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Case No: CR-2019-002793

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

Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 29/07/2019

Before:

THE HON MR JUSTICE NORRIS

**IN THE MATTER OF REALM THERAPEUTICS
PLC
- and -
IN THE MATTER OF THE COMPANIES ACT
2006**

Andrew Thornton (instructed by **Cooley(UK) LLP**) for the Applicant
George Bompas QC and Edward Crossley (instructed by **Teacher Stern LLP**) for Bavaria
Industries Group AG

Hearing dates: 8 July 2019

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Approved Judgment**Mr Justice Norris:**

1. This is a contested transfer scheme, where the objections to the scheme probe the rules for the constitution of classes and test the nature of the Court's power to sanction schemes.
2. Realm Therapeutics plc ("Realm") was incorporated in 2006 and has a current share capital of 116,561,917 shares with a nominal value of £0.10p each. Some of these are held as American depositary shares and listed on Nasdaq. Between June 2006 and December 2014 Realm shares were listed on the main market of the London Stock Exchange: and then from 23 December 2014 until 27 March 2019 on AIM, at which point they were de-listed, leaving only the Nasdaq listing.
3. Realm used to have several operating businesses in the United States. But it sold them (giving customary warranties) and from early 2016 the strategic focus of its business became pharmaceutical development. For this purpose it raised additional capital in October 2017, both from existing investors (including two funds) and from new specialist institutional investors. The subscription price was £0.29p per unit (a "unit" comprising a share and a share warrant).
4. By 2018 Realm enjoyed a royalty stream from a wound care product, and it had two further prescription treatments undergoing Phase 2 clinical trials. One (PR013) was a topical ophthalmic solution for the treatment of allergic conjunctivitis. By March 2018 this trial had not demonstrated efficacy and Realm decided to discontinue development. The other (PR022) was a treatment for atopic dermatitis or psoriasis. By September 2018 the results from this trial did not satisfy Realm's threshold tests for continued investment and Realm decided to discontinue this development as well, and also to suspend development of all other dermatologic programmes. Upon the discontinuation of its drug development programme the board of Realm decided to undertake a strategic review with the assistance of MTS Health Partners LP ("MTS"). The review was to consider all options, from an asset sale to a strategic merger or other transaction with a third party. The evidence of Mr Martin (the CEO of Realm) was that a telephone canvass of shareholders suggested a preference for some sort of transaction with a life sciences company.
5. On 15 February 2019 Realm agreed a sale of its royalty stream, intellectual property and the benefit of certain contracts and licences for \$10 million to an unconnected third party, again giving the customary warranties and indemnities. The proceeds of the sale would be added to the \$18.8m of cash, near-cash equivalents and short-term investments already held by Realm. In the light of that sale Realm decided to de-list from AIM (but not from Nasdaq) and to adopt an investment policy. A detailed public announcement of the board's plans was made that day and a circular posted to all Realm shareholders.
6. At this point shares in Realm were trading on AIM at about 7-8p per share. On one view this was below the estimated dividend on a liquidation (which might have been 16p per share). On 21 February 2019 Bavaria Industries Group AG ("Bavaria") acquired from an institutional investor some 6,944,948 shares (being 5.96% of the Realm shares in issue) at 7.5p per share. Bavaria invests in listed securities and its investment manager, Mr Sims, is an experienced UK liquidation arbitrageur. (Bavaria

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was not alone: others had noted the disparity between the share price and the cash pile and had also bought into Realm).

7. Immediately upon acquiring its holding Bavaria wrote to the Realm board suggesting that the board should use Realm's cash resources to straightaway make a tender offer for Realm shares at 15p per share before de-listing from AIM. Such an offer would plainly have been to the great advantage of Bavaria (which would have made 100% profit on its investment in days). Realm's response was to the effect that the absence of distributable reserves made the suggested course unlawful: and a partial return of capital would leave the remaining shareholders unfairly exposed to Realm's contingent liabilities. So Bavaria suggested that advice be sought on other available options for the return of capital to shareholders, expressing its opposition to the use of cash to make an acquisition or acquire third party shares.
8. The Realm board did not agree that a return of capital was "the most equitable solution for all shareholders" (as Bavaria described it), some of whom had invested in an active drug development business at 29p per share. Instead, the announced proposals were put to all Realm shareholders at a meeting on 15 March 2019. Bavaria was by then registered as a Realm shareholder.
9. The proposal to de-list from AIM was supported by 99.58% of those voting (being 50.55% of the total shareholder population). One consequence of the de-listing was that the Takeover Code no longer applied to Realm.
10. The investment policy that had been announced on 15 February 2019 was in these terms:-

"The Investing Policy will require the Company to seek to invest in, partner with, acquire and/or be acquired by companies with meaningful development potential in the life sciences sector or with good overall business prospects; or, if a suitable transaction is not identified, the Company will consider winding down and distributing the remaining assets to Shareholders, following satisfaction of applicable obligations."

(The reference to "remaining assets" was a reference to the cash pile: and the reference to "applicable obligations" was a reference principally to the exposure under the warranties and indemnities given on the last sale, and on the earlier disposals in 2014 and 2016). It was this Investing Policy that enabled the Nasdaq listing to be maintained pending a potential combination with an operating company. At the meeting the Investing Policy was approved by 99.92% of those voting (being 50.72% of the total shareholder population).
11. Following the de-listing from AIM the market price of Realm shares had to be ascertained by reference to the price of the ADS dealings on Nasdaq. An ADS unit is the equivalent of 25 ordinary shares priced in US dollars. Realm shareholders had the option to convert their shares into ADSs if they wished their investment to remain tradeable.

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12. The board of Realm contained both executive members (Mr Martin (CEO) and Ms Thorell (CFO)) and non-executive members. A thumb-nail sketch of the non-executive directors in March 2019 is as follows:-
- (a) Mr Spicer (Chairman) had 20 years' experience of working in the medical technology and life sciences segments of the healthcare sector, and chaired an "Invention for Innovation" Funding Panel for the Department of Health.
 - (b) Mr Birkett had been an independent non-executive director since 1999, being by training an accountant, but having a career in global investing and private equity.
 - (c) Dr Gill's background lay in the bio-technology sector, and he was then President and CEO of Evelo Biosciences and a venture partner at Flagship Pioneering (a life sciences innovation enterprise).
 - (d) Mr Gergel had more than 25 years' experience of drug development and had held very senior roles (such as Chief Scientific Officer) in the research and development departments of various pharmaceutical companies.
 - (e) Mr Zweifach had 25 years' experience in the life sciences industry, founding some companies and being CEO of others, and developing a focus on corporate partnering, business development and capital raising.
13. With the assistance of MTS the board of Realm considered a number of different transactions with different counterparties, entering into advanced discussions with some of them. Eventually in early May 2019 the board identified what they unanimously regarded as a suitable transaction, and on 16 May 2019 announced it to the market. Shortly put, Essa Pharma Inc ("Essa") (a Canadian company) was to acquire the entire issued share capital of Realm by way of a scheme of arrangement, each Realm shareholder receiving newly issued Essa shares ("New Essa Shares") by way of consideration. Under the proposed exchange ratio entitlement to New Essa Shares was calculated to be 105% of the net cash amount held within Realm (after providing for liabilities and costs) at the effective date provided for by the scheme, divided by \$3.189. This last figure was the volume weighted average price ("VWAP") of Essa shares on Nasdaq for the 60 days preceding the date of the implementation agreement. It was above the undisturbed share price of Essa on the day preceding the announcement: that was \$2.40. In substance, Realm's cash was to be invested in Essa's drug development programme and Realm shareholders were to receive a proportionate interest in the venture so financed.
14. The intended transaction was set out in detail in a Scheme Circular dated 29 May 2019 which explained the objective of the deal, the economics of the deal and the reasons why the board was recommending it.

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15. As to the objectives of the deal, Essa's business was research into and the development of anti-cancer drugs using licenced patents. Androgens are hormones that play a significant part in the inception and progression of prostate cancer. Androgen blockers can be initially effective, but they lose their effectiveness as the disease progresses towards its lethal variant. Anitens are compounds which inhibit androgen activity. Studies had shown that Essa's approach using anitens was effective in blocking tumour growth where then-current therapies were no longer effective. At the time of the deal Essa was in the early stage of a Phase 1 clinical trial of an androgen inhibitor for patients with advanced prostate cancer. It wanted access to Realm's cash resources to complete that programme, to generate "proof of concept" clinical data for the use of those anti-androgens in other prostate cancer patients, and to advance its early preclinical pipeline of anitens for other cancers (such as breast cancer). Essa knew (and the Circular disclosed) that Realm's cash alone would not be sufficient to complete the programme so that further equity financing "involving insiders of Essa and other investors" would be required at a later date. But Realm's cash was sufficient to achieve what Essa described as "multiple value-inflection points and key near-term objectives". Essa was a pure research "play": it had no products in commercial production or use (as the Circular disclosed). So its continuation as a going concern was dependent on the successful development of its technology to a commercial standard.
16. As to the economics of the deal, the Circular explained that the estimated net cash amount in Realm (ignoring exposure under warranties and indemnities) was \$20.5 million. The holder of a Realm ADS could calculate that that suggested that a Realm ADS had a raw implicit value of \$4.40. The Circular explained that, on the assumption that the estimated cash amount was indeed \$20.5 million, the holder of a Realm ADS would receive 1.446 New Essa Shares which were to be listed on Nasdaq and on the Toronto Ventures exchange: and it disclosed that the current price of Essa shares was about \$2.40. The holder of a Realm ADS could therefore calculate that in return for a Realm ADS with a raw implicit value of \$4.40 he or she would receive Essa securities with a then-current value of \$3.47. (In the event, because of the adjournment of the original sanction hearing, the Net Cash has been determined to be \$20,404,000; but the figures used in this paragraph are sufficiently accurate for the purposes of this judgment).
17. As to the reasons why the board was recommending this deal the Circular explained (in summary) that the transaction (i) enabled Realm shareholders to continue investing in a company with meaningful development potential in the life sciences sector with the opportunity for potential value creation and (ii) was estimated to be more favourable than a wind-down and distribution of residual assets "after satisfaction of all applicable obligations".
18. By way of exposition of the reasons behind the key exchange ratio the board dealt first with the selected VWAP (a "significant point of negotiation"). One factor was the recent volatility in the Essa share price (affected by trading volumes) compared with its historical trading price. The VWAP placed the price in the middle of a 52-week trading range of between \$1.87 and \$4.69.
19. Next the Realm board dealt with comparables. It said that focusing on the oncology sector and seeking to identify companies having products at the pre-clinical or early Phase 1 stage of development (whose value could be tracked through public trading or

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- disclosed M & A transactions) Essa's then current market valuation appeared to be significantly lower than its peer group; and it dealt in detail with that group.
20. Next the Realm board faced up to the apparent premium being paid for New Essa Shares. The New Essa Shares to be acquired by Realm shareholders would represent between 46% and 49.9% of the Essa shares in issue. The board considered that the acquisition of so large a block of shares by Realm investors would normally be at a premium (given that equivalent demand in the market would drive up the price).
 21. Finally, the board addressed the alternative of a winding up, which it thought less favourable in terms of cost, timing and value recovery, given the contingent liabilities relating to the warranties and indemnities, for which provision would have to be made before any distribution to Realm shareholders.
 22. The Circular disclosed that the board had received irrevocable undertakings to support the scheme from (i) BVF Partners LP ("BVF") (a fund manager which held 19.15% of Realm); (ii) OrbiMed Private Investments VI LP (a fund manager which held 21.91% of Realm); (iii) Oracle Management Limited (a fund manager which held 4.64% of Realm) and Sussex Trading Limited (an investor which held 5.28% of Realm). In view of its known attitude Bavaria was not invited to subscribe to the "lock-up". There had been another significant shareholder Abingworth BioEquities Master Fund Limited ("Abingworth"), a fund manager which in April 2019 held 5.28% of Realm. But on 17 May 2019 (the day following the public announcement of the Essa transaction) Abingworth sold its holding to BVF for a price of \$4.40 per Realm ADS.
 23. It is now necessary to go back in the chronology of events, because BVF and Bavaria had also been in contact about the acquisition by BVF of Bavaria's holding in Realm. It will be recalled that Bavaria was keen to "cash out" its investment in Realm for a price approaching its implicit asset value of \$4.40, but it was unable to persuade the board to put in place appropriate arrangements. Bavaria's desire for an exit was well known and was repeated (after canvassing some other shareholders) on 28 March 2019. On 2 May 2019 this led to a call from Mr Martin (the CEO of Realm) with an invitation to sign a "non-disclosure agreement" prior to his imparting certain information to Mr Sims of Bavaria. He hinted in that call that there may be a cash purchaser for Realm ADSs. Once the NDA was signed Mr Martin outlined the proposed transaction with Essa, including the fact that it did not contain a cash option. But he did suggest that BVF may be a purchaser for Bavaria's entire holding at \$4.40 per Realm ADS, whilst making clear that he did not want to broker a transaction. He gave Mr Sims the contact details for Arman Gupta, an analyst at BVF .
 24. There followed e-mail correspondence between Mr Sims and Mr Gupta in the course of which (on 10 May 2019) Mr Gupta confirmed that BVF was willing to purchase Bavaria's entire stake at \$4.40 per Realm ADS. During negotiations this price was reduced. The Essa deal was publicly announced on 16 May 2019. By 23 May 2019 technical difficulties had emerged which prevented BVF from acquiring the whole of Bavaria's holding (because it had acquired Realm ADSs from other shareholders, including Abingworth, and seems to have been obliged to conduct a "share sweep"). Bavaria responded:-

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“We are happy to get this done today and to give you as much of our line as possible at what is frankly an unfair price to us. However if we cannot be confident in exiting greater than 80% at \$3.50+ there is no point in this transaction going ahead. At prices below this we are a more interested buyer.”

The 80% target could not be hit and BVF and Bavaria each walked away, unscrambling such trades as they had already undertaken.

25. On 28 May 2019 the Court gave permission for Realm to convene a single scheme meeting of all of its shareholders. Bavaria did not appear at that convening hearing or object to the convening of a single meeting in the light of what had occurred. On 11 June 2019 Bavaria, which was still looking for any way to “cash-out” its investment, suggested to the Realm board that Realm’s largest shareholders should structure a tender offer for Realm shares before the scheme meeting at a fair price (which Bavaria suggested should be \$3.75 or above).
26. On 12 June 2019 ISS (a renowned proxy advisory service) recommended Realm shareholders to support the transaction.
27. The Court meeting was held on 24 June 2019. At the scheme meeting 5.61 % by number (representing 70.98% by value) of the shareholder population voted. Of those attending the majority in favour of the scheme was 70.83% by number and 78.49% by value. There were 19 Realm shareholders with holdings of fewer than 100,000 shares. 15 voted in favour of the scheme and 4 against.
28. This is now the adjourned sanction hearing (Bavaria having given notice of intention to object at the original sanction hearing and directions having been given for the filing of evidence).
29. Under ss. 895-899 of the Companies Act 2006 the Court has jurisdiction to sanction the scheme only if it has been approved by the requisite majority at a properly convened scheme meeting or meeting; once that threshold is surmounted a scheme so approved is then considered by the Court for sanction (so as to bind dissentients) according to well-ordered principles.
30. The rules by reference to which class composition is determined are very familiar and an extensive citation of authority is unnecessary. It suffices that I direct myself according to the key principle enunciated by the Court of Appeal in Sovereign Life Assurance Co v Dodd [1892] 2 QB 573 and record that I have been referred to the expositions and elaborations of the principle in Re BTR [1999] 2 BCLC 675 (ChD) and [2000] 1 BCLC 740 (CA), Re Hawk Insurance [2001] 2 BCLC 48 (CA), Re UDL Argos Engineering [2001] HKFA 54, Re Telewest Communications [2005] BCLC 752 (ChD) and Re SABMiller [2016] EWHC 2153 (Ch).
31. The classic statement of Bowen LJ in Sovereign puts the matter thus (in the context of a creditors’ scheme proposed under a predecessor of Part 26):-

“What is the proper construction of that statute? It makes the majority of the creditors or a class of creditors bind the minority; it exercises a most formidable compulsion upon

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dissentient, or would-be dissentient creditors; and it therefore requires to be construed with care, so as not a place in the hands of some of the creditors the means and opportunity of forcing dissentients to that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority..... The word “class” is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such meaning to the term “class” as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.”

32. As the later cases have made clear, the focus is upon “rights”; upon existing “rights” as they stand and the “rights” as they will be under the proposed compromise or arrangement; upon identifying material dissimilarities in such “rights” of the members to be called to the meeting; and in relation to those material dissimilarities asking the question whether they are so great as to make it *impossible* for the holders of those differing “rights” to confer together because there is no community of interest.
33. At the hearing before the ICC Judge at which the order for convening the single scheme meeting was made Realm presented its analysis to the judge: holders of all Realm shares without distinction were to be treated identically under the scheme, so that could be a single scheme meeting. The judge agreed.
34. Bavaria now says that this order was wrongly made, that there should have been two class meetings, and that the court lacks jurisdiction to sanction the scheme. I detect three strands to the argument. First BVF has a cross holding in Essa. As a matter of fact, this is correct. BVF’s cross-holding in Essa was 9.2%, but on the exercise of warrants would be 16.7%. This was disclosed in the Circular. Second, BVF had enlarged its holding in Realm by buying in the shares of Abingworth and of other shareholders (who, it is suggested, would have voted against the scheme); and BVF was willing to buy part of Bavaria’s holding (though not as much as Bavaria wanted to sell). So it was really a buyer not a seller of Realm shares. Third, BVF gets special treatment under the scheme.
35. I can immediately dispose of two of these strands. The fact that a class member has a cross holding in the bidding company (a commonplace occurrence where the class member is an index fund or a specialist fund with a focused investment mandate such as life sciences) is not seen as an issue going to class composition but as a factor potentially relevant to the exercise of the discretion to sanction: see the discussion in Re Primacom [2013] BCC 201 at [48]-[50].
36. It is also right that in the Implementation Agreement BVF is one of those designated as a “Realm Principal Shareholder” (along with OrbiMed) upon whom is conferred a right to enforce a particular provision in the contract (cl 10.7) However, the point of this designation is to confer upon BVF and OrbiMed (who, under US securities regulations, might be regarded as “affiliates” by reason of the size of their respective holdings) the same dealing rights in relation to the New Essa Shares as is enjoyed by

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other Realm shareholders notwithstanding the size of their respective holdings of New Essa Shares. It is not a material difference which puts BVF and OrbiMed into a separate class.

37. The remaining objection has more weight. The burden of the submission is that this present case is substantially the same as Re Hellenic and General Trust Ltd [1976] 1 WLR 123 in which case a single class meeting was held to be inappropriate. Hellenic was an investment trust. 53.1% of Hellenic's shares were owned by another investment trust ("Merchandise"). Merchandise was a wholly owned subsidiary of Hambros. Under the scheme Hambros was to acquire all of the Hellenic shares (the Hellenic shares being cancelled and in return new Hambros shares being issued). Hambros was thus acquiring Hellenic; but Hambros already controlled 53.1% of Hellenic through its subsidiary Merchandise. A single scheme meeting of Merchandise and of the remaining outside shareholders was convened. Templeman J refused to sanction the scheme because he said that two meetings should have been convened.
38. At p.126 of the report Templeman J conducted his analysis of class composition issues not in terms of rights (as "existing" and as "under the scheme") but in terms of commercial interests.

"In the present case on analysis Hambros is acquiring the outside shares for 48p. So far as the [Merchandise] shares are concerned it does not matter very much to Hambros whether they are acquired or not. If the shares are acquired a sum of money moves from parent to wholly owned subsidiary and the shares move from the subsidiary to the parent. The overall financial position of the parent and the subsidiary remain the same. ... From the point of [Merchandise], provided [Merchandise] is solvent the directors of [Merchandise] do not have to question whether the price is exactly right. Before and after the arrangement the directors of the parent and of the subsidiary could have been made the same persons with the same outlook and the same judgment. [Counsel] ... submitted that since the parent and subsidiary were separate corporations with separate directors, and since [Merchandise] were ordinary shareholders in the company, it followed that [Merchandise] had the same interests as the other shareholders. ... This seems to me unreal. Hambros are purchasers making an offer. When the vendors meet to discuss and vote whether or not accept the offer, it is incongruous that the loudest voice in theory and the most significant vote in practice should come from a wholly owned subsidiary of the purchaser. No one can be both a vendor and a purchaser and in my judgment for the purpose of the class meetings in the present case, [Merchandise] were in the camp of the purchaser."

Mr Bompas QC submits that BVF is both a vendor of Realm shares (because it is exchanging its Realm shares for New Essa Shares) and a purchaser (because it bought the Abingworth holding and those of other small shareholders).

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39. I do not accept this submission. The present case is distinctly different from Re Hellenic. Hambros and its wholly owned subsidiary Merchandise were seen as one: they could therefore be seen to be both vendor and purchaser in the same transaction, which made their commercial interests (if not their strict rights) different from those of the outside shareholders. But Essa and BVF are truly distinct: the one is not under the control of the other, and although there are mutterings that Essa and BVF must be acting in concert there is no evidence to support that suspicion. It cannot be said that the Realm shares held by BVF are somehow not part of the scheme. BVF is a vendor under the scheme; it has been a purchaser *under different transactions* (just as Bavaria itself was when it bought into Realm in anticipation of the distribution, and was willing to be again after announcement of the scheme provided that Realm ADSs were available below \$3.50). I hold that the fact that a class member has acquired voting shares after the announcement of the transaction which is eventually embodied in the circular and is to be voted on at the scheme meeting does not fracture the class (though it might constitute a relevant factor at the subsequent “fairness” hearing).
40. It follows from this that the jurisdictional threshold is crossed and the approved scheme falls to be considered for sanction. The principles upon which the Court approaches the question of sanction are likewise very well settled and it is again unnecessary to embark upon an extensive citation of authority. The relevant principles are summarised in Re TDG [2009] 1BCLC 445 at [29] and in Re Noble Group [2018] EWHC 3092 at [17].
41. However, given the arguments presented at the hearing it is perhaps worth setting out at length the observations of Lindley LJ in Re English Scottish and Australian Chartered Bank [1893] 3 Ch 385 at 409:-
- “If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from the proper point of view, that is, with a view to the interests of the class to which they are belong and are empowered to bind, will be slow to depart from. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some material oversight or miscarriage.”
42. With that background I can turn to address the specific issues to be addressed.
43. First, I am satisfied that the scheme is a “compromise or arrangement” proposed between Realm and its members within s.895 of the 2006 Act.
44. Second, I am satisfied that the statutory provisions have been complied with i.e. both those directly arising under ss. 897 and 898 of the 2006 Act and those indirectly

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arising by way of proper compliance with the terms of the convening order made by the ICC Judge.

45. Third, for the reasons given above I am satisfied that the ICC Judge correctly identified that a single Court meeting of all Realm shareholders was required.
46. Fourth, I am satisfied (subject to consideration of one argument advanced by Mr Bompas QC) that the requisite statutory majorities were achieved at the meetings so convened.
47. Bavaria seeks to undermine the achievement of the statutory majorities (and so to deprive the Court of jurisdiction to sanction the scheme) by arguing that the votes of BVF should not be counted, because of its cross-holding in Essa and because of its buying programme of Realm shares. This is an aspect of minority oppression which falls to be considered elsewhere. But it is convenient at this point to establish the basis upon which validly cast votes may be dismissed or discounted: “dismissed” in the sense that they are excluded from the count, and “discounted” in the sense that they are included in the count but that the weight given to the majority of which they form part is reduced so that the Court is less inclined to treat the shareholders as the best judges of their own commercial interests.
48. The issue of minority oppression was recently considered by Hildyard J in Re Lehman Bros International (Europe) [2018] EWHC 1980, who (at paragraph [88]), summarise the relevant questions in this way:-

“(a) whether the majority creditors had some “special interest(s)” different from and adverse to the other members of the [relevant] class by which it is shown (b) they were predominantly motivated in voting as they did; if so, (c) whether their votes are to be (i) disregarded or (ii) discounted, and (d) what effect that should have in terms of whether or not the court should decline to sanction the scheme.”

I shall address those questions later.

49. Bavaria also advanced an argument that some votes cast by the majority ought to be discounted because they did not represent the voter’s “true” views. Oracle entered into a “lock up” agreement. Shortly before the scheme meeting Oracle’s principal asked some testing questions of the Realm board and expressed concerns about the deal. This led to a conversation with Mr Martin. After that, the concerns were not pressed and Oracle cast its vote in accordance with its undertaking. Oracle has not given evidence in support of Bavaria’s suggestion that it did not vote in accordance with its “true” wishes and does not invite the Court to refuse sanction. I do not consider that there is a sound basis for dismissing or discounting its vote.
50. Fifth, I am satisfied that the single class of Realm shareholders was fairly represented at the scheme meeting. 24 scheme shareholders attended the meeting. By headcount this represented 5.61% of the total shareholder population: by value it represented 70.98% of the shares in issue. So large shareholders were heavily represented. But according to the evidence there were 19 attendees with modest shareholdings (valued at about £7500 or less). Both large and small shareholders were found on each side of

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the question, and the evidence shows that there was healthy interaction between Mr Martin as CEO of Realm and a range of investors before the meeting. That some large investors and many small investors did not attend the meeting might be attributable to a variety of causes, and is not an indicator of opposition to the scheme: see the observations of Morgan J in Re TDG (*supra*) at [25].

51. Before turning to address the next two issues it is helpful to identify what was the essential issue for all Realm investors. One small investor who corresponded with Mr Martin of Realm snappily encapsulated it in this way:-

“rather than taking a path that maximises the probability of realising a modest gain (i.e. getting back \$4.50+ per share short term) the BOD is taking a path that maximizes the POTENTIAL gain – but that requires Essa being a successful venture.”

Whether to support the board’s implementation of the Investing Policy and whether to share the board’s view of the current value of Essa and the current prospects of success of its development programme (and so the reality of the “POTENTIAL gain”) was what each shareholder had to decide.

52. The next two issues are to consider whether the majority was acting bona fide and was not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and whether the arrangement is such as an intelligent and honest class member acting in respect of that membership interest might reasonably approve. Although these are generally spoken of as separate tests I think they might properly treated as different aspects of the same fundamental question, where the conclusion on one aspect may well (but not necessarily will) influence the conclusion on the other. If the deal is such that no honest and intelligent class member could approve it, then that suggests that those who did approve it were either not honest or were honest but acting to promote some interest other than the true interests of the class. If there is no evidence (direct or inferential) to suggest a want of good faith in the exercise of the votes in support of the scheme that suggests that the deal is such that an honest class member might reasonably approve it. But these aspects normally receive separate consideration (see for example the analysis suggested by Hildyard J in Re Lehman (*supra*) at [66]) and I shall adopt the normal approach.

53. I begin with the aspect of minority oppression, where I have already set out the suggested analysis. It is important to begin by pointing out that a “class” consists of those who have to face the same issue or issues, not of those who think the same way about the issue. That is what underlies the distinction between “rights” and “interests”. As Jonathan Parker J pointed out in in Re BTR (*supra*) at p 682h:-

“Shareholders with the same rights in respect of the shares which they hold may be subject to an infinite number of different interests *and may therefore, assessing their own personal interests (as they are perfectly entitled to do), vote their shares in the light of those interests.* But that in itself, in my judgement, is simply a fact of life: it does not lead to the conclusion that shareholders who propose to vote differently

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are in some way a separate class of shareholders entitled to a separate class meeting. Indeed a journey down that road would in my judgement lead to impracticality and unworkability. ”
(Emphasis added)

54. In general, when addressing the issues faced by the class as a whole a class member is entitled to vote in accordance with his or her economic interests in relation to that issue. For example, nobody would suggest that Bavaria was not entitled to vote against the scheme because it was a late purchaser of shares which wanted to cash out its shareholding for a large and speedy gain and which saw scuppering the scheme as a step towards achieving that end. Whether to prefer the certainty of a modest profit over the chance of a great gain is the very question that had to be addressed by all investors, and their multifarious economic interests as well as their commercial judgment will direct the answer each gives.
55. What is not legitimate is to vote in accordance with economic interests in relation to some matter *other* than the issue raised for decision, some matter that is not shared by the class as a whole. So, for example, if BVF voted as it did *because* of its cross-holding in Essa (being complicit with Essa in a strategy to secure further finance for Essa) that would not be to use the vote which BVF was given in relation to the issue facing the class as a whole for the purpose for which it was conferred, but for some collateral purpose. This is the “special interest” different from and adverse to the interest of the class as a whole of which Hildyard J spoke in Re Lehman (*supra*).
56. This is in fact the very accusation levelled by Mr Bompas QC on behalf of Bavaria: and I can understand the concern. Although Mr Bompas QC did not put it in quite this way, if BVF was buying Realm ADSs at \$4.40 or \$3.75 when it was intending within days to vote for a proposal that would yield \$3.47 in value, then a question is raised.
57. One available explanation is that because Essa was in a “cash burn” stage of drug development and needed finance, and because BVF already had a 16.7% cross-holding in Essa, BVF was using the votes it had on its Realm shares to to vote through the scheme, to release the Realm cash pile to Essa and thereby to preserve or enhance the value of its Essa holding. The evidence did not address the anticipated decline in the Essa share price if the scheme failed, or how much excess over \$3.47 per unit BVF had spent in order to increase the size of its Realm holding prior to the Circular. So the commercial reality of this explanation was not explored. But it is not the only explanation.
58. BVF was a specialist fund investor. It already thought enough of the Essa project to have invested in Essa on the last occasion upon which Essa raised capital. So another available explanation is that BVF (like the Realm board) felt that Essa’s prospects of success and potential to provide added value meant that a fund like BVF ought to be acquiring as large an interest in it as possible, and the takeover (and the status of internal investor which it conferred in relation to any future equity raise) meant that it was worth paying a premium to increase its Realm holding. This would be no more than addressing the issue which faced all class members (“Do we forego modest gains for the potential of great gains?”) from the standpoint of its own economic interests. According to this explanation BVF was doing no more than sharing the view of the 16 others who voted in favour of the scheme. BVF joined the “regiment of commercial

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men marching in step” to whom Hildyard J referred in paragraph [135] of his judgment in Re Lehman (*supra*).

59. It is for Realm to persuade the Court that the majority comprises those acting *bona fide*. Where there are two possible explanation for the casting of votes the question is whether it is the illegitimate one which predominates i.e. that unlike the other 16 investors who voted in favour of the scheme BVF actually thought that this was not an acceptable scheme or was neutral as to its merits, but was primarily motivated to support it (and to make further purchases in order to do so) by reason of its cross-holding in Essa. Looking at the evidence as a whole I see no basis for making such a finding. It seems to me plain that BVF believed that Essa presented the prospect of large potential gains and it shared the view recommended by the Realm board.
60. So I turn to the other aspect of the “fairness test”, whether it is such as an honest and intelligent class member having regard to his or her own interest as such could reasonably approve.
61. Before addressing that issue directly I must address two arguments that hovered around the edges of Bavaria’s case: (a) the absence of a “cash option” as an alternative to taking Essa shares; and (b) alternative ways of arranging matters.
62. As to (a) the argument is that where there is a shareholder population that consists of specialist fund managers (who have to find a home within the sector for their investable funds) and owners (who want to be free to take cash) a scheme ought to contain a cash option. Bavaria wanted to take at least 80% of its holding in cash. Whether any commercial deal could have been struck with Essa or any other counterparty with that level of “cash-out” is debatable. But the task of the Court at the sanction stage is not to ask whether this is the best scheme that could be devised or whether it could be improved by the insertion of a cash option: see Re Telewest Communications (No.2) [2004] EWHC 1466. The question is whether the scheme as presented meets the “fairness” criteria.
63. As to (b) the argument was that that if the Realm shares had not been de-listed or if the board had embarked on some other arrangement then “a cash option” would have been available. If Realm shares had remained listed on AIM and Essa had acquired Realm shares not by way of a single acquisition under a scheme but by way of on-market or off-market purchases then at a certain point it would have been obliged to make a cash offer for the remaining shares. If the Realm directors had decided to promote a scheme under ss 110 and 111 of the Insolvency Act 1986 dissentient shareholders would have had the right to have their shares valued and purchased. Mr Bompas QC submits that in assessing the fairness of this scheme account should be taken of the implications of using other methods. I do not accept this submission. In Re TDG (*supra*) Morgan J was pressed with the argument that account should be taken of how the takeover and squeeze out provisions would have operated (as had Plowman J in Re National Bank [1966] 1WLR 819). At [33] and [34] Morgan J rejected the relevance of a different set of statutory provisions structured in a different way and operated in a different way to the assessment of the fairness of a scheme. I agree.
64. So to the heart of this question. Mr Bompas QC submitted that this was “a terrible deal”; Essa was “a gamble” where “the odds are not even known” and its shares are

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“gambling tokens”; the use of the VWAP for pricing Essa shares confuses primary and secondary market conditions and given the historic downward trend overprices Essa; the comparables used are bad comparables; there is no attempt in the Circular to analyse Essa’s technology and no indication how it might be monetised; whilst Essa is overvalued, Realm is undervalued (by reference to unquantified contingent liabilities); market dealings show the true value of Realm to be \$4.40 per ADS; the New Essa Shares will be illiquid (though that seems to overlook the listing proposal). In short, if ever the Court was to refuse sanction a scheme (i) as not being one of which an honest and intelligent class member could reasonably approve or (ii) on broader discretionary grounds then this was the case in which to do so.

65. One investor who corresponded with Mr Martin (the Realm CEO) put the point pithily. Having referred to what he called “basic economic ground rules” he wrote:-

“If a company which is basically a bag of cash of ~20 million dollar is selling itself for ~14.5 million dollar in very illiquid and volatile stock, that can’t be passed off as an alternative “investment strategy”; it’s objectively a really bad trade.”

The evidence shows that a number of others (both those who had sought to arbitrage the difference between the Realm share price and its estimated distributable cash pile and other investors) shared this view.

66. But however strongly this view is held by the dissentients (and it is expressed in very strong language), based on the material set out in the Circular a highly experienced board, a 78.49% majority by value of a body of experienced investors (including specialist institutional investors) and an outside commentator such as ISS all considered that this was the sort of transaction of which honest and intelligent shareholders might reasonably approve. Even Bavaria itself was prepared to increase its holding in Realm in full knowledge of the risks in the deal provided it could have acquired Realm ADSs at \$3.50. Of course, the deal contains a large element of “gamble”; that is the very nature of drug development programmes. But rather than asking for their money back the Realm shareholders had (after the creation of the cash pile) overwhelmingly adopted an Investing Policy which put at its forefront re-investment in this very field and had entrusted an experienced board to make a judgment call in selecting a candidate (with distribution being only a default position). This the board did and provided in the scheme documentation information (in my judgment, sufficient information) to enable each investor to decide whether (i) to take the chance of a modest gain (by rejecting this scheme and trying to force the board of directors not to look at other associations but to liquidate Realm); or (ii) to seek to maximise the potential gain and to trust in the judgment of the board that Essa was likely to be successful. “Is the gamble worth the stake given the apparent odds?” In my view the Court is not as well placed as the investors themselves are to make this pure commercial judgment.
67. So I turn to pure discretion. Given that the shareholders seem to be the better judges of their own commercial interest is there something (absent any technical “blot” on the scheme) that should cause the Court to withhold its sanction? The absence of a “cash-out” alternative is not (for reasons given above) such a feature. Rejection of the scheme would not, of course, achieve that end: it would simply enable the Realm board to select another investment opportunity. Bavaria suggested that there may have

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been a lack of disclosure and that the majority was not fully informed: but the Circular is in my view full and clear and what it says (and what it does not say) would be readily apparent to investors in Realm. Further, the evidence discloses real engagement between the Realm management and the shareholder population.

68. Bavaria suggested that the Realm directors had a conflict of interest (the two executive directors received termination payments and upon implementation three Realm directors would serve on the Essa board). But the payments received by the executive directors were part of their contractual entitlement and (so far as I can work out) would have been payable in any selected comparator scenario. The prospect of appointment to the Essa board was disclosed in the Circular; the actual appointment of Mr Martin, Ms Thorell and Mr Zweifach may not have been disclosed before the scheme meeting but cannot have been material to the actual decisions how to vote, given prior undertakings. The acquisition of the Abingworth holding at \$4.40 per ADS was not mentioned in the Circular. But I am not clear that this dealing (or any of the other dealings resulting from “the share sweep”) were known to the board and I cannot think (given that BVF had ceased to be a purchaser) that it could have had any material impact on the way the majority voted. I do not think that there is anything in any of the “disclosure” points made.
69. The minority opposition to the scheme has been vocal. Bavaria’s criticisms of the scheme have, in some respects, weight and merit. But the simple fact is that others, for reasons that cannot be dismissed as invalid, take a different view, albeit that they are less vocal in their support than Bavaria is in its opposition. I see no ground upon which I can properly withhold sanction on discretionary grounds: and I accordingly sanction the scheme.