

# THE HIGH COURT

## COMMERCIAL

[2020] IEHC 428  
[2020 No. 238 COS.]

**IN THE MATTER OF FUNDLOGIC ALTERNATIVES PUBLIC LIMITED**

**COMPANY**

**AND**

**IN THE MATTER OF SECTIONS 449 TO 454 OF THE COMPANIES ACT, 2014**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, 2014**

**JUDGMENT of Mr. Justice David Barniville delivered on the 19<sup>th</sup> day of August,**

**2020**

### **Introduction**

1. The applicant company, FundLogic Alternatives Public Limited Company (the “Company”), applied for orders under s. 453 of the Companies Act, 2014 (the “2014 Act”), sanctioning a proposed scheme of arrangement (the “Scheme”) between the company and certain of its members (the “Scheme Shareholders”) and for various related orders.
2. Having given various directions in respect of the Company’s application, I heard the application on 19<sup>th</sup> August, 2020. Having had the opportunity of considering the papers in advance, and having heard counsel for the Company and counsel for two other relevant parties, who provided undertakings for the purpose of giving effect to the proposed Scheme, I ruled that the Company had fulfilled all of the requirements in order for the Scheme to be sanctioned by the court under s. 453(2) of the 2014 Act. In light of the relative urgency of the matter, I gave my ruling immediately following the hearing and made an order that the Scheme be sanctioned pursuant to s. 453(2) of the 2014 Act and various related orders. I indicated that I would give my reasons for my decision in this written judgment.

## **Factual Background**

3. The factual background to the Company’s application was mainly set out in an affidavit sworn by Maurice Murphy, a director of the Company, on 24<sup>th</sup> July, 2020 (the “grounding affidavit”). There is no dispute in relation to the facts set out in the grounding affidavit.
4. The Company is an umbrella open-ended investment company with variable capital incorporated under the Companies Acts, 1963-2009 and existing under the 2014 Act, having segregated liability between its various sub-funds. Under clause 2 of the Company’s constitution, the sole object for which the company is established is the collective investment in (a) transferable securities and/or (b) other liquid financial assets of capital raised from the public operating on the principle of risk-spreading in accordance with the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations (SI No. 352 of 2011) (as amended) (the “Regulations”).
5. The Company is authorised and regulated by the Central Bank of Ireland (the “CBI”) as an Undertaking for Collective Investment in Transferable Securities (“UCITS”) under the Regulations. The Company is further authorised by its constitution to offer separate classes of shares, each representing interests in a fund comprising a distinct portfolio of investments (a “fund”). Each fund may be further divided into a number of different classes within the particular fund.
6. Certain of the funds are approved by the CBI as exchange traded funds (each an “ETF”). An ETF differs from other types of open-ended funds in that its shares are listed on one or more stock exchanges and only certain financial institutions, known as authorised participants, may, in the normal course of events, subscribe for and redeem on the primary market for shares in an ETF. Such subscriptions will typically be in large blocks of shares. Those shares, which have no par value, are then sold by the authorised

participants on the secondary market (including on one or more stock exchanges), with investors acquiring interests in the ETF on the secondary market. The Company has appointed one authorised participant, being Morgan Stanley & Co. International plc (the “Authorised Participant”).

**7.** The Company has eight separate funds approved as ETFs, each of which is approved and regulated by the CBI (the “Relevant Funds”). Accordingly, members holding shares in the MS Scientific Beta Global Equity Factors UCITS ETF, the MS Scientific Beta US Equity Factors UCITS ETF, the SciBeta HFE EM Equity 6F EW UCITS ETF, the SciBeta HFE Europe Equity 6F EW UCITS ETF, the SciBeta HFE US Equity 6F EW UCITS ETF, the SciBeta HFE Japan Equity 6F EW UCITS ETF, the SciBeta HFE Pacific ex-Jap Equity 6F EW UCITS ETF and the SciBeta HFI US Equity 6F EW (USD) UCITS ETF comprise the Scheme Shareholders.

**8.** The authorised share capital of the Company is €300,002.00 represented by 300,002 subscriber shares issued at €1.00 each (of which 2 such shares are issued) and 1,000,000,000,000 (one trillion) shares of no par value, initially designated as unclassified shares. As at 14 May 2020, 5,028,103 Participating Shares in the Relevant Funds had been issued and credited as fully paid up.

**9.** The Company’s shareholder base, as recorded on the register of members (the “Register of Members”) for the Relevant Funds, comprises a mix of (1) nominee accounts of the Authorised Participant (a market maker or broker entity registered with the Company), and (2) other account holders in the CREST system owned and operated by Euroclear UK & Ireland (mostly nominee companies and custodian banks and very few individuals) (the “CREST System”). Consequently, a majority of investors, who do not have accounts in Euroclear UK & Ireland (CREST System), already hold their shares in the Relevant Funds through nominees and other intermediaries, with the result that most

investors in the Relevant Funds are beneficial owners who/which do not hold legal title to their shares.

### **The Proposed Scheme**

**10.** The shares of each of the Relevant Funds are currently listed on the London Stock Exchange (the “LSE”). The LSE operates its own CSD, being the CREST System for post-trade functions (the “Current Model”). However, as a result of Brexit, the Company, in common with all EU-domiciled ETFs, will not be able to continue to access the Current Model following the completion of a transition period in March 2021. Considering this, the Company believes that it is necessary to transition the settlement of the Scheme Shares to another model, which is domiciled within the EU and so remains available to the Company, and which it is expected will provide for more streamlined, centralised settlement.

**11.** Therefore, the Company is proposing to adopt, in place of the Current Model, an international centralised securities depository model of settlement (the “ICSD Model”) (described more fully below) for all the Relevant Funds. In order to do so, it is proposed that the Company will have one shareholder, Citivic Nominees Limited, which will be a nominee of the common depository, Citibank Europe plc (the “Common Depository”) which will hold all shares (evidenced by a Global Share Certificate) on behalf of Euroclear Bank S.A./N.V. (“Euroclear”) and/or Clearstream Banking S.A., Luxembourg (“Clearstream” and referred to together as the “ICSDs”).

**12.** The proposed Scheme provides for the transfer of the legal (but not beneficial) interest in the Scheme Shares (as defined in the Scheme) to Citivic Nominees Limited (“Citivic Nominees”), as nominee of the Common Depository, in consideration for Citivic Nominees agreeing to hold the Scheme Shares as nominee of the Common Depository and on behalf of the ICSDs.

### **The Reasons for Choosing the ICSD Model**

**13.** As noted above, in light of the United Kingdom's departure from the European Union, the Company, in common with all EU-domiciled ETFs, will not be able to continue to access the Current Model following the completion of a transition period in March 2021. Therefore, the Company has decided that it is necessary to transition the settlement of the Scheme Shares to the ICSD Model which is domiciled within the EU and so remains available to the Company, and which it is expected will provide for more streamlined, centralised settlement.

**14.** The evidence on behalf of the Company is that the ICSD Model will provide a more streamlined, centralised settlement structure, which is expected to result in a reduction in inventory requirements, improved foreign exchange functionality and reduced risk in the settlement process. Converting the Relevant Funds to the ICSD Model will also bring all of the Relevant Funds onto one consistent settlement structure which is expected to make navigating the settlement structures for the Relevant Funds more straightforward.

**15.** Under the ICSD Model, shares will be evidenced by a Global Share Certificate and registered in the Register of Members in the name of a single shareholder, namely Citivic Nominees, as the nominee of the Common Depositary. While Citivic Nominees will benefit from the rights of a registered shareholder, it will, as nominee, pass on the benefit of such rights to the Common Depositary. Consequently, Citivic Nominees will pass any notices of shareholder meetings, circulars and any distributions received to the Common Depositary and will vote the shares it holds in accordance with voting instructions from the Common Depositary. In turn, the Common Depositary will pass the benefit of such rights to the relevant ICSD. The relevant ICSD will, in turn, pass the benefit of such rights to its participants under the terms of the ICSD's agreements with its participants, as outlined further below. Investors who are not participants in the ICSD will need to use a broker, nominee, custodian bank or other intermediary which is a participant in the ICSD. This is

similar to the way investors in the Current Model use a broker or other intermediary which is a participant in the local CSD for the market in which the investor intends to trade and settle. The chain of beneficial holding in the ICSD Model will, therefore, be similar to existing nominee arrangements under the Current Model.

**16.** For the existing limited number of individual investors who are on the Register of Members, their ownership of shares will change from legal and beneficial ownership to ownership of a beneficial entitlement through the nominee of the Common Depositary, as explained above. Such Scheme Shareholders may move their shares held in the CREST System to the ICSD, (i.e. Euroclear or Clearstream), if the Scheme Shareholders hold or open an account with the ICSD. Alternatively, if they so choose, it should be possible for such shareholders to continue holding a beneficial entitlement to the shares in the CREST System through Euroclear UK & Ireland (by means of CREST depositary interests), as Euroclear UK & Ireland has an account in the ICSD.

**17.** Investors who are not shareholders and who thus only have a beneficial entitlement to shares, will continue to hold a beneficial entitlement to the same number of shares in the same Relevant Fund upon the adoption of the ICSD Model.

**18.** The main difference between the current model and the ICSD Model, as far as the Company is concerned, relates to the shareholder of record. Following the implementation of the proposed Scheme, the sole legal holder of the shares in a Relevant Fund will be the Common Depositary's nominee, Citivic Nominees. The Common Depositary has been appointed by the ICSD and its holding will represent the holding of the investors through the ICSD.

**19.** In addition to the primary benefits of the ICSD Model outlined above, the Company is of the view that the ICSD Model will have a number of other operational advantages for the Company and investors in the Relevant Funds, including, importantly, improved settlement performance through longer operating hours of the ICSD, thus

increasing the time in which trades can match and settle. Other advantages of the ICSD Model will include an alignment of record date methodologies across Europe, as well as improved foreign exchange functionality for dividend payments.

**20.** Consequently, it is anticipated that the ICSD Model and the Scheme will be advantageous to the Company and the ultimate beneficial owners of the Scheme Shares.

**21.** In essence, therefore, what is being proposed by the Company in the Scheme which is the subject of this sanction application is that the legal, but not the beneficial, interest in the Participating Shares in the Company will be transferred from the current registered shareholders into the name of the Citivic Nominees so that it will become the sole registered holder of those shares.

**22.** The Company's evidence is that it would not have been practicable to secure the individual agreement of each registered shareholder to transfer the legal title into the name of Citivic Nominees. Consequently, the Company has decided to seek to effect this change in the holding of the legal title to Participating Shares by means of the proposed Scheme pursuant to Chapter 1 of Part 9 of the 2014 Act.

### **Procedural History**

**23.** By Order dated 25<sup>th</sup> May, 2020, I entered the case in the Commercial List and made directions for the Scheme Meeting to be convened on 19<sup>th</sup> June, 2020. I accepted the Company's contention that the Scheme Shareholders should meet as a single class of members and gave a direction to that effect under s. 450(5) of the 2014 Act. In relation to both the Scheme Meeting and the accompanying EGM (at which the Company itself was to approve the Scheme), I gave direction that they be held by electronic means in light of the COVID-19 pandemic. Insofar as the EGM is concerned, that direction was given pursuant to s. 179 of the 2014 Act.

**24.** A difficulty, however, arose in relation to the directions made in the order of 25<sup>th</sup> May, 2020. In the proposed Scheme it was originally envisaged that the Common Depositary would be The Bank of New York Mellon, London Branch (“BYNM”), with the Common Depositary’s nominee being the Bank of New York Depository (Nominees) Limited. However, it transpired that the Company’s administrator, Northern Trust International Fund Administration Services (Ireland) Limited (“Northern Trust”) does not have an operational relationship with BYNM. It was, therefore, necessary for the Company to change the Common Depositary and its nominee in the proposed Scheme. In addition, it transpired that due to human error, members of the Company who were not Scheme Shareholders had not been given notice of the EGM. Therefore, by order dated 16<sup>th</sup> June, 2020, I vacated the original dates for the Scheme Meeting and for the EGM. By a further order dated 22<sup>nd</sup> June, 2020, I gave fresh directions for a Revised Scheme Circular to be sent to all members and for the Scheme meeting and for the EGM to be reconvened (the “Reconvened Scheme Meeting” and the “Reconvened EGM”) and to be held on 17<sup>th</sup> July, 2020.

**25.** In accordance with the directions which I gave for the Reconvened Scheme Meeting, and under Article 36(a) of the Company’s Constitution, the quorum was fixed at two members present in person or by proxy. Moreover, with regard to the Reconvened Scheme Meeting, in order for a proxy to be valid, it had to be submitted at least 24 hours before the meeting.

**26.** As matters transpired, whilst the Reconvened EGM was going to be quorate, only one proxy had been lodged in time for the Reconvened Scheme Meeting. Accordingly, in accordance with Article 36(b) of the Company’s Constitution, which was applied by paragraph (m) of the Court’s directions dated 22<sup>nd</sup> June, 2020, the Chairman adjourned the Reconvened Scheme Meeting for one week. He did likewise with the Reconvened EGM.



27. The Reconvened Scheme Meeting and the Reconvened EGM were ultimately held on 24<sup>th</sup> July, 2020. Both meetings were quorate and the proposed Scheme was unanimously approved at both meetings.

28. The Company then sought directions from the court in relation to the hearing of its application to sanction the proposed Scheme. In an order dated 27<sup>th</sup> July, 2020, I fixed 19<sup>th</sup> August, 2020 as the date for the hearing of the Company's sanction application. I gave certain further directions in relation to the publication of the hearing date and in relation to the appearance by any member or creditor of the Company at the hearing. I was satisfied at that stage that the various orders which had been made on 25<sup>th</sup> June, 2020, 22<sup>nd</sup> June, 2020 and 17<sup>th</sup> July, 2020 had been complied with by the Company on the basis of the affidavit evidence before me.

29. The Company's sanction application proceeded on 19<sup>th</sup> August, 2020. As noted earlier, I ordered that the Scheme be sanctioned pursuant to s. 453(2) of the 2014 Act, having found that the Scheme was fair and equitable. I made a number of other related orders. I explain below the reasons why I was satisfied to make those orders.

### **Court Sanction for a Scheme of Arrangement**

30. The test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number of recent judgments of the Irish courts. In *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("*Colonia*"), the High Court (Kelly J.) set out the test to be applied in the case of a scheme of arrangement in relation to a solvent company. The test was subsequently applied to takeover or acquisition schemes, such as the scheme at issue in the present case: In *Re Depfa Bank plc* [2007] IEHC 463 ("*Depfa*") (Kelly J.) and *In Re SCISYS Group plc* [2019] IEHC 904 ("*SCISYS*") (Barniville J.). The test has also been applied to schemes of arrangement providing for corporate restructuring in other situations, including schemes

which provided for the migration to the ICSD Model of settlement (*In Re UBS EFTs public limited company* [2019] IEHC 860 (“*UBS*”), *In Re Allergan PLC* [2020] IEHC 214 (“*Allergan*”) and *In Re Xtrackers (IE) public limited company* [2020] IEHC 330 (“*Xtrackers*”) (all Barniville J.) and to schemes of arrangement concerning insolvent companies (*In Re Ballantyne plc* [2019] IEHC 407 (Barniville J.)). I am satisfied that the test set out in *Colonia* and referred to, and applied, in those other cases is the appropriate test to be applied in considering the Company’s application for court sanction in respect of the proposed scheme and I apply it here.

**31.** In summary the test requires the court to be satisfied that the following five requirements have been fulfilled, namely, that:-

1. Sufficient steps have been taken to identify and notify all interested parties;
2. the statutory requirements and all directions of the court have been complied with;
3. the class of members (in the case of a scheme of arrangement between the company and its members) has been properly constituted;
4. there is no improper coercion of any of the members concerned; and
5. the scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.

**32.** In addition to those five requirements, the court must also be satisfied that the scheme is not *ultra vires* the company the subject of the application. That might be the case where the scheme at issue involved the sale of the entirety of a company’s undertaking, in circumstances where there was no power in the company’s constitution permitting such a radical alteration in its position (for example: *In Re Oceanic Steam Navigation Co. Ltd* [1939] Ch. 41). The proposed Scheme, the subject of the present application, is not *ultra vires* the Company. The purpose of the proposed Scheme is to enable the Company to

adopt the ICSD Model and provide for the transfer of the legal, but not the beneficial, interest in the Scheme Shares. I am satisfied that the proposed Scheme is not *ultra vires* the Company. The purpose of the scheme here is to give effect to the proposed acquisition which will alter the identity of the Company's members, but not its activities. There is, therefore, no question of the proposed scheme being *ultra vires* the Company.

**33.** I will now deal with each of the five requirements, or criteria, of the test derived from *Colonia* and considered and applied in the other cases referred to earlier.

(1) Steps to Identify and Notify Interested Parties

**34.** As noted earlier, certain difficulties arose in relation to the original Scheme meeting convened on foot of the order of 25<sup>th</sup> May, 2020 and the related EGM, as a result of which it was necessary for the court to give directions on 22<sup>nd</sup> June, 2020 for the Reconvened Scheme Meeting and for the Reconvened EGM to be held on 17<sup>th</sup> July, 2020. In that order, I directed that a Revised Scheme Circular be sent to all members.

**35.** The interested parties in the present case are those members of the Company, as listed in the Register of Members who hold shares in the "*Relevant Funds*" (as defined in the Scheme). They are the Scheme Shareholders. In the grounding affidavit of Maurice Murphy sworn on 24<sup>th</sup> July, 2020 (from paragraph 36 to 39) and in the affidavit of Meliosa O'Caoimh of Northern Trust sworn on 16<sup>th</sup> July, 2020, the affidavit of Barry Saville of Computershare Investor Services (Ireland) Limited sworn on 17<sup>th</sup> July, 2020 and the affidavit of Diarmuid Dawson of Innovative Print Solutions Limited sworn on 17<sup>th</sup> July, 2020, details are given of the Company's compliance with the directions I made in the order of 22<sup>nd</sup> June, 2020, concerning the giving of notice to all of the members. This was done both by advertisement and by sending the Revised Scheme Circular (incorporating notice of the Reconvened Scheme Meeting and the Reconvened EGM, the proxy forms, and so on) to all of the members.

**36.** In those circumstances, I am satisfied that, as required by s. 452 of the 2014 Act, all persons affected by the Scheme have been duly notified of the Scheme by the circulation of Revised Scheme Circular to the Scheme Shareholders and that the Circular contained the necessary information as required by that section.

**37.** I am satisfied, on the basis of all of that evidence, that sufficient steps were taken by, and on behalf of, the Company to identify and notify interested parties of the Reconvened Scheme Meeting and to provide them with the information required under s. 452 of the 2014 Act.

(2) Compliance with Statutory Requirements and Court Directions

**38.** The statutory requirements which have to be fulfilled before a scheme of arrangement can become binding on the members of the company concerned (in the case of a scheme between a company and its members) are set out in ss. 452 and 453 of the 2014 Act.

**39.** Section 452 contains the requirements as to the information which must be provided to the relevant members in relation to the proposed scheme of arrangement. I have concluded that the revised Scheme Circular provided to the members contained the information required under section 452.

**40.** Section 453(1) provides that a scheme will become binding on the members of the company concerned if certain conditions are satisfied. Those conditions are set out in section 453(2). In summary the conditions are as follows:-

- (a) There must be a “*special majority*” of those voting at the scheme meeting in favour of a resolution agreeing to the scheme. A “*special majority*” is a majority in number representing at least three fourths in value of the members (s. 453(2)(a));

- (b) Notice of the passing of the resolution at the scheme meeting, and that an application will be made to the court in relation to the scheme of arrangement, must be advertised in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situated (s. 453(2)(b)); and
- (c) The scheme must be sanctioned by the court (s. 453(2)(c)).

**41.** As regards the statutory requirement contained in s. 453(2)(a), Mr. Murphy explained in the grounding affidavit that all members present in person or by proxy at the Reconvened Scheme Meeting voted in favour of the Scheme. Mr. Murphy was the chairperson of the Reconvened Scheme Meeting and exhibited the report of that meeting. As all of the members present in person or by proxy voted in favour of the Scheme, this statutory requirement was satisfied.

**42.** As regards the statutory requirement in s. 453(2)(b), Mr. Murphy swore a second affidavit on 14<sup>th</sup> August, 2020 in which he stated that the relevant notices were published in the Irish Times, the Irish Independent and in the International Edition of the Financial Times on 30<sup>th</sup> July, 2020 and in Iris Oifigiúil on 31<sup>st</sup> July, 2020. I am satisfied that the publication of these notices complied with the statutory requirement contained in s. 453(2)(b) and with the directions contained in the order of 27<sup>th</sup> July, 2020.

**43.** As regards the statutory requirement contained in s. 453(2)(c), this requirement relates to the obtaining of the court's sanction for the proposed Scheme, which is the subject of the Company's application and this judgment.

**44.** I am also satisfied on the evidence that the Company complied with all of the orders and directions made by the court prior to the hearing of the Company's application on 19<sup>th</sup> August, 2020.

45. I am satisfied, therefore, that the second of the requirements or criteria which must be fulfilled in order for the court to sanction the proposed Scheme have been fulfilled on the evidence before the court.

(3) Class of Members Properly Constituted

46. The next requirement which must be fulfilled by the Company is that it must persuade the court that the class of members which voted at the Reconvened Scheme Meeting on 17<sup>th</sup> July, 2020 was properly constituted.

47. As noted earlier, in my order of 25<sup>th</sup> May, 2020, I gave a direction pursuant to s. 450(5) of the 2014 Act that all of the Scheme Shareholders would comprise one class for the purposes of the Scheme Meeting. The Reconvened Scheme Meeting proceeded on that basis on 17<sup>th</sup> July, 2020.

48. I was satisfied at that stage to give that direction on the *ex parte* application of the Company. Although no objection has been taken by any person to the fact that the Reconvened Scheme Meeting was conducted on the basis of a single class of members, I must be satisfied for the purposes of s. 450(3) of the 2014 Act that it was appropriate for the Reconvened Scheme Meeting to proceed on the basis of a single class of members. In circumstances where no objection has been taken to that, the court should be slow to reach a different view as to the appropriateness of the meeting proceeding on the basis of a single class: see for example: *UBS*, *SCISYS*, *Allergan* and *Xtrackers*. I had previously agreed with the view expressed by Chadwick L.J. in the Court of Appeal of England and Wales in *Re Hawk Insurance Co. Limited* [2001] 2 BCLC 480, that an applicant would be “*entitled to feel aggrieved*” if the court, in the absence of any opposition and of its own motion, were to reach a different view of the appropriateness of the class composition to that reached at the earlier stage of the process (see, for example: *Allergan* at para. 28). However, as the

court is not a rubber stamp, it is necessary for me to reconsider the position on this application.

**49.** The legal principles applicable to class composition have been discussed in a number of the authorities. They were very recently considered by me in my judgments in *Allergan* and *Xtrackers*. At para. 30 of my judgment in *Allergan*, I stated as follows:-

*“As discussed by me in UBS and in SCISYS, the leading statement on the question of the class composition of meetings is that made by Bowen’s LJ. in the English Court of Appeal in Sovereign Life Assurance Company v Dodd [1892] 1 QB 405, where he stated:*

*“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.”* (page 583)

**50.** As noted in *Allergan* and *Xtrackers*, the test has been considered and applied in numerous subsequent cases. The relevant principles were very helpfully summarised by Lord Millett in the Court of Final Appeal of Hong Kong in *Re UDL Argos Engineering Ltd* [2001] HKCFA 54, by the English Court of Appeal in *Re BTR plc* [2000] 1 BCLC 740 and *Hawk Insurance* and by Lloyd J. in the English High Court in *Re Equitable Life Assurance Society* [2002] EWHC 140 (“*Equitable Life*”) (and recently by Hildyard J. in the High Court of England and Wales in *Re Apcoa Parking (UK) Limited* [2014] 2 BCLC 285). In *Equitable Life*, the court noted that it was necessary to balance the power of the majority and that of the minority and stated that:-

*“...whereas unnecessary subdivision of a class may thwart a proper scheme altogether because of a veto thereby afforded to a small minority, on the other hand if it is said that there has been a unfairness or oppression on the part of the*

*majority in a larger undivided class, the control mechanism is the court's scrutiny at the sanction stage: see Re Hawk insurance Co Ltd... and Nordic Bank plc v. International Harvester Australia Ltd...*" (para. 46)

**51.** The test in *Sovereign Life Assurance* was approved in this jurisdiction by Laffoy J. in the High Court in *In Re Millstream Recycling Ltd* [2009] IEHC 571. It was also approved and applied by me in *UBS, SCISYS, Allergan* and *Xtrackers*. The proper focus is on the legal rights possessed by the members of the company. If those rights are not so dissimilar as to make it impossible for the members to consult together with a view to their common interest, then it is appropriate to treat the members as a single class. There is no suggestion in the present case there has been any unfairness or oppression on the part of the majority in the single class of members.

**52.** I am satisfied on the evidence that it was appropriate for the Scheme Shareholders to meet as a single class, on the basis that, under the terms of the proposed Scheme, the rights of all of the Scheme Shareholders will be varied in precisely the same manner. They will retain a beneficial interest in the Scheme Shares with the legal interest transferring to the Common Depositary nominee. The differences between the rights of the Scheme Shareholders, which, in essence, relate to their rights and various sub-funds, are not in any way affected by the operation of the proposed Scheme. The proposed Scheme will not vary any of the specific rights attaching to particular share classes or sub-funds of the Company. The Scheme will provide that the legal ownership of all of the shares in the Company will be transferred to the Common Depositary's nominee. As in the other cases in which this issue arose, I am satisfied on the evidence that each of the Scheme Shareholders is being treated identically in terms of their legal rights. On that basis, the Company felt that it was appropriate that the Scheme Shareholders should form one class. I accepted that at the *ex parte* stage of the process in May, 2020. Having reconsidered the position again at this stage of the process, I am satisfied that it was the appropriate approach to take and that the



Reconvened Scheme Meeting proceeded properly on the basis of a single class of members.

**53.** I accept, on the evidence, that the Scheme Shareholders are treated in the same way under the proposed Scheme. I also accept that there is a significant similarity of rights among the Scheme Shareholders and that they could, therefore, consult together with a view to their common interest.

**54.** There are two potential bases on which it might potentially have been contended that meetings of separate classes of Scheme Shareholders ought to have been convened. The first potential basis is that some of the sub-funds may be more valuable than others and that, therefore, some participating shares may be more valuable than others. I considered that issue in *UBS* and in *Xtrackers*. In both those cases, I was satisfied that the difference in the economic values of the participating shares did not afford a good basis for directing that separate classes of Scheme Shareholders should meet. I have reached the same conclusion in this case. I accept the case advanced by the Company that the proposed Scheme does not provide for any alteration to the rights attaching to the participating shares. Nor does the proposed Scheme purport to alter the economic value of any particular share or shares. The Scheme provides for similar treatment as regards all classes of participating shares, namely, that the legal title will be transferred to the Common Depositary's nominee with the beneficial interest (and, therefore, the underlying economic value) remaining unchanged. I agree that it is irrelevant for the purposes of determining proper class composition that the underlying economic value of the participating shares in one sub-fund may be greater or less than the economic value of the participating shares referable to another sub-fund. I am satisfied, therefore, that this issue does not provide any basis on which it could be contended that Scheme Meetings of different classes of Scheme Shareholders ought to have been convened.

**55.** The second potential basis on which it might have been contended that separate classes of Scheme Shareholders may have been required was that, while most of the participating shares are held through nominees, a minority of the registered shareholders are also beneficial owners. That was another issue which I considered in *UBS* and I concluded that it did not provide a proper basis for directing meetings of separate classes of Scheme Shareholders. The Company would only be required to provide for separate classes, where the legal rights attaching to the relevant shares were so dissimilar that the relevant Scheme Shareholders could not fairly be asked all to vote together on the proposed Scheme. I accept the Company's contention that the fact that Scheme Shareholders may have different private commercial motivations or interests is not a matter with which the Company (or the court) need concern itself, at least in terms of whether the Scheme Shareholders ought to be segregated into different classes.

**56.** I am satisfied, therefore, on the evidence, that it was appropriate for the Scheme Shareholders to meet as a single class. On the evidence, there was no basis for treating the Scheme Shareholders other than as a single class. In any event, in circumstances where the Scheme Shareholders voted unanimously in favour of the proposed Scheme, the question as to the appropriate class composition was somewhat academic on the facts of this case. Nonetheless, I have given it careful consideration and have concluded that the third requirement of the test to be met, has clearly been fulfilled by the Company.

#### (4) Coercion

**57.** The court must also be satisfied that there has been no coercion of the members in respect of the approval of the scheme. As has been pointed out in a number of the cases mentioned (including *Ballantyne*, *UBS*, *SCISYS*, *Allergan* and *Xtrackers*), every scheme in a sense involves an element of coercion, where a dissenting member may be bound by the scheme, notwithstanding its opposition to it. However, as explained in *Ballantyne* (at para.

63), what this requirement is focused on is improper coercion or pressure by one group or section of members on another, similar perhaps to the oppression of a minority interest in a company. In any event, as the Scheme Shareholders voted unanimously in favour of the proposed Scheme, there was clearly no question of coercion in the present case and so this requirement has also been fulfilled by the Company.

(5) Approval by Intelligent and Honest Person

**58.** The fifth and final requirement which must be fulfilled is that the court must be satisfied that the scheme is such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her own interests, might reasonably approve of it. This requirement has been widely considered and discussed in several Irish, and other, cases, a number of which were discussed by me in *Ballantyne*. It is unnecessary to consider the cases in any detail in this judgment. The test was most succinctly put by Kelly J. in *Depfa* in the terms just summarised. In considering whether the test is satisfied, it is important to bear in mind, as stated by Kelly J. in *Colonia* and in *Depfa*, and by me in *Ballantyne*, *UBS*, *SCISYS*, *Allergan* and *Xtrackers*, that the court does not act as a rubber stamp in considering whether to sanction a scheme which has been approved by the relevant Scheme Shareholders. That said, however, the court will be slow to reach a different view in respect of the scheme to that reached by experienced persons involved in the relevant market or industry relevant to the company who voted in favour of it. As I mentioned in *Allergan* and in *Xtrackers*, Parker J. in *Re Ocean Rig UDW Inc.* (18 September 2017, Grand Court of the Cayman Islands, Parker J), in the case of a creditor scheme:-

*“It is clear, therefore, that the court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even*

*where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme, and in that regard the court's own view as to whether the scheme is reasonable or even the best scheme is not relevant.” (para. 89)*

**59.** That is the approach which I have adopted in considering the Company's fulfilment of this requirement of the test.

**60.** I am satisfied that the Company has fulfilled this requirement for a number of reasons. First, the Scheme has received the unanimous support of the Scheme Shareholders. The Scheme Shareholders voting at the Reconvened Scheme Meeting represented experienced and sophisticated investors. The court would be very slow to differ from the vote in those circumstances. Second, Mr. Murphy in his grounding affidavit set out in considerable detail the rationale for the Scheme. The evidence establishes that the move to the ICSD Model will provide a more streamlined, centralised settlement structure, which will be likely to generate significant advantages for the Company. Further, the United Kingdom's departure from the European Union means that the Company will not be able to continue to access the current model following the completion of the transition period in March, 2021. It is clear, therefore, that the Company carefully considered the changes provided for in the proposed Scheme and formed the view that it would be advantageous for the Company and for the ultimate beneficial owners of the Scheme Shares. I note also that the Company, through its solicitors, has kept the CBI updated in relation to the proposed Scheme and the proposed transition to the ICSD Model and no objections were raised by the CBI. Third, the Scheme was recommended by the directors of the Company and the rationale for it was clearly identified and communicated to the Scheme Shareholders in advance of the Reconvened Scheme Meeting. Fourth, on the evidence, it is clear that there is no material prejudice to the Scheme Shareholders or to

investors. Nor will any service providers or creditors be prejudicially affected by the proposed Scheme, other than existing service providers whose services will no longer be required. Employees will not be prejudicially affected as the Company has no employees.

**61.** I am satisfied on the evidence that the proposed Scheme is fair and equitable and that it is one which an intelligent and honest person, being a member of the relevant class, acting in his or her own interests, might reasonably approve of it. Proof of this is that the Scheme Shareholders unanimously did so.

**62.** On the evidence, therefore, I was satisfied that all of the five requirements summarised earlier were fulfilled by the Company and that the Scheme should be sanctioned by the court.

### **Conclusions**

**63.** In conclusion, I have set out in this judgment the reasons why I was satisfied to make an order sanctioning the proposed scheme of arrangement between the Company and the Scheme Shareholders pursuant to s. 453(2) of the 2014 Act at the conclusion of the hearing on 19<sup>th</sup> August, 2020. I was satisfied that the Scheme was fair and equitable and I have explained in this judgment why that was so.

**64.** For those reasons, therefore, having noted the undertakings given on behalf of the Common Depository and its nominee, I made an order on 19<sup>th</sup> August, 2020, sanctioning the proposed Scheme and making a number of related orders, including an order that the effective time of the Scheme should be 11.59pm (Irish Standard Time) on 4<sup>th</sup> September, 2020. I also gave liberty to apply to the Company.