part 26A plan. It is right, therefore, that this court should be vigilant since the process adopted has the potential to amount to an abuse. Judge Peck notes that the bankruptcy court of the Southern District of New York has made similar

observations in the case of *Mega Newco Limited* (Case No. 24-1203-MEW (Bankr. S.D.N.Y. Feb. 24, 2025; *2025 WL 601463*)).

51. It is in my judgment important that the plan does not violate any public policy considerations that underpin US bankruptcy law. Judge Peck's very clear, readable and scholarly opinion expresses the strong view that not only does the Plan not violate any public policy considerations but that it would be likely to be considered favourably by a US court asked to recognise it. Judge Peck's opinion addresses head-on potential contrary arguments, for example, the notes of caution sounded in the *Mega Newco* case, and it is all the more impactful for doing so. Overall, Judge Peck reaches the clear conclusion, speaking as a judge of many years' experience in this specialist area, that a US bankruptcy court would be likely to recognise and give effect to any order that the English court makes. That indeed is what happened in the *Mega Newco* case, which unlike this one involved a cross-class cram-down.

52. Judge Peck reaches his conclusion because he considers this Plan would be seen as producing a good and favourable outcome for creditors generally and would therefore be going with the grain of US bankruptcy legislation rather than violating any public policy considerations that underpin it. Ultimately I need only be satisfied that there is a reasonable prospect of recognition. Judge Peck's opinion, engaging as it does with the contrary issues, gives me clear comfort on that point.

53. That in turn allays concerns about the "artificiality" of the deed of contribution arrangement and the possibility that it could be regarded as forum shopping. Judge Peck considers that a US bankruptcy court would be likely to look favourably on the Plan on the basis that it achieves a beneficial outcome for Plan Creditors generally. That is also my view on the Plan and indeed no-one has attended the sanction hearing to articulate a different view.

54. The final issue on potential blots is that I should be slow to sanction the Plan if I thought the court would be acting in vain by doing so. Here there are some

conditions outstanding to the Plan taking effect. However, having seen the explanation of what those conditions are in the third witness statement of Mr Greben, I am quite satisfied the court would not be acting in vain by sanctioning this Plan.

55. I will therefore sanction the Plan.

**1045* Saipem SpA v Petrofac Ltd

	Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
1 July 2025

Report Citation
[2025] EWCA Civ 821
[2025] B.C.C. 1045

Court of Appeal (Civil Division)

Snowden LJ , Zacaroli LJ and Sir Christopher Floyd

1 July 2025

H1 *Restructuring plans—Compromise of claims—New money to be provided by existing creditors—Returns on new money investment amounting to equity of two-thirds of restructured group—Relevant alternative to plan would be insolvent liquidation—Proposed compromise including claims against plan companies arising from failed project—Project creditors dissenting from plans—Plans sanctioned by cross-class cram-down—Whether dissenting creditors would be no worse off than in the relevant alternative—Scope of 'no worse off' test—Fairness of distribution of benefits under plans—Whether raising new money from existing creditors was cost or benefit of restructuring—Companies Act 2006 s.901G.*

H2. This was an appeal by certain creditors of two companies against the sanctioning by the court of restructuring plans of the companies under the Companies Act 2006 Pt 26A .

H3. A group of companies, including PL, which was the parent company of a group, and PIUL began to encounter financial difficulties in 2017. In 2021 refinancing of the group was carried out, creating a new range of creditors and liabilities for the group, but by 2023 it appeared that it had not been successful in achieving long-term stability. Towards the end of 2024, the group formulated restructuring plans, which categorised the liabilities as senior secured funded debt, shareholder claims, directors' claims, insurance restitutionary claims, and claims connected to a particular project—the Clean Fuels Project. The last-mentioned category related to a consortium which certain group companies entered into, along with members of the Saipem and Samsung groups, the present appellants. PL, one of the group companies which joined the project, issued an English law guarantee for the group's liabilities under the project.

H4. The project was commissioned by a Thai company, but proved disastrous. Complex proceedings arising from the failure of the project were under way or pending, and both Samsung and Saipem had claims against the group both by way of claim on the guarantee and other more direct claims against PL and PIUL. All the claims under relating to the clean Fuels Project were to be compromised under PL's and PIUL's restructuring plans. Those plans were negotiated principally between the plan companies and an ad hoc group of entities which had or claimed to have senior secured funded debt.

H5. Under the plans, the senior secured shareholders would receive equity of about 17.5% of the restructured group in the form of tradeable shares. The shareholder, directors' and restitutionary claims would be released in exchange for a right to participate in claims settlement funds, and in a 1.5% equity in the restructured group. In relation to Samsung's and Saipem's Clean Fuels Project claims, these would be dealt with (a) in relation to an unsecured claim of Samsung against PIUL, by the release of the claim in return for a distribution of cash or new ordinary shares in PL; and (b) in ***1046** relation to the other claims, by the release of the claims in return for a right to participate in an non-shareholder claims settlement fund of £1m.

H6. It was now agreed that the "relevant alternative", for the purposes of the Companies Act 2006 Pt 26A , was the insolvent liquidation of the group, including the plan companies. In that alternative, and by reference to a revised equity valuation of the restructured group carried out in 2025, so far as the present appellants were concerned, Samsung would be likely to recover approximately 10 percent of its claim against PIUL; its remaining claims, and those of Saipem, would be unlikely to make any recovery and would therefore be out of the money.

H7. If the plans were sanctioned, the return for Samsung would be approximately 10 percent of its claim against PIUL; its remaining claims, and those of Samsung and Saipem in their other claims, together with unsecured claims of other claimants, would yield cash or warrants amounting to a return of about 1.4%. In total, the plan creditors claims would be compromised for cash and equity amounting to a low-case value of US$329. Of the remaining equity, 67.7% would be allocated to the providers of new money, which was a central feature of the group's proposed financing. The senior secured funded debt creditors were entitled to contribute to the new money investment; that same group might also acquire additional equity by way of backstop fees and work fees connected with the restructuring.

H8. At the class meetings to approve the plan, Samsung, Saipem and certain other creditors voted against the plan; however, the plans were sanctioned by the court via the cross-class cram-down procedure. Samsung and Saipem appealed against that order, submitting that the judge had been wrong: (1) to conclude that they would be "no worse off" (as mentioned in Condition A set out in s.901G) under the plan than in the relevant alternative, and (2) to sanction the plans because the benefits were not being fairly shared between the plan creditors.

H9. With regard to (1) they accepted that if regard were had only to the amounts that they would recover on their debts they would not be worse off, but argued that regard should have been had to other benefits which would accrue to them if the companies went into liquidation, in particular the competitive advantage that would arise if they were freed of a competitor namely the plan companies. the judge had held that the test in s.901G(3) was concerned solely with the impact of a plan on a creditor in their capacity as creditor, and that the indirect benefits identified were too remote and fell out of consideration for the purposes of the statutory test. With regard to (2) Samsung and Saipem submitted that the benefits preserved or generated by the plans were largely the result of the compromise of claims against the plan companies, and were reflected in a substantially increased value of the equity in PL as parent of the restructured Group, but that a disproportionate majority of that equity was allocated under the plans in return for the provision of new money rather than to the creditors whose claims were compromised. They asserted that the judge's position that the new money was high risk and the return to the providers of it was proportionate, was wrong.

H10. Held, allowing the appeal.

H11. (1) The judge had been correct to find that Condition A was satisfied, though the present court's reasoning differed. In summary, the court was required to determine the financial value which a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights which the plan offered in return for the compromise of those existing rights. The scope of that enquiry was primarily concerned with the financial value of rights of the creditor against the plan company, but where a plan compromised or released other rights of the creditor, it extended to those other rights. This might include claims against guarantors or other third parties, which were difficult to characterise as part of the debtor-creditor relationship that arose between plan companies and plan creditors. This approach was to be preferred to a test based on remoteness, or on what fell in or out of consideration, which had no basis in the statute. However, in ***1047** the present case, the loss of a competitive advantage in and of itself was clearly beyond the scope of that test. Therefore the court rejected the first ground of appeal. (*Re Smile Telecom [2021] EWHC 685 (Ch)* , *Re Great Annual Savings [2023] EWHC 1141 (Ch); [2023] Bus. L.R. 1163* considered.)

H12. (2) The idea that the court should consider fair distribution of the benefits in a restructuring, particularly where cram-down was being exercised, was a developing area. If the court was being asked to exercise a discretion to alter the rights of a dissenting class for the benefit of assenting classes necessarily involved the court inquiring how the value sought to be preserved or generated by the plan, over and above the relevant alternative, was to be allocated between those different creditor groups. The fact that a creditor would be out of the money in the relevant alternative was not a reason for not taking account (or taking only *de minimis* account) of their treatment under the plan. (*Re AGPS Bondo Plc [2024] EWCA Civ 24; [2024] Bus. L.R. 745* applied.)

H13. (3) When considering the injection of new money, it was established that those providing new money should be entitled to full repayment in priority to pre-existing plan creditors. This was to be regarded as a cost of the restructuring, and applied equally if the new money was being raised from existing creditors if the returns to them were equivalent to what it would cost the company to raise the funding in the market. However, if the new money being provided by existing creditors were to cost the company more than could be achieved in the market, then the excess cost was more properly regarded as a benefit conferred by the restructuring. It was for the plan company to show that the costs were equivalent, or that the distribution of the benefit was justified. The judge had failed to take account of some important considerations, such as the equity valuation of the restructured group or whether there was evidence as to the cost of raising money in the market, but had focussed instead on the pre-restructuring risks faced by the group. A further significant point was that the proposed allocations of equity for new money in 2024 were not revisited after the 2025 revaluation, but this fact was not explored or explained; nor was it considered whether the allocation of the benefits was fair or justified. In the present case, on the evidence, the plan companies had not justified the returns granted for the new money providers, and the formulation of the plans had taken place on a false premise. For these reasons the court would set aside the judge's exercise of his discretion to sanction the plan. (*Re Houst Ltd [2022] EWHC 1941 (Ch); [2022] B.C.C. 1143* , and *Re AGPS Bondo ("Adler") [2023] EWHC 916 (Ch)* applied.)

H14 Cases referred to in the judgment:

Kington SARL v Thames Water Utilities Holdings Ltd [2025] EWCA Civ 475
Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch); [2007] Bus. L.R. 1771; [2007] B.C.C. 500
Re AGPS Bondco Plc [2024] EWCA Civ 24; [2024] Bus. L.R. 745; [2024] B.C.C. 302
Re Bluebrook Ltd [2009] EWHC 2114 (Ch); [2010] B.C.C. 209
Re DeepOcean 1 UK Ltd [2021] EWHC 138 (Ch); [2021] B.C.C. 483

Re Great Annual Savings Co Ltd [2023] EWHC 1141 (Ch); [2023] Bus. L.R. 1163; [2023] 2 B.C.L.C. 278
Re Hawk Insurance Co Ltd [2001] EWCA Civ 241; [2002] B.C.C. 300; [2001] 2 B.C.L.C. 480
Re Houst Ltd [2022] EWHC 1941 (Ch); [2022] B.C.C. 1143; [2023] 1 B.C.L.C. 729
Re Lehman Brothers International (Europe) (In Administration) [2009] EWCA Civ 1161; [2010] Bus. L.R. 489; [2010] B.C.C. 272
Re Smile Telecom Holdings Ltd [2021] EWHC 685 (Ch)
Re T&N Ltd [2004] EWHC 2361 (Ch); [2005] 2 B.C.L.C. 488; [2005] Pens. L.R. 1
Virgin Active Holdings Ltd, Re [2021] EWHC 1246 (Ch); [2022] 2 B.C.L.C. 62 ****1048***

H15 Representation

Andrew Thornton KC and Jon Colclough (instructed by Mayer Brown International LLP) for the appellants.
David Allison KC , Henry Phillips , Ryan Perkins and Stefanie Wilkins (instructed by Linklaters LLP) for the respondents.
Daniel Bayfield KC and Riz Mokal (instructed by Weil, Gotshal & Manges (London) LLP) for Boundary Creek Advisors LP, FIL Investments International, Fortress Investment Group LLC, Sparta Capital Management Ltd and Mason Capital (the "Ad Hoc Group").

Judgment

Snowden, Zacaroli LJJ and Sir Christopher Floyd:

Introduction

1. This is an appeal against the decision of Marcus Smith J, sanctioning two related restructuring plans (collectively the " Plans ") under Part 26A of the Companies Act 2006 ("Part 26A ") in respect of two companies: Petrofac Limited (" PL ") and Petrofac International (UAE) LLC (" PIUL "). Together PL and PIUL are the " Plan Companies ", and with their subsidiaries they comprise the " Petrofac Group " or the " Group ".

2. The appeal raises issues (i) as to the meaning of the "no worse off" condition for the application of the Court's discretion to impose a restructuring plan on a dissenting class or classes of creditors, and (ii) as to the appropriate allocation of the benefits of the restructuring, and the treatment of creditors who would be "out of the money" in the relevant alternative to the plan.

3. For the reasons set out below, although we reject the appeal on the first of those grounds, we allow the appeal on the second ground and set aside the judge's order.

The statutory framework

4. Part 26A applies where two conditions are met (see section 901A(1) to (3)):

(1) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

(2) Condition B is that (a) a compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them, and (b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2).

5. Pursuant to section 901C, the Court may order a meeting of the creditors or classes of creditors to be summoned in such manner as the Court thinks fit, although by section 901C(4), the Court can exclude from participation in meetings creditors who have no "genuine economic interest in the company".

6. The Court's discretion to sanction a plan under Part 26A is found in section 901F(1):

> "If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an

application under this section, sanction the compromise or arrangement." **1049*

7. By section 901G, however, the Court may sanction a plan even though one or more of the classes fails to approve it by the requisite majority:

"(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.

(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.

(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).

(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive

> a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

The Plan Companies

8. PL was incorporated and registered in Jersey in 2002. Its shares are listed on the London Stock Exchange. It is the ultimate parent company of the Group, and primarily operates as a holding company.

9. PIUL was incorporated and registered in Sharjah, UAE, in 2008. 1% of its shares are owned by PL and 99% are owned by Petrofac International Limited, a wholly-owned subsidiary of PL.

10. The Group is a leading international service provider to the energy industry, with expertise in the design, construction and operation of energy facilities. It operates across 29 countries. PIUL is the Group's principal operating company.

Background to the Plans

11. The Group first encountered serious financial difficulties in 2017, when PL and others were investigated by the Serious Fraud Office (" SFO ") for suspected bribery, corruption and money laundering. PL pleaded guilty to seven offences of failing to prevent bribery by associated persons, and paid a fine of £70 million. Notwithstanding an extensive corporate governance review and an overhaul of its compliance systems and controls, the Group's business has continued to suffer. This has been exacerbated by, among other things, the Covid pandemic and the war in Ukraine.

12. In November 2021 the Group completed a refinancing, comprising a US$250 million capital raise by PL, the issue by PL of US$600 million senior secured notes, the creation of two new bank facilities and an extension of maturity of an existing US$50 million senior secured term loan facility.

13. By September 2023, it had become clear that the 2021 refinancing had not resulted in the long-term stabilisation of the Group, and it began exploring options for alleviating its financial position, out of which the Plans emerged in the latter part of 2024. ***1050***

The Plan Companies' liabilities

14. The Plans compromise the liabilities of the Plan Companies to five categories of " Plan Creditors ": (1) Senior Secured Funded Debt; (2) Shareholder Claims; (3) Director Claims; (4) PL Insurance Restitutionary Claims; and (5) claims connected to the "Clean Fuels Project".

(1) Senior Secured Funded Debt

15. PL is the borrower and issuer in respect of four English law governed financing agreements (comprising secured notes, an RCF facility, and two further loan facilities) in an aggregate amount (as at the date of the convening hearing) of approximately US$909 million (exclusive of fees and interest), (the " Senior Secured Funded Debt "). PIUL is a guarantor in respect of the Senior Secured Funded Debt, which has the benefit of a common guarantee and security package over certain of the Group's main assets. The holders of Senior Secured Funded Debt are referred to as the " Senior Secured Funded Creditors ".

(2) Shareholder Claims

16. These claims arise out of the investigation commenced by the SFO in 2017 and PL's subsequent guilty plea.

17. Certain shareholders or former shareholders have brought, or threatened to bring, claims (under the Financial Services and Markets Act 2000) alleging that PL made misleading statements and/or dishonest omissions or delays in its public disclosures, resulting in the inflation of PL's share price and losses to the relevant shareholders.

18. The Plan Companies deny these claims. They are at an early stage and difficult to quantify. The Plan Companies estimate, however, that, if the claims were to be established, the quantum would be potentially very high and (while the Plan Companies dispute this) has been claimed to be as high as US$1.25 billion. This is the figure the Plan Companies have used in estimating the recovery likely to be made in respect of the Shareholder Claims in percentage terms under the Plans.

(3) Directors' Claims

19. During the SFO investigations, a number of directors and employees of the Group were interviewed and retained independent legal advisers. PL was liable to indemnify some of them for their legal fees, and voluntarily assumed liability to pay the legal fees of others. The Plan Companies do not expect further claims of this nature, but recognise there is at least some risk in this regard. There is also a risk that former directors or employees may incur additional fees in relation to the Shareholder Claims. Albeit that the Plan Companies do not ascribe any significant value to these claims, they wished to erase any risk by including them within the Plans.

(4) Pl Insurance Restitutionary Claims

20. In November 2022, the Group's D&O policy insurers purported to elect to avoid the D&O policy on the grounds of fraudulent non-disclosure and/or fraudulent misrepresentation, and asserted a claim to recover amounts paid out under the policy. PL disputes the insurers' entitlement to do so, but has included an estimated US$6 million for actual and potential claims of this nature within the Plans. ***1051**

(5) Claims connected to the Clean Fuels Project

21. In October 2018, certain companies in the Group entered into a project commissioned by Thai Oil Public Company Limited (" Thai Oil "), relating to an expansion to enable increased efficiency and cleaner fuel production at a refinery in Thailand (the " Clean Fuels Project "). The Group companies entered into this project as part of a consortium with companies in the Saipem group (" Saipem ") and the Samsung group (" Samsung "). PL has issued an English law governed guarantee of the liabilities of its Group companies towards Thai Oil.

22. The Clean Fuels Project, which the consortium entered into for a fixed price, has proved disastrous. It has been beset with problems that have increased the anticipated cost. Saipem and Samsung served termination notices on Thai Oil on 23 April 2025. Thai Oil served its own termination notice the following day.

23. This has given rise to substantial claims by Thai Oil. Arbitration proceedings are pending to determine the extent of those claims. The liability of the joint venturers for Thai Oil's claims is joint and several, and is divided as follows: PL and PIUL as to 36%; Saipem as to 36%; and Samsung as to 32%. Saipem and Samsung, for understandable reasons, are careful not to accept in these proceedings the quantum of Thai Oil's claim. For the purposes of the Plans the exposure of the consortium to Thai Oil has been assumed to be in the region of US$1.627 billion (recognising that it may be much more or much less). To the extent that Saipem and Samsung might be required to pay more than their identified share of the liabilities of the consortium to Thai Oil, they would have claims for a contribution or indemnity against PL and PIUL.

24. In addition, Saipem and Samsung have direct claims against the Plan Companies arising out of the joint venture. Samsung has a claim against PIUL of about US$92.8 million, and Saipem and Samsung have combined claims against PL of about US$26.7 million, giving a total of about US$119.5 million.

25. All of the above claims relating to the Clean Fuels Project will be compromised under the Plans. In addition, three banks (ABN Amro, Argonaut and HSBC) have crystallised and contingent claims against PL and PIUL arising out of performance guarantees and counter-guarantees which they gave in relation to the Clean Fuels Project.

26. ABN Amro has claims relating to its performance guarantees and counter-

guarantees of approximately US$29.6 million. Its claims are governed by English law. They are secured and rank *pari passu* with the Senior Secured Funded Debt. These claims will be compromised under the Plans.

27. Argonaut has unsecured claims (not covered by margin held) of approximately US$20 million which are also governed by English law. These claims will also be compromised under the Plans.

28. HSBC has an unsecured claim against PIUL of approximately US$49.7 million (after a deduction of US$16.5 million of cash collateral). Its claim is governed by UAE law and will not be compromised under the Plans. Instead, HSBC will enter into a bilateral arrangement under which it has agreed that its claim will be converted, on a full US$1 for US$1 basis, into a new senior secured term loan.

Formulation of the Plans

29. From about mid-2023 the Group began to explore a potential sale of certain of its business lines. In parallel, it considered a range of financing options, both by way of equity investment and by way of junior financing (i.e. subordinate to the Senior Secured Funded Debt). From late 2023 discussions also took place with the Group's secured lenders and banking group. None of these efforts resulted in any viable solution. ***1052**

30. In the first half of 2024, the Group considered, but ultimately rejected, a Group-wide restructuring, but comprising liabilities at the level of PL alone, a break-up of the Group and a Group-wide insolvency. Thereafter, the boards of the Plan Companies decided to promote the Plans (alongside certain bilateral negotiations with other key stakeholders). In that same time period, the Group held discussions with Thai Oil and Saipem and Samsung in an effort to resolve the disputes over the Clean Fuels Project. According to the evidence of the Group's CFO, Mr Afonso Reis e Sousa (" Mr Sousa "), the lack of engagement from Thai Oil and the "obvious delta" between the Group's position and that of Saipem and Samsung, meant that "we had no option but to consider more complex unilateral solutions – i.e. whether it would be possible to compromise the Clean Fuels Project-related liabilities under the Plans".

31. The potential restructuring was first announced in high level terms by way of a public announcement dated 27 September 2024. There was ongoing dialogue thereafter between the Plan Companies and Saipem and Samsung, and the latter were given access to key documents.

32. The terms of the Plans were, however, negotiated principally between the Plan Companies and a so-called " *ad hoc* group" of five entities that have, or claim to represent funds that have, investments in the Senior Secured Funded Debt (the " AHG "). From about early 2024, the AHG had indicated that they would in principle be prepared to provide an investment of new money of around US$200 million, subject to an independent appraisal of the business and conditional on a successful restructuring on agreed terms. According to Mr Sousa, "ultimately, the terms of that investment have been negotiated and agreed as part of the restructuring." The judge observed (at §53 of his judgment) that the Plans had been "long in the making, and the subject of considerable and hard-fought negotiation." Indeed, the level of the "work fee" agreed with the AHG (described in more detail below) was said to be justified by the "massive time and effort" of the AHG in formulating and negotiating the Plans (see §74 of the judgment).

33. The restructuring was formally announced on 23 December 2024. On the same date, the "Practice Statement Letter" was sent to creditors. According to Mr Sousa, shortly prior to that date, the Group made contact with Thai Oil and Saipem and Samsung to discuss its terms in further detail and to see whether there was scope to agree a consensual deal. Thereafter, Samsung and Saipem made various offers for a different restructuring, none of which were accepted.

The treatment of Plan Creditors' claims under the Plans

34. The treatment of the existing and contingent claims of the different groups of Plan Creditors varies under the Plans.

35. The Senior Secured Funded Creditors will receive, in return for the release

of their existing claims, equity in the restructured Group in the form of new ordinary shares in PL (" Ordinary Shares ") equating to about 17.5% of the post-restructuring equity. As with the existing ordinary shares in PL, those new shares will be immediately tradable securities and hence immediately realisable.

36. Claimants in respect of the Shareholder Claims will receive, in return for the release of their existing claims, a right to participate, *pro rata* , in a "Shareholder Claims Settlement Fund" of £1 million. Claimants in respect of the Directors' Claims and the PL Restitutionary Claims will be entitled to share, pro rata, in a similar "non-Shareholder Claims Settlement Fund" of £1 million.

37. In addition, claimants in all three categories will be entitled to receive, *pro rata* to their admitted claims, warrants giving an entitlement to new Ordinary Shares in PL equating to about 1.5% of the post-restructuring equity of PL in the event that its market capitalisation exceeds US$1.35 billion and ***1053** an additional 2% of the post-restructuring equity if PL's market capitalisation exceeds US$1.95 billion (" Warrants ").

38. ABN Amro will receive, in return for the release of its existing and contingent secured claims arising out of its provision of guarantees, new Ordinary Shares in PL in the same proportion as the holders of the Senior Secured Funded Debt, equating to between 0.44% and 0.62% of the post-restructuring equity.

39. Argonaut, which is unsecured, will receive, in return for the release of its existing and contingent claims, new Ordinary Shares in PL equating to about 0.2% of the post-restructuring equity.

40. As indicated above, HSBC's unsecured claims will not be compromised under the Plans but will be converted into a new senior secured debt instrument on a US$1 for US$1 basis.

41. Samsung's unsecured claim of US$92.8 million against PIUL will be released under the Plans in return for a distribution of cash or new Ordinary Shares in PL equating to 110% of what it would be likely to receive in the relevant alternative (high case).

42. Samsung and Saipem's remaining unsecured claims against PL, together with the unsecured claims of Thai Oil itself, will be released under the Plans in return for a right to share in the non-Shareholder Claims Settlement Fund of £1 million and to receive a proportion of the Warrants.

43. Finally, and specifically in response to objections from Samsung and Saipem, Samsung was offered the opportunity – together with Argonaut – to participate in providing up to US$25 million for new equity within the PIUL Plan, on the same terms as the equity investment offered to the holders of the Super Senior Funded Debt. Shortly prior to the sanction hearing, this offer was extended to include Saipem. The position of Samsung and Saipem is that they are unable to and/or do not wish to participate in subscribing for such new equity.

The relevant alternative

44. Before the judge, Saipem and Samsung contended that an alternative restructuring plan, on the terms of an open offer they had made to the Plan Companies, was the "relevant alternative" for the purposes of determining whether the Court has the jurisdiction under section 901G to sanction the Plans notwithstanding the existence of a dissenting class. Saipem and Samsung do not pursue this argument on appeal. Instead, it is accepted that the relevant alternative would be an insolvent liquidation of the companies in the Group, including the Plan Companies.

45. The judge's findings in respect of the likely distributions that Plan Creditors

would receive in respect of their claims against the Plan Companies in the relevant alternative were based on a report from Teneo Financial Advisory Limited (" Teneo "), commissioned by the Plan Companies. This provided an estimated outcome for each of the creditor groups in the relevant alternative of a Group-wide liquidation on "low case" and "high case" scenarios.

46. According to Teneo, in the relevant alternative:

(1) The Senior Secured Funded Creditors and ABN Amro in respect of its secured guarantee-related claims, were likely to recover between 24.3% and 31.9% of their claims.

(2) Argonaut would be likely to recover between 7.0% and 9.3% of its claims.

(3) Samsung would be likely to recover between 6.9% and 9.3% of its claim against PIUL.

(4) None of the other Plan Creditors would be likely to make any recovery on their claims and would thus be "out of the money" in the relevant alternative. ***1054**

Recoveries under the Plans: the Teneo Valuation Report

47. The Plan Companies also commissioned a valuation report from Teneo in September 2024. Teneo was instructed to prepare a (post-restructuring) valuation analysis of the enterprise value of the Group on a debt-free, cash-free going concern basis. In February 2025 Teneo reported that the post-restructuring enterprise value of the Group was between US$1.35 billion and US$1.7 billion.

48. That valuation was updated in April 2025. Teneo concluded that the enterprise value of the restructured Group on a going concern basis would be between US$1.4 billion and US$1.75 billion. Teneo's valuation expressly took account of the risks associated with the delivery of the management's Business Plan post-restructuring, including in particular the Group's ability to secure guarantee lines for its ongoing contracts and future contracts.

49. Taking into account the post-restructuring net cash available to the Group of

between US$96 million and US$104 million, the Teneo valuation report implied that the day one post-restructuring equity value of PL would be between US$1.5 billion and US$1.85 billion. That figure was agreed between the parties before us.

50. On the basis of that low case day one post-restructuring equity valuation of PL, the parties broadly agreed the following summary of the likely recoveries of the Plan Creditors under the Plans in respect of their Plan claims. The numbers are rounded, and where there were disagreements as to the figures, they are not relevant for the purposes of the analysis. Under the Plans, on the likely low case outcome (i.e. based on a post-restructuring equity value of US$1.5 billion):

(1) The Senior Secured Funded Creditors and ABN Amro (in respect of its secured guarantee claims) would receive equity valued at US$270.4 million: a return of about 28.8%.

(2) Argonaut would receive equity valued at US$3 million: a return of 8.5%.

(3) Samsung (in respect of its claim against PIUL) would receive equity valued at US$9.5 million: a return of 10.2%.

(4) The Shareholders, in respect of the Shareholder Claims will receive equity and cash valued at US$23 million: a return of 1.9%.

(5) All other unsecured claims, including Thai Oil, Samsung and Saipem, will receive Warrants and/or cash equating to a return of 1.4%.

51. It is common ground that the returns described above are, in all cases, likely to be better than if the Plan Companies went into liquidation. The Senior Secured Funded Creditors, for example, would be likely to recover only 24.3% of their debt (in the low case), Samsung would be likely to recover only 9.3% in respect of its claim against PIUL, and the remaining unsecured creditors would receive (practically) nothing in a liquidation. But under the Plans they stand to recover Ordinary Shares and/or cash amounting to a slightly greater percentage of their claims.

52. In aggregate, therefore, all of the Plan Creditors' existing claims against the Plan Companies will be compromised in return for equity and cash in the restructured Group valued on a low case basis at US$329 million.

53. Of the remaining equity in the restructured Group, and excluding fees, 67.7% will be allocated to the providers of US$350 million "New Money" to the restructured Group (as set out below). On the basis of Teneo's low case post-restructuring equity valuation of US$1.5 billion, this equity will be worth about US$1 billion. It is this allocation of value to the providers of New Money that is at the heart of the second ground of appeal. ***1055**

New finance

54. A central feature of the Plans is the provision of new financing for the restructured Group. This comprises an investment of " New Money " of US$350 million, and the provision of a "cash back guarantee facility" of US$80 million (the " CBG Facility ").

55. The New Money divides into two parts: US$131.25 million will be provided by way of loan in exchange for " New Money Notes " issued by a wholly-owned indirect Jersey subsidiary of PL, with the benefit of a guarantee and security package, and paying interest at a rate of 9.75% per annum; and US$218.75 million which will be provided in exchange for " New Money Equity " which comprises new Ordinary Shares in PL. Both the New Money Notes and the New Money Equity will be listed and tradeable securities, and hence immediately realisable for cash on day one after the restructuring takes effect.

56. All of the Senior Secured Funded Creditors (and ABN Amro in respect of its secured guarantee debt) will be entitled under the Plans to participate in the provision of the New Money, *pro rata* to the amount of their existing claims. Any such participation must be split equally between New Money Notes and New Money Equity. In fact, not all of the Senior Secured Funded Creditors opted to participate in the New Money, and it will be provided as follows:

(1) The Senior Secured Funded Creditors will provide a total of US$187.5 million of New Money: US$93.75 million in return for New Money Notes and US$93.75 million in return for New Money Equity. This New Money was underwritten by certain of the Senior Secured Funded Creditors in return for "Backstop Fees" (see below).

(2) Two funds represented by an entity called Nut Tree Capital Management LP (" Nut Tree ") are providing a total of US$75 million: US$37.5

million in return for New Money Notes and US$37.5 million in return for New Money Equity. Although, at the time Nut Tree was approached to invest in the Group it was not an existing investor, a number of funds which it represented subsequently purchased a quantity of Senior Secured Funded Debt at a price that was lower than the anticipated return on that debt in the relevant alternative.

(3) The remaining US$87.5 million is being provided by various persons whose identity has not been revealed, but who include existing shareholders and directors of the Group. This investment is being provided exclusively in return for New Money Equity.

57. The CBG Facility involves the provision of US$80 million to a bankruptcy remote special purpose vehicle (" spv ") to be used as collateral for certain of the Group's existing customer contracts. US$30 million is to be provided by a member of the AHG. The remaining US$50 million is to be provided by funds connected with Nut Tree.

58. The US$80 million will be provided in return for notes issued by the spv (" CBG Notes "). The CBG Notes pay quarterly interest in cash at 7% over the prevailing base rate. The member of the AHG and the funds connected with Nut Tree will also be issued by PL with a further US$19.57 million in aggregate of New Money Notes, and the Nut Tree funds will additionally be paid a fee of US$1.25 million in cash and will receive a "contingent value rights instrument" worth US$9.8 million.

Backstop Fees and Work Fees

59. In addition to the allocation of equity in the restructured Group in return for the provision of New Money, the Senior Secured Funded Creditors (but not ABN Amro in respect of its claim arising ***1056** from the provision of guarantees) also had the opportunity to receive further equity under the Plan by way of so-called " Backstop Fees " and " Work Fees ".

Backstop Fees

60. The Backstop Fees were available to those Senior Secured Funded Creditors who agreed to underwrite the provision of the US$187.5 million of New Money by the Senior Secured Funded Creditors. The Backstop Fees were provided in the form of New Money Notes and new Ordinary Shares in PL. On the likely low value of the post-restructured Group, the Backstop Fees in relation to the provision of US$187.5 million of New Money amounted to about US$62.6 million. In the region of 80% of the Backstop Fees were allocated to the AHG.

Work Fees

61. The "Work Fees" were negotiated and agreed between the AHG and the Plan Companies shortly before the Practice Statement Letter was circulated in late December 2024. They are said to be compensation for the work undertaken by the AHG in relation to the restructuring, and for the fact that when the members of the AHG obtained access to confidential information relating to the Group they became "restricted" under applicable market abuse laws. However, the amount of the Work Fees was not calculated by reference to the actual value to the Plan Companies of the work done or the amount of time expended by members of the AHG. It was simply fixed as an agreed percentage (2.5%) of the AHG's aggregate holding of Senior Secured Funded Debt. This equalled US$7.1 million.

62. If the Plans are not sanctioned, the Work Fees will be payable in cash but will rank as an unsecured claim. However, if the Plans are sanctioned, the Work Fees will be paid in equity. The evidence was that the number of new Ordinary Shares in PL that would be issued in this respect (428,705,264) was fixed in late December 2024 on the basis of a notional post-restructuring equity value of the Group of US$351 million because the Teneo valuation report was not then available.

63. For reasons that were not explained, however, the number of new Ordinary Shares to be issued to the AHG in respect of the Work Fees remained the same, notwithstanding that the post-restructuring equity value of the Group was subsequently determined by Teneo to be between US$1.5 billion and US$1.85

billion rather than the notional US$351 million.

64. This means that if the Plans are sanctioned, the number of new Ordinary Shares in PL to be issued to the AHG in respect of the Work Fees will be worth between US$24.1 million and US$29.9 million rather than the US$7.1 million that was initially agreed. This represents an increase to between 339% and 421% of the agreed value of the "work".

65. Saipem and Samsung did not contend on appeal that the increased value of the new equity in PL allocated to the AHG by means of the Work Fees should itself have led to the judge declining to sanction the Plans. However, they did submit that the way in which the Work Fees were dealt with was symptomatic of a general approach under which a disproportionate share of the benefits of the restructuring was conferred upon the providers of the New Money (including members of the AHG) under the Plans. We shall return to that issue in our consideration of Ground 2 below.

The outcome of the meetings of creditors

66. Pursuant to the order of Marcus Smith J made at the convening hearing, seven separate meetings were convened in respect of the PL Plan, and five separate meetings were convened in respect of the PIUL Plan. ***1057**

67. These were, in relation to the PL Plan:

(1) The Senior Secured Funded Creditors (apart from those in classes (2) and (3) below). 99 creditors, holding 88.41% of the claims by value, attended. 100% voted in favour.
(2) The Nut Tree funds and the member of the AHG which were to subscribe for CBG Notes. 16 creditors, holding 100% of the claims, attended. 100% voted in favour.
(3) ABN which, constituting 100% of the class, voted in favour.
(4) Argonaut which, constituting 100% of the class, voted in favour.
(5) The Shareholder Claimants. 272 creditors, holding 99.9% of the claims attended. 99.92% of those voted in favour.
(6) Thai Oil, the Director Claimants and the PL Insurance Restitutionary Claimants. All voted against the Plan.
(7) Samsung and Saipem and PSS BV (the joint venture vehicle). All voted against the Plan.

68. In relation to the PIUL Plan, the meetings were:
(1) The Senior Secured Funded Creditors (apart from those in classes (2) and (3) below). 99 creditors, holding 88.41% of the claims by value, attended. 100% voted in favour.
(2) The Nut Tree funds and the member of the AHG who were to subscribe for the CBG Notes. 16 creditors, holding 100% of the claims, attended. 100% voted in favour.
(3) ABN which, constituting 100% of the class, voted in favour.
(4) Argonaut which, constituting 100% of the class, voted in favour.
(5) Thai Oil, Saipem and Samsung and PSS BV. All voted against the Plan.

The issues raised on appeal

69. Saipem and Samsung appeal with the permission of the judge on two grounds:
(1) First, that the judge was wrong to hold that even though Saipem and Samsung will be "worse off" under the Plans, they will not be "worse off" in a way that is relevant for the purposes of the statutory test under section 901G(3).
(2) Second, that the judge was wrong to sanction the Plans because the benefits preserved or generated by the Plans are not being fairly shared between the Plan Creditors.

Ground 1: the "no worse off" test

70. Section 901G(3) of the 2006 Act imposes, as a jurisdictional gateway to the sanction of a plan where there is a dissenting class, a condition (" Condition A ") that, if the plan were to be sanctioned, "none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative."

71. On the basis of the figures explained at §50 above, Saipem and Samsung accept that – if regard is had solely to the amounts they can expect to recover in respect of their debts owed by the Plan Companies – they are likely to be better off under the Plans than in the relevant alternative of the liquidation of the

Group.

72. They contend, however, that in assessing whether they would be "any worse off" under the Plans than in the relevant alternative, the judge should have had regard not only to the direct monetary returns that they would make on their claims against the Plan Companies, but also to any indirect economic benefits which would accrue to them if the Group went into liquidation. In that event, ***1058** Saipem and Samsung would be freed of a competitor and would stand to make substantial profits from future business which would otherwise have been taken by the Group.

73. Saipem's and Samsung's case was that they stood to make profits of approximately US$340 million from such business in the relevant alternative. The judge accepted – without needing to delve into the expert evidence that supported this figure – that the competitive advantage which would accrue to Saipem and Samsung in the event of the liquidation of the Group was self-evidently substantially greater than the very small returns they could expect under the Plans.

74. The judge held, in reliance on a dictum of Trower J in *Re Smile Telecom Holdings Ltd [2021] EWHC 685 (Ch)* at §30 that the "no worse off" test in section 901G(3) was exclusively concerned with the impact of a plan – compared with relevant alternative – on a creditor *in its capacity as a creditor* .

75. The judge then concluded, at §69, that the indirect benefits which Saipem and Samsung would lose if the Plans were sanctioned would have accrued to them in their capacity as creditors:

> "The Saipem and Samsung Opposing Creditors contended that the indirect economic benefits of the Liquidation – namely the dissolution of the Petrofac Group – did arise in

> their capacity as creditors. A joint venture like the Clean Fuels Project is a risk-sharing endeavour, where the potential liabilities are shared amongst the joint venturers. Where the joint venturers are competitors, and one of the joint venturers cannot meet their obligations under the joint venture due to insolvency, at least the solvent joint venturers, who will shoulder additional liabilities, have the benefit of a competitor leaving the market. The Plan undercuts this balanced outcome, by compromising Saipem and Samsung's claims against the Petrofac Group, whilst permitting the Group to stay in business and compete without the burden of the joint venture liabilities. To my mind, it is difficult to say that these consequences are not suffered by Saipem and Samsung as creditors."

76. The judge nevertheless found that Condition A was satisfied, because the indirect benefit that would accrue to Saipem and Samsung if the Group went into liquidation "does fall out of consideration" or (as he put it) was "too remote": see §70. The judge gave four reasons. The first three essentially boiled down to the point that Condition A was a jurisdictional requirement that needed to be "as clear-cut, as binary, as possible", and that although the relative size of the benefits by comparison to the returns under the Plans were clear enough in the instant case, in another case it might be very hard to quantify the indirect economic benefits without a wide-ranging inquiry which would be better undertaken at the discretionary/fairness stage. The fourth reason essentially suggested that if wider economic consequences were to be taken into account so far as Saipem and Samsung were concerned, then the economic consequences of the Petrofac Group's liquidation (e.g. effects on employees and effects on markets) "need to be considered in the round" so as to give full weight to Part 26A 's place in the "rescue culture".

77. For Saipem and Samsung, Mr Thornton KC contended that the judge was wrong to limit the no worse off test to the impact on creditors in their capacity as such. He submitted that the correct test was whether there was a sufficient connection between the benefits that would accrue to the creditor in the relevant

alternative and the underlying debtor-creditor relationship that a plan seeks to compromise. Mr Thornton also submitted that if the judge was right to limit the no worse off test to a consideration of the impact of a plan on a creditor in its capacity as such, then he was wrong to introduce an undefined test of "falling out of consideration" or "remoteness" and was wrong on the facts to conclude that the competitive advantage that would accrue to Saipem and Samsung on the Group's liquidation was too remote to be taken into account. ***1059***

78. For the Plan Companies, Mr Allison KC contended that the judge was right to conclude that Condition A was satisfied, albeit for a different reason. He submitted that the judge had been right to conclude that the no worse off test focuses on the impact on a creditor in its capacity as a creditor of the plan company. However, he contended by way of a respondents' notice, that the judge ought to have held that the indirect benefits of reduced competition in the relevant alternative would not accrue to Saipem and Samsung in their capacity as creditors of the Plan Companies.

Discussion

79. We have no doubt that the judge was correct to find that Condition A was satisfied on the facts of this case, although our reasoning differs from that of the judge. In summary, as explained in this section, the court is required to determine the financial value which a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights which the plan offers in return for the compromise of those existing rights. The scope of that enquiry is primarily concerned with the financial value of rights of the creditor against the plan company, but where a plan compromises or releases other rights of the creditor, it extends to those other rights. In the instant case, the loss of a competitive advantage upon sanction of the Plans is clearly beyond the scope of that test.

80. It is appropriate first to consider the nature of the "no worse off" test.

81. The genesis of the no worse off test is to be found in the law relating to schemes of arrangement under Part 26 of the Companies Act 2006 ("Part 26 "). The explanatory notes to Part 26A stated (at §15) that "the new restructuring plan

procedure is intended to broadly follow the process for approving a scheme of arrangement" and (at §16) that "while there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."

82. In *Re T&N Ltd [2005] 2 B.C.L.C. 488* , at §82, David Richards J explained that in exercising its discretion to sanction a scheme of arrangement under Part 26 , where it was an alternative to a winding-up, the Court was unlikely to sanction a scheme:

> "which was likely to result in creditors, or some of them, receiving less than they would in a winding-up of the company, assuming that the return in a winding-up would, in reality be achieved and within an acceptable time-scale."

83. The same idea appeared in the context of challenges to CVAs on the basis that they were unfairly prejudicial, in the guise of the "vertical comparator" test: see *Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch); [2007] Bus. L.R. 1771* , per Etherton J at §75 to §81.

84. The provisions of Parts 26 and 26A both apply 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": see sections 895(1) and 901(A)(3)(a) respectively. It has also been said that for a compromise or arrangement between a company and its creditors to qualify as a scheme of arrangement under Part 26 , it must be a compromise or arrangement "which deals with their rights *inter se* as debtor and creditor": see *Re Lehman Brothers International (Europe) [2009] EWCA Civ 1161* (" *Lehman Brothers* ") at §65.

85. The comparison required by section 901G(3) is between the outcome for the

creditor under the "compromise or arrangement" and in the relevant alternative. This suggests that, at least as a starting ***1060** point, there should be a correlation between the scope of the no worse off test and the scope of the compromise or arrangement.

86. That is consistent with the approach taken in some of the first cases to come before the courts under Part 26A . In *Re DeepOcean 1 UK Ltd [2021] EWHC 138 (Ch)* at §§34-35 (" *DeepOcean* "), Trower J stated,

> "The primary question for the court when considering what will happen under a restructuring plan and comparing it with what is likely to happen in the relevant alternative, is to look at the likely financial return in each of the alternative eventualities.
>
> Doubtless, the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt. However, the phrase used is "any worse off", which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay."

87. Trower J revisited this question in *Re Smile Telecom Holdings Ltd [2021] EWHC 685 (Ch)* at §30. He said that the no worse off condition,

> "… is concerned with, and only with, those persons in their capacity as members of that class. If they might be worse off in some other capacity as a result of the sanctioning of the plan, that is capable of having an impact on the exercise

> of the court's discretion, but does not of itself mean that condition A is not satisfied."

88. Neither of these cases raised the question of indirect benefits such as those in play on this appeal. That question arose, however, in *Re Great Annual Savings [2023] EWHC 1141 (Ch)* (" *GAS* "). In that case, it was contended by HMRC that Condition A was not satisfied in relation to it. The plan company's response was to contend that the benefits of the plan to HMRC included the future tax revenues which would be collected by HMRC by reason of the fact that the company would continue to trade. Those revenues would be lost if the company was liquidated.

89. Adam Johnson J rejected that argument. His first reason was to point out the fallacy in the proposition that HMRC would collect less tax in the event of the company's liquidation, because the company's employees would be likely to find work elsewhere, and its present counterparties would transact replacement business elsewhere – generating the same tax liabilities. His second reason, however, is of particular relevance to this appeal. At §85 of his judgment, referring to Trower J's comments in *DeepOcean* , Adam Johnson J said:

> "I think the inquiry Trower J had in mind was whether the relevant class of creditors are likely to be any worse off as regards the existing rights the plan seeks to compromise – hence his reference to "the impact of the restructuring plan on all incidents of the liability to the creditor concerned". I accept that is potentially a broad inquiry, but what it seems to involve is a comparison between the financial value which the creditor's existing rights would be likely to produce in the relevant alternative, and the value of the new or modified rights which the proposer of the plan is offering up under the terms of its proposed compromise, in return for

the existing rights being extinguished."

90. The references in each of these dicta to a creditor's *rights* is no accident. In matters that go to jurisdiction under both Part 26 and Part 26A , the focus on *rights* rather than *interests* is fundamental. So, for example, the classes for voting purposes are defined by reference to *rights* that the scheme or ***1061** plan modifies or extinguishes, and not merely to *interests* of the plan creditors that might be affected by the plan: see e.g. *Re Hawk Insurance Co Ltd [2001] 2 B.C.L.C. 480* at §§30-34.

91. Against that background, we agree that the starting point for application of the "no worse off" test is a comparison between the value of the existing rights which a creditor has against the plan company in the relevant alternative, and the value of the new or modified rights given under the plan in exchange for the compromise of those rights.

92. Where a plan compromises or releases only creditors' rights against the plan company, that is also the end point. Where, however, a plan interferes with rights of creditors against third parties, the scope of the no worse off test must extend to such rights.

93. The most common circumstance is where creditors have the benefit of a guarantee from a third party. Where the guarantor would have a right of subrogation or indemnity against the plan company, then the plan can require the creditor to give up its claim against the guarantor to avoid "ricochet" claims being brought against the company by the guarantor. The rationale is that such claims would undermine the essential compromise of the company's liabilities to its creditors. That was clearly explained by Patten LJ in *Lehman Brothers* at §§62-65 where he indicated that the rights which can be released or re-organised under a scheme are not limited to those enjoyed by scheme creditors but can include rights against third parties related to and essential for the operation of the scheme.

94. Since the guarantor in such a case is not a party to the scheme or plan and

hence unable to enforce a release contained in it, such releases are conventionally achieved through the appointment under the terms of the scheme or plan of an attorney for the creditors who is authorised to enter into a deed of release of the creditors' rights against the guarantor.

95. Claims against guarantors are obviously closely connected to the debtor-creditor relationship between company and creditor, not least because if the guarantor pays under the guarantee, it will be subrogated to the claims of the creditor. It is also possible for the terms of a plan to go beyond this, and in an appropriate case to require plan creditors to release other types of claims that they might have against a third party. An example canvassed in argument was that if a plan company sought to compromise the claims of the holders of debt instruments, the creditors might bring claims in negligence for the unrecovered balance against the financial advisers who had advised them to acquire the instruments in the first place. The financial advisers might in turn seek a contribution or indemnity from the plan company on the basis that they relied on misleading financial information published by the plan company.

96. Such claims against third parties are difficult to characterise as an incident of the debtor-creditor relationship between plan company and plan creditor. In our judgment, it is nevertheless a relevant consideration – in applying the no worse off test under s.901G(3) – that a creditor is being required by the terms of a plan to release such a claim against a third party, where that claim would be retained in the relevant alternative. Hence, we prefer the test we have set out at 79 above.

97. An approach which focusses on the valuation of rights affected by the plan is also preferable, in our judgment, to some form of remoteness test as adopted by the judge. There is no basis in the wording of the statute for such an approach, and the judge did not explain how a concept of remoteness would be applied to decide what would fall "in" for consideration and what would fall "out".

98. We do, however, agree with the judge that any broader prejudice that a creditor contends it would suffer as a consequence of a plan being sanctioned which is not encompassed in the valuation of its rights, goes to the issue of discretion.

99. Mr Thornton accepted that a creditor who happened to operate in the same

market as the insolvent debtor could not claim to be worse off under a plan because of the loss of a competitive advantage that would accrue to it merely by the insolvent debtor ceasing to operate in the same market. ***1062** He said, however, that the judge was correct to find that the special circumstance that Saipem and Samsung were in a joint venture with the Plan Companies in relation to the Clean Fuels Project made all the difference.

100. The reason advanced by the judge, at §69, as to why this was a consequence suffered by Saipem and Samsung in their capacity as creditors was because the joint venture between them and the Plan Companies provided what the judge described as "a balanced outcome" between (1) the detriment that on the liquidation of one of the joint venturers, the others would be liable for the failed company's share of the liabilities to Thai Oil and (2) the advantage that in that event the others would have the benefit of the failed company leaving the market. The judge said that the Plans undercut that balanced outcome by compromising Saipem and Samsung's claims against the Plan Companies, but permitting the Plan Companies to stay in business and compete without the burden of the joint venture liabilities.

101. That approach, however, appears to us to do no more than describe the commercial position and interests that Saipem and Samsung would have as joint venturers and competitors if the Plans were not sanctioned, and those that they would have if the Plans were sanctioned. Whilst the judge correctly identified the adverse effect that the Plans would have on Saipem and Samsung's rights to seek contribution from the Plan Companies in relation to the Thai Oil joint venture, the other aspect of his "balanced outcome" was not referrable to any rights that Saipem and Samsung had that would be required to be compromised under the Plans. Specifically, in spite of being challenged to do so in argument, Mr Thornton could not point to any rights that Saipem or Samsung had under the joint venture (or otherwise) to compel the Plan Companies to cease trading in competition with them in any particular situation.

102. We therefore dismiss the appeal on Ground 1.

Ground 2: fairness and discretion

103. The headline complaint of Saipem and Samsung under Ground 2 is that the

benefits of the Plans are not being fairly shared with them. They contend that the judge did not approach the question of fairness in the right way and that he based his exercise of discretion to sanction the Plans on a number of errors of principle and fact.

104. The main objection of Saipem and Samsung in this respect centres on the allocation of equity in the restructured Group in return for the provision of New Money. They contend that the benefits preserved or generated by the Plans were largely the result of the compromise of the secured and unsecured claims against the Plan Companies, and were reflected in a very substantially increased value of the equity in PL as parent of the restructured Group. However, a disproportionate majority of that equity was allocated under the Plans in return for the provision of New Money rather than to the creditors whose claims were compromised.

105. Saipem and Samsung contend that the judge wrongly thought that this was a fair allocation of the benefits of the restructuring because he wrongly thought that the New Money was high risk and that the return to the providers of the New Money was "competitive". They say that, properly understood, the New Money is not high risk because it will be provided to a profitable Group which will be relieved of its debt burden by the Plans, and the evidence does not in fact show that the terms for the provision of the New Money are the result of any competitive testing of the market for such finance. ***1063**

The fair allocation of the benefits of the restructuring

106. This is the third case under Part 26A to come before the Court of Appeal. The other two were *Re AGPS Bondco Plc [2024] EWCA Civ 24 (commonly referred to as "Adler")* and, more recently, *Kington SARL v Thames Water Utilities Holdings Ltd [2025] EWCA Civ 475* (" *Thames Water* ").

107. *Thames Water* emphasised (at §94) that Part 26A is a developing jurisdiction, in which the approach to be adopted to sanctioning a plan is to be developed on a case-by-case basis. There are, however, several common themes that have been identified. The most relevant to the instant case is what has been called "the fair allocation of the benefits preserved or generated by the

restructuring".

108. That concept can be traced back to the judgments of Trower J in *DeepOcean* at §63 and Zacaroli J in *Re Houst Ltd [2023] 1 B.C.L.C. 729* (" *Houst* ") at §29. In *Adler* , after referring to those judgments, and making the point that satisfaction of the "no worse off" test in section 901G(3) is a necessary, but not sufficient, condition for the exercise of the cross-class cram down power, Snowden LJ said this at §§160-161,

> "160. … As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.
>
> 161. It is this concept that has been encapsulated in the expression "the fair distribution of the benefits of the restructuring" or "fair distribution of the restructuring surplus": see *DeepOcean* and *Houst* (above). To similar effect, in the paper referred to in *Houst* at §30, Professor Sarah Paterson adopted a dictum of Mann J in the scheme case of *Bluebrook Ltd [2009] EWHC 2114 (Ch)* at §49 and suggested that the essential question for the court is whether any class of creditor is getting "too good a deal (too much unfair value)"."

109. As Snowden LJ pointed out at §§162-163, *Adler* was a relatively straightforward case in terms of carrying out the inquiry into the fair allocation of the benefits of the restructuring, because all of the plan creditors would have been unsecured and would have ranked equally in the relevant alternative of a formal insolvency. The plan in *Adler* also did not envisage a continuation of the business of the group as a going concern but was simply designed to achieve a more advantageous realisation and distribution of the assets in a wind-down process controlled by the management than would have been the case in a formal insolvency. Snowden LJ noted that the inquiry might be more difficult where plan creditors had different priority rankings of secured and unsecured debts, or where the plan envisaged a complex restructuring of debts in order to continue trading.

110. Two of the issues that have been raised in such cases include the extent to which a class of creditors which would be "out of the money" in the relevant alternative should be entitled to share in the distribution of the benefits of the restructuring, and the extent to which a plan can reward the providers of new money.

Treatment of out of the money creditors

111. As the Court of Appeal noted in *Thames Water* at §112, the treatment of creditors who would have been out of the money in the relevant alternative was not directly in issue in *Adler* , where all of ***1064** the plan creditors would have ranked *pari passu* in a distribution of assets in the relevant alternative. But it was addressed in *Thames Water* , albeit in the context of a plan with limited scope.

112. The plan in *Thames Water* sought only to provide the company with breathing space (or a "bridge") to enable to it to formulate a full-scale restructuring of its debt. This was achieved by extending the maturity date of its financial indebtedness. The relevant alternative was a special administration regime, in which a special administrator would likely have sought to impose a similar bridge, while seeking either to rescue the company as a going concern via a restructuring of its debt, or sell the business and assets as a going concern.

113. The position of the out of the money creditors was raised and addressed by the Court in response to an argument advanced by counsel for the plan company

that was summarised at §§124-125 as follows,

> ”124. [Mr Smith KC, counsel for the plan company] maintained that a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness the fact that out of the money creditors get nothing at all counts for nothing…
>
> 125. Mr Smith accepted, in light of the comments of this Court in *Adler* as to the need for give and take in respect of any creditor whose rights were compromised by a plan, that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but submitted that this need be no more than *de minimis* . He maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such *de minimis* consideration. He submitted that we are bound to reach this conclusion because of this Court's approval, in *Adler* , of Snowden J's decision in *Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch)* (" *Virgin Active* ")."

114. The Court of Appeal in *Thames Water* squarely rejected that submission. The Court not only held, at §140, that it was no part of the ratio of *Adler* to endorse the aspects of *Virgin Active* upon which the plan company had relied, but it also expressly disapproved those aspects and explained why the plan company's argument was not right as a matter of principle.

115. At §133 the Court of Appeal referred to the particular statement in *Virgin Active* at §266 upon which reliance had been placed, and continued, at §134,

> ”If that is taken to mean that the Court cannot take account of the treatment of out of the money creditors in considering the fair distribution of the benefits preserved or generated by a plan, simply because they would be out of the money in the relevant alternative, then – for the reasons developed below – we disagree with it.”

116. The Court of Appeal then set out its reasoning at §§142-148 and concluded, at §149, as follows:

> ”As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved ***1065** or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly.”

117. That was a clear rejection of the argument based upon *Virgin Active* . It should also not be read as an indication that in most cases an out of the money class can fairly be excluded from the benefits of a restructuring and need only be given a *de minimis* amount necessary to satisfy the jurisdictional requirement

that the plan should amount to a "compromise or arrangement".

The provision of new money

118. The continuation of a business as a going concern will often depend upon the company being able to access new funding. From first principles, new money which is made available to a post-restructured company can be analysed in various ways, depending on the circumstances. In some cases, the purpose of the restructuring is to remove sufficient of the company's debt burden, so that it is better able to access new funding at more advantageous rates in the market. In such a case, the new money does not in itself form part of the plan.

119. In other cases, such as the instant case, the restructuring itself includes new money being committed so that it is available to the restructured company immediately following sanction of the plan. If the new money is provided from independent third parties following a competitive process in the market, then the proper analysis is that the returns for the providers of new money are simply a cost of the restructuring. It is also well established that those providing new money to facilitate a plan in such circumstances should be entitled to receive full repayment of that money under a plan in priority to pre-existing plan creditors: see *Adler* at §168.

120. A similar analysis applies, in our view, where existing creditors of the company are invited to participate in lending the new money. If the returns to such creditors are equivalent to what it would cost the company to obtain the funding in the market, the provision of new money should be regarded primarily as a cost of, as opposed to part of the benefit arising from, the restructuring.

121. If, however, the returns offered to those providing new money are such that it costs materially in excess of that which could be obtained in the market, and existing creditors are invited to participate in the new money, then the excess cost is better analysed as a benefit conferred by the restructuring.

122. Since it is the plan company that seeks the exercise of the Court's discretion under section 901G , the burden of showing that the returns on new money are either equivalent to that which could be obtained in the market (and

hence not a benefit of the restructuring), or justifying the fair allocation of those benefits must rest with the plan company.

123. That analysis is consistent with the comments of Snowden LJ in *Adler* at §169 in relation to the possibility that returns on new money might be structured by way of an elevated return on plan creditors' existing claims:

> "It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money." ***1066**

124. Mr Allison accepted that in a case where there was "egregiously priced money" the fact that it was offered to all would not be enough to save the plan. He submitted, however, that there would need to be careful consideration of whether certain creditors had reasons why they could not participate.

The Plan Companies' arguments

125. Against this background, Mr Allison submitted that three key principles could be distilled from the authorities.

126. First, he submitted that the "obvious reference point" for assessing the fairness of a plan is the treatment of creditors in the relevant alternative. This is undoubtedly correct. But it is only a starting point. The fairness of the treatment of dissenting classes of creditors under a plan requires more than simply deciding whether they would be out of the money in the relevant alternative.

127. Mr Allison sought to bolster this proposition by reference to *Virgin Active* . However, as we have explained, insofar as that case addressed the position of out of the money creditors as a matter of principle, it must be read in light of *Thames*

Water , particularly at §134. It is also relevant to note that *Virgin Active* was one of the earliest decisions in this developing area. The complexities involved in the exercise of the cross-class cram down power have become more apparent in the numerous cases decided since then.

128. To that end, we should explain further why we do not accept the basic premise of the argument, recorded in §124 of *Thames Water* , and in essence sought to be resurrected by Mr Allison, that "a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan". That assertion - and its corollary that the creditors who would be "in the money" in the relevant alternative are the economic owners of the business and entitled for that reason alone to all of the benefits created by a plan – contains a *non sequitur* , the fallacy of which is readily apparent on the facts of the instant case.

129. In many cases, such as the instant case, the relevant alternative is an insolvent liquidation of the plan company. In that scenario the plan company would be unable to pay its debts to its creditors and would be forced to cease to trade. The business of the company as a going concern would be lost, and neither it, nor its value, would be realised for the benefit of, or belong to, any group of creditors.

130. In these circumstances, absent recourse to Part 26 or Part 26A , if a class of creditors who would expect to receive a distribution from the realisation of assets in the liquidation wished to obtain the additional benefit of the preservation of the company itself and the value of its business as a going concern, free of the claims of the other creditors, they would have to negotiate with the company and with the classes of out of the money creditors for the latter to give up their claims. That would inevitably require a genuine commercial compromise by all parties.

131. Prior to the enactment of Part 26A , a scheme of arrangement under Part 26 provided a means by which such a negotiated deal could be implemented without having to get unanimity among all affected creditors. But the terms of the deal would have to be good enough to attract a sufficient assenting majority in each of the classes of creditors, including those who would have been out of the money in the liquidation alternative. As was made clear by the legislative history to

which reference was made in *Adler* at §259 to §270, the primary purpose of the introduction of the cross-class cram down power under Part 26A was to allow the court, in an appropriate case, to override the absence of assent in each class and thereby to prevent any one or more classes of creditors from exercising an unjustified right of veto. The cross-class cram down power was not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring. ***1067*** The Court's discretion to *refuse* to sanction a plan would in such circumstances clearly be engaged (c.f. the Explanatory Notes to Part 26A , at §192, where it is pointed out that the Court may refuse to sanction a plan, even if the section 901G conditions are met, if it would not be just and equitable to do so).

132. Mr Allison's second submission was that the fairness of a plan will be assessed by reference to its purpose, citing *Thames Water* at §§117-118, §149 and §153. Specifically, he submitted that a different approach is justified where the plan is designed merely to provide a "bridge" (as in *Thames Water*) from where it is designed to implement a comprehensive balance sheet restructuring (as in this case).

133. In *Thames Water* , the Court of Appeal relied on the fact that the plan was intended only to provide a bridge as one of the reasons why regard should be had to the position of the out of the money creditors. The Court was careful, however, to say nothing about when it might be appropriate to have regard to their position if the plan had a different purpose, such as a comprehensive balance sheet restructuring.

134. While we agree, therefore, that the purpose of the plan is one of the factors to be taken into account, there is nothing in *Thames Water* which supports the proposition that the impact on the out of the money creditors should carry no or even little weight in the case of a plan designed to implement a comprehensive restructuring of the company's balance sheet.

135. Mr Allison's third submission was that if the plan company requires an injection of new money, then it might be fair for the new money providers to receive an enhanced share of the benefits of the restructuring.

136. We have dealt with the provision of new money as a matter of principle

above. As we have said, we accept that those providing new money to facilitate a restructuring can properly expect to be repaid that money in priority to the existing indebtedness of the company. That also clearly applies to the return on the new money, insofar as that return reflects the price for new money that would be obtainable in a competitive market. But whether, and if so, to what extent, the providers of new money should also be entitled to share – above and beyond market rates for such funding – in the benefits generated by the restructuring is dependent on the facts of each case and is the key issue in this appeal, to which we now turn.

The benefits of the restructuring and the returns on the New Money

137. As the Teneo valuation report makes clear, the value to be preserved or generated by the restructuring of the Group is likely, on the low case, to amount to about US$1.25 billion, i.e. the difference between the day one value of the equity in the restructured Group as a going concern (US$1.5 billion) and the US$250 million that would be realised for the assets of the Group in the relevant alternative of a liquidation.

138. That likely preservation or generation of value is contributed to by the write-off of US$900 million of Senior Secured Funded Debt, the write-off of unsecured debt in an unknown amount but estimated to be in the region of US$3 billion (of which more than US$1.6 billion is assumed to be due to Thai Oil), and the provision of the New Money to the restructured Group.

139. As we have indicated above, the return to all of the Plan Creditors for the write-off of their existing claims against the Plan Companies is equity and cash valued on a low case basis at US$329 million, and (excluding the Backstop Fees and the Work Fees), the providers of US$350 million New Money will be allocated 67.7% of the new equity in the restructured Group, with a value of about US$1 billion. ***1068**

140. There are numerous ways in which this return on the New Money can be presented. In closing argument the Plan Companies provided a table which shows that the overall return upon the investment of all of the New Money (US$350 million), the CBG Facility (US$80 million), and a small amount which it is envisaged will be raised from retail investors and a third party (US$14 million) would be US$939,343.036. That equates to a return of 211.7% on the

sums invested.

141. So far as the participating Senior Secured Funded Creditors are concerned, the table indicates that for an investment of US$187.5 million of New Money, they will receive equity and debt with a value of approximately US$500.2 million. This represents a return of 266.8% (on the likely low case outcome).

142. As Mr Perkins, who explained the table at the hearing of the appeal on behalf of the Plan Companies, acknowledged, this shows a blended return including both the issue of New Money Notes and New Money Equity. The returns identified within the table referable to the former are lower (reflecting the lower risk of debt, particularly secured debt, and the fact that the primary return, a coupon of 9.75%, is not included within the table at all). It follows that the return on the equity investment is significantly higher.

The judge's conclusions on the pricing and risk of the New Money

143. The judge addressed the nature of the pricing and risk attaching to the New Money in a number of places in his judgment, and in the context of a variety of different arguments.

144. He heard evidence from Mr Sousa and from Mr Samuel Read (" Mr Read "), a partner at Mason Capital, a member of the AHG.

145. At §54, in a section of the judgment dealing with the relevant alternative, the judge found the financial position of the Group to be "precarious in the extreme. Not only are there stresses in the upstream (the supply chain to Petrofac), so too are there stresses in the downstream (the markets Petrofac serves)." At this point, the judge appears to have been commenting on the Group in its current, pre-restructuring, state, although his comments about the stresses in the market had broader application.

146. At §56, also dealing with the relevant alternative, the judge addressed the question whether – if the Plans failed – there would likely be an alternative plan in the form of "Plan B", put forward by Saipem and Samsung, which involved –

among other things – a cash payment of US$25 million to them. In this context, the judge made a variety of points. These included a statement that, "This is a high risk restructuring, and the rewards to the providers of New Money are considerable. But I consider this to be reflective of risk, not a gouging of a company that is going bust".

147. The judge did not elaborate further on this statement, but it would seem that a key point for the judge in this section of his analysis, dealing with whether a "Plan B" was a viable alternative, was that some of the providers of New Money had no existing exposure to the Group, so there was nothing – beyond the return they expected to gain – to tie them to the Plans. In this respect the judge also referred to the evidence that further concessions that eroded the returns that the AHG had negotiated under the Plans would not be forthcoming. In evidence, Mr Read, on behalf of the AHG, firmly rejected the proposition that a tweaking of the Plans was possible. That was corroborated by Mr Sousa's evidence. He referred to a letter written by Nut Tree which said that they were not willing to consent to any changes to terms "that would transfer value from them or from their prospective value to other parties." Mr Sousa also said that he did not believe the Plan Companies would be able to obtain the new money required on the basis of the alternative restructuring put forward by Saipem and Samsung. ***1069***

148. At §75, in considering an objection to the Work Fees, the judge noted that although the Work Fees appeared to be high, that was because the AHG had elected to take them in equity rather than cash. The point of the Plans, he said, was that the equity would increase in value if the Group was successful if the Plans was sanctioned. But, he said, "the Plan is not risk-free. It is perfectly possible for the Group to fail, and if it does so, the Work Fee will be rather less than it presently appears."

149. Finally, at §89, in considering the fair allocation of the benefits of the restructuring, the judge addressed directly the justification for the allocation of equity. His conclusions, at §89(i), in relation to those contributing New Money who were not also existing holders of debt are important, and we set them out in full (emphasis in the original):

> "…They have no prior involvement in the Petrofac Group, and the Group does not owe them anything. They have

nothing to claim, and so nothing to lose. They choose to involve themselves by injecting US$226m of New Money: but only if the Plan is sanctioned, and as has been seen, I have accepted that the Plan sits at the very cusp of providing an acceptable return to these investors. I have accepted Mr Sousa's evidence that Plan B would not be accepted by these new investors. The notion that a new investor, choosing to inject US$226m, should thereby receive a "haircut" of 59% is absurd. But this is the substance of the point made by the Saipem and Samsung Opposing Creditors … Obviously these investors must receive a return and – given the risks – that return is going to be substantial. It is not the job of courts to re-write commercial agreements and to impose a price on markets save in the most exceptional of cases. Here, the furthest a court can go, is to say that the reward is disproportionate and so unfair. I decline to reach this conclusion in this instance:

a) This is a significant cash injection (US$226m) into an organisation that would otherwise fail and go into Liquidation. I see nothing disproportionate in a return of 211%.

b) I was impressed by the evidence of Mr Sousa. I am satisfied that this return is a competitive one. This is demonstrated by the fact that even a marginal shift from the Plan to Plan B will result in these investors walking away, and the Relevant Alternative of Liquidation obtaining.

c) The secured creditors had the option of injecting New Money. Some took that option, some did not. If the returns on the injection of New Money were disproportionate in favour of the investor, one would expect greater take up and/or opposition to the Plan."

150. We shall return to this analysis in greater detail after reviewing the evidence. However, we would observe at once that in the body of this paragraph and in sub-paragraph (b), the judge appears to have elided two different questions. The first question was whether the AHG, or the new investors which they had enlisted to provide New Money under the Plans, would have been prepared to agree to a reduction in those agreed terms in order to accommodate an alternative "Plan B" put forward by Saipem and Samsung. That is not the same as the question of whether the terms which had been agreed for the provision of New Money were equivalent to the terms that could have been obtained in the market.

The evidence

151. In assessing whether the returns on the New Money are in excess of those that could be obtained in the market, it is critical to appreciate that the New Money is only being committed conditional upon the sanction of the Plans and completion of the restructuring, and will be invested in the restructured Group. As we will explore in greater detail below, much of the evidence from the Plan Companies seeking to justify the cost of the New Money relied on the difficulties in obtaining ***1070** funding from the market in the very different context of considering alternatives to the proposed Plans, i.e. obtaining funding for the insolvent Group. What matters, however, is what price could be obtained in the market for new debt and/or equity funding in the restructured Group, once it was freed of virtually all of its debt.

152. A reasonable starting point in considering the price at which New Money might be obtained in such circumstances is the value ascribed to the post-restructuring Group by an independent expert. As we have already noted, the valuation report prepared by Teneo ascribes an equity value to the restructured Group of approximately US$1.5 billion to US$1.85 billion.

153. As Mr Allison and Mr Bayfield KC stressed, there is no absolute correlation between the enterprise or equity valuation of the Group and the price at which investors in the market may be prepared to invest in debt or equity issued by the Group. Investors will have regard to other factors such as their own perception of the risks facing the Group's business and wider market conditions. It is, however, an obvious starting point, particularly where – as here – the

valuation is presented to Plan Creditors as a justification for why they should approve the Plan, and the New Money Debt and New Money Equity is to be listed and hence represents immediately realisable value in the hands of the investors upon implementation of the Plan.

154. The Explanatory Statement (at page 191) presented the valuation as “an assessment of the enterprise value of the Group as at a valuation date of 9 January 2025, on the basis that the Restructuring is implemented and the Group’s business is able to continue operating in accordance with the Business Plan”. The Explanatory Statement then provided an analysis of the recoveries of Plan Creditors in liquidation “compared with the value of the Entitlements of Plan Creditors in the Restructuring (on the basis of the Going Concern Valuation)”. This assumed, among other things, that the Tranche 1 Warrants (but not the Tranche 2 Warrants) become exercisable “which is consistent with the conclusions of the Going Concern Valuation”.

155. The boards of the Plan Companies recommended to Plan Creditors (at page 129 of the Explanatory Statement) that they vote in favour of the Plan because the benefits to the Plan Companies will in turn benefit the Plan Creditors “not least as they are expected to be no worse off with respect to their recoveries” if the Plans were sanctioned.

156. The Explanatory Statement contained, as is usual, a detailed list of risk factors (at part 7). Nowhere in the Explanatory Statement is it suggested, however, that the risks of the business failing are such that, notwithstanding the Group is relieved of virtually all of its debt (totalling nearly US$4 billion), there is any real or significant risk that Plan Creditors will not do better under the Plans than under the relevant alternative. That, however, is so only if the equity value of the restructured Group is at, or at least not much less then, the likely low value ascribed to it in the valuation report.

157. As Mr Colclough, who presented this part of the case on behalf of Saipem and Samsung, submitted, if the New Money Equity and New Money Debt were as risky as the Plan Companies now contend, then the picture as presented to Plan Creditors in the Explanatory Statement was at best incomplete and at worst misleading.

158. Mr Allison relied on numerous passages in the Explanatory Statement, and in the evidence of Mr Sousa, which he said highlighted the risky nature of the Group's business.

159. He submitted that the business is a "contract business", without significant property (including intellectual property) assets. Mr Sousa's evidence was that it relies on contracts and its relationship with clients in its core geographies to succeed and survive. In Teneo's report on the relevant alternative, Thai Oil is given as an example of a contract going badly wrong, with liabilities that present an "existential threat" to the Group's viability as a going concern. The Explanatory Statement stated that ***1071** should any of the Group's relatively small number of contracts prove less profitable than forecast, that could have a significant adverse impact on the Group's profitability.

160. Mr Allison also pointed to passages in the Explanatory Statement referring to specific geopolitical risks in the Middle East and North Africa region, which accounted for 26% of the Group's consolidated revenues for the year ended 31 December 2023. Some of the countries in that area have experienced prolonged periods of political, social and economic upheaval. If such disturbances were to occur or escalate in countries in which the Group operates, that may have a material adverse effect on the Group's business and financial position. These factors underscore the vulnerabilities inherent in operating within volatile geopolitical landscapes.

161. The difficulty with this submission is that all of these risk factors were taken into account in the Teneo valuation report. It is correct, as Mr Allison submitted, that Teneo identified a number of assumptions which underpinned their discounted cashflow analysis, and that these included significant growth in the business, and that management anticipated the Group E&C segment would generate more than 80% of its revenue from unsecured contracts by 2027 (albeit that one-third of this was already committed under a framework agreement with one client, TenneT). Mr Allison also pointed to the "Limiting Conditions" set out at page 28 of the valuation report, in which Teneo stated their assumptions that management's forecasts are reasonable and achievable subject to the successful implementation of the restructuring (although they also noted that if the Group tracked to its financial forecast in the business plan, its future cash flows would be further de-risked supporting a higher valuation).

162. However, on the following page 29 of the valuation report, Teneo stated:

> ”throughout our discussions and our review of the Business Plan, we have identified and documented the key risks associated with the forecasts, which are then reflected in our assessment of the discount rate estimates and sensitivity analysis as part of the income approach (DCF analysis) and in our selection of the multiple range as part of the market approach corroboration.”

163. At page 30 of the report, the following also appeared:

> ”WACC: Our concluded WACC range of 21.0% to 24.0% reflects the execution risk in the Business Plan that is predicated on the Group’s ability to secure guarantee lines. It also captures the potential risks of operating as a high-growth business with a significant proportion of unsecured contracts over the forecast period. It further captures the customer concentration risk with ADNOC and TenneT representing c.70% of the total E&C revenue over the forecast period.”

164. In short, as would be expected of competent valuers, the key risks associated with the Group’s business, and its ability to meet its forecasts and business plan, were taken into account by Teneo in arriving at its conclusions on valuation. Notwithstanding those risks, Teneo concluded that the Group would have a post-restructuring equity value of approximately US$1.5 billion to US$1.85 billion.

165. Although, as we have noted, there is no absolute correlation between an independent expert's conclusion as to the equity value of the Group and the price at which investors in the market might be prepared to invest in return for debt or equity, the fact that Teneo has arrived at such a large valuation in this case is, at the very least, something which calls for an explanation, rooted in credible evidence, as to why the Plans should give what appears to be an immediate three-fold or even higher return on the New Money.

166. The most obvious way of demonstrating this would be evidence from a market expert as to the range of prices that debt or equity might have been obtained by the restructured Group. The Plan Companies, however, adduced no such evidence. ***1072**

167. Another way would be evidence of market testing. The Plan Companies' evidence of the steps taken to raise finance is found mainly in Mr Sousa's witness statements, supplemented in part by Mr Read's evidence. Mr Allison and Mr Bayfield between them took us to the parts of that evidence which they contended addressed this issue.

168. Although Mr Sousa refers to the extensive negotiations with the New Money providers, to his belief that they pushed these providers "as far as we could", to "the challenges we have faced in getting funding" (see for example §10.12 of his first witness statement), and (in cross-examination) to his belief that the new debt and equity had some considerable risk to them, he did not give any evidence – at least any sufficiently clear evidence – that the Group or its advisors carried out any market testing to ascertain at what cost the Group was likely to be able to raise funds in the market, once its balance sheet was cleansed of all debt pursuant to the restructuring.

169. In his first witness statement (at §2.38) Mr Sousa describes the efforts made in the twelve months following December 2023 to explore "potential balance sheet and operational solutions … including new financing". While these were not limited to a potential sale of the Group or parts of it, but included provision of new money (see §6.1 of Mr Sousa's fourth statement), it is clear that these were *not* addressing the question of investing in the post-restructured Group. That is evident, for example, from §2.31.3 where – in explaining why such offers of equity investment that were made could not be taken forward – Mr Sousa said "each expression of interest that we received was conditional on a comprehensive restructuring to deleverage the balance sheet and remove

impediments to equity value, such as by effecting a compromise of the Shareholder Claims".

170. Mr Sousa also exhibited to his fourth statement Powerpoint slides summarising the work of an investment bank (Lazard) engaged by the Group. Nothing in these, however, demonstrates any attempt to ascertain at what price investment in the restructured Group might be obtained. Lazard's engagement was stated to be in relation to a potential sale of all or substantially of PL and potential equity capital raising options.

171. At §2.33 of his first statement, Mr Sousa outlined the difficulties encountered by the Group based on feedback from potential investors and advisors. These included the number of historical liabilities, which meant that parties that expressed any interest in the Group were only prepared to consider it on the basis that there was considerable deleveraging. At §10.15.2, in a part of his statement explaining the challenges in attracting investment, Mr Sousa referred to an attempt at a further capital raise being thwarted for the reasons he had referred to in §2.33. Mr Sousa returned to this in his fourth statement where, at §6.4, he referred to the extensive outreach process undertaken by three investment banks, including Lazard, seeking "every form of investment". Again, however, one of the reasons given for such offers as were received in this process being unacceptable was that they were conditional on the completion of the restructuring. It is apparent from this that the Group were *not* seeking to test the market for investing in the post-restructured Group. Similarly, at §2.43, Mr Sousa refers to the lack of interest from its consortium of 21 banks, because the Group's balance sheet was heavily leveraged.

172. In other parts of his evidence, Mr Sousa emphasised that there had been hard-fought negotiations with the AHG, and with Nut Tree, over the terms on which the New Money would be invested. No doubt the members of the AHG were focused on obtaining the best value they could from the restructuring. It is also clear from Mr Read's evidence (see §50 of his witness statement) that he viewed the restructuring as founded on the principle that the Senior Secured Funded Creditors, who alone stood to obtain any material recovery in the relevant alternative, were converting their claims to equity and being incentivised to participate in the New Money by being offered attractive potential recoveries. Mr Read said, ***1073***

> ”From my perspective, it would make little commercial sense to allocate more value to unsecured creditors like Saipem and Samsung, who would receive no or *de minimis* recoveries under the Relevant Alternative and who are contributing no new financing or support of the Group as part of the Restructuring.”

That evidence has clear echoes of the mistaken approach to out of the money creditors that was rejected in *Thames Water* (above). However, it does not go far, if at all, in demonstrating what terms could be obtained for new financing in the market by the restructured Group, with a clean balance sheet shorn of all liabilities.

173. The same observation can be made in respect of the evidence from Mr Sousa and Mr Read that Nut Tree, when asked for its views on the alternative plans put forward by Saipem and Samsung after the Plans had been proposed, insisted that it would not countenance any modification of the deal it had negotiated in December 2024. Nut Tree was well placed to take a hard line in negotiations, since – by reason of the low price at which it had acquired its investment in the Senior Secured Funded Debt – it stood to make at least some profit even if the Plans failed. This provides no insight into the terms on which new money might have been obtained in the market.

174. The Plan Companies also relied on the fact that not all Senior Secured Funded Creditors were willing to participate (as confirmed by the evidence of Mr Read, in particular). They ask, rhetorically, if the return on the New Money was so disproportionately high, why did they not all participate? That is a legitimate point. It only goes so far, however, when set against the fact that nothing is known as to the reasons why the relevant secured creditors chose not to participate.

175. Mr Read (at §36 of his statement) gave his opinion why he considered “some investors may not be prepared to participate in the New Money”, emphasising the risks to the Group going forward, including the fact that the operational re-organisation which is an integral aspect of the restructuring would not be completed for some time. This speculation does not fill the evidential gap

as to why those who did not take up the opportunity did not do so. We have also already observed that these risks were factored into the equity valuation by Teneo.

176. Mr Sousa did provide some evidence of the reason why two of the five members of the AHG did not participate in the Backstop Agreement. At §10.27.2 of his first statement he said this was because of the "Group's difficulty in attracting new capital and building consensus between its many and varied stakeholders". While this may be relevant to the additional risk which is assumed by someone backstopping the equity raise at an early stage in the process, it is difficult to see why either of these factors would have an impact on the price at which investment could be obtained by the restructured Group.

Discussion

177. With that evidence in mind, we turn to the judge's reasons for dismissing the objections based on the price of the New Money. There are two key passages in his judgment.

178. The first is at §89(i), where the judge said that "obviously" the providers of New Money who were not existing creditors of the Group "must receive a return and - given the risks - that return is going to be substantial". He then expanded upon that at §89(i)(a) (quoted at §150 above), where he said that such creditors were making a cash injection of US$226 million "into an organisation that would otherwise fail and go into liquidation. I see nothing disproportionate in a return of 211%". This, in our judgment, addresses the wrong question, focussing as it does on the pre-restructuring risks faced by the Group. As we have noted at §152 above, the correct question is the cost at which new money could be raised by the Group on day one *after* the restructuring and *conditional upon* the ***1074** sanction of the Plans which would remove the existing liabilities from the Plan Companies' balance sheets and hence avoid liquidation.

179. The second is at §56(i), where the judge said that the rewards for the New Money were "considerable", but he considered this to be reflective of risk. That, too, appears to make the same error. The judge began the paragraph with the comment that "this is a high-risk restructuring". We do not think the judge intended by this to refer to the riskiness of the business, and thus investments by

way of the New Money, post-restructuring. Neither that, nor his assessment at §54 – that the financial position of the Petrofac Group was "precarious in the extreme" – would make sense in relation to the post-restructured Group: the latter, in particular, is not a description which could be applied to the Group once cleansed of all its liabilities.

180. For the reasons we have set out above, we consider that Teneo's equity valuation of the restructured Group is an important factor in considering whether the price of the New Money was excessive. It begged an obvious question, one which required cogent evidence – either by way of expert evidence or by evidence of the market having been tested – to explain why allocating the lion's share (approximately US$1 billion on the low case) of the value preserved or realised by the restructuring (approximately US$1.25 billion, also on the low case) to the providers of New Money was a fair reflection of the cost at which funding could be obtained in the market.

181. This is not, however, an analysis which the judge undertook. He made no reference to Teneo's equity valuation of the restructured Group. Its relevance was not factored into his consideration. Specifically, he did not consider whether the question it begged was answered by any evidence as to the price at which new money might have been raised by the restructured Group in the market.

182. Mr Allison pointed to the fact that Saipem and Samsung did not themselves provide any evidence to challenge the Plan Companies' evidence that they believed the New Money had been procured on the best terms available. He referred to *Thames Water* (at §208) where this Court took into account, against the opposing creditors, the absence of any evidence as to what terms super senior funding could have been obtained in the market "without which the assertion that the costs associated with the [funding] are excessive compared with what could be obtained remains speculation."

183. As we have said, the burden of establishing that a plan is fair, so as to justify the exercise of the Court's discretion to sanction a plan notwithstanding the presence of a dissenting class or classes, rests squarely on the plan company. Whether it has discharged that burden is a question of fact to be determined on the specific facts of the case. Where, as here, the Plan Companies' own evidence in the form of the valuation of the equity in the restructured Group begs clear

questions, then there is a burden on the Plan Companies to provide evidence to meet those questions.

184. In addition to these points, it is also revealing to stand back, as Mr Thornton and Mr Colclough urged us to do, and to look at the wider picture. The Plans were negotiated between the AHG and the Plan Companies in 2024. The terms by which over two-thirds of the new equity in the Group was to be provided to the providers of New Money, including Nut Tree, and to members of the AHG by way of Work Fees, were agreed in December 2024 before Teneo's valuation report was available. The basis for that agreement was described in the passage at §6.3 of the Explanatory Statement (and reflected in Mr Sousa's evidence), addressing how the equity allocation for the Work Fees was initially arrived at using a notional post-restructuring equity valuation of US$351 million:

> ”As the Going Concern Valuation was still in the process of being prepared at the date of the Practice Statement Letter, the US$351 million post-Restructuring equity value was not intended to represent the post-Restructuring equity valuation of the Group. Rather, it was used as a ***1075** common reference point, reflecting the price at which the various new investors were willing to acquire new equity and a reference to which new equity allocations could be calculated. “ (emphasis added)

185. The clear impression given by this passage is that the allocations of new equity to the providers of New Money were set in stone by late December 2024, before Teneo's valuation report was prepared, and there was no evidence that they were revisited thereafter. Instead, the Plans were persisted in, even though, on the basis of Teneo's subsequent equity valuation report, the equity rights to be conferred on the AHG for Work Fees and the providers of New Money turned out to be significantly more valuable than they would have appeared in the context of the notional equity value used to calculate their allocations of equity in December 2024.

186. This is significant. Keeping the same allocation of equity entitlements as between existing creditors, even when it later transpires that the valuation of the restructured company is substantially higher, might not be of such concern because it could be said that what matters is the entitlement of such creditors *relative to each other* . That is not so, however, where the increase in the valuation results in an increase in the value of the rights granted to the providers of new money in absolute terms. That is because these fall to be benchmarked against the market, and not measured against the entitlements of other stakeholders. If – as the evidence here suggests – the increase is such that the price becomes disproportionate to the price at which equivalent finance could have been obtained in the market, then for the reasons that we have explained, it becomes a benefit, not a cost, of the restructuring, which needs to be specifically justified. These matters cried out for an explanation in the instant case, but none was given, the Plan Companies called no expert evidence as to market terms, and their evidence of market testing was wholly inadequate for the reasons given above.

187. In these circumstances, we consider that the judge's key statements that the New Money was provided on "competitive" terms that were not disproportionate cannot stand. Given the fact that the issue of equity in return for New Money represented the allocation of over two-thirds of the value preserved or generated by the restructuring, this was plainly a material error that vitiated the judge's exercise of discretion to sanction the Plans against the dissent of Saipem and Samsung. The judge also did not then go on to consider whether such allocation of the benefits of the restructuring was fair or justified on the correct basis.

188. It is not an answer to these objections to say that Saipem and Samsung were (belatedly) offered an opportunity, in relation to Samsung's claim against PIUL, to participate in the New Money on the same terms. This might have been a commercial solution to prevent objections being pursued by Saipem and Samsung, but it does not answer the underlying problems we have identified. Moreover, as Mr Allison explained in argument, this was offered within the PIUL Plan, where Samsung has a claim of around US$90 million and was not offered in respect of the much larger claims compromised under the PL Plan.

189. It is also not clear to us that the unfairness inherent in the fact that providers of New Money are being given an excessive return is cured by offering the same opportunity to all creditors, but only at a further cost to them. There may be many and varied reasons why creditors are not prepared to make the

further investment required in order to participate in that opportunity (irrespective of whether they are *unable* to do so, which Mr Allison accepted would be a relevant consideration). The fact that they do not wish to do so may well not be a reason for depriving them of a share in the benefits of the restructuring to which they would otherwise be entitled. We did not hear full argument on this point, and we do not need to resolve it in view of our earlier conclusions. ***1076***

190. Having determined to set aside the judge's exercise of discretion, the question arises whether it is appropriate for us to re-exercise the discretion. We do not, however, consider that it is appropriate to do so on the basis of the evidence before us.

191. As we have observed (see above at §131), the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders. Our conclusion that the Plan Companies have failed to justify the returns granted in respect of the New Money as a cost of the restructuring means that the formulation of the Plans – and such negotiation as there may have been between the different classes of creditors – has taken place on a false premise. It has failed to address at all the appropriate allocation of such part of the return on the New Money that constitutes a benefit generated by the restructuring. Moreover, the absence of evidence as to the price at which equivalent funding for the restructured Group could have been obtained in the market means that we could only speculate as to what part of the return on the New Money should be regarded as a benefit of the restructuring, the fair allocation of which falls to be considered.

Other objections to the sanction of the Plans

192. Mr Thornton raised further objections to the sanction of the Plans under Ground 2. These related mainly to alleged unfairness as between the treatment of Saipem and Samsung on the one hand and other creditors who sit equally with, or below, them in the capital structure. He referred specifically to HSBC, to HMRC and to liabilities in respect of a different project carried out by the Group with a Lithuanian company. He also referred to the Plan Companies' failure to

engage with the offers made by Saipem and Samsung.

193. Our conclusion on the principal objection raised by Saipem and Samsung to the Plans under Ground 2 means that it is unnecessary to consider these other objections. We need say no more than that, had these objections stood alone, we would not have been persuaded to interfere with the judge's exercise of discretion to sanction the Plans.

Conclusion

194. For the reasons set out above, we will allow the appeal on Ground 2 and set aside the judge's order sanctioning the Plans.

(Appeal allowed) ***1077**

Faculty

Hon. Justice Jalil Asif KC is a judge of the Grand Court of the Cayman Islands, appointed in 2024. Called to the Bar of England & Wales (Lincoln's Inn) in 1988 and subsequently to the Bars of the Eastern Caribbean Supreme Court (2012), the Cayman Islands (2014) and Belize (2023), he brings decades of advocacy and judicial experience. Justice Asif served as recorder on the Midland Circuit (2005-16), was appointed Queen's Counsel in 2010, and was elected a Bencher of Lincoln's Inn the same year. Prior to becoming a judge, he practiced at leading chambers in London (2 Crown Office Row and Four New Square) before joining Kobre & Kim as a partner in both the U.K. and Cayman firms (2011-23). A member of the Chartered Institute of Arbitrators, Justice Asif has contributed to and edited major legal texts, including the *Professional Negligence Law Reports* (Sweet & Maxwell), *Law of Medicines* (OUP) and *APIL Clinical Negligence* (Jordans). He received his B.A. with honors in 1987 and his M.A. in 1991 from the University of Cambridge.

Hon. Bruce A. Harwood is a retired U.S. Bankruptcy Judge for the District of New Hampshire in Concord, appointed to the bench in March 2013, and currently resides in San Francisco. He also served as Chief Bankruptcy Judge prior to his retirement from the bench, and he served on the First Circuit's Bankruptcy Appellate Panel. Prior to his appointment to the bench, Judge Harwood chaired the Bankruptcy, Insolvency and Creditors' Rights Group at Sheehan Phinney Bass + Green in Manchester, N.H., representing business debtors, asset-purchasers, secured and unsecured creditors, creditors' committees, trustees in bankruptcy, and insurance and banking regulators in connection with the rehabilitation and liquidation of insolvent insurers and trust companies. He was a chapter 7 panel trustee in the District of New Hampshire and mediated insolvency-related disputes. Judge Harwood is ABI's President. He previously served as ABI's Secretary and Vice President-Communication, Information & Technology, as co-chair of ABI's Commercial Fraud Committee, as program co-chair and judicial chair of ABI's Northeast Bankruptcy Conference, and as Northeast Regional Chair of the ABI Endowment Fund's Development Committee. He also served on ABI's Civility Task Force. Judge Harwood is a Fellow in the American College of Bankruptcy and was consistently recognized in the bankruptcy law section of *The Best Lawyers in America*, in *New England SuperLawyers* and by *Chambers USA*. He received his B.A. from Northwestern University and his J.D. from Washington University School of Law.

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. He previously was a member of the Business, Finance & Restructuring Group of Weil, Gotshal & Manges LLP and focused on representations ranging from top global corporations in mega-restructurings to middle-market debtor and creditor representations. Judge Lopez lectures across the country on bankruptcy issues. He also serves as an adjunct professor at Thurgood Marshall School of Law. Judge Lopez currently serves as a council member of the State Bar of Texas's Bankruptcy Law Section, an advisor to the State Bar of Texas Young Lawyers Committee, a member of the Nominations Committee for the National Conference of Bankruptcy Judges, and a member of the National Bankruptcy Conference. He received his B.A. in psychology in 1996 from the University of Houston, his M.A. in religion in 1999 from Yale Divinity School and his J.D. from the University of Texas School of Law in 2003.

Hon. Robert A. Mark is a U.S. Bankruptcy Judge for the Southern District of Florida in Miami, appointed in 1990, and he served as Chief Judge from 1999-2006. Prior to his appointment to the bench, Judge Mark was head of the bankruptcy department of the Miami firm of Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, PA. He is a frequent speaker at international programs sponsored by INSOL, III, IWIRC and ABI, and he has served for several years as the co-judicial chair of the ABI's Caribbean Insolvency Symposium. Judge Mark is a Fellow of the American College of Bankruptcy and an author for *Collier on Bankruptcy*. His community activities include participation in a program that offers internships to minority law students, and participation in financial education programs for high school students through the Bankruptcy Bar Association's CARE program, which teaches students about the dangers of credit card abuse. Judge Mark is a graduate of Boalt Hall School of Law, University of California at Berkeley.

Hon. Justice Nicholas A. Segal is a judge of the Grand Court in the Cayman Islands, where he has served on the Financial Services Division since 2015. He is admitted as a solicitor (1982), qualified to practice at the New York Bar (2003), and was called to the Bar of England and Wales in 2018. Before joining the judiciary, Justice Segal practiced for more than 30 years at leading international law firms, including partner roles at Cameron Markby (now CMS Cameron McKenna), Allen & Overy, Davis Polk & Wardwell and Freshfields Bruckhaus Deringer LLP. He later practised as a barrister at Erskine Chambers. Justice Segal is a Fellow of the Society for Advanced Legal Studies, INSOL, and the American College of Bankruptcy, and serves as a trustee of BAILII. He has contributed extensively to legal scholarship as a consulting editor and author on insolvency and restructuring and has held academic roles at Oxford University, where he was educated, and other institutions. Justice Segal has written and lectured extensively. He is one of the consulting editors of *Totty, Moss and Segal on Insolvency* (Sweet & Maxwell) and a contributor to a number of leading textbooks. Justice Segal is a Fellow of the Society for Advanced Legal Studies and a trustee of the British and Irish Legal Information Institute.