OUTER HOUSE, COURT OF SESSION

[2020] CSOH 39

P28/20 & P29/20

OPINION OF LADY WOLFFE

in the petitions of

PREMIER OIL PLC and PREMIER OIL UK LIMITED

Petitioners

for sanction of Schemes of Arrangement

Petitioners: Delibegović-Broome QC, van der Westhuizen; CMS Cameron McKenna Nabarro Olswang
First Respondent: Lord Davidson of Glen Clova QC, Macgregor; Dickson Minto
Second and Third Respondents: Borland QC; Burness Paull LLP

29 April 2020

Introduction

The parties

The petitioner and the Group

[1] By these two applications Premier Oil plc ("PO") and Premier Oil UK Limited (POUK"), respectively a public and a private company registered in Scotland, each seek sanction under part 26 of the Companies Act 2006 (respectively "Part 26" and "the 2006 Act") for a scheme of arrangement ("the Schemes"). POUK is the principal operating member of the group of companies ("the Group" (also referred to in some of the documentation as "the Scheme Companies")) of which PO is the parent company. (PO is

the guarantor of all of the Scheme Debt Facilities (as after defined) apart from the Retail Bonds (as after defined), which are guaranteed by POUK.) The Group comprises 63 companies in total and it carries on oil exploration and production operations throughout the world. As at the date of these applications, PO's issued share capital amounted to £104,684,823.

[2] The proposed PO scheme and POUK scheme are on the same terms and each scheme has the same Scheme Creditors. While these applications were not formally conjoined, for ease of reference I shall refer to PO and POUK as "the petitioners" and to the Schemes without differentiation.

The first respondents: the single opposing creditor group

[3] The first respondent, Fund III Investment 1 (Cayman) Limited, is the only creditor to lodge answers in opposition to the Schemes. The first respondent is part of a group of entities collectively described in its answers as the Asia Research and Capital Management Ltd Group ("ARCM"). As at the Record Time (being 5 pm on 10 February 2020), the funds ARCM controlled totalled approximately 15% (or approximately US $428 million) (by value) of total commitments under The Group's indebtedness ("the Scheme Debt Facilities"), although the first respondent itself only holds approximately US $85 million of commitments under the Scheme Debt Facilities. ARCM are the largest single creditor of the Petitioners. Their debt falls within several creditor classes as defined by the nature of the debt instruments (explained below).

The second and third respondents: the compearing supporting creditors

[4] The second and third respondents are two separate groups of creditors, referred to for the sake of commercial confidentiality as "the Allen & Overy Creditor Group" and "the Ad Hoc Creditor Group" (collectively, "the Supporting Creditors").

[5] The Allen & Overy Creditor Group comprises creditors of the Group presently holding principal commitments amounting to approximately US $175 million and £100 million (as at the Record Date) which, in turn, are co-ordinating creditors of the Group presently holding principal commitments which amount to approximately US $915 million and £4 million. The Ad Hoc Creditor Group is made up of creditors of the Group which between them presently hold scheme claims as at the Record Date amounting to approximately US $935 million. The Supporting Creditors, who are said to represent 83.59% of the Super Senior Creditors and 75.4% of the Senior Creditors in value, support the petitioners and the petitioners' motion for sanction of the Schemes.

[6] The petitioners proposed two classes of creditors (referred to collectively as "the Scheme Creditors"): (1) the "Super Senior Creditors" (who were secured creditors); and (2) the "Senior Creditors" (comprising essentially all the other private creditors and the Retail Bond holders). These two classes of creditors met and approved the Schemes. In respect of the approval of the Schemes at the class meetings, the petitioners make the following points: first, that, with exception of the ARCM-controlled funds, the Schemes were approved by approximately 99% in value of the Super Senior Creditors and Senior Creditors who cast a vote; secondly, that the turnout was very high, with 96.82% of the Senior Creditors and 99.81% of the Super Senior Creditors (in value) being represented in person or by proxy at the Meetings; and thirdly, that while a small number of Scheme Creditors voted against the Schemes at the Meetings, they do not seek to oppose the sanctioning of the Schemes.

Background

The Group's capital structure ("the 2017 Refinancing")

[7] The Group's current capital structure was put in place following earlier schemes of arrangement sanctioned by this Court in 2017 ("the 2017 Schemes"). The 2017 Schemes played a key part in the overall refinancing of the Group in 2017 ("the 2017 Refinancing"). The two key documents of the 2017 Refinancing were the "Intercreditor Agreement" and "the 2017 Override Agreement". The 2017 Override Agreement provided for a common set of voting rights, covenants and events of default for the Scheme Liabilities. The Scheme Liabilities are secured by a common security package. The 2017 Override Agreement provided also that the Scheme Liabilities have a single contractual maturity date of 31 May 2021 ("the Scheme Maturity Date") (referred to in some of the documentation as "the 2021 Maturity"). If the Schemes are sanctioned these documents will be amended.

[8] Significant features of the 2017 Refinancing should be noted, as follows.

Creditor classes

[9] Under the 2017 Override Agreement there were 7 creditor classes corresponding to the debt instruments. (These are detailed in the petitioners' Note on Class for the Reporter, dated 21 February 2020 and in para 3.8 of Part A of the Explanatory Statement.) Mention need be made of three creditor classes:

1) *The Converted Group*: The Converted Group emerged as follows. At the time of the 2017 Schemes ARCM held certain German debt instruments ("the Schuldschein debts"). In order to bring those debts within the jurisdiction of

the English courts and the 2017 Schemes, ARCM agreed to convert these into a debt instrument recognised in English law.

2) *RCFs*: Some creditors (including ARCM and the first respondent) provided revolving credit facilities ("RCFs"). The first respondent's "new obligation" argument (see below) relates to the undrawn amount under its RCF.

3) *The Retail Bonds:* The Retail Bonds are the only publically traded debt. All other creditors apart from the Retail Bond holders are referred to as "the Private Creditors."

Super Senior Creditors and Senior Creditors

[10] The Intercreditor Agreement governed the ranking of the Scheme Debt Facilities and it provided that the Super Senior Creditors ranked ahead of the Senior Creditors for all purposes (clause 2); otherwise, the Senior Creditors "ranked *pari passu* without any preference between them" (clause 2.1(b) an 2.2(b)). The Super Senior Creditors' debt instruments were the RCF facilities and the Term Loan facilities. There are also RCFs and Term Loan facilities that are held by the Senior Creditors. The remaining creditors (ie the Senior Creditors as well as Retail Bondholders) are unsecured.

Voting rights

[11] Clause 23 of the 2017 Override Agreement contained complex provisions for making amendments and granting waivers. There were a number of different categories of amendments and waivers, each with different consent thresholds. Some categories required unanimous or near-unanimous consent of the creditors; others required significant majorities of, for example, 75%. Accordingly, in respect of categories of amendments and waivers requiring unanimity, any creditor opposed had a blocking vote or *de facto* veto. In

respect of waiver of a Material Covenant (as provided for in clause 23.2), which included a prohibition on entering into any sale or purchase agreement, the percentage of the debt instrument held by ARCM in two creditor classes gave it a *de facto* veto in respect of this form of waiver. In particular, clause 23.2 required that any change or waiver which affected or related to Clauses 10 (Representations and Warranties) and to 16 (Defaults), could only be made or given with the consent of the Majority Creditors (as defined) and at least three of the RCF Group, the Term Loan Group, the Converted Group, the USPP Group and the Retail Bond Group. By late 2019 ARCM was the Group's largest single creditor. It had a total of 15% of the Group's debt - it is disputed whether this was accumulated incrementally since 2017 (the petitioners' understanding) or was held by ARCM at that time (ARCM's position). ARCM's holding gives it a *de facto* blocking vote within two of the creditor classes, namely, the Converted Group and the Term Loan Facilities. (Indeed, the Petition narrates that, by reason of the Group's inability to agree proposals voluntarily across all creditor classes, it was compelled to promote the Schemes.)

[12] In clause 23 of the proposed Override Agreement, the voting structure will be simplified: instead of majorities within each of the creditor classes (as defined by debt instrument), majorities will be required from two principal groups, namely the Retail Bondholders and the Private Creditors (ie comprising all of the other classes of creditors apart from the Retail Bondholders). The effect of this would be the loss of ARCM's blocking vote. As will be seen, ARCM challenge this as an impermissible confiscation of their voting rights.

The "debt wall"

[13] One consequence of the 2017 Refinancing was the harmonisation and postponement of the maturity date of the Group's indebtedness to a single date, namely, the Scheme Maturity Date of 31 May 2021.

[14] The liabilities owing to the Scheme Creditors amount to about US $2.56 billion. The total lending commitments are higher, at US $ 2.83 billion (ie "Scheme Debt Facilities"), the difference in the two figures is the extent to which the Scheme Debt Facilities are as yet undrawn. In the discussions among the Group and its creditors prior to the promotion of the Scheme, this was referred to as a "debt wall" (a phrase understood to have been coined by ARCM). It was accepted at that time (though not by ARCM in these proceedings), that in the absence of a further debt extension as part of the Scheme or of forbearance on the part of the Group's creditors, refinancing of this magnitude of debt at a single point in time presented very significant challenges.

The two creditor classes for the Schemes

[15] The petitioners observe that, notwithstanding the identification of seven categories of debt instruments within the 2017 Override Agreement, the 2017 Scheme itself was approved at a meeting of two creditors classes, namely, the Super Senior Creditors and the Senior Creditors, and that ARCM did not object to the composition of these two creditor classes at that time. Consistent with the petitioners' approach to the 2017 Schemes, the petitioners divided the Scheme Creditors into the same two classes for the creditors' meetings to vote on the Schemes. (As will be seen, one of ARCM's challenges is to class composition.)

The impetus for the Schemes: the challenge of refinancing the Scheme Debt Facilities

[16] The Group issued a statement, as required by section 897 of the 2006 Act, setting out the proposed Schemes ("the Explanatory Statement"). Part A of the Explanatory Statement, which takes the form of a letter from the directors of the Group, sets out in detail the background to the Proposed Transactions, the iterative process by which its several elements were developed and the benefits and risks of what is proposed. The fundamental driver is the Group's position that it is at present unable to refinance the Group's indebtedness and that, absent the Schemes, it will be unlikely to be able to refinance its indebtedness in full by the Scheme Maturity Date.

[17] While a common method of refinancing for a company in the Group's sector would be reserve based lending ("RBL") facility (a form of lending against existing and anticipated yields of oil- and gas-producing assets), coupled with a subordinated public debts instrument, the Group would currently be able to obtain an RBL facility for only part of its debt. (This basis for this view is a report from PWC ("the PWC Report").) ARCM challenge the assumptions in the PWC Report and also criticise the lack of a further or independent report to support this view. Furthermore, it is the view of the directors that the Group is unlikely to be able to obtain sufficient subordinated debt to repay the balance of the Scheme Debt Facilities. The directors do not believe that a partial refinancing is feasible.

The Proposed Transaction

[18] The Schemes seek to enable a complex transaction ("the Proposed Transaction") to be carried out for the purposes *inter alia* of extending the maturity date of the Group's debt ("the Credit Facilities Extension") from 31 May 2021 (ie, the Scheme Maturity Date) to 30 November 2023, and to improve the ability of the petitioners to fund ongoing activities.

The Schemes are not seen as achieving the resolution of the Group's financial challenges (in the sense of deleveraging the balance sheet), but are intended to improve the Group's financial position and to enhance the ability of the Group to execute a future refinancing of the Scheme Debt Facilities. In part, this is sought to be achieved by adding to the Group's debt capacity under RBL. The Schemes are also intended to avoid hitting the debt wall; that is, to avoid what the directors of the Group regard as a very substantial risk that the Group will not otherwise be able to refinance the Scheme Debt Facilities before the Scheme Maturity Date.

[19] In outline, the essential elements of the Proposed Transaction, include:

1) *The Acquisitions*: The proposed acquisition (putting it simply) of one or more of three proposed material acquisitions of oil- or gas-producing assets (the "Andrew" and "Shearwater" acquisitions), or of a part-interest in such an asset (the "Tolmount" acquisition) (collectively, "the Acquisitions"). The sale and purchase agreements relative to the Acquisitions are in escrow and will only be released and take effect subject to completion of other elements of the Schemes. It should be noted that the Schemes will not themselves give effect to the Acquisitions. The Acquisitions essentially involve a transaction between PO and the relevant vendors (to purchase the assets comprising the Acquisitions), and a transaction between PO and its shareholders and other investors (to raise new equity capital to finance the purchase price). The Schemes simply provide the necessary consents by the Scheme Creditors in respect of any contractual restriction (eg in the 2017 Override Agreement) that would otherwise prevent the Acquisitions.

2) *The equity raise*: The Acquisitions are funded by, and therefore conditional on, the Placing and Rights Issue to raise US $500 million (net of expenses) ("the Placing and Rights Issue"), which is at present fully underwritten; and

3) *Extension of the Scheme Maturity Date:* The extension of the Scheme Maturity Date is dependent on the equity raise and on either the Andrew or Tolmount Acquisition completing.

There will also be ancillary amendments to the 2017 Override Agreement and other documentation associated with the 2017 Refinancing. The Group's directors believe that the Acquisitions and related funding arrangements are in the best interests of the Group and the Scheme Creditors. It should be noted that the Scheme Creditors are not being required to advance any new money to finance the Acquisitions. The burden of financing the Acquisitions will be borne by PO's shareholders and the new equity capital provided by the new investors (subject to completion of the Placing and Rights Issue).

[20] If granted, the Schemes will authorise PO as an attorney (on behalf of the Scheme Creditors) to sign a number of deeds, including one described as "the Implementation Deed". Among the matters the Implementation Deed provides for are (i) the extension of the Scheme Credit Facilities, (ii) conditional consent to the Acquisitions and related financing arrangements (including the Placing and Rights Issue and the Acquisition Bridge Facility), (iii) a waiver of all breaches of the finance documents which may occur consequent upon the Proposed Transaction, and (iv) certain releases.

[21] As will be seen, ARCM challenges the mechanism of constituting PO an attorney to execute certain documentation on behalf of the Scheme Creditors ("the power of attorney issue") and it challenges the conditionality of the Scheme.

Urgency of the Schemes

[22] The petitioners stress the urgency of sanction of the Schemes. They cite several factors, including:

(1) *The consequence of the Scheme Debt Facilities becoming current liabilities*: First, the Scheme Debt Facilities will become current in June 2020. In other words, if the Scheme Debt Facilities are not refinanced before 30 June 2020, they would require to be reclassified as current liabilities under International Accounting Standard 1 in the Group's half-yearly statements for the 30 June 2020 reporting period. By reason of the magnitude of the Group's indebtedness, coupled with the fact that these facilities all fall due on the same date (the "Scheme Maturity Date"), and that (in the absence of the Schemes or at least in the absence of an amendment and extension ("A&E") of the Scheme Maturity Date) there is no prospect of repayment in full as at the Scheme Maturity Date, it can reasonably be anticipated that the Group's auditors will interrogate these circumstances, and which may lead to an adverse market perception of the Group's financial prospects;

(2) *The escrow purchase agreements for the Acquisitions*: The Acquisitions are also time-critical. While the Group has concluded agreements for the Acquisitions, these are in escrow. There is a longstop date of 30 June 2020. There is no guarantee that the vendors will permit a prolonged period of uncertainty before completion of the Acquisitions; and

(3) *The underwriting of the equity raise*: The equity raise is at present fully underwritten, though only to 6 May 2020. Again, there is no certainty that the underwriters would extend the Standby Underwriting Agreement

beyond that date, particularly given the current market uncertainty. The equity raise is necessary, as the means to fund the Acquisitions.

ARCM's undeclared accumulation of shares in the Group ("the hedge issue")

[23] One of the unusual features of these applications was the issue of ARCM's hedge or short position of the Group's stock. From materials produced by the first respondent, the Group is said to have "one of the most shorted stocks in the UK with 18.7% of the total equity shorted" (para 2.2.8 of the Boyle Report (as after defined)). In the petition, the figure ARCM is understood to hold is 16.85% of the shares of PO as at 6 January 2020 (see statement 41.3.1). The petitioners' understanding is set out in section 7 of Part A of the Explanatory Statement. (ARCM dispute this narrative.) In brief, the petitioners understand that ARCM first acquired a publically disclosable net short position (being .5% of the ordinary shares in PO and each increment of .1% thereafter) in February 2017. ARCM failed at that time to disclose this on the website of the Financial Conduct Authority ("the FCA"), in breach of the EU Short Selling Regulation (Regulation (EU) No 236/2012 ("the Short Selling Regulation")). Over the intervening 33 or so months, ARCM continued to accumulate a short position but it failed on each disclosable acquisition (which the petitioners suggest were 80 in number) to publicise this, in breach of the Short Selling Regulation. It did not disclose the accumulated short position until 9 December 2019.

[24] Several matters flow from this. First, it is ARCM's position that it was thereafter frozen out of the discussions between the Group and the other Scheme Creditors and unable to influence the final form of the schemes to be promoted. This is not accepted by the petitioners, who point to extensive interactions with ARCM. Paragraphs 7.3 to 7.9 of Part A of the Explanatory Statement also detail the Group's consideration of the alternative

proposals favoured by ARCM and the reasons these alternatives were not in the end adopted. The petitioners also contend that this argument is irrelevant.

[25] Secondly, this gave rise to a dispute between ARCM and the petitioners as to whether this is a "short" (as the petitioners contend) or a "hedge" (as ARCM contend) (my reference to this as "the hedge issue" is for ease of reference only, and does not mean I have determined this matter). The first respondent lodged a report to support its position that this was a hedge. The petitioners lodged an affidavit from Mr Charles Worsnip to support their position that this was a short and, in any event, they argue that the characterisation as a hedge or a short is irrelevant. Their positon is that, as ARCM would benefit from the hedge/short from every drop in the price of PO's shares (the greater the drop in share price, the greater the profit it would make), the effect of this meant that ARCM has a different economic incentive to that of the general body of Scheme Creditors (who, collectively, would benefit from a rise in the share price). Putting it crudely, the more the share price falls, the more ARCM will benefit; the more the share price rises, the more ARCM could lose. And while in the former scenario, ARCM's potential profit would be capped by the fall in share price (ie, the price cannot fall below zero), in the latter scenario, ARCM's potential losses would be uncapped (as there was theoretically no limit on the amount the share price might rise).

[26] The petitioners did not directly address the relevance of ARCM's pre-Schemes comments (quoted four paragraphs above), or of ARCM's breaches of their obligations of disclosure as they accumulated their position on the hedge. In response to a question from the court, the petitioners' Senior Counsel expressly eschewed invoking against ARCM or the first respondent any doctrine of coming to court with clean hands. Their position was that the hedge placed ARCM in a conflict of interest *vis à vis* the other creditors. They referred to

the Reporter's conclusion (at para 4.78 of his Report) that by reason of the hedge, ARCM's complaints about the unfairness of the Scheme should be discounted. I turn now to outline the first respondent's challenges to these Schemes.

The Scheme Meetings

[27] The meetings of the Scheme Creditors in the two Scheme Meetings were held on 20 February 2020. The Minutes of those meetings, which were chaired by the Group's Finance Director, Mr Rose, were lodged. ARCM did not attend the Scheme Meetings, though they arranged for legal representation. They made no challenge at the Scheme Meetings to the composition of the classes. The two classes of creditors, comprising the Super Senior Creditors as one group and all other creditors (ie the Senior Creditors and the Retail Bond holders), voted overwhelmingly in favour of the Schemes. In their Note on Class (at para 27) the petitioners set out the votes cast by debt instruments. In each of the following classes ARCM were the only opposing creditors (their % of the vote against is stated in parentheses), whereas all other creditors in that class voted in favour:

(1) Super Senior (ie secured) Creditors holding RCFs and LC facilities (13%),

(2) Senior Creditors holding RCFs (13%),

(3) Term Loan facilities (35%), and

(4) USPP Notes (7%).

In two classes there were other votes against, as follows:

(5) Converted Facility (ARCM was 40%; others opposing, 8%),

(6) Retail Bonds (ARCM was 1%; others opposing, 2%).

In the final debt instrument the vote in favour was 100%

(7) Nelson Bilateral LC Facility.

In summary, 87% of the Super Senior Creditors voted in favour of the Schemes (ARCM's total against was 13%) and 84 % of the Senior Creditors and Retail Bondholders voted in favour (ARCM comprised 15.5% of the 16% opposed). In practical terms, had the creditor classes been comprised of debt instruments, which is ARCM's position, ARCM would have had a blocking vote only of the Term Loan Facilities creditors and the Converted Facilities creditors each voted as separate classes.

Outline of the first respondent's challenges to the Schemes

Anterior jurisdictional challenges

[28] The *Buckley* test, as reformulated by Snowden J in *Re Noble Group Ltd (No 2)* [2019] 2 BCLC 548 at paragraph 17 (set out under the heading "The Part 26 Jurisdiction", at para [41], below) is a helpful framework in which to situate ARCM's challenges. The first stage of the *Buckley* test (whether the provisions of the statute have been complied with) are often referred to as "jurisdictional" challenges. However, ARCM also advanced further, anterior jurisdictional challenges on grounds not readily encompassed within the *Buckley* test. (For convenience of reference, ARCM's grounds of challenge are numbered sequentially, notwithstanding the different subheadings in the following paragraphs.) ARCM's overriding submission in relation to their anterior challenges was that the Schemes go beyond what is permitted as a "compromise or arrangement" between a company and its creditors. The elements of this challenge are as follows:

1) *Novelty of forced Acquisitions*: The Acquisitions result in a fundamental change to the risk profile of the Group; in seeking sanction to acquire significant assets the Schemes are novel and not within the permissible scope of the Court's jurisdiction;

2) *The Schemes take but do not give*: A "compromise or arrangement" involves "give and take". In compelling the Scheme Creditors to vote in favour of the Acquisitions, the Schemes permanently alter their voting rights (the *de facto* effect of which would be to deprive ARCM of their blocking vote in one or two of the creditor classes (defined in terms of debt instruments)); this involved "taking" something from the creditors without "giving" them anything in return; and

3) *Purported changes to non-pecuniary rights*: A scheme can only compromise "pecuniary" rights of a creditor of a company. Neither the "forced" approval of the proposed Acquisitions nor the proposed "confiscation" of the voting rights, are "pecuniary" or creditor rights that fell within the jurisdiction of schemes under part 26 of the 2006 Act.

The Buckley stage 1 challenges: compliance with the statute, jurisdiction and the adequacy of the Explanatory Statement

[29] One of ARCM's (or more properly, the first respondent's) principal challenges was the not uncommon jurisdictional one on class composition. (This is because, if classes of creditors are not correctly constituted, the court ultimately has no jurisdiction to sanction the scheme (*per Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 ("*Hawk*").) The first respondent advanced several discrete challenges in respect of class composition as follows:

4) *Incorrect class composition*: The first respondent's principal contention was that the petitioners' division of the Scheme Creditors into two classes, namely the Super Senior Creditors as one class and the other class comprised of all other Scheme Creditors (regardless of debt instrument and including the Retail

Bondholders), was incorrect. Its final position as to the appropriate classes of creditors, as revealed in its written submissions lodged shortly in advance of the Sanctions Hearing, was that there should be a separate class of creditor for each debt instrument, reflecting the classification recorded in the 2017 Override Agreement ("the 2017 Override Agreement").

5) *The wrong comparator*: Closely allied to class composition issue was the question of the proper comparator. The first respondent contends that the Group is not insolvent (when assessed against the statutory grounds of insolvency found in the Insolvency Act 1986 ("IA 1986")); that the Group and Mr Rose (the Group's Finance Director) made conflicting statements as to the risks the Group faced as the Scheme Maturity Date approached ("the insolvency issue"); that the Group had a significant Enterprise Value and that evidence was required to resolve these disputed matters of fact.

6) *Inadequate Explanatory Statement*: ARCM contend that the Explanatory Statement was inadequate to such an extent that none of the creditors who voted in favour of the Schemes could have made a properly informed decision.

The Buckley stage 2 challenges: were the classes fairly represented at the Scheme Meetings?

[30] The first respondent contends that the interests of the classes of creditors were not fairly represented at the meeting, or that their interests were so diverse as to make it impossible for them fairly to meet together. In particular,

7) *Fees or "special interests"*: The first respondent referred variously to fees or "special interests". It queried whether there were undisclosed fees payable to

some of the creditors and which improperly influenced the creditors who voted for the Schemes. It also contended that there were "special interests", in the form of payments, which meant there was a materially greater benefit of the Schemes to some creditors when compared to others. When analysed, the changes to interest rates, coupled with a variety of fees paid, disclosed such a variance of change that these creditors could not sensibly form one creditor class. Also encompassed within the characterisation of "special interests" was the constitution of a new majority of 66.66% of creditors to make any amendments (which meant, in effect, the Supporting Creditors), and that creditors in some debt instrument groups will be able to trade out of their debt more readily than others.

8) *Mr Rose's unfair comments about ARCM*: Whether the comments made at the outset of each the Creditor Meetings by the petitioners' chair, Mr Rose, disclosed bias and/or improperly influenced the creditors who voted for the Schemes;

9) *The ARCM hedge or short*: The relevance, if any, of ARCM's (only lately disclosed) accumulation of shares in the Group, and described variously as a hedge or a short.

The Buckley stage 3 challenges: The Schemes are not fair

[31] The first respondent contends that the Schemes involve overriding unfairness. To some extent this involved a reference to criticisms already advanced: the Explanatory Statement omitted important information, contained false statements and as a whole did not put creditors in a position to make a reasonable judgement as to whether the Schemes were

in their commercial interest; the classes were not fairly represented at the meetings because of the special interests granted in favour of some Scheme Creditors but not others; the Schemes are not ones the Scheme Creditors could reasonably approve as there was no justification for confiscation of voting rights and the proposed Acquisitions made no sense; and there were blots on the Schemes (these are detailed below). In addition, it was contended

10) that the effect of the decline in oil and gas prices have resulted in so profound a change that the Acquisitions are no longer economically viable, such that the Schemes the Scheme Creditors approved are no longer reasonably capable of implementation. The lock up arrangements preclude the Scheme Creditors from voicing this.

11) Further, the Reporter misapplied the law in his Report and uncritically accepted the facts and assumptions presented by the petitioners without any testing of them.

The first respondent maintained that all these matters involve disputes of fact for which a proof was required. For these reasons, the first respondent moved the Court to refuse to sanction the Schemes and to allow a proof.

The Buckley stage 4 challenges: there are "blots" on the Schemes

[32] The first respondent also contends that there are "blots" on the Schemes. In particular,

12) *The conditionality of the Schemes:* The Schemes are conditional. As the conditions are under the control of third parties, and not the Court, this is impermissible;

13) *The Schemes are self-amending*: The Implementation Deed can be amended to alter the Schemes in any way by a 66.66% majority, again without the consent of the Court. This was another impermissible exclusion of the Court's jurisdiction; and

14) *The unfair exclusion of ARCM from the prior negotiations*: The first respondent contends that negotiations of the Schemes were conducted in a manifestly unfair manner, which involved the exclusion of ARCM from the discussions and the mischaracterisation of ARCM's hedge position. ARCM's position is that two unfair consequences flowed from their voluntary, albeit late, disclosure: first, that they were unfairly excluded from the final discussions amongst the creditors and the Group and therefore could not influence the Schemes; and secondly, the comments of the petitioners' chairman at the class meetings were so unfair as to constitute bias and to have influenced the other creditors to vote against ARCM.

15) *The power of attorney issue*: The Schemes purport to grant a power of attorney to PO. This is a matter governed by English law. However, the court's interlocutor does not constitute a "deed" for this purpose, and this is accordingly incompetent. The petitioners and the first respondent each lodged affidavits from Senior Counsel qualified in English law to support their respective positions. This was a further matter that the first respondent contended that the Court could not resolve without hearing evidence.

Petitioners' undertakings

[33] The following undertakings were proffered at the sanctions hearing:

1) The petitioners and first respondents agreed, in effect, to a reduce period of 7 days within which to reclaim (or appeal) the Court's order. Toward the end of the sanctions hearing, the petitioners offered an undertaking to resolve the criticised self-amending blot (ground of challenge (13), above). This was accepted by the first respondent and this ground of challenge was not maintained.

The sanction hearing

Procedural history

The first hearing and appointment of the reporter

[34] In Scottish procedure, a party seeking sanction for a scheme under Part 26 does so by presenting a petition to the Court. The operative orders sought are contained in the "prayer" of the petition and, if granted, will be brought into effect by the Court's interlocutor (ie the court order). At the first hearing of such a petition, the first orders the Court will typically grant include the appointment of a reporter, and the timetable for notification and holding of the meetings of the scheme creditors, for any answers to be lodged in due course and for the lodging of the reporter's report. The Court maintains a list of approved reporters for this purpose who are solicitors with expertise in schemes under Part 26. In anticipation of bringing forward a petition, the petitioner's agents will first contact the Court for the name of the solicitor next on the list (as was done in this case, when Lord Doherty identified John Stirling as the next reporter to serve by rotation). Thereafter the petitioner's agents will make informal inquiries of the reporter to ascertain his or her availability and to confirm there is no conflict of interest. The reporter, who has been described as the "eyes and ears of the court", is independent of the parties. In Scottish

practice, the reporter enquires into the petitioner's proposed scheme; s/he reviews the documentation relative to it; and s/he comments on the conduct of the Scheme Meetings and on any answers lodged in the court process. The reporter in this case had also assisted the reporter appointed by the Court in relation to the 2017 Schemes.

[35] The final stage is the sanctions hearing. In contrast to what I understand is the usual practice in England, the sanctions hearing in Scotland is generally not an evidential hearing. In Scottish practice, the court has the benefit of the reporter's report and it considers this, together with the petition, any answers, the petitioner's (and any other party's) written submission (the practice being to lodge detailed submissions in advance of the sanctions hearing), the productions and the relative caselaw. On the rare occasions when there is a question about class composition, this is dealt with at the sanctions hearing and not (as I understand may be the practice in England) at a separate hearing for this purpose, prior to the sanctions hearing.

The first respondent's interim interdict

[36] On the eve of the first hearing in these petitions, the first respondent sought to interdict *ad interim* the grant of first orders. The petitioners appeared and opposed that motion. The Supporting Creditors instructed Senior Counsel to attend on a watching brief. After hearing extensive argument, I refused that motion and the first hearings in these applications were held and the usual first orders granted. I indicated to the parties' senior counsel, that if there was to be a challenge to class composition (prefigured in some of the submission at the *interim* interdict hearing), the court would arrange for that issue to be considered in advance of the sanctions hearing. That offer was not taken up.

By Order of 6 March 2020

[37] A one-day sanctions hearing was fixed for 17 March 2020. However, I fixed a By Order hearing for 6 March 2020 ("the By Order") to deal with any interlocutory matters that might arise prior to the sanctions hearing. On 3 and 4 March, the first respondent lodged all its productions (detailed below), which comprised 178 productions totalling approximately 6,000 pages. Both parties also lodged supporting affidavits. A variety of motions were enrolled shortly before the By Order hearing. The Court dealt with these at the By Order hearing on 6 March and it also made certain orders in respect of further procedure. One of the matters raised was the form of the sanctions hearing. The petitioners moved for a hearing on affidavits and the documents; they were supported in that motion by the Supporting Creditors. The first respondent moved for an 8-day proof. Given the volume of materials just produced, it was not appropriate to determine the first respondent's motion for a proof at the By Order hearing, and the emerging Covid-19 virus emergency would likely preclude a hearing of that length in early course (this proved correct, as the UK lockdown commenced on 23 March, the Monday following conclusion of the sanctions hearing). To facilitate participation of parties' legal representatives from other jurisdictions, I granted permission for a live-note transcription of the sanctions hearing, and further authorised the use of mobile phones in court if immediate instructions were required from those following proceedings from remote locations.

Materials lodged for the Sanctions Hearing

[38] While I reserved the first respondent's motion for proof, I directed that the Sanctions Hearing proceed in the usual way on affidavits, the documents and submissions. If it transpired during that hearing that evidence was required on certain issues, this could be the focus of any further hearing thereafter. In response to court orders (directed to making

the most efficient use of the Sanctions Hearing), the parties each lodged written submissions (of no more than 50 pages in length) (and which I will refer to as the named party's "Submissions") , a joint bundle of authorities (which amounted to 7 folders totalling 120 items), reading lists of their own productions and of key passages in the authorities, and lists of essential topics for cross examination of other parties' witnesses. (The latter was to assist the Court in further consideration of the first respondent's continued motion that there were disputes of fact which necessarily required a proof.)

[39] I am grateful to the parties and their legal representatives for their considerable efforts in complying with these orders in the timescale provided. I have considered these materials. I do not propose to rehearse those matters in detail in this Opinion. I have, of course, also considered the parties' four Notes on Class Composition (ARCM submitted a Supplementary Note on Class) submitted to the Reporter, the Reporter's Report ("the Report") and Mr Rose's Reports of the Scheme Meetings.

The Reporter's Report

[40] The Reporter produced his report on 11 March. In his Report, the Reporter details the background to and issues arising in the Schemes and the procedures followed (prior to the promulgation of the Schemes, in the identification of the creditor classes, compliance with the Court's first orders convening the Scheme Meetings and the procedure at those meetings). He provides his views on the jurisdiction of the Court, on ARCM's arguments and any facts said to be disputed, and on the central question of whether the Court should in its discretion sanction the Schemes. Having considered matters, the Reporter's view is favourable to the Schemes; he does not accept any of ARCM's challenges to them; and he identifies no procedural, technical or other matter that would preclude the Court from

sanctioning the Schemes. I do not propose to set out the Reporter's' views in any more detail at this stage, though I do note his views on certain issues in the course of my discussion of the issues, below.

[41] The 4-day hearing on the sanction of the Schemes (conducted in three days, in light of the impending impact of the Coronavirus) proceeded by way of affidavits and oral and written submissions, and was concluded on 19 March. The petitioners and the Supporting Creditors moved, *inter alia*, for sanction of the Schemes. The first respondent opposed this and maintained its position that an evidential hearing was required.

The Part 26 jurisdiction

[42] As will be seen, the battle lines between the parties were drawn on many fronts, including on the formulation of some of the applicable legal tests. There was, at least, no dispute as to the broad outlines of the jurisdiction of the Court under Part 26 and the four stages for consideration of a scheme ("the *Buckley* test"), recently restated by Snowden J in *Re Noble Group Limited (No.2)* [2019] BCC 349 ("*Noble (No 2)*")at para 17. The four stages are as follows:

(1) *Stage 1*: The Court "must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to the creditors";

(2) *Stage 2*: The Court "must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote the interests adverse to the class whom they purported to represent";

(3) *Stage 3:* The Court "must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the Court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme"; and

(4) *Stage 4*: The Court "must consider whether there is any "blot" or defect in the scheme that would, for example, make it unlawful or in any other way inoperable".

[43] I set out below parties' submissions on the law applicable to class composition. Before setting out the first respondent's grounds of challenge to the Schemes, I describe the materials it lodged.

The first respondent's reports

[44] The first respondent lodged a significant amount of materials a few days before the By Order hearing fixed for 6 March. The bulk of these materials (c 6,000 pages lodged) comprised the appendices to four reports. The four reports were from Mr Ed Boyle of KMPG ("the Boyle Report"), Ms Lyuda Sokolova of KPMG ("the Sokolova Report"), Mr Jonathan Fuller of Xodous ("the Xodus Report") and Dr Chudozie Okongwu of NERA ("the NERA Report") (these reports are collectively referred to as "the ARCM Reports"). It also lodged affidavits from two of its officers, a Mr Alp Ercil ("Ercil 1" and "Ercil 2") and Mr Matthew Prest ("Prest 1" and "Prest 2").

[45] While I have considered the ARCM Reports and affidavits in detail, I need only summarise the key points from those materials.

The Boyle Report

[46] Mr Boyle is an insolvency practitioner with expertise in financial services insolvency. He accepts (at para 1.2.4) that he has little experience in the oil and gas sector, the sector in which the Group operates, and that he is not an expert in capital markets (para 2.5.10). The principal points in his report are:

(1) As the Group has net assets of $1,100 million as at 30 June 2019, the Group is not balance sheet insolvent within the meaning of section 123 of IA 1986 (see section 4);

(2) As at the Group's year end of 31 December 2019, it was currently able to pay its debts as they fell due (para 2.3.9) and so is not cashflow insolvent within the meaning of section 123 of IA 1986;

(3) He concluded that the Group appeared solvent and that an insolvency scenario is "unlikely (albeit not impossible) in the near term", even if the Proposed Transactions failed, however he did not factor in market volatility into this assessment (para 2.3.9); he also acknowledged a limitation on his analysis in the absence of more detailed non-public information that would typically be provided by a company (para 4.2.1);

(4) There was sufficient time before the Scheme Maturity Date for the Group directors "to consider a range of restructuring options and negotiate with stakeholders to implement an agreed restructuring solution" (para 2.3.8);

(5) In respect of the Group's short-term forecast liquidity to the Scheme Maturity Date (considered in detail in section 5), on any of the scenarios Mr Boyle considered there is insufficient liquidity to repay the Group's debt facilities at the Scheme Maturity Date (paras 2.3.7, 5.5.5 and 5.6.3). Accordingly, a solution would be required "in order for the Group to continue to trade and

to avoid a payment default" (para 5.6.3), although Mr Boyle regarded this as a capital structure problem;

(6) In respect of medium-term forecast liquidity to 3 December 2025 (considered in section 6), Mr Boyle concluded that the Group could continue to trade and to deleverage, even absent any new monies, so long as the creditors granted an extension of the maturity date (para 2.4.2 and 6.3.1);

(7) He considered (in section 7) a number of alternative options (to those comprised in the Schemes). Having considered the PWC Report set out in the Explanatory Statement, Mr Boyle agreed with its commentary that it would not be possible to put in place an RBL facility and to achieve an issue of High Yield Bonds ("HYB") of the amount required to refinance by April 2020 (para 7.4.8). He thereafter proceeded to consider other financing options, such as partial refinancing (which "may be possible" if the creditors would agree to it) (he accepts that full refinancing prior to the Scheme Maturity Date is not viable (para 7.4.8)), a voluntary or involuntary extend and amend (which is "simple to implement" and is "credible", though he accepts that negotiations can be "complex" (para 7.3.19)), disposal of non-core assets (though none are identified), an equity raise (which he accepts is not a standalone solution (at para 7.7.15)), a debt for equity swap (which is dismissed as "unlikely to occur as it would be a very complex transaction" (para 7.8.12), and a sale (via a merger &acquisition ("M&A")) of the Group as a whole (which he does not have the expertise to comment upon, but relies on the view of a colleague to dismiss this as untenable) (para 7.6.2);

(8) In the absence of any of these solvent alternatives, he accepted that the Group could be forced into insolvency (para 7.9.14);

(9) At best, he concludes that these are "the most likely areas that could feasibly be explored by the Group" (para 2.5.6), and that one or more of the options he identified "could be explored in combination … [with] a disposal of assets combined with a voluntary or involuntary [amend and extend] of facilities".

(10) He concluded that, given the 14 months to the Scheme Maturity Date, which he asserts is "highly likely to be sufficient time to explore, and if a consensus is found, to execute any of the alternatives" (paras 7.15.4; 2.5.6). He considered that the "key determinant" is the ability of the Group, the Scheme creditors and the potentially the shareholders, to "reach a consensus on the way forward" (para 7.15.4). There appeared to be a stable platform to negotiate and implement an alternative option.

(11) An administration or insolvency scenario would "likely result in a significantly worse financial outcome for the creditors as a whole" (para 2.5.12).

The NERA Report

[47] The purpose of the NERA report was to consider the economics of the Acquisitions, their associated benefits and risks, their attendant decommissioning liabilities and to consider how this was presented in the Explanatory Statement. It considered the change in the Group's relative exposure to the UK gas and oil markets and it examined certain assumptions (eg price assumptions underpinning the proposed benefits and risks of the Acquisitions, the assumed production volumes) and the ability of the Group to refinance the

Scheme Debt Facilities on the hypothesis that the Acquisitions are implemented. In general, having identified that the effect of the Acquisitions will mean that gas will comprise about 74% of the Group's output in future, the author of the NERA Report believes that the assumptions supportive of the benefits (including the estimated value of the reserves) are over optimistic and those underpinning the risks are understated (eg of decommissioning). In relation to the RBL capacity, which is the principle driver for the Acquisitions, the NERA Report concludes that there is "a substantial risk" that this strategy is unsuccessful (para 120 of section 8.5).

The Fuller Report

[48] The Fuller Report was instructed to assess the technical and commercial aspects of the Acquisitions, any associated risks (including decommissioning liabilities) and benefits, and the presentation of these matters in the Explanatory Statement. It contained an exhaustive analysis of historical decommissioning costs in the North Sea, which typically involved cost overruns, and it seeks to apply this to the Acquisitions. The author of the Fuller Report disagreed with some of the assumptions as to future events (eg oil and gas prices). Mr Fuller does not criticise the disclosures in the Explanatory Statement anent decommissioning.

Mr Prest

[49] Mr Prest's principal affidavit ("Prest 1") details a large number of criticisms (see paras 109 to 130) of the Schemes.

[50] Mr Prest also advances the criticism that the PWC Report was lacking in independence, because it applied the Group's working assumptions.

Mr Ercil

[51] Mr Ercil is also critical of what he says are mischaracterisations in the Explanatory Statement of ARCM and its dealings with the Group (see Ercil 1 at para 184).

The Sokolova Report

[52] The Sukolova Report was instructed to address the enterprise value ("EV") of the Group, which she identified as substantial, and also to review the Group's own model.

Matters relevant to the question of comparator

Characterisation of the risks to the Group if no Schemes

[53] One of the first respondent's challenges is to the comparator used for identifying the appropriate creditor classes. The first respondent submits that, as the Group is not insolvent on either of a balance sheet or cashflow basis, the Group was wrong to use insolvency as the counterfactual. In support of its position, the first respondent has produced the ARCM Reports noted above. The first respondent also submits that the petitioners and Mr Rose have been inconsistent in their pronouncements as to the Group's financial prospects and, accordingly, a proof is required to challenge Mr Rose' credibility and reliability. The petitioners and the Supporting Creditors submit that this is to apply too narrow a definition to insolvency. I consider the parties' competing submissions on the solvency issue, below. I next set out the statements made on the Group's financial prospects.

Statements by or on behalf of the Group

The Explanatory Statement

[54] The Explanatory Statement set out the Group's prospects as follows:

(1) *The refinancing risk*: That "although the Group has taken steps to deleverage its balance sheet since the 2017 Refinancing, the Directors' view (based on current assumptions as to the future of oil and gas prices) is that there is a **very substantial risk** that the Scheme Debt Facilities will not be capable of being refinanced through new debt facilities either by the end of June 2020 when the Scheme Debt Facilities would have to be classified as 'current liabilities' (for accounting purposes) or by their existing maturities in May 2021" (Part A, para 2.23). This statement is expanded upon (at para 18.7), as follows: "and that, in the absence such refinancing, [the Group] **would be unable to pay their liabilities** under the Scheme Debt Facilities at their existing maturity date. (See section 18, under rubric "What Happens if the Schemes Do Not Become Effective".) (Emphasis added.)

(2) *Risks of the Scheme Debt becoming current*: After noting that the Scheme Debt Facilities make up the vast majority of the Group's total liabilities, it is stated: "Unless the Group is able to demonstrate that it has a plan to refinance or extend the maturity of the Scheme Debt Facilities that is capable of implementation in the time available and has the requisite creditor support, disclosing such indebtedness as current liabilities… could have a number of significant negative consequences when the Group's financial statements are made publicly available, which is currently scheduled to occur in August 2020." The risk was that the Group's commercial counterparties would likely interpret this change in the financial statements….as a sign that the Group has lost the confidence of its creditors. And that suppliers might infer that the "Group is suffering, or is about to encounter, serious liquidity problems…".

(3) *The risk of insolvency*: The statement in Part A of the Explanatory Statement addressed the risk of insolvency. It stated that if an extension to the maturities of the Scheme Debt Facilities was sought against a backdrop of imminent debt maturity and a potential liquidity shortfall, and specially following a failed scheme, the process would be less controlled and with a greater risk of "significant value destruction". The conclusion was stated (at para 18.13): "Ultimately, there is a very substantial risk (based on current assumptions as to future oil and gas prices) that it would not be possible to refinance or agree an extension of the maturity date, which would make insolvency of [the Group] a real possibility in 2021 (if not before)." An insolvency would be "highly destructive to the returns of Scheme Creditors".

The Rose Affidavits

[55] The Group's Finance Director, Mr Rose, produced three affidavits for the sanctions hearing.

(1) His principal affidavit ("Rose 1"), dated 12 February 2020 and extending to 85 pages (with a lever arch file of appendices), dealt comprehensively with the Group's position, the general background to debt and equity financing for companies in the Group's sector and to the Group and to the 2017 Refinancing, the steps taken by the Group since the 2017 Refinancing with a view to facilitating a full refinancing of the Scheme Debt Facilities, and the risks of the Group entering into insolvency proceedings in the near to medium term.

(2) His first supplementary affidavit ("Rose 2"), dated 12 March 2020 and extending to 38 pages, addressed the substantial volumes of materials produced by the first respondent on 3 and 4 March (including two witness statements, four reports and multiple volumes of appendices, and a second inventory of productions). Rose 2 responded to the first respondent's criticisms of the adequacy of the Explanatory Statement and its contention that there were alternatives to the Schemes. He also addressed in more detail the likelihood of the Group entering into insolvency proceedings in May 2021 (if not before) and the urgency of the Schemes.

(3) Mr Rose's third affidavit ("Rose 3"), dated 12 March 2020, responded to the second affidavit of Mr Ercil ("Ercil 2") and the recent market developments, including the recent drop in oil prices, and its impact on the Schemes.

Mr Rose's statements of the Group's risk of near to medium term insolvency

[56] The issue of the Group's risk of insolvency in the near to medium term was dealt with most comprehensively in Rose 1 (at paras 172 to 177). After referencing paragraphs 18.12 and 18.13 of Part A of the Explanatory Statement, Mr Rose noted ARCM's contentions

(1) that the phrase "very substantial risk" meant that it was more likely than not that the Group would be able to refinance absent the Schemes, and

(2) that a "real possibility" of insolvency meant that it was more likely than not that insolvency proceedings would be avoided.

Mr Rose categorically rejected those contentions. In relation to (1), the risk of insolvency, he explained that it had not been necessary to quantify in percentage terms "the very substantial risk of the Group not being able to refinance absent the Schemes". He continued:

> "for the avoidance of doubt, my view, which is shared by my fellow Directors, is that, absent the Schemes, it is more likely than not that it would not be possible to conclude a successful refinancing before June 2020 (when the Scheme Debt Facilities become current) or ahead of the 2021 Maturity. This risk is increasing day by day. If the Group was not able to refinance the Scheme Debt Facilities, the Group would likely attempt an alternative restructuring. However, for the reasons I explain in this affidavit, I do not have a sufficient basis to conclude that any such restructuring would be successful. It follows that the consequence of not being able to refinance is that the relevant Group Companies **would more likely than not enter into insolvency proceedings in May 2021 (if not before)**". (Emphasis added.)

While ARCM appeared to consider the Group to be solvent on a balance sheet basis, that was not determinative and it did not mean that creditors would recover in full on their outstanding debt claims (see paras 174, 176). Mr Rose explained that it was necessary to consider the question of insolvency risk from the perspective of cashflow insolvency. It was his view (at para 174) that:

> "the risk of being unable to refinance the Scheme Debt Facilities (with the consequence of the relevant Group companies entering into insolvency proceedings) has increased, and continues to increase. Without such a refinancing, and assuming the 2021 Maturity is not extended (and there is insufficient basis to conclude that it is likely that it would be), **it is plain that the Group would not be able to repay the Scheme Debt Facilities on the 2021 Maturity**". (Emphasis added.)

[57] Mr Rose confirms these views in Rose 2 (eg see paras 13, 19 and 30 to 45) and in Rose 3 (at para 29). He stressed that the Schemes present the best way forward and the only means identified by the Group which has the support of sufficient Scheme Creditors to be implemented in the time available. He responded at length to the Boyle Report (which had concluded that the Group was not balance sheet insolvent), and which had not changed his views. He explained that in considering the Group's financial prospects, the appropriate

focus was on cashflow, not balance sheet insolvency. He remained of the view that, absent the Schemes, it was more likely than not that it would not be possible for the Group successfully to conclude a refinancing before June 2020 (when the Scheme Debt Facilities become current) or ahead of the 2021 Maturity. He also responded to ARCM's criticisms that the Group's statement of 5 March 2020 ("the March Release") relative to the release of the Group's annual accounts to the year ended 31 December 2019 ("the 2019 Accounts") were more positive about its financial prospects and was therefore inconsistent with the Group's position in the Explanatory Statement or other statements by Mr Rose.

The March Release

[58] Mr Rose explained that the observations of the Group as a "going concern" in the March Release related to the period covered by the 2019 Accounts, consistent with applicable accounting standards, and did not have to address the question of the ability of the Group to repay the Scheme Debt Facilities at maturity in May 2021 (which the Explanatory Statement addressed), because that was outwith the term covered by the 2019 Accounts. Accordingly, there was no inconsistency between the March Release and the Explanatory Statement.

ARCM's views on the risk facing the Group prior to the promotion of the Schemes

[59] The petitioners refer to certain statements by ARCM made prior to the presentation of these Schemes consistent with the petitioners' assessment of the Group's financial prospects. I need only quote one example, which is ARCM's letter of 18 December 2019 to the Group. This referred to the Group "facing a debt maturity wall in under 18 months a highly leveraged structure and no possibility of a full refinancing of the 2021 maturity" and

that "considering that the May 2021 debt becomes current in less than six months, we believe [the Group] must address this debt maturity".

Parties' legal submissions on class composition

The dispute on the proper approach to class composition

[60] One of the first respondent's principal challenges was to the Group's division of the Scheme Creditors into only two classes for the purposes of voting on the Schemes at the Scheme Meetings. ARCM's ancillary criticisms include the issue of the correct comparator and the payment of fees.

[61] The correct class composition is critical; if the classes of creditors are not correctly constituted, the court ultimately has no jurisdiction to sanction the scheme: *Hawk, cit supra,* at para 22. However, there is no statutory test for class composition under Part 26 of the Companies Act 2006.

[62] With a view to using the Sanctions Hearing to focus on areas of dispute and to have parties agree uncontroversial matters, I directed parties to produce a joint statement of agreed legal principles on class composition. Somewhat surprisingly, given the abundance of the case law (or perhaps because of it), parties were unable to agree what might be considered settled law in England, especially on the issue of class composition. I summarise parties' principal submissions, noting their points of difference.

[63] The essential differences between the first respondent and the other parties was whether "arrangements" should be narrowly or broadly construed; whether essentially the test focuses on dissimilarity (as ARCM does, but which the petitioners argue is to ignore stage 1 of the *Buckley* test and the assessment of similarity); the meaning of insolvency

(whether this is equated to the statutory definitions in the IA 1986 or attracts a broader definition); and the assessment of interests derived from legal rights.

The two-stage test derived from two English Court of Appeal decisions

[64] In England, the Court of Appeal set out the legal test in *Sovereign Life Assurance Co* v *Dodd* [1892] 2 QB 573 ("*Sovereign Life*"). This has been confirmed by the Court of Appeal in England more recently in the case of *Hawk*. It involves a two-stage test (*per Sovereign Life*; *Re Apcoa Parking Holdings GmbH* [2015] BCC 142 ("*Apcoa*" at para 52)), namely:

> "(1) At the <u>first</u> stage, the court considers the legal rights of the relevant creditors. There are two sets of rights that are relevant in this context (*Re Hawk Insurance Co Ltd* [2001] BCLC 480, at para 30; *Re UDL Holdings Ltd* [2002] 1 HKC 172 at para 17):
>
> (i) the existing rights against the company, which are to be released or waived under the scheme; and
>
> (ii) the new rights (if any) which the scheme gives to those whose rights are to be released or waived.
>
> (2) If there is no material difference between the legal rights of the relevant creditors, they will form a single class, and there is no need to proceed to the second stage of the test.
>
> (3) If there are material differences between the legal rights of the relevant creditors, at the <u>second</u> stage the court needs to assess the relevance of those differences.
>
> (4) 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 in order to avoid the unnecessary proliferation of classes: *Sovereign Life Assurance* v *Dodd*, at page 583."

[65] The first respondent did not explicitly acknowledge the two-stage test the petitioner identified, although its own reliance on para 30 of *Hawk*, which is the source of the petitioner's analysis, would suggest the two-stage test is not disputed as wrong in law. The first respondent's approach was to condense the test into its latter part, ie focusing on dissimilarity. The first respondent submitted that the legal test is whether the rights of creditors are so dissimilar as to make it impossible for them to consult together with a

view to their common interest. In support of this approach, the first respondent cited the following passages:

(1) Lord Justice Bowen in *Sovereign Life* (at p.583), where he said:

> "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."

(2) Lord Justice Chadwick in *Hawk* who stated 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" (para 30).

And, further, at para 33 in relation to "class rights":

> "When applying Bowen LJ's test to the question 'are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements' it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements – so that they should have their own separate meetings – but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression is that the court is not bound by the decision of the meeting. It is important Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority."

(3) Lord Millett (a Law Lord who was in the House of Lords prior to that court becoming the United Kingdom Supreme Court) in *Re UDL Holdings Ltd* [2002] 1 HKC 172, at p.184 F to I ("*UDL*"), who summarised the class test as follows:

> "(2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.

> (3) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.
>
> (4) The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class."

[66] The petitioners referred to other more recent cases in which the *Sovereign/Hawk* test is reformulated or elaborated. So, for example, the petitioners also submitted that the cases indicate that a broad approach to class is taken and "differences may be material, certainly more than *de minimis*, without leading to separate classes" (*per Re Metinvest BV* [2016] EWHC 79 (Ch) at para 17 ("*Metinvest*"); *Re Telewest Communications plc* [2004] BCC 342 at par 37 ("*Telewest*"); *Re DX Holdings Ltd* [2010] EWHC 1513 (Ch) ("*DX Holdings*")at para 5); and that in assessing class composition, the court should consider whether there is more that unites the scheme creditors than divides them (*Telewest*, at para 40; *Apcoa*, at para 107).

[67] For its part, the first respondent deprecated the tendency in modern cases to reformulate the test as laid down by the English Court of Appeal, and it cautioned against this Court relying on *dicta* in cases where puisne judges sitting at first instance in the Chancery Division have given their own worded summaries of the Court of Appeal's formulation, often without any opposition in schemes of arrangement, or proper argument; and it cautioned this Court against relying on cases which were not argued by any opposing party attending in the English Courts (it referred to the petitioners' citations of *Telewest*, *Re Primacom* [2013] BCC 201, *Metinvest* , *DX Holdings Ltd, Re Hibu Group Ltd* [2016] EWHC 1921

(Ch) ("*Hibu*"), *Re Cooperative Bank plc* [2017] EWHC 2112 (Ch) ("*Co-operative Bank*") and *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) ("*Lecta*")).

Legal rights, not interests

[68] It is important to note that at both stages of the test, the Court is concerned purely with the legal rights of the relevant creditors as against the scheme company, not their economic interests (*UDL*, at para 27; *Re Primacom Holding GmbH* [2013] BCC 201, paras 44 - 45.) (This is relevant as the petitioners argue that matters founded upon by the first respondent as a relevant difference, eg the *de facto* blocking vote enjoyed by the first respondent, are precisely such "interests" and not a matter of legal right.) The petitioners note by way of illustration that the courts have assessed creditors' existing rights in the alternative counterfactual to the scheme in determining whether matters such as different interest rates or maturity dates attaching to debt in fact give rise to a difference in rights or a material difference in rights. (*Re McCarthy & Stone plc* [2009] EWHC 712 (Ch) ("*McCarthy & Stone*"), at para 7; *Re Primacom Holding*, at paras 52 - 53; *Co-operative Bank*, at paras 9 - 14, 17.) The first respondent submitted that the decision of Lord Millett in *UDL* makes clear (at point (3)) that the relevant legal test relates to similarity or dissimilarity of legal rights, "not on similarity or dissimilarity of interests not derived from such legal rights". The first respondent submitted that this means there is an outstanding question in English law to the extent of interests that are derived from the relevant legal rights that would be relevant to the class question. The first respondent submitted that the answer to that question is found in *Hawk* (at para 30).

The comparator

[69] Parties were agreed that the foregoing analysis entails consideration of the comparator to the scheme, or the counterfactual of what will be the alternative if the proposed scheme does not proceed. As was noted by one jurist eminent in this field, Hildyard J, in *Re Stronghold Insurance Co Ltd* [2019] BCLC 11 ("*Stronghold*") (at paras 48 to 51, and especially at para 49).

> "... only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights be weighed fairly."

[70] Accordingly, the legal significance of the comparator is two-fold as it informs the question of class composition. First, the comparator is relevant to ascertaining the nature and substance of the creditors' rights in the absence of the scheme. Thus, if the comparator is an immediate liquidation (eg where the company has an urgent cash flow crisis), then creditors' rights must be assessed by reference to their rights in such a liquidation. (See, eg David Richards J (as he then was) in *Re T&N Ltd (No. 4)* [2007] Bus LR 1411 ("*T&N (No 4)*") at 87 "In considering the rights of creditors which are to be affected by the scheme, it is essential to identify the correct comparator.") In the case of rights against an insolvent company, where the scheme is proposed as an alternative to an insolvent liquidation, it is their rights as creditors in an insolvent liquidation of the company*:* see *Hawk.* Secondly, the comparator is relevant to assessing whether creditors with different rights can consult together in their common interest. Parties were agreed that, in the event of insolvency, this will affect the assessment as to whether the creditors' rights are sufficiently similar that they can vote in a single class. As Hildyard J said in *Apcoa* at paragraph 52, the Court should "postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class". In this

context, the first respondent stressed the observations of Hildyard J in In *Re Lehman Brothers* [2018] EWHC 1980 (Ch) ("*Lehman (2018)*"), (at paragraph 105) that:

> "... the 'comparator' is always very important at both the second and the third stage, as was recognised as long ago as the decision in Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385 at 415, though it should not be used as 'a solvent for all class differences' even in a context where the alternative is insolvent winding-up or its real likelihood (which will destroy value and negate any real economic value in the competing interest): see *Apcoa* [117]."

The meaning of insolvency for the purposes of the comparator

[71] What divided the parties was the definition or prospect of insolvency. As noted above, the first respondent equated that with the statutory tests for insolvency in section 123 of the IA 1986. The petitioners contended for a more flexible approach. They argued that there are a range of possibilities which lie between the two extremes of immediate insolvency and profitable and successful trading as a going concern for the foreseeable future. By way of example they cited Hildyard J's use of "the possibility or real likelihood of insolvency" as the comparator in *Co-operative Bank* (at paras 11 to 14). Hildyard J stated that the comparator was a "possibility", "real risk" or "real likelihood" of insolvency. In *Lecta*, Zacaroli J followed Hildyard's approach in *Co-operative Bank* (see para 13) and he used the formulation that the company was subject to a "very real risk" of insolvency as the comparator. The high point of this approach, from the petitioners' perspective, is the formulation in *Hibu.* In that case (as here), schemes of arrangement were proposed in order to deal with certain legacy issues arising out of a prior restructuring in 2014. In describing the comparators to the schemes (at paras 22 to 28), Warren J pointed out that "there is no immediate prospect that the Group will enter into insolvency proceed*ings*", but that the company would likely be unable to repay certain facilities (called PIK facilities) at their scheduled maturity in 2024. He noted that:

> "… The 2014 restructuring achieved its primary purpose of restoring the Group to financial health.
>
> Nevertheless, whilst there is no immediate prospect that the Group will enter into formal insolvency proceedings, the 2014 restructuring created three legacy issues which the 2016 restructuring is designed to address ...
>
> ... First, the PIK debt is too high. The company considers it unlikely that it will be able to repay the PIK Facilities by 2024 in accordance with its obligations. There is no immediate problem, but the issue does need to be addressed and it is considered best to do so now in conditions of financial stability from the Group's perspective."

The fourth cases the petitioners cited in support of their approach to the assessment of insolvency was *Scottish Lion Insurance Co Ltd* v *Goodrich Corp* 2010 SC 349 at 364 ("*Scottish Lion (2010)"*), in which the First Division stated (at para 44):

> *"The occasion for the presentation of an application for sanction may be where there is a 'problem' — in the sense of an adverse situation facing both the company and its creditors, or a class of them, which requires to be resolved. The existence of such a problem may be a factor in favour of the granting of sanction. But it is not, in our view, a precondition to the sanctioning of a scheme, whether solvent or otherwise."*

[72] The petitioners submitted that these authorities illustrate the range of the possible comparators to a scheme. In each case, they argued, it is necessary to determine what the likely factual position would be absent the scheme and to assess creditors' rights against that context. They submitted that, by contrast, the approach taken by ARCM is simplistic and confused. ARCM draws a binary "black and white" distinction between "imminent risk of insolvency" (on the one hand) and a "solvent comparator" (on the other hand). In relation to the latter scenario, ARCM states: "Solvent companies require [sic] to comply with their contractual obligations". The petitioners submitted that such a crude approach has no basis in law. It is wrong to say that merely because a company would not immediately go into an insolvency proceeding if the scheme was not approved, it must be treated as solvent, and the creditors' rights assessed accordingly. They noted that ARCM's position appears to be

that companies not at risk of immediate liquidation cannot undertake schemes of arrangement varying their contractual obligations (as they would be thereby departing from their contractual obligations) – a proposition that was explicitly rightly rejected by the Court in *Scottish Lion (2010)*.

[73] In the context of the comparator, they submitted that it is necessary to look at the actual facts and commercial reality. As illustrated by *Hibu*, a company may be able to continue performing its contractual obligations for a period of time, but may then be unable to repay its debts at a particular date in the future. Accordingly, when identifying the appropriate comparator, the Court obviously can and should consider whether the company will be able to repay its debts in the future. The Court is not confined to asking whether or not the company would go immediately into an insolvency proceeding if the scheme was not approved and applying that single test by placing the comparator into either an "insolvent" or "solvent" box.

[74] The petitioners' primary position was that the concept of cash flow insolvency under section 123(1)(e) has nothing to do with schemes of arrangement under Part 26 of the 2006 Act. The comparator to a scheme is a counterfactual scenario which represents what will (or may) happen if the scheme is not sanctioned. While proof of insolvency under section 123 is one of the statutory preconditions for making a winding-up order against a company, the petitioners submitted that the Court may conclude that the comparator to a scheme involves a likelihood or a risk of an inability to repay debts in the future, even if the company is not presently insolvent under section 123(1)(e).

[75] However, they advanced a fall-back argument to the effect that even if the test of cashflow insolvency in section 123 applied, the first respondent erred in its understanding and application of it. The petitioners referred to the first respondent's citation of *BNY*

Corporate Trustee Services Ltd v *Eurosail-UK-2007-3Bl plc* [2013] 1 WLR 1408 ("*Eurosail*"). This is the leading Supreme Court case on the definition of cash flow insolvency under section 123(1)(e) of the Insolvency Act 1986 ("a company is deemed unable to pay its debts if ... it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due"). They submitted that the test for cash flow insolvency under section 123(1)(e) is much broader than ARCM is willing to acknowledge. In *Eurosail*, Lord Walker stated (at para 37):

> "The 'cash-flow' test is concerned, not simply with the petitioner's own presently-due debt, nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business."

In the present case, it is at least arguable that the Scheme Debt Facilities will fall due in the "reasonably near future" (namely, May 2021). ARCM's assertions about cash flow insolvency are not accepted and were at least arguably based on a misapplication of the test in *Eurosail*.

Distinguishing Stronghold

[76] The petitioners sought to distinguish one of the cases on which ARCM placed considerable reliance, that of *Stronghold,* where a solvent insurance company proposed a scheme of arrangement. In that case, the Practice Statement Letter expressly stated that "in the event that the scheme is not implemented, the current likely alternative is that the company will continue in a solvent run-off": see the judgment at para 60. The company suggested that it might cease to operate as a going concern at some unknown time in the future (as a result of an unspecified regulatory intervention), but failed to identify any point

at which this might happen. That being so, Hildyard J concluded (at para 61) that "it is very difficult to take liquidation as sufficiently imminent and likely to show the best comparator".

[77] The petitioners submit that while that decision may well have been correct on its facts, it provides no assistance in the present case. The facts of *Stronghold* are not the same as those of the present case. In this case, the Group faces a specific and concrete maturity deadline in just over a year. At that stage, the Scheme Debt Facilities (amounting to about US $2.6 billion in drawn commitments) will become immediately due and payable. Unless the Schemes are sanctioned, it is more likely than not that the Scheme Companies will be unable to refinance or otherwise repay their debts at the scheduled maturity. These facts form the relevant comparator in the present case. Thus, the relevant comparator is one where, absent the Schemes, the Scheme Companies would continue in business for a period of time but where they would more likely than not be unable to repay their debts at maturity and would more likely than not go into insolvency proceedings. The relevant rights of the creditors for the purposes of the class analysis are their rights in this scenario.

Deference to the view of the directors

[78] Finally, in this context, the petitioners submitted that whenever there is a dispute as to the appropriate comparator, the Court will generally defer to the views of the company's directors (who are in the best position to assess what will happen if the scheme does not proceed). They referred to observations by Hildyard J in *Apcoa*, in support of that submission:

> "... there is often little dispute [as to the comparator], except perhaps as to the imminence of actual insolvency; but as noted previously, there was considerable dispute in this case. Although FMS [a dissentient creditor] put in issue the reality of the threat, I concluded that I should accept the detailed

> evidence of the Scheme Companies (put in with regret on behalf of the directors for obvious reasons) that the restructuring which the Schemes enable and in part effect, and the new finance which Deutsche Bank has offered conditionally upon the restructuring, is necessary if the Apcoa Group is to trade solvently and successfully. I see no sufficient reason for doubting the directors' evidence that if the Schemes fail they will, under German law, have to commence insolvency processes very soon thereafter.
>
> There was some suggestion in FMS's evidence that Centerbridge [a creditor who supported the schemes] had too much to lose to allow this, and would step into the breach at the last minute; but that implicitly invites a gamble or an assessment as brinkmanship on the part of the court which I do not think would be appropriate."

[79] In this case, the parties dispute whether the proper comparator of the Group is insolvency; the difference arises from their differing definitions of what constitutes insolvency. It is in this context that the first respondent contends for the statutory definition of insolvency from IA 1986. It submits that the comparator in the present case will need to be determined, first, by application of insolvency law and whether the Group is unable to pay its debts, or likely to become unable to pay its debts in the senses used in section 23 Insolvency Act 1986 and Schedule B1, para 11 of the Insolvency Act 1986; and, second, by assessment of the relevant facts of the case. By contrast, the petitioners contend for a broader spectrum of insolvency. They submit, first, that there is a range of possibilities between the two extremes of immediate insolvency and profitable and successful trading for the foreseeable future (*Hibu* at paras 22 to 28; *Lecta* at para 13; *Co-operative Bank* at paras 11 to 14) and, secondly, that where there is a dispute as to the correct comparator, the court will have due regard for the views of the company's directors (*Apcoa*, at para 71).

The relevance of fees or other collateral benefits to class composition

[80] One of the points of contention was whether the fees payable (or other collateral benefits) under the Schemes were relevant to class composition. There is no dispute that the payment of fees under the scheme or wider restructuring to some but not all scheme creditors may have impact on the class question. Both parties referred to the observations in *Re Noble Group Ltd* [2018] EWHC 2911 (Ch); [2019] BCC 349 ("*Noble (no 1)*"), at para 111, of Snowden J (another distinguished jurist in this field):

> "Any payments to a limited group of creditors in connection with a restructuring can have a potential impact both upon the class question and upon the question at the sanction hearing of whether, to the extent that the recipients of such payments make up the majority voting in favour of the scheme, they are really representative of the interests of the wider class of creditors as a whole. Of necessity, therefore, the making of such payments carries with it a requirement for full and frank disclosure to the Court throughout out the scheme process, together with absolute transparency and disclosure to all creditors in the Explanatory Statement."

The petitioners point out that much will depend on the nature of the fees.

The need to safeguard against majority and minority oppression

[81] There is a further factor important to the question of class composition, namely the need to safeguard against both the majority and the minority oppression. This has long been recognised by the courts. So, for example, in *Hawk* it was stated:

> "When applying Bowen LJ's test to the question 'are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements' it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements – so that they should have their own separate meetings – but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression is that the court is not bound by the decision of the meeting. It is important [that] Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority."

The petitioners submitted that a holistic approach was required and that the first respondent's approach was a form of "salami-slicing" which artificially divided creditors in

many classes, thereby increasing the risk of minority oppression. The first respondent submitted that the Court should apply the correct test, which was dissimilarity, and must guard against oppression by the majority in this case.

Discussion

[82] In considering the many issues in this case, I propose to adopt the *Buckley* test as recently reformulated by Snowden J in *Re Noble* (quoted at para [41], above). As I noted above, in the Outline of ARCM's challenges, some of their challenges are anterior jurisdictional challenges. I propose to start by considering those before addressing their other grounds of challenge.

ARCM's anterior jurisdictional challenges

[83] ARCM's anterior jurisdictional challenges are that the Schemes go beyond a compromise of pecuniary rights and so are outwith the Part 26 jurisdiction; that a scheme of arrangement can do no more than re-arrange debt rights; that the Acquisitions are novel and nothing similar has been provided for in other Part 26 schemes; that the changes to voting rights are not ancillary to compromise of a pecuniary liability and that Schemes lack "give and take". The first respondent also described the loss of ARCM's *de facto* blocking vote as a "confiscation" (ie because it is "taken" without any "give" in return). It should be noted that while it was ARCM which produced their Notes on Class to the Reporter, the Answers opposing the Schemes was submitted by the first respondent (one of the funds under the control of ARCM). The other parties drew no distinction between ARCM and the first respondent and I adopt the same approach.

Preliminary observations on the role of the Court and the approach to be adopted in consideration of a Part 26 scheme

[84] In considering the role of the court in a Part 26 application, I bear in mind Lord President Clyde's observations in *Singer Manufacturing Co* v *Robinow* 1971 SC 11, where he observed (at pages 13 to 14) that:

> "[t]he Courts have always interpreted [the then applicable statutory provision in the Companies Act 1948] and its statutory predecessors **broadly**, so as to enable a **wide variety of arrangements** to be put forward". (Emphasis added.)

The English case law is replete with similar observations, an early and powerful expression of which is found in the judgment of Fry LJ in *Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at LA 14 ("*Alabama*") (at 246ff), a case he described as "fully and earnestly argued", where he stated that "the jurisdiction conferred by the Act of 1870, and the words there **are of the largest description**" (emphasis added). At an earlier point in the same case, Lindley LJ enjoined an approach that looked at matters "fairly as a whole and [to] consider what there is in the state of this company which renders a scheme necessary at all…" (at p 240).

[85] Fry LJ's observations in *Alabama* as to the role of the court in considering sanction of a scheme are instructive. He began by noting (i) that the legislature has vested the discretion in the majority of the class who are present at the meeting, and (ii) that it is not for the courts to introduce restrictions on that, but to respect the power the legislature as conferred on the majority of those meeting in each class. In relation to the court's inquiry, he posed the question (at p 247): "Under what circumstances is the Court to sanction a resolution which

has been passed approving of a compromise or arrangement?". While he wisely refrained from an exhaustive list of the relevant factors, he had no doubt "that the Court is bound to ascertain that all of the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve it".

[86] From these *dicta,* it is clear that the Courts have consistently interpreted "arrangement" broadly to permit a wide variety of arrangements and that the approval of the scheme proposed is pre-eminently a matter for the commercial judgement of those in each class voting on it. While of course the Court must ensure that what is proposed falls within the statutory language of "compromise or arrangement", it is important to note how carefully Fry LJ has articulated the Court's role. It is, in a sense, limited to a consideration of what is proposed within the parameters Fry LJ stated (an "intelligent and honest man… might approve") and premised on the proposal being "made in good faith". Within those parameters, the Court respects the commercial judgment of those meeting in the requisite classes. The Court does not supplant the commercial judgement of the majority within each class with its own view. This approach accords with the nature of the application to the Court. What is sought is sanction *of the scheme approved by the creditors or members in the statutory meetings*, not an adjudication on wider issues (eg a comparison of the scheme proposed with possible alternatives and their respective commercial merits) involving determinations of disputed fact. This understanding is also consistent with the description, in modern cases, of the court exercising a "discretion" when it considers whether to sanction a scheme approved by the creditors or members in the statutory meetings. It follows that a

petition for the sanction of schemes under Part 26 is not a forum for the close or detailed forensic examination *de novo* of the commercial merits of the proposed scheme, much less to adjudicate upon alternative arrangements that might have been promoted. It is necessary to stress this, because a significant amount of the ARCM Reports (and which formed part of the rationale for the first respondent's motion for a proof) was directed to just this sort of enquiry.

[87] As a generality and consistent with the observations of Lindley LJ in *Alabama*, the Court considers the proposed arrangement as a whole ("…to look at the thing fairly as a whole…"). This will inform the assessment of the object of the proposed scheme, against the background of "what there is in the state of this company which renders a scheme necessary at all", and its consideration of whether the requisite "give and take" is present. On this approach, the Court does not consider each constituent element of a scheme in isolation, which at times reflected the first respondent's approach (eg criticising the Acquisitions, divorced from their function within the Schemes), and which the Supporting Creditors referred to as "slicing and dicing". In my view, this holistic approach is consistent with the language of an "arrangement" (and which encompasses its constituent elements), and it is also consonant with assessing the intended commercial purpose the proposed arrangement seeks to achieve.

[88] Furthermore, in respect of complex schemes, such as the Schemes, it is inapt to focus on the individual elements of an arrangement (in disregard of their function within the whole) where the constituent elements are expressly interconnected. The different elements of the Schemes are strongly interdependent: the Acquisitions are predicated on a successful equity raise; the improved RBL is dependent on the Acquisitions. Only if all three of these elements are achieved, will the proposed amendments to the voting rights (and other

changes in the Override Agreement) come into effect. In any event, a critique of individual elements of a proposed arrangement without regard to their contribution to the overall scheme and its objectives is, in my view, an approach divorced from commercial reality. So, for example, the stated intention is for the benefit of the Acquisitions to flow through to the Group's Creditors: see the Explanatory Statement at para 5.18(A) at p 44. The overriding purpose of the Schemes, and to which the constituent elements are directed, is to address the debt wall. The object of the proposed refinancing is to obtain an extension of the debt maturity. As the directors explain, the Scheme Creditors would not agree an extension of the Scheme Maturity Date without addressing the debt wall. In its submissions, the first respondent never fully engaged with the fundamental problem the debt wall poses, even though this was recognised in some of the materials it produced (see eg the Boyle Report at paras 5.5.5 and 5.5.10).

[89] I turn to consider ARCM's anterior jurisdictional challenges.

ARCM's anterior jurisdictional challenge 1: Do the Schemes go beyond an "arrangement" under Part 26?

Are the Schemes compromises or arrangements?

[90] While the first respondent's written submission consistently used the word "compromise", which is a narrower concept than "arrangement" (*AI Scheme Limited* [2015] EWHC 1233 (Ch) at para 17), in oral submissions Senior Counsel for the first respondent accepted that in these applications the Court was concerned with "arrangements" not compromises. In my view, he was right to do so. The outcome of these Schemes, if granted, do not result in a diminution of the Scheme Debt Facilities or of the interest rates payable, or

in a diminution or alteration of the amount of a secured creditor's security (which Fry LJ considered to be likely to be "the most common kind of compromise or arrangement": see *Alabama* at p 246. Indeed, if granted, the Schemes will see all creditors benefit from an enhanced interest rate (albeit to different degrees). Accordingly, I approach the Schemes on the basis that what they propose are arrangements.

An "arrangement …between a company and… its creditors"

[91] Section 899 of the 2006 Act confers jurisdiction on the Court to sanction "a compromise or arrangement". That form of words is found in section 895(2). However, the statutory definition of "arrangement" in section 895(2) of the 2006 Act is patently not comprehensive; it simply "includes" reorganisations of a company's share capital (as might arise in an arrangement between a company and its shareholders). The definition otherwise provides no example or specified form of wording directed to *inter alia* an arrangement between a company and its creditors. Further, I agree with the observations of Patten LJ in *Re Lehman Bros (No 2)* [2010] Bus LR 489 ("*Lehman (No 2)*") (at paras 58 to 61) that "arrangement" is not considered in isolation, but in the context of the statutory phrase "an arrangement between a company and its creditors". In that case Patten LJ noted: "Although 'arrangement' is a wide expression, it is given content and meaning by the parties to it". Patten LJ concluded (at para 65) that an arrangement between a company and its creditors must mean an arrangement which deals with their rights *inter se* as debtor and creditor. He also concluded that an arrangement can include collateral releases proposed "for the disposition of the debts and liabilities of the company to its own creditors."

[92] Notwithstanding the acceptance by Senior Counsel for the first respondent that each Scheme proposes an "arrangement" and not a compromise (although the first respondent contends that these Schemes go too far even for an arrangement), the first respondent's submissions often conflated "compromise" with "arrangement". So, for example, the first respondent argues that "the only subject matter that can be compromised is a debt claim, or a claim that is parasitic on the debt such as security rights". The *dicta* on which this submission is based are (i) Patten LJ's observation in *Lehman (No 2)* (at para 66) that a "person is the creditor of a company only in respect of debts or similar liabilities due to him from the company", (ii) Lord Neuberger's observations in the same case (at para 78) that if a person's claim cannot be said to render him a creditor or a member then the subject matter of the claim cannot be covered by the arrangement; and (iii) the observations of Zacaroli J (at paras 18 to 22) in *Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch) ("*Instant Cash (Sanctions Hearing)*") that the arrangement jurisdiction was confined *prima facie* to the rights of the company and its creditors *inter se*. The first respondent emphasised Zacaroli's observation (at the end of para 24 of *Instant Cash (Sanctions Hearing*), that:

> "[i]t is within the scope of the scheme jurisdiction to impose such a term [compelling a landlord to accept the tenant's surrender of the lease] on a creditor only if it is ancillary to the compromise of the pecuniary liability or necessary to ensure effectiveness of the compromise effected by the scheme".

The first respondent's overarching submission was that non-pecuniary rights fell outwith the jurisdiction in Part 26 of the 2006 Act.

The first respondent's challenge based on "pecuniary rights"

[93] One of the principal bases on which the first respondent argues that the Schemes exceed what is an "arrangement" within the scope of Part 26 of the 2006 Act is that neither the proposed "confiscation" of Override Agreement voting rights, nor the "forced" approval of the proposed Acquisitions, are compromises of "pecuniary rights". Nor are they "ancillary to the compromise of the pecuniary rights or necessary to ensure the effectiveness of the compromise" of pecuniary rights (*Instant Cash Loans Ltd* at paras 18 to 20). (These are the first respondent's challenges in [28(1), (2) and (3)], above.) Accordingly, so this argument runs, the Schemes go beyond the proper jurisdiction conferred under Part 26.

Rights which may be subject to an arrangement between a company and its creditors are the rights inter se as debtor and creditor

[94] In considering the first respondent's anterior jurisdictional challenges, I proceed on the footing that an "arrangement" between a company and its creditors that falls within Part 26 must mean an arrangement which deals with their rights *inter se* as debtor and creditor.

[95] What are the rights of a creditor? The defining quality of a creditor is an entity to whom the company owes a debt, an obligation to pay a money sum. The corollary right vested in the creditor is for that debt to be repaid. A creditor may have ancillary rights arising from that principal obligation: eg such as receipt of interest or payment by a specified point in time (ie a maturity date). Equally, the debtor may have granted certain warranties and covenants, designed to protect against the erosion of the debtor's financial position (and thereby diminishing the prospect of the creditor being repaid in full in due course). Clearly, a debtor's creditor is entitled to enforce these kinds of provisions and it

will have a claim against the debtor company if they are breached. Under more complex arrangements, a significant creditor or the creditors as a collective may be entitled to exert controls over certain decisions or acts of the debtor. These can include restrictions on significant corporate actions. These obligations are imposed by the creditor on the debtor (and which confer correlative rights for the creditor) with a view to increasing the prospects of its debt being repaid. A scheme of arrangement under Part 26 is one form in which such rights may be formalised and imposed, even on dissentient creditors, so long as the Court has been satisfied that the statutory test has been met and has sanctioned the scheme. That is precisely the circumstance that obtains between the Group and the Scheme Creditors consequent upon the 2017 Refinancing.

[96] It is helpful therefore to start with the nature and source of the rights which the Schemes propose to amend.

The source and substance of the Scheme Creditors' voting rights

[97] In relation to the source of the Scheme Creditors' voting rights, those rights were defined in clause 23 of the 2017 Override Agreement pursuant to the 2017 Scheme sanctioned by this Court. *Prima facie* these contractual rights were within the Part 26 jurisdiction. Or, at least, the parties to that arrangement (which included ARCM) accepted at that time that, for example, contractual provisions defining voting rights fell within the 2017 Scheme. While the fact that the voting rights were conferred in the 2017 Override Agreement is not determinative that such rights *properly* fall within the scope of an "arrangement" under Part 26 (the 2017 Schemes were not opposed, and so there was no dissentient creditor to take the point), it is nonetheless the case that the voting rights in the

2017 Override Agreement were conferred on the Scheme Creditors *qua* creditors of the Group; they did not arise from any other context or relationship. The voting rights are exercisable in relation to defined matters; in substance, these relate to matters that could affect the financial position of the Group and, therefore, the prospects for repayment of the Scheme Debt Facilities. More fundamentally, the voting rights are exercisable by virtue of the debt instruments the creditors hold. They are weighted according to the *quantum* of the Group's indebtedness to the individual creditor under each debt instrument. Accordingly, leaving aside the absence of any challenge in the 2017 Schemes to the inclusion of the voting rights within the 2017 Override Agreement, it is nonetheless the case that the voting rights in clause 23 of the 2017 Override Agreement were conferred on the Scheme Creditors *as creditors* of the Group. In my view, the voting rights, together with other terms of the Override Agreement, as one of the finance documents, is clearly an incident of the debt owed to the first respondent *qua* creditor. Accordingly, the amendments to the voting rights which the Schemes contemplate are permissible under a Part 26 scheme and I reject this aspect of the first respondent's anterior jurisdictional challenge.

[98] I am fortified in this view by other contexts in which creditors are afforded voting rights *qua* creditors. In other words, the provisions in the 2017 Override Agreement for the Scheme Creditors to exercise voting rights *qua* creditor are not anomalous. In formal insolvency regimes, there is statutory provision for creditors' views to be expressed on certain decisions. This takes the form of their votes (which, for certain purposes, are assessed by a weighting related to the *quantum* of the debt owed). Quintessentially, the creditors enjoy these voting rights by virtue of their status as creditors. Accordingly, voting rights as an attribute or right of a creditor is well recognised. The first respondent did not offer a definition of a "pecuniary right", but the voting rights the Scheme Creditors enjoy by

virtue of the 2017 Override Agreement are clearly incidental or ancillary to the indebtedness of the Group to the Scheme Creditors. The voting rights arise *inter se* the Group and the Scheme Creditors *as* debtor and creditors, respectively. Accordingly, in my view the proposed amendments to the 2017 Override Agreement voting rights which may follow from the sanction of the Schemes is permissibly within an "arrangement" under Part 26. While, perhaps, more pertinent to the fairness of the Schemes (which I consider below) and commensurate with a holistic approach, it is convenient here to note that, as explained in Rose 1 (at paras 117 to118), amendments to the voting rights in the 2017 Override Agreement was one of the creditors' conditions of support for the Schemes.

[99] Another aspect of the first respondent's challenge to the proposed changes to the voting rights is that it amounts to a confiscation, which I consider below, under the rubric "*Do the Schemes lack 'give and take'?*".

Do the Schemes impose new obligations?

[100] The first respondent argues that, if granted, the Schemes impermissibly impose new obligations on the RCF lenders (of which ARCM is one, but not the sole RCF lender) in respect of the undrawn facility during the period of the debt extension ("**forcing presently undrawn amoun**ts to be available to draw in the future", *per* para 60 of the First ARCM Note), and which will be on new terms (described at para 64 of the First ARCM Note as "**forcible new lending** on entirely different and new terms from May 2021 to November 2023…, with a new lending relationship upon wholly different terms to the present relationship") (emphasis added).

[101] I begin by considering the question, does the extension of the maturity date of the RCF result in "new lending" in respect of the present undrawn element of the RCF? It may help to recall that an RCF is, as its name suggests, a credit facility in which, so long as the credit limit and other conditions are observed, the debtor (here, the Group) may draw down and repay the facility as it chooses. It is "revolving" because the amount due to be repaid at any time will vary, and may increase and decrease. It is the functional equivalent of an overdraft facility on a current account. The corollary of the debtor's right to drawdown and repay at its option, is the creditor's obligation to make funds available (or to honour the drawdown) up to the permitted limit (again, so long as the other terms of the RCF are complied with or any breach thereof waived). In respect of any undrawn amount, the creditor is contingently liable; but it is a creditor nonetheless because the underlying lending commitments already exist. Here, there is an established relationship of debtor and creditor between the Group and the RCF Scheme Creditor; the Scheme Creditors holding RCF debt instruments have a subsisting obligation to lend up to the agreed amount. While the RCF Scheme Creditors are contingent creditors in respect of any undrawn amount, properly analysed their obligation to honour or provide the undrawn element of the RCF is an existing obligation. It is not a "new" one imposed by the Schemes.

[102] Is the liability of the Scheme Creditors under the RCFs on "on entirely different and new terms"? In my view, there is no substance to this submission. The Scheme Debt Facilities have not been increased and the principal sums owed to the Scheme Creditors remain the same. In relation to the extension to the maturity date (if this is contended separately to constitute a new obligation or "entirely different terms"), in my view this does not amount to a new obligation or one on wholly new terms. It is a variation of an existing term – the date by which the Group must repay the Scheme Debt Facilities. It does not

relieve the Group of the obligation of repayment; much less does it diminish the amount to be repaid (cf a compromise). I am fortified in this view by the case of *Apcoa*, in which Hildyard accepted (at para 167) that a debt extension or rollover of an existing RCF did not constitute a new obligation or new contract. That is what is proposed in the Schemes. The maturity extension will simply roll over the existing RCF available to the Group (including any undrawn element) without imposing any new or more extensive obligations on the RCF Scheme Creditors. I accordingly reject the contention that the first respondent (or ARCM) is not a creditor in respect of the undrawn element of the RCF or that the undrawn element of that becomes a "new debt" during the period of the debt extension. It follows that I reject the first respondent's submission that the RCF lenders constitute a distinct class for the purposes of class composition because of the "imposition of new positive obligations in the form of future advances" (*per* the first respondent's Submissions at para 75).

[103] The petitioners note that a similar "new obligations" point arose in the recent challenge to the Debenhams CVA (creditors voluntary arrangement): see *Discovery (Northampton) Ltd* v *Debenhams Retail Ltd* [2020] BCC 9 ("*Debenhams*"). While that case involved a CVA under section 1 of IA 1986, which makes provision for a procedure similar to that under Part 26, it was accepted in *Debenhams* (at para 100(a)) that there is no relevant difference between a CVA and scheme under Part 26. The jurisdiction under Part 26 in respect of a scheme and under section 1 of IA 1986 are sufficiently close that the court exercising one jurisdiction can read across cases from the other. Indeed, as will be seen, the court in *Debenhams* referred to cases arising under Part 26. The feature of the CVA giving rise to the "new obligation" challenge was the proposal requiring landlords to accept a reduced amount of rent for a period of five years. A group of creditors challenged this as impermissibly imposing a new obligation on landlords, as, it was argued, the landlords

were required to make their premises available to the company on different terms from those which they had originally agreed. Norris J rejected this argument. He stated (at para 78):

> "In my judgment the CVA does not impose 'new obligations', save in the sense that it varies existing obligations. **But variations of existing obligations** are 'arrangements' of the company's affairs **which it is the very object** of Part 1 of the Act [ie IA 1986] **to enable**. The landlord was and is obliged to permit quiet enjoyment of the demised premises for the duration of the term granted: the covenants (upon breach of which the landlord can put an end to the term) have been varied (because the rent has been reduced)."

After citing *dicta* from *Apcoa* and *Noble* (at paras 79 and 80) on the imposition of new obligations through a scheme, Norris J continued at [81]:

> "In my view these observations do not cast any doubt on what is proposed in the instant case. What is proposed here **is a variation of an existing obligation** binding the company and its creditor, not the creation of a new contract requiring the assumption of fresh liabilities to some new third party." (Emphasis added.)

That same distinction between the imposition of a new obligation on a creditor and the variation of an existing obligation owed by the company applies to the Court's consideration of schemes under Part 26.

[104] Applying that analysis to the changes proposed in the Schemes which ARCM challenge, it reinforces my view that the undrawn element under the RCF does not constitute a new obligation. The sums ultimately to be paid to the Scheme Creditors under the Scheme Debt Facilities have not changed. The debt extension simply varies an existing term. The obligations of the RCF creditors in respect of undrawn funds do not result in an

increase in the *quantum* of those facilities. The first respondent's new challenges to these features of the Schemes as impermissibly imposing new obligations fails.

[105] There is another feature of the Schemes which ARCM argue will result in impermissible new obligations on the RCF creditors. This relates to the partial re-designation of certain commitments under the Senior RCF. The proposed amendment to the Senior RCF will permits the borrowers to re-designate a proportion of the commitments under the cash facility as an additional commitment under the letter of credit sub-facility. The context is that under the credit sub-facilities the Group can call upon the creditors to issue letters of credit in respect of decommissioning liabilities (these relate to the Group's North Sea assets). However, the re-designation does not increase the overall lending commitments of any lender under the Senior RCF: it substitutes some of the re-designated letter of credit facility for the cash facility. (The petitioners submit that a creditor's obligation under a letter of credit, which is a contingent liability to the beneficiary, is less onerous than the upfront provision of cash under the cash facility.) In my view, ARCM's new obligation challenge to the proposal to enable a partial re-designation of an RCF is also without merit. For completeness, I note that it is also one change which does not affect them. Mr Rose explains (in Rose 1 at paras 194 to 195) that ARCM's commitments under the cash facility will not be susceptible to re-designation as additional letter of credit facilities. In any event, none of the creditors whose facilities might be subject to partial re-designation has objected to the Schemes on this ground.

The novelty of the Acquisitions

[106] The first respondent is critical of the Acquisitions, which it says are novel in the context of a Part 26 scheme and that it is not within the Court's jurisdiction to force the Acquisitions upon it (and ARCM). Closely allied to this are the first respondent's criticisms that the Acquisitions will materially change the balance of the Group's energy production (weighting it significantly more toward gas than oil) and bring in its train significant decommissioning liabilities.

[107] In relation to the novelty of the Acquisitions (neither the petitioners nor the Supporting Creditors demurred from that description), novelty itself is not a jurisdictional bar. I have already noted above the observations of the Courts, English and Scottish, which decline to set limits *ab ante* as to what may constitute an "arrangement". I approach this issue as a matter of analysing the features and effect of the Acquisitions in light of that case law.

[108] The terms of the 2017 Override Agreement preclude the Acquisitions, unless the requisite majorities of the creditor classes entitled to consider this grant a waiver. As the Group has not been able to secure the waiver, it seeks that as part of the Schemes. Accordingly, the mechanism adopted is to permit the Group to grant that waiver on behalf of the Scheme Creditors under powers of attorney (which gives rise to the power of attorney issue). However, in this context, it is significant that, strictly, none of the Scheme Creditors will become a party to the agreements by which the Group may acquire the Acquisitions; none will be constituted owners of these assets. Testing this in the language of Norris J in *Debenhams*, the Acquisitions do not require the Creditors to assume "fresh liabilities to some new third party".

[109] In relation to the first respondent's criticisms of the merits of the Acquisitions (for that is what the critique amounts to), this is quintessentially a question of commercial

judgement. That is a matter for the directors of the Group, and which has been subjected to scrutiny by the Scheme Creditors in Scheme Meetings. The Group's views as to the purposes the Acquisitions are to serve are supported by the PWC Report and also by the advice from Rothschild. On this matter, the Scheme Creditors have spoken, approving the Schemes overwhelmingly. Further, the first respondent's critique fails to have regard to the role of the Acquisitions in the overall scheme of the Schemes. The Acquisitions are not pursued as an end in themselves; in the directors' judgement, the Acquisitions are critical to unlocking funding or liquidity in the form of RBL. While there are criticisms of the assumptions on which the amount of funding is predicted (ARCM and the first respondent deploy the ARCM Reports to contend that these are overly optimistic in respect of reserves and under estimate the downsides), there is no challenge to the need for increasing liquidity or to the mechanism of RBL as the means to tap this). For the reasons I have provided above, disputes about the commercial merits of the Scheme (or an alternative arrangement preferred by a minority creditor) are not apt in Part 26 proceedings.

ARCM's anterior jurisdictional challenge 2: Do the Schemes lack "give and take"?

[110] I have already considered ARCM's challenge that the voting rights are not pecuniary rights or ones which may permissibly be included within the scope of a Part 26 scheme. A different facet of ARCM's attack on the change to the Scheme Creditors voting rights is the complaint that this amounts to a "confiscation" and the loss of their *de facto* blocking vote ("veto") ARCM (but not the first respondents) enjoy by virtue of the amount of debt ARCM holds within two of the creditor classes, but for which they receive nothing in return.

The degree of compulsion under Part 26

[111] As some of the quotations from ARCM's Note and Supplementary Note on Class disclose, ARCM characterise what is proposed in language that is, at times, emotive: eg the "forcible" new lending, the "confiscation" of voting rights. It is necessary to address these characterisations, as they go to the very nature of the Part 26 jurisdiction. Lest it be suggested that Norris J's observations in *Debenham*s (quoted above) are inapposite (he stated that "variations of existing obligations are 'arrangements' of the company's affairs which it is the very object of Part 1 of the Act [ie IA 1986] to enable"), the Inner House make the same observations in *Scottish Lion (2010)* (at para 46):

> "The respondents, for reasons which are readily understandable, would prefer to retain their existing contractual rights. But the loss of these contractual rights cannot be said *a priori* to be something which would disable the court sanctioning the scheme. **It is of the very nature of the power conferred on the court under s.899 that,** provided the statutory majorities are properly obtained and the requisite test for the granting of sanction satisfied, **contractual rights will, notwithstanding opposition by persons in right to them, be varied or extinguished."** (Emphasis added.)

Those observations, which are binding on me, confirm that, provided the statutory majorities are properly obtained and the requisite test for the granting of sanction is satisfied, contractual rights may be varied, notwithstanding the opposition of a creditor affected by those variations. The element of compulsion (or "confiscation") ARCM object to flows from the exercise of the court's *own* powers to sanction the scheme. The minority creditors may regard that as "forcible", but that is a consequence of the jurisdiction the Court exercises under Part 26; it is not a basis for challenging the exercise of that power. Accordingly, a complaint against the Court's power to sanction schemes under Part 26 in the

face of dissentient creditors is not a legitimate ground of opposition. Were it otherwise, the Part 26 jurisdiction would be incapable of giving effect to any meaningful variation of creditors' rights.

[112] In considering whether there is a want of "give and take", it is convenient here to consider whether ARCM have been treated differently than the other creditors in respect of the proposed amendments to their voting rights under the Schemes, or whether those rights are immutable (as appeared at times to be ARCM's position).

[113] At times ARCM's submission amounted to the contention their voting rights are sacrosanct; that it was illegitimate on the part of the petitioners to resort to the Part 26 jurisdiction when it was not insolvent; or that that constrained the nature of a scheme that could be promoted or the Court's role. In my view, the voting rights are simply contractual rights. They do not acquire some other complexion, making them immutable or beyond the reach of any future Part 26 scheme, because they resulted from the 2017 Schemes. Another way ARCM advanced this was to suggest that they had only agreed to the rights as stated in the 2017 Override Agreement because they were promised that these would be the basis for the relationship going forward. The Supporting Creditors point out that ARCM have produced nothing to support such a contention. The petitioners' response is that even rights consequent upon a Part 26 scheme (ie the 2017 Schemes) do not render them immutable. In my view, there is force in these submissions. In any event, any expectation ARCM might have would founder on the fact that at the time the 2017 Schemes were promoted, it was well understood that it was an incremental step towards the Group's improved financial health, not the cure itself.

Are ARCM or the first respondent being treated any differently in the amendments to their voting rights?

[114] I did not understand ARCM to argue that there was a degree of discrimination in respect of amendments to their voting *rights*, so much as the loss of their *de facto* veto they have because of the size of their holding in two of the creditor classes. (Neither the petitioners nor the Supporting Creditors took the point that this argument is not, strictly, open to first respondent to advance in its own right, as their debt holding is too small. In the discussion of this issue it is obviously the debt holding of ARCM which is under consideration.)

Voting right changes

[115] The creditors' voting rights put in place by the 2017 Refinancing are complex. These are described more fully in the petitioners' Notes on Class at paragraphs 124 to 129. In brief, amendments and waivers (eg of events of default) are divided into seven categories (corresponding broadly to debt instruments, and collectively described as the Private Creditor Groups), each with different consent thresholds. ARCM have a *de facto* blocking vote in respect of two of these voting groups (the Converted Group and the Term Loan Group), because it holds enough to preclude the other creditors within these classes from achieving the requisite majorities. It should be noted that, as the petitioners observe in their Note on Class, ARCM are not the only Scheme Creditor with a *de facto* blocking vote. Lloyds Bank plc has a blocking vote under the Term Loan Facilities, and in fact all the Private creditors have a veto in respect of those forms of consent that require unanimity.

[116] I accept as correct the petitioners' analysis of clause 23 of the 2017 Override Agreement and its amended form if the Schemes are sanctioned (and the amended form of clause 23 takes effect), which is that each Private Creditor Group (and each individual Private Creditor) has materially the same legal rights under either the existing or proposed voting regimes. So, for example, as matters stand under the current provisions of the 2017 Override Agreement, no Private Creditor Group has a special or unique veto position that differs from other Private Creditor Groups to veto amendments or waivers under clause 23.2. Similarly, each Private Creditor (viewed as an individual rather than a group), has a like right to vote on amendments or waivers under Clause 23.2.

[117] Turning to the amendments to the voting rights proposed under the Schemes, the proposals include a waiver of any breach of covenant or event of default arising out of the Acquisitions. The mechanics of this are that each Private Creditor Group (and each individual Private Creditor) will relinquish their right to block the Acquisitions under Clause 23.2. Further, the Schemes will amend the voting regime under clause 23.2 by eliminating the veto position of each Private Creditor Group and allowing certain amendments to be made by Private Creditors holding two-thirds of their total commitments. It is this change that removes ARCM's *de facto* veto in the Converted Group and Term Loan creditor classes. The petitioners' position is that this change will affect each Private Creditor Group and each individual Private Creditor in the same way. They observe that no one will be singled out for special treatment: the veto ability of each Private Creditor Group will be lost, and each dollar of debt held by each individual Private Creditor will continue to carry the same right to vote. I did not understand ARCM to contest this reading of clause 23 in its existing or amended form.

[118] Returning to ARCM's arguments about the confiscation of voting rights and the lack of something in return, so far as I understand this argument, it is premised on the contention that the first respondent's voting rights will be altered, regardless of the outcome of the other elements of the Scheme. However, this submission does not accurately reflect the conditionality and the sequential nature of the different elements of the Schemes. It suffices to note that the amendment to the voting rights does not take effect immediately, as ARCM appeared to contend. These provisions (including the change in clause 23 to the voting rights) will take effect, only if the series of transactions (the equity raise, the Acquisitions and the additional financing from RBL) complete. More specifically, it is only upon delivery of the A&E effective notice to the lenders (which brings the extension of the Scheme Debt Maturity into effect), that the proposed changes to the Override Agreement take effect, Considering the Schemes as a whole (and assuming their different elements take effect), there is "give and take" and of which the amendments to the voting rights form part. In any event, even if the voting rights were amended upon sanction of the Schemes (rather than consequent of satisfaction of certain elements of it) and fall to be considered in isolation, the Scheme Creditors' voting rights in the 2017 Override Agreement are not taken away without replacement; they are replaced with a different set of voting provisions. Something is given back, even if it is different in form. Whether the first respondent is content with that is not a jurisdictional question.

[119] That suffices to resolve ARCM's jurisdictional challenge predicated on the treatment of their voting rights. In my view, there is no "take" without "give"; and there is no difference between ARCM and the other Private Creditors in respect of what is "taken" from them. There is no wholescale removal of voting rights. There is a variation of these rights, but, as a matter of legal right, that is applied equally to each of the Private Creditor Groups.

[120] To the extent that ARCM's challenge that there is no "give and take" may be predicated on other features of the Schemes, it was not clear if other elements of the Schemes are subject to ARCM's anterior jurisdictional challenges. However, I accept the petitioners' submission that in assessing whether there is the requisite "give and take" it is necessary to consider the proposed scheme as a whole. For that purpose, it should be noted that apart from the benefits it is hoped that the Acquisitions will bring in their train, the Scheme creditors will also receive the enhanced interest or coupon rates. The financial elements of the Schemes are set out in the Explanatory Statement (at paragraph 5.19 (see p 583)). I will address the arguments focused on the interest rates for the Scheme Creditors below, but in this context, it suffices to note that Mr Rose confirms (in Rose 1 at para 182) that all creditors will receive a positive return from the Schemes.

[121] Accordingly, considering the Schemes as a whole, in my view there is the requisite give and take. That element of "give" is sufficient to dispose of this argument, as it is not a requirement of an arrangement that each individual right of a creditor that is altered or restricted by the arrangement must be counterbalanced by an exactly matching benefit.

[122] I turn now to consider ARCM's remaining challenges using the four stages of the *Buckley* test as a framework to do so (see para [42], above). At stage 1 of *Buckley*, the Court considers whether the procedures in the statute have been complied with; whether the statutory majorities were obtained; and whether an adequate explanatory statement was provided to the creditors. The challenges falling within stage 1 are ARCM's challenges to the Explanatory Statement and to class composition.

ARCM's challenges falling within stage 1 of Buckley: (1) Was the Explanatory Statement adequate?

The directors' duties and the standard required of an explanatory statement

[123] The statutory requirement in section 897(2) of the 2006 Act is that the explanatory statement "must... explain the effect of the …arrangement". This is described in the case law as the Court requiring to be satisfied "as to the adequacy and accuracy" of the explanatory statement" (*per Lehman Brothers* [2018] EWHC 1980 Ch (at para 67)). While the parties refer to different *dicta*, the directors' duty in respect of an explanatory statement is to place before the members or (as here) the creditors "sufficient information for them to make a reasonable judgment" on whether the proposed scheme is in their commercial interests (*per* Snowden J in *Re Indah Kiat* [2016] EWHC 246 (Ch) (at para 41); which is based on the observations of Sir David Nicholls VC in *Re Heron International NV* [1994] 1 BCLC 667 at 672 to 673) ARCM's position is that it's disputes are not complaints about commercial judgment, but that it disputes that the Explanatory Statement gave the creditors sufficient information to make a reasonable judgement (see para 105 of the First Respondent's Submissions).

ARCM's criticisms of the Explanatory Statement

[124] In addition to the Explanatory Statement's lack of clarity on class comparator or the extent of fees being paid, ARCM submit that the Explanatory Statement is deficient in the following respects:

1) it fails properly to explain the risks inherent in the proposed Acquisitions (including "insufficient disclosure" of increased decommissioning liabilities) and there is a failure to consider the likelihood of early cessation of production from them;

2) there is "inappropriate" reliance on oil and gas price forecasts;

3) it is misleading in respect of the pre-tax cash flows that can be expected (reference is made to "more realistic" assumptions used by Dr Okongwu) and which undermines the business case for the Acquisitions.

There was a separate criticism, not related to the merits of the Schemes, that ARCM's position had been mischaracterised. Reference is made to the ARCM Materials to support different assumptions or alternative forecasts and which are essentially said to be more realistic (eg references to the Fuller and Okongwu Reports for oil and gas forecasts and prices, for the effect of reliance on the UK gas market and for decommissioning liabilities; and the early cessation of production from the Acquisitions). The thrust of these criticisms is to attack the Schemes' reliance on the Acquisitions to refinance the Scheme Debt facilities and in respect of which, it is said, the Explanatory Statement so fundamentally understated the "significant risks" such that the creditors could not have given their informed consent to the Schemes.

The petitioners' response

[125] The petitioners point out to the numerous caveats, warnings and identification of risk factors contained in the Explanatory Statement. These included: the caveat in respect of the uncertainty of forecasts relating *inter alia* to interest rates, oil and gas prices, foreign currency fluctuations and business trends (at pages 20 to 21); the large number of risk factors relevant to the Schemes, and especially the Acquisitions (eg at page 98, "However, these expected financial benefits [ie from the Acquisitions] may not arise and the other assumptions upon which [PO] determined the considerations may prove to be incorrect");

the recognition of the uncertainty in estimating the reserves, production and decommissioning liabilities *inter alia* of the Acquisitions (at pages 103 to 105); and the risks arising from the volatility of energy prices in the market (at page 108).

[126] The petitioners also note that the criticisms ARCM made of the Acquisitions in the latter part of 2019 were fully narrated and responded to in the Explanatory Statement (see eg at paras 7.3 and 7.4). They also challenge much of the ARCM Materials: eg, they challenge Mr Fuller's ability to comment in any meaningful way on the Explanatory Statement (see the comments in their Note on Class)) or on his view that his set of forward curve pricing assumptions are "correct"; they challenge the relevance of Dr Okongwu's assessment of the commercial benefits and disadvantages of the Schemes. Rose 2 contains a more sustained response and refutation of the ARCM Materials.

[127] The petitioners also make the point that the Group has operated in the energy sector since 1934; it has conducted other acquisitions and is familiar with the obligations of due diligence. In relation to the Acquisitions, which ARCM oppose, the Group has a track record of operating assets close to the end of their productivity and in deferring their cessation and maximising their productivity (Rose 2 at para 59(A)). The Group also has "extensive experience" in preparing decommissioning forecasts. It was noted that Mr Rose made the further point (at Rose 2, para 60) that the decommissioning liabilities have been fully discounted from the purchase price and that, given the Group's experience in extending the life and recovery from aging North Sea assets, it sees this as an opportunity.

[128] In relation to criticisms of the corporate model, the petitioners note that the Group prepared the 2017 Explanatory Statement using the same corporate model and which was not subject to the objections as are now made. The Group had made its corporate model available to all private creditors. Mr Rose's response (in Rose 2) to Mr Prest's criticism that

the PWC Report was lacking in independence is that PWC nonetheless reviewed the Group's RBL assumptions, and they confirmed that these were all within a reasonable range (see PWC Report at p 59). Furthermore, PWC were supported in this view by other expert analysts, namely Rothschild and DNB. PWC did not consider the assumptions in respect of the Acquisitions, including the reserve assumptions and decommissioning liabilities, as these are outwith PWC's expertise. These were verified by the Group. In relation to Mr Ercil's complaint about mischaracterisation, Mr Rose doubts whether the matters Mr Ercil identifies had any impact on the decision of the Scheme Creditors to vote for the Scheme. He notes that ARCM set up its own website setting out its own position and posing certain questions for the Group, though none of these was posed at the Scheme meetings. No other Scheme Creditor has made any complaint about the inadequacy of the Explanatory Statement.

[129] Finally, in relation to the Explanatory Statement, the Supporting Creditors point out that the Scheme Creditors were a large, multi-party group comprised mainly of sophisticated financial institutions and investors. The Supporting Creditors submit that the large majorities voting in favour of the Schemes belie the suggestion that the Explanatory Statement was inadequate or that the Scheme Creditors had any doubts as to the sufficiency of the information it provided. They make the further point, more appropriately for them than the petitioners, that notwithstanding the volume of the ARCM Reports, the Supporting Creditors continue to support the Schemes. Accordingly, the court could be satisfied that any alleged deficiencies in the Explanatory Statement would not have made any difference to the outcome of the Scheme Meetings.

Consideration of whether the Explanatory Statement was of the requisite standard

[130] In considering the criticisms of the Explanatory Statement it must be borne in mind that the purpose of the Explanatory Statement is to present the Group directors' presentation of the benefits, disadvantages and purposes of the scheme proposed as they see it. Here, the Schemes are complex arrangements. The Explanatory Statement is extremely detailed. It totals 583 pages (of which 450 are the appendices). Notwithstanding its length, its presentation of the Schemes is clear and intelligible and the format of the Explanatory Statement (including its provision of defined terms, contents and its division into discrete headed sections) is accessible, well-ordered and readily navigable. The amount of information provided is commensurate with the complexity of the Schemes. It is recognised that in a case of great complexity not every relevant fact can be stated (*per* Maugham J in *Re Dorman Long and Co Ltd* [1934] Ch 635 at 665 to 666; see also the comments of Neuberger J (as he then was) in *Re RAC Motoring Services Limited* [2000] 1 BCLC 307 at 328). The nature of ARCM's criticisms is not so much that there are omissions, but that ARCM fundamentally disagree with the Group directors' views of the business case for, and benefits of, the Acquisitions. The ARCM Materials are directed at supporting those criticisms and, to a large extent, repeat (in this context) the criticisms of the Schemes they have advanced under other headings.

[131] In reflecting on the proper approach to these criticisms, I note that the Courts have long recognised that there is ready scope for arguments that the directors should have expressed themselves more fully or differently in their explanatory statements. It is in relation to those sorts of criticisms that Clauson J (sitting in the Court of Appeal) stated in *Re Imperial Chemical Industries Ltd* ("*Imperial*") (at p 617) that:

> "Where the matter is one of difficulty, the Court will always scrutinize such a circular very carefully; but where, as in this case, there is no suggestion that the

> directors were doing otherwise than honestly putting forward to the best of their skill and ability a fair picture of the company's position, the question is not whether the circular might not have been differently framed**, but whether there is any reasonable ground for supposing that such imperfections as may be found in the circular have had, with or without other circumstances, the result that the majority (who have approved the proposal placed before them) have done so under some serious misapprehension of the position**." (Emphasis added.)

In relation to the directors' honesty, Mr Rose confirmed that the Explanatory Statement contained the directors' good faith assessment based on the information available at the time. I have no reason to doubt this.

[132] The issue here is whether the Explanatory Statement had sufficient information for the Scheme Creditors to make a reasonable judgment on whether the proposed Schemes are in their commercial interests. Having regard to ARCM's criticism, the question might be posed (paraphrasing Clauson J) thus: have the majority of the Scheme Creditors (who have approved the Schemes in their respective Scheme Meetings) done so under some serious misapprehension of the risks and rewards of the Schemes?

[133] The criticisms ARCM make amount to no more than that different experts may come to different views about matters which are essentially questions of commercial judgement. It is not said that the Explanatory Statement omits some critical data. The disputed issues essentially concern predictions, forecasts and assumptions. They do not relate to known fact circumstance that can be said objectively to be "correct" or which are susceptible to proof of that fact. There would therefore be little utility in a proof, as ARCM seeks, as its result would be the Court's views on which set of predictions, assumptions or forecasts is more likely. That exercise would be of doubtful utility to the Scheme Creditors, for whose benefit the Explanatory Statement is provided.

[134] I have considered the ARCM Reports and the Explanatory Statement. On analysis ARCM's criticisms of the Explanatory Statement simply reflect differences of commercial judgement. Given the size and complexity of the Proposed Transaction and the sector and market in which it operates, the Group is not surprising that different experts, making difference judgements about assumptions and forecasts come to different views. The differences are no more than differences of commercial judgement. There is nothing in the ARCM Reports that would suggest that the Explanatory Statement was not soundly based or that the conclusions and views expressed in it are outwith the range of views which directors of the Group could reasonably form. In this context, it does not suffice to show (as the ARCM Reports do) that others might have come to different judgements on such matters. Accordingly, I am not persuaded that the Explanatory Statement suffered from any deficiency such that it precluded the Scheme Creditors from forming a reasonable judgment on the Schemes. It is in my view not insignificant, though not determinative, that no other creditors have made any criticism of the Explanatory Statement. The Scheme Creditors have exercised their own commercial judgment on the Schemes proffered by the Group's directors in good faith. There is no deficiency in the Explanatory Statement as ARCM suggest which vitiates that judgment. This ground of challenge fails

[135] I turn to consider ARCM's other jurisdictional challenges falling within stage 1 of the Buckley test.

ARCM's challenge falling within stage 1 of Buckley: (2) class composition and the comparator

[136] ARCM's fundamental challenge was to the petitioners' use of a solvent comparator. While the comparator is critical to class composition, ARCM other challenges were said to fracture class and undermine the petitioners' use of just two classes. In the main, the focus of these other challenges was to contend that the petitioners had erred in placing all other creditors (apart from the Super Senior Creditors) into a single class. In particular, the first of these was the increase and broad harmonisation of interest rates but, it was said, which produced too wide a variance of the degree of uplift, and was such as to fracture class. In respect of the comparator, there were several strands to this challenge: what was the Group's position as to its financial prospects (it being said that different statements were too inconsistent)?; what was the meaning of insolvency in this context? And, as an ancillary issue to that, did ARCM apply too narrow a reading of statutory cash flow insolvency. Finally, there was a further, free-standing challenge, that the Retail Bondholders should have formed their own class.

The objective underpinning the correct composition of creditor classes

[137] The purpose of class meetings is to place the proposed scheme before a company's creditors so they may express their collective view on its merits. This is necessary because it is inherent in the Part 26 jurisdiction that their legal rights may be affected and altered by the scheme. It is important to note, however, that it is the *collective* views of the creditors which is sought; hence the need to identify the appropriate *classes* of creditors and for each of the appropriately constituted classes to meet together. While the risk of oppression by the majority is one of the obvious risks the court must guard against when considering schemes under Part 26, it has also been recognised that by ordering a multiplicity of separate

meetings the court might give a veto to a minority. For that reason, the courts have sought to ensure that the test for class composition "should not be applied in such a way that it becomes an instrument of oppression by a minority" (*per* Chadwick LJ in *Hawk* at para 33). Chadwick LJ's observations were echoed by Lord Millet in *UDL* where he stated (at pp 183-184) that:

> "the risk of empowering the majority to oppress the minority ... is not the only danger. It must be balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority. Fragmenting creditors into different classes gives each class the power to veto the scheme and would deprive a beneficent procedure of much of its value".

To like effect are the comments of Neuberger J (as he then was) in *Re Anglo American Insurance Co Ltd* [2001] 1 BCLC 755 at 764, that the Court must guard against being "too picky about different classes" and ending up "with virtually as many classes as there are members of a particular group". (See also Warren J in *Hibu* (at para 50, citing *Hawk*), Hildyard J in *Re Noble Group Ltd* [2019] 2 BCLC 548 (at paras 86 to 88) and *in Re Lehman Brothers International (Europe)* [2019] BCC 115 (at para 70).)

The comparator

Is insolvency a prerequisite of the Court's jurisdiction under Part 26?

[138] At the Sanctions Hearing the first respondent did not contend that impending insolvency was a prerequisite of the Court's jurisdiction under Part 26, notwithstanding shades of such an argument in earlier iterations of their position. (It was a significant plank of the first respondent's submission at the hearing on its interim interdict action that

companies which were not at risk of imminent insolvency cannot undertake schemes of arrangement which trespass on contractual rights.) In any event, as the observations of the Inner House in *Scottish Lion 2010* make clear, imminent insolvency is not a prerequisite to the promotion of a scheme under Part 26. As the Inner House in *Scottish Lion 2010* makes clear, an arrangement is appropriately directed at a "problem"; that problem need not be imminent or even impending insolvency.

The "debt wall"

[139] In respect of the Group, the "problem" is the debt wall; the totality of the Scheme Debt Facilities fall due on the same date (ie the Scheme Maturity Date) in about 14 months' time. This, at least, did not appear to be controversial between the parties. For its part, the first respondent acknowledges that "[a] solution would need to be found ahead of the debt maturity date...A solvent refinancing solution is the most likely outcome" (see Answer 53.10.1). The drawn commitments of the Scheme Debt Liabilities stand at US $2.6 billion. The petitioners do not exaggerate when they described (at para 75(a) in their Note on Class) any refinancing of that as a "massive undertaking". Furthermore, the first respondent's expert, Mr Boyle, accepts that the Group will be unable to repay the Scheme Debt Facilities on maturity. He also accepts that (1) a full refinancing would not be possible before then, and (2) that it would therefore be necessary for there to be an alternative transaction, most likely involving the amendment and extension of the Scheme Debt Facilities. This is reflected in the first respondents' Answers, where it avers, at Answer 51.1.2:

> *"There is a period of at least 14 months, prior to the debt maturity date, in which options can be explored. There are credible alternatives to the Scheme. Solvent options include:* ***a***

> ***voluntary or involuntary amend and extend of the debt ('A&E'). An A&E is likely to be at the core of any solution. The A&E could potentially include a partial refinancing, sale of assets, an equity raise, or a debt for equity swap*.*" (emphasis added)

It is therefore undisputed that an extension of the Scheme Maturity Date is required or, as the Supporting Creditors' Senior Counsel, Mr Boreland put it, it appears to be common ground that (absent the Schemes), the Scheme Companies will more likely than not, be unable to refinance the Scheme Debt Facilities by the existing maturity in May 2021. It is also common ground that, absent the Schemes or some form of A&E, the Group will not be able to repay the Scheme Debt Facilities in full when they fall due on the Scheme Maturity date in about 14 months' time.

[140] The fact that the first respondent and ARCM disagree with what the Group proposed as the means to address the debt wall reflects a difference of commercial judgement. However, disputes as to the merits of one set of commercial arrangements over another, or whether there are better alternatives, are not properly within the scope of a sanctions hearing or the Court's Part 26 jurisdiction.

The counterfactual: ascertainment of the likely factual position in the absence of the Schemes

[141] The starting point is that the ascertainment of the correct composition of the creditor classes involves a determination of what the likely factual position would be in the absence of the scheme proposed (ie the comparator), and to assess the creditors' rights against that circumstance.

The petitioners' use of an insolvent comparator

[142] One of the critical differences between the first respondent and the other parties was whether the petitioners had been correct to use an insolvent counterfactual as the comparator if the Schemes do not proceed.

[143] The petitioners' position is that the Group will be unable (or, at least, will very likely be unable) to repay the Scheme Debt Facilities in full, or fully to refinance the Scheme Debt Facilities, by the Scheme Maturity Date, and that that supports the use of insolvency as the relevant comparator. On this basis, the Group determined that two creditor classes sufficed (the secured creditors and the unsecured creditors). ARCM dispute this.

[144] The arguments ancillary to the issue of the comparator took many forms: What was the correct understanding of what the Group had said on this issue? Had the Group's public pronouncements changed? Did this require a proof to test the credibility and reliability of the author of these statements, Mr Rose? What is the import of the ARCM Materials? What weight, if any, should the Court give to the views of the directors on the Group's prospects in a no-Schemes scenario?

[145] The Explanatory Statement sets out the directors' views which are that there is "**a very substantial risk**" that the Scheme Debt Facilities will not be capable of being refinanced through new debt facilities, either by the end of June 2020 or by the Scheme Maturity Date in May 2021 and, in the absence of such refinancing, the Group "**would be unable to repay** their liabilities under the Scheme Debt Facilities at maturity" (emphasis added) (see Part A, para 4.4). If ARCM misconstrued this to mean that it is more likely than not that the Group **would be able** to refinance the Scheme Debt Facilities (absent the Schemes) (which was their positon in their Supplementary Note on Class), by the time of the Sanctions Hearing they

can have been in no doubt that this was a misreading of the Explanatory Statement. In their Note on Class (at para 72), the petitioners reiterated the directors' view "that a failure to refinance is more **likely than not** absent the Schemes" (emphasis added). Accordingly, this was the directors' view which informed the petitioners' approach to the composition of the creditor classes.

[146] In relation to the first respondent's charge that there is an inconsistency between that statement and others by Mr Rose (including the March Release), in my view, there is nothing in this criticism. (These are set out above.) The Explanatory Statement is the core document setting out the considered views of the directors for the purposes of invoking the Court's Part 26 jurisdiction. The statements in the Rose affidavits, fairly read, are not inconsistent with this; they are commentary on the Group's position and its response to the positions advanced by ARCM and the first respondent from time to time. The March Release prompted a further round of affidavits (Prest 2 and Rose 3). It is important to understand the purpose of the March Release. It is the public statement commenting on the Group's annual accounts on their release. The accounts, and therefore the comments thereon, are *retrospective*; by contrast, the consideration of a comparator is necessarily *prospective*, as it is a consideration of the counterfactual *in the future* if the Schemes are not approved. I reject the first respondent's contention that a proof is necessary to test the credibility and reliability of Mr Rose on these matters. The more fundamental point, however, is that a dispute about what precisely Mr Rose said on several occasions in different contexts is apt to obscure (and, indeed, are irrelevant to) the core issue, which is: what is the likely position in the absence of the Schemes.

[147] What, then, is the likely factual position absent the Schemes? While there was a degree of common ground as regards the Group's likely inability to repay or refinance the

Scheme Debt Facilities by the Scheme Maturity Date, there was a sharp divide as to whether that instructed an insolvent comparator. There is no doubt that, by reason of the magnitude of the debt wall and the approach of the Scheme Maturity Date, the Group will not be able to continue in business as a going concern for the foreseeable future. Rather, within a time horizon of 14 or months, it is patently the case that (absent an A&E) the Group will be unable to repay the Scheme Debt Facilities in full. The petitioners characterise this as being "more likely than not" that the Group will enter some form of insolvency proceedings in or prior to May 2021. Leaving aside the sparring as to precise formulation of the probability of insolvency (and whether Mr Rose's several utterances were entirely consistent with one another), the first respondent cannot really dispute this fact.

[148] To put it another way, there is nothing in the materials produced by ARCM that provides a cogent basis to challenge, much less to displace, the directors' view of the likelihood of some form of insolvency in a no-Schemes scenario.

The meaning of insolvency

[149] I have set out the parties' respective positions in detail, above (see paras [69] to [75]). The first respondent contends that, in this context, the statutory definitions of insolvency in section 123 IA 1986 (ie a cash flow or balance sheet basis), apply, and necessarily so, to the exclusion of a broader understanding of insolvency. In essence, ARCM's position is that in the absence of imminent insolvency (because the statutory tests for insolvency in section 123 of IA 1986 are not met), a solvent comparator must be used (see, eg ARCM's First Note on Class, at paras 29-31). The petitioners contend for consideration of a broader range of circumstances in the determination of whether an insolvent comparator is appropriate.

[150] I do not accept the first respondent's submissions on this point. The formalism inherent in the first respondent's position finds no support in the statute or the caselaw. More fundamentally, and in my view fatally for their position, is the first respondent's failure to engage with the problem that the debt wall poses. It is artificial to a very high degree to acknowledge, on the one hand, that the problem of the debt wall looms on the horizon, but to maintain, on the other, that that immutable fact is nonetheless left wholly out of account because that circumstance does not fall within the technical definitions of insolvency in section 123 of IA 1986.

[151] On this point, I prefer the submissions of the petitioners and the Supporting Creditors. The fact that the Group may not satisfy the definitions of cashflow or balance sheet insolvency for the purposes of section 123 of IA 1986 does not preclude the Group's use of insolvency as the comparator in identifying the correct class composition. By contrast, I find the petitioners' rationale for an insolvent comparator more persuasive: there is a likelihood or risk of an inability on the part of the Group to repay the Scheme Debt Facilities in full when they fall due, even if the Group does not as yet satisfy the test for cashflow insolvency (ie an inability to repay its debts as they fall due), because the Scheme Debt Facilities are a few months short of being classified as "current" liabilities.

[152] The petitioners also presented a fall-back argument (based on *Eurosail*) in response to ARCM's contention that in order to justify an insolvent comparator it is necessary for one or other of the statutory definitions of insolvency in section 123 of AI 1986 to be met. In short, this was that on the basis of *Eurosail* (see Lord Walker at para 37), the cashflow test was not confined to presently-due debt, but it applied to "debts falling due from time to time in the reasonably near future". Lord Walker continued: "What is the reasonably near future … will depend on all of the circumstances…". In this case, there is the debt wall: the very

magnitude of the amount due, coupled with the fact that it all falls due on the same date, cannot be ignored (as the first respondent's approach does). In the "reasonably near future", as Lord Walker phrases it, the totality of the Scheme Debt Facilities will fall due. Even the first respondent's experts, especially Mr Boyle, acknowledge that the Group will be unable to pay this unless something is done (Mr Boyle figures an A&E coupled with other steps). The insolvent comparator is correct.

[153] For these reasons, I reject ARCM's challenges to the petitioners' use of an insolvent comparator.

Economic differential affecting class*: Do interest rates or the Upfront Fee fracture class?*

[154] I turn to consider the other matters that were said to fracture the class.

[155] ARCM identified an economic differential which they argued affected class composition. The overarching submission was that these created special interests and thereby fractured the creditor classes.

What is proposed under the Schemes

[156] There are 15 different interest rates payable in respect of the various debt instruments held by the Scheme Creditors (see para 19 of the petitioners' Note on Class). They range from 4.6% + LIBOR (for Facility A of the Term Loan Facility) to 9.63% (for Series C 2011 of the USPP Notes).

[157] If sanctioned, the Schemes will result in a uniform coupon or interest rate of 8.85% on all cash facilities held by the Senior Creditors (including LIBOR to the extent that it is payable under the relevant facility). Harmonisation will result in an increase for most Scheme Creditors, albeit the amount of the difference will depend on the level of the existing interest rate from which it is increased, and a decrease for some of the USPP Notes creditors. The weighted average increase was calculated at 1.62%. A further feature of the Schemes is the payment of a fee ("the Upfront Fee") to those creditors who will either receive less than the weighted average increase or who will receive a lower interest rate than they currently receive.

[158] There are two exceptions to this harmonisation of the rate, which the petitioners explained as follows:

1) Letter of credit facilities: the letter of credit facilities (which all at present have an interest rate of 5%) will be increased to 6.94% (rather than to 8.85%). The rationale for this is that 6.94% is also the new margin that will be paid in respect of cash facilities within the Senior RFCs. However, LIBOR is also payable under the equivalent cash facilities. In that case, the all-in rate (of LIBOR plus the new margin of 6.94%) is 8.85%. This reflects the fact that LIBOR is a cost incurred in the provision of a cash facility but which doesn't arise under a letter of credit (and in which the lender assumes a contingent liability, rather than provides a cash advance). If there is a call by the beneficiary under a letter of credit (meaning that an actual cash advance will be required), then the interest rate payable to that lender will increase to the same level as a cash facility.

2) The Upfront Fee: An Upfront Free will be payable to those cash creditors who

will receive less than the weighted average increase of 1.62%, or who will receive a lower rate of interest than they currently receive. The two elements of the Upfront Fee are (i) an amount to compensate the recipient for the interest it would have received up to the existing Scheme Maturity Date if the margin had been increased by the 1.62% average weighted uplift, and (ii) for those creditors whose interest rate was reduced below their current rate, an amount to compensate for lost interest until the revised maturity date of 20 November 2023. This equates to the interest the creditor would have received up to that date if the interest rate had not been reduced.

[159] The petitioners' submission is that none of this fractures class or makes it impossible for lenders under the letter of credit facilities to consult together with the lenders under the cash facilities. In overall effect, the Senior Creditors will receive the same deal. They also note that lenders under both types of facilities voted overwhelmingly in favour of the Schemes. ARCM's submission, even if correct on this point, would not have led to any different outcome of the Meetings.

ARCM's criticisms

[160] ARCM identifies two ways in which the change of interest rates is said to fracture the Scheme Creditors. First, ARCM focus on the differential increase for those creditors receiving a higher rate. So, for example, the US 50$m Converted Loan creditors (at present in receipt of 8.76%) will see a proportionate rise of c 1% (ie the difference between 8.76% and 8.85%). By contrast, ARCM calculate that the £100m Term Loan creditors (at present in receipt of 5.47%) will see a proportionate rise of 62% (the figures are taken from para 80 of

the first respondent's Submissions). ARCM describe these differentials as "extreme and are such to preclude any true community of interest amongst these creditors. Secondly, the same is said of those creditors taking a modest cut in their coupon (being some of the USPP Notes creditors), who are said to have no community of interest with the creditors receiving increases. To the extent that the Upfront Fee seeks to address this, ARCM argue that it fails to do so as it simply cements the differences and that those not in receipt of an Upfront Fee cannot consult with those who are. There is a subsidiary criticism of Appendix 9 ("Fee Comparison Table") of the Explanatory Statement which is said to be misleading in a variety of ways and which is said to mask the degree of variance in the uplift of interest rates (as set out in detail at paras 86 to 87 in the first respondent's Submissions). This is responded to in Rose 1 (see paras 181 to 182), where an internal rate of return ("IRR") is said to produce a much lesser variance than ARCM's figures, and which brought out a range of uplift of between 7 and 11.1%.

The petitioners' and Supporting Creditors' response

[161] The petitioners and Supporting Creditors reject those criticisms. The first point made is that, given the (insolvent) comparator, there is no basis to suggest that a right to receive a slightly different rate over a short period of time renders it impossible for the Senior Creditors to consult together with a view to their common interest when voting on the Schemes. This is because the difference is insignificant when compared with the key rights the Senior Creditors enjoy and considered in the context of the comparator, namely, the amount of principal debt at risk, the *pari passu* ranking in an insolvency and the common security package. It was also noted that the intention is to harmonise the new coupon rate at

8.85% for all Senior Creditors. That indicates a clear community of interest between the relevant Scheme Creditors. Further, rather than further fracturing class, as ARCM suggest, it is submitted that the effect of the Upfront Fee to any cash Scheme Creditors who will receive less than the weighted average of 1.62% is to ensure that no Scheme Creditor will receive a lower return because of the harmonisation of the coupon rate. Accordingly, all Scheme Creditors will receive a higher return than they would in the absence of the Schemes. Reference was also made to *re McCarthy & Stone plc* [2009] EWHC 712 (Ch) at para 7 and *Re Primacom Holdings GmbH* [2013] BCC 201 at paragraphs 52 to 53, as examples where the court rejected similar arguments that different interest rates fractured class. Indeed, the petitioners observe that in no case has it been held that a difference in interest rates fractured a creditor class.

Consideration of the economic differential

[162] On these issues, I prefer the submissions of the petitioners' and Supporting Creditors and I have no hesitation in rejecting the ARCM's submissions.

[163] In respect of the differential effect of the Schemes on interest rates, ARCM's analysis is partial. ARCM's analysis focuses only on the interest rate change, whereas the analysis in the Explanatory Statement looks at the total return the creditors stand to receive (ie including the Upfront Fee and the interest rate harmonisation). On that analysis, contained in Appendix 9 to the Explanatory Statement (at p 583), all creditors will receive an increased return of at least 10%; the average increase is 13% and the highest increase is 19%. I need not record or resolve the minutiae of the parties' disputes on the precise figures or how they were calculated (eg regarding the baseline which formed the calculation of the increase in

the creditor's return (see ARCM's Note on Class at para 52ff and the petitioners' Note on Class at para 168)). Differences are permissible in the level of benefits a scheme may confer. The assessment the Court is making is whether those differences (together with other legal rights) unite or divide the creditors as a class. In considering the common interest of the Senior Creditors, the fact that they all will benefit is, in my view, a unifying factor and is likely to outweigh the differential in that uplift. In relation to the Upfront Fee, I accept the petitioners' submissions that this is a comparatively minor feature of the Schemes. The significant point in respect of interest rates (coupled with the equalising effect of the Upfront fees (where payable)) is that the Schemes will harmonise these. If the Schemes are sanctioned, the Senior Scheme Creditors will all benefit. No Scheme Creditor will receive a lower return; all will receive a higher return than they would have received in the absence of the Schemes, albeit to varying degrees. Their interests are converging, especially given the existing commonality of the significant economic rights these creditors already share (as noted above). The different interest rates and the differential in the degree to which the Scheme Creditors will benefit does not, in my view, render it impossible for them to have consulted together in the Scheme Meetings.

Should the Retail Bondholders have constituted a separate class?

[164] The petitioners grouped the Retail Bondholders in the same class with the Senior Creditors, on the rationale that they were all unsecured creditors. ARCM contend that the Retail Bondholders should have constituted a separate class. There is considerable force in the petitioners' observations that this is another example of a ground of criticism that is advanced by ARCM or the first respondent and in which they have no relevant interest.

This is because the ARCM vote against the Schemes falling into this debt instrument is stated in the petitioners Note on Class (at para 27) as 1%; whereas 97% of the Retail Bondholders voted in favour. In other words, the argument has no practical relevance and would not have affected the outcome of a meeting comprised (on this hypothesis) of just the Retail Bondholders. Putting it another way, even in the absence of the Retail Bondholders (who, on the hypothesis were voting in their own separate class), the Senior Creditor Class would also have approved the Schemes by a very large majority without the Retail Bondholders.

[165] Analysed in light of the petitioners' comparator (which I have accepted), there are no material differences between the legal rights of the Retail Bondholders and the Private Creditors. Any differences arising between the Senior Creditors and the Retail Bondholders, eg arising from the fact that the latter are not party to the Override Agreement, are largely irrelevant. In the no Schemes scenario, all amounts owing to the Private Creditors and the Retail Bondholders would become immediately due and payable, and creditors would have a right to lodge a proof of debt for the entire amount owing to them. The fact that the Retail Bondholders are not parties to the 2017 Override Agreement does not make it impossible for them to consult together with the other Senior Creditors with a view to their common interest. I accept the petitioners' submission that this is also reflected by the fact that both groups of creditors voted overwhelmingly for the Schemes.

Application of the test for class composition

[166] As I recorded above (from para [58]ff), the proper approach to the question of class composition was a matter of dispute between the parties. While on the case law this

involves a consideration of two sets of rights (the creditors' existing rights against the company which are to be released or varied and any new rights which the scheme gives to those creditors (see para [62])), the petitioners focused on the first stage (to the effect that if there were no material differences the creditors will form a single class) whereas the first respondent focused on the second stage (which presupposed that there were material differences and the relevance of which the court needed to assess). The first respondent emphasised the observation of the test to be applied at this stage, namely, 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" (*per* Hildyard J in *Apcoa*, paraphrasing *Sovereign Life* at p 583 and *Hawk*). In considering class composition, I begin with a consideration of the two sets of rights just noted.

The Creditors' existing rights considered

[167] The assessment of class begins with a consideration of the Scheme Creditors' existing rights against the Group, which are to be waived or released under the Schemes. In relation to their existing rights, the principal difference between the Super Senior Creditors and the other creditors is that the former will rank ahead of the latter. It is that feature that justifies treating the Super Senior Creditors as a distinct class, and for which the caselaw provides support. (I did not understand ARCM or the first respondent to demur from the proposition that the Super Senior Creditors properly form a separate class.) What of the other rights of those whom the petitioners placed in the second class, the Senior Creditors? The interest rate or coupon payable to the Group's creditors also varies according to debt instrument. The interest rates are detailed in the table at paragraph 19 of the petitioners' Note on Class

and comprise a mix of fixed rates (of between 5% and 9.63%) and variable (ie varying between 4.6% and 6.85% above LIBOR). I have already considered whether the different interest rates would fracture class. Of course, the amounts the Senior Creditors are owed and the currency in which that indebtedness is expressed are obviously different. Otherwise, the rights of the Senior Creditors under the 2017 Refinancing are essentially the same:

1) The Senior Creditors share the same security package;
2) They rank *pari passu* and without any preference amongst themselves;
3) They have the same maturity date (ie the Scheme Maturity Date); and
4) They share a common set of undertakings, covenants, voting rights and events of default under the 2017 Override Agreement (other than the Retail Bonds).

It is patent, in my view, that the key economic rights of the Senior Creditors are similar in their essentials. In its Submissions, the first respondent referred to an observation of Hildyard J in *Re Lehman Brothers International (Europe) (In Administration)* [2018] EWHC 1980 (Ch) at paragraph 106 (citing *Re English, Scottish and Australian Charterer Bank* [1893] 3 Ch 385 at p 415 and *APCOA* at para 117), that an insolvent comparator should not be used "as a solvent for all class differences". However, one of the striking features in these applications is the significant commonality of the essential economic and legal rights of the Group's creditors. This convergence is in large measure a consequence of the fact that Private Creditors (ie all but the Retail Bondholders) became party to and are bound by the 2017 Override Agreement. In addition, there is the harmonised Scheme Maturity Date. If the caveat is that insolvency should not be used to dissolve differences, in this case there are few significant differences or rights amongst the Senior Creditors on which that solvent could work. Testing this against the counterfactual (ie in the absence of the Schemes), they will all

be affected by the inability of the Group to refinance the Scheme Debt Facilities in full by the Scheme Maturity date. Because of the shared maturity date and the *pro rata* ranking, any deficiency will bear upon them in the same way. The Senior Creditors (being the unsecured Private Creditors and the Retail Bondholders) will be, as the petitioners put it, "in the same boat".

Consideration of the rights of the Scheme Creditors under the Schemes

[168] The Schemes preserve the prior ranking of the Super Senior Creditors. In their Note on Class the petitioners state that the Super Senior Creditors will "almost certainly be repaid in full" but that the same is not necessarily true for the Senior Creditors.

[169] In relation to the Senior Creditors, they are treated in materially the same way under the Schemes. The Schemes will uniformly extend the maturity date of the Scheme Debt Liabilities to the same date of 30 November 2023. This same extension will also apply to the Super Senior Creditors. Furthermore, they will be waiving the same event(s) of default which may arise from the Acquisitions. To the extent that the Acquisitions contribute to an improved liquidity from RBL facilities, the Senior Creditors will all share in like fashion from these benefits. They also share exposure to the risks of the Acquisitions in the same way. In respect of these matters, the extension of the Scheme Maturity Date and the impacts of the Acquisitions, the Scheme Creditors (including the Super Senior Creditors) are all treated equally.

Can the Senior Creditors consult together as a class?

[170] I return to the question: Can the Senior Creditors consult together as a class? While the parties differ as to whether the initial focus is on similarity rather than dissimilarity, I am not persuaded that that difference in approach would alter the outcome in these petitions. Even if there are "material differences" (and the second stage is reached only if there *are* "material differences"), the issue is whether those material differences make it "impossible for them to consult together with a view to their common interest". ARCM identify a number factors which they say fracture class or, in this context, constitute "material differences". I have addressed each of those above. Even considering these factors cumulatively, having regard to the Scheme Creditors' rights, I am not persuaded that the factors ARCM invoke make it "impossible" for the Senior Creditors or the Super Senior Creditors to consult together in their respective classes with a view to their common interest. The differences of the *quantum* of indebtedness owed to different creditors (or the currencies in which that is expressed) are permissible differences. In respect of the different interest rates payable (and which was not regarded as fracturing class for the purposes of the 2017 Schemes), the Schemes will harmonise interest rates to a very significant degree. Accordingly, apart from the distinction between those creditors who are secured (ie the Super Senior Creditors) and the remaining Scheme Creditors (ie the Private Creditors and the Retail Bondholders), there is a commonality of rights to a very significant degree. Subject to consideration of ARCM's submission about interests derived from rights, I find that ARCM's challenge on the basis that the petitioners had not convened correctly composed classes of creditors fails.

[171] In support of their position, the petitioners refer to *Re Hibu Group Ltd* [2016] EWHC 1921 (Ch). In that case, two linked schemes of arrangement were proposed, one of which was a members' scheme relating to a company called Topco. Under Topco's articles of

association, members holding 5% of Topco's shares could requisition a meeting to remove a director. Under the scheme, the articles of association were amended to delete this provision. Some members held more than 5% of the shares and, in effect, lost their ability to requisition a meeting. Warren J held that the members could nevertheless vote in a single class. He stated at [56]:

> "So far as concerns the Topco Scheme, the rights of all shareholders (both before and after the scheme) will all be identical. It is true that the interests of different groups of shareholders may differ. For instance, those with more than a 5 per cent shareholding can require, under the Existing Articles but not the Revised Articles, a meeting to remove a director to be requisitioned. Nonetheless, all the shares are identical in that they carry the same rights. To conclude that this potential divergence of interests should lead to separate classes would lead to precisely the sort of proliferation of classes which the courts have cautioned against. The time for considering any alleged unfairness is at the sanction hearing. In my judgment, a single class is appropriate for both of the two schemes."

Rights, interests and interests derived form rights

[172] In consideration of class composition, it is clear on the authorities that the Court is concerned with the legal rights of the creditors as against the scheme company, not their economic interests (see, eg, *UDL* at para 27). It is in this context that ARCM's blocking vote or veto falls to be considered. ARCM are particularly aggrieved by the loss of their *de facto* veto. The petitioners dismiss this as constituting no more than an interest and which falls outside of the consideration of the legal rights which are considered at this stage. They note that there is no differentiation in the legal rights associated with creditors' votes and that in relation to the collective power of votes, a number of Private Creditors (acting alone or in concert with other Private Creditors) have a practical ability to block amendments and

waivers under Clause 23.2. In addition, new or existing Private Creditors could build up additional blocking positions through the acquisition of debt. This is no more than an interest. ARCM's veto arises simply as a function of the *quantum* of the debt that they hold within each debt instrument. However, the practical ability to block is not itself a legal right in any meaningful sense. Rather, it is a consequence of exercising the voting rights attached to the *quantum* of debt. At the Sanctions Hearing, the first respondent did not develop or apply the formulation of "interests derived from rights" it had identified in the caselaw. I am not persuaded that in the context of this case, that formulation would lead to any different approach in the assessment of the issues. Any veto is derived from the *quantum* of debt held; not from the voting rights. Creditors with different levels of voting power may be able to achieve different results by exercising their rights as a consequence of the amount of debt which they hold, but that is irrelevant to class composition: the legal rights attached to the debt are the same.

[173] Furthermore, the petitioners observe that a recurrent theme in ARCM's submissions is that the voting rights of each Private Creditor Group are somehow unique. (See eg ARCM's Note on Class at para 76].) The petitioners submit this is wrong. They emphasise that in the context of a scheme of arrangement, it is necessary to consider the substance of a *legal right* – not the identity of the person or group who is able to exercise it. To do otherwise would result in the unnecessary proliferation of classes. As a matter of substance, the voting rights conferred on each Private Creditor Group (and on each individual Private Creditor) are the same. Furthermore, when the comparator to the Schemes is taken into account, the analysis becomes even more straightforward. In that no-scheme scenario, it is more likely than not that the Scheme Companies will be unable to refinance their debts in May 2021 if the Schemes are not implemented. This would be likely to result in the Scheme

Companies entering into formal insolvency proceedings. In that counterfactual scenario, the contractual voting rights under the Override Agreement would, the petitioners submit, be completely irrelevant. For these reasons, they submit that the contractual voting regime under the 2017 Override Agreement and the modification of that regime under the Schemes do not fracture the class of Senior Creditors.

Conclusion on first stage of the Buckley test

[174] The other matters considered at the first stage of the *Buckley* test are whether the petitioners have complied with the terms of the convening order and whether the statutory majorities were obtained. The Reporter confirms that:

1) subject to minor deficiencies which should be waived, there has been compliance with the Court's convening order (see Report at paras 2.10 to 2.11 and 5. 3;) and
2) the statutory majorities were obtained (on which see the Report at paras 2.12 to 2.17 and 5.3, and Rose 1 at paras 167 to 168, and the Chairman's reports of the Scheme Meetings, which the petitioners have also lodged).

The deficiency the Reporter noted in respect of compliance was minor and caused no prejudice. I am satisfied that the first stage of the *Buckley* test has been complied with.

Second stage of the Buckley test

[175] The questions for the Court at the second stage of the *Buckley* test are whether the class was fairly represented at the Scheme Meetings and whether the majorities were

coercing the minority in order to promote interests adverse to the class whom they purported to represent.

[176] It is in this context that ARCM argue that certain payments (described by the petitioners as fees and disbursements) constitute collateral benefits or "special interests" and which mean the Court cannot sanction the Schemes on the basis of the present votes. In framing their challenges at this stage of the *Buckley* test, ARCM refer to the observations of Hildyard J in *Re Lehman Brothers International (Europe) (in admin)* [2018] EWHC 1980 (Ch), where he stated (at para 88):

> *"The questions at the heart of the matter at this stage are (a) whether the majority creditors had some "special interest(s)" different from and adverse to the other members of the higher rate creditor 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."*

The special interests ARCM identify

[177] ARCM identify the following as special interests:

1) *Fees*: ARCM note that fees for "collateral" services of between approximately US $1 million and approximately US $12 million are to be paid to certain of the scheme creditors which, they submit, give rise to an obvious inference that the votes of these creditors are motivated by the fees;

2) *The extreme variance in benefit*: ARCM revisited the issue of the (on their calculation) extreme variance in the degree of uplift in interest rate. They submit that it is an obvious inference that those creditors who receive more beneficial economic treatment under the Scheme (ranging between 8% and

67%), would be induced to vote in favour, which they say illustrates that the class was not fairly represented;

3) *The new majority of 66.66%*: ARCM also note that, if the Schemes are sanctioned, then those creditors who make up the 66.66% (whom they described as "the new majority") required to make new amendments (whom ARCM equate with the Supporting Creditors), pursuant to the new provisions of the Override Agreement or the Implementation Deed have a "special interest"; it was said that they are voting in favour of the Scheme to receive ultimate decision-making power;

4) *Trading out of their positions*: ARCM also submit that the Schemes were designed to induce creditors to support the Scheme so that they might trade out of their positions. In support of this, they refer to the passage in the Explanatory Statement (at para 5.20), were the effect of harmonized interest rates will be to "facilitate a broader and deeper trading market than currently exists, which in turn should have a positive impact on the price of the debt in the secondary market."

The economic differentials ARCM argue constitute "special interests"

Special interest 1: Variance of uplift of interest rates

[178] The two economic differentials ARCM identify as relevant to the second stage of the *Buckley* test are interest rates and other collateral benefits (fees and disbursements) because they are said to constitute "special" interests to induce votes in favour of the Schemes. This is one reason why a "special interest" argument is raised at stage 2 of the *Buckley* test, even if

the factor relied on could also have been said to fracture class (as would be considered at stage 1 of the *Buckley* test). ARCM did not offer a definition of "special", but I understand ARCM to mean an interest *particular* to one or more of the creditors and with the intended purpose of inducing those with a special interest to support the scheme. As noted above, ARCM also advanced the interest rate issue as a factor that fractured class, because of the very wide variance in the percentage of uplift. I refer to, but do not here repeat, the details relating to the interest rates, the parties' differing calculations of variance and the Upfront Fee.

[179] In presenting its argument at this stage ARCM again focus solely on the proposed amendment to the interest rate. While this is to be harmonised, at present the interests rates vary among the debt instruments with the consequence that the degree of improvement will vary (ARCM's "variance" point). In my view, a focus on the proposed amendment to enhance and harmonise the interest rate on its own does not provide a complete basis for assessing whether it constitutes a special interest. It is incomplete, because the Upfront Fee was explicitly linked to interest rate harmonisation to ensure that no Scheme Creditor will receive a lower return as a result of that harmonisation. There is patently no material difference such as to constitute a special interest, if the interest rate harmonisation is considered in combination with the Upfront Fee (as the Schemes intend), because all Scheme Creditors will receive a higher return (in the form of interest) than they would in the absence of the Schemes.

[180] Even if ARCM's calculation of the variance is accepted (and part of the petitioners' response was to point to the IRR as a different metric) and considered in isolation from the Upfront Fee, on analysis it is difficult to see how this creates a *special* interest either among the creditors benefiting (to a greater or lesser degree) or among those creditors who will see

a decline in their coupon. The vast majority of the Scheme Creditors will benefit from a harmonised and enhanced interest rate. While a creditor at the higher end of ARCM's spectrum of variance, say the creditor getting 67% improvement, may vote for the Schemes more enthusiastically, its interest is not adverse to the creditor who is also benefiting, albeit to a lesser degree (eg getting only, say, a 5% improvement on its current interest rate). Both are benefiting from the Schemes. They have a *common* interest to vote in favour of the Schemes, not a *special* one (ie one particular to them or marking them out from the rest of this class). What ARCM's variance argument leaves wholly out of account are the creditors whose interest rate will be reduced as a consequence of harmonisation.

[181] If the Upfront Fee is left out of account (as it is on ARCM's approach to this issue), the Schemes will be detrimental to these creditors in this respect. While this could be said to give them an interest adverse to the majority who are benefitting, that is the very opposite of a "special interest" with which we are concerned. It may be for that reason, that ARCM do not address the position of these creditors in advancing this argument. However, the plain fact is that the vast majority of creditors in this class voted in favour of the Schemes, including those whose interest rates will be reduced by harmonisation (if considered without the effect of the Upfront Fee). In conclusion, in my view, ARCM's variance argument founders in the face of the overwhelming support of the Scheme Creditors to whom the variance argument applied (ie those who will benefit from an enhanced interest rate). It is difficult to apply the descriptor "special" to a feature (here an interest uplift), shared by all of the members of the group (ie all of the creditors to whom ARCM's variance calculation applied).

Special interest 2: Other collateral benefits

[182] If the Schemes are sanctioned, some of the Scheme Creditors will receive payment of fees representing the provision of certain services. So, for example, fees will be payable to RBC (the Royal Bank of Canada) in relation to underwriting the rights issue. ARCM argue that this constitutes a "special interest" different from and therefore adverse to the interests of the rest of the class of creditors. The Petitioners' position is that the fees are in respect of services, such as RBC's provision of those commercial services and assumption of risk being undertaken, and that the amount of fee payable is in line with market rates in arms' length transactions (see Rose 1). The petitioners argue that RBC's vote could only be discounted if the fees payable to RBC created an interest which is "adverse to, or clashes with, the interest of the class as a whole" (*per* Hildyard J in *Lehman Brothers International (Europe)* [2018] Bus LR 1012 ("*Lehman (Europe)*")(at para 89)) and that in any event it would be necessary to show that RBC would not have voted for the Schemes "but for" the opportunity to receive the underwriting fee (*ibid* at paras 90 to 103). Finally, the petitioners point out, that even if RBC's votes were discounted, this would not have affected the outcome of the Meetings and so ARCM's argument on this point has no practical effect.

[183] A second category of payments ARCM challenge (and which they characterise as a "collateral economic benefit") are the disbursements to be paid to a creditor's financial advisers for their work in connection with the Schemes. ARCM rely on *Noble* in which the court had to consider a work fee of US $36 million. The petitioners' position is that the circumstances of that case are readily distinguishable, as the proposed disbursements are of a wholly different character and order. The petitioners have disclosed to ARCM the information relating to the disbursements. The disbursements confer no "net" benefit on the

creditor concerned: absent the Schemes, the creditor would not have incurred professional fees; payment of its reasonable professional fees ensures it is not out of pocket. There is no "benefit" to the creditors concerned.

[184] In relation to the fees, it is important to note that none of these is a consent fee. As for the underwriting fees to be paid to RBC or the disbursements to defray the professional fees of some of the Scheme Creditors, I did not understand ARCM or the first respondent to challenge the amount of these as out of line with the market, it was just the fact that these were to be paid. However, I find that the RBC fees are patently in respect of additional commercial services to be rendered and the risks RBC will assume. Payment to defray the professional fees some of the Scheme Creditors have incurred in advising on the proposed Schemes does not actually benefit the creditors concerned. I am also persuaded that there was no reason or basis to conclude that RBC (or other creditors whose disbursements are being defrayed) would not have voted for the Schemes "but for" the underwriting fees. It is not insignificant, in my view, too, that the other Senior Creditors not in receipt of such fees or disbursements, nonetheless voted in favour of the Schemes.

[185] In my view, these matters do not constitute a "special interest". I am fortified in this view, too, by the Reporter's conclusion that no collateral benefit arose from the payment of these fees (see paras 4.71 to 4.73).

Are there undisclosed fees?

[186] By the time of the Sanctions Hearing, the question of whether there were undisclosed benefits was implied rather than fully argued. To the extent that this may initially have been based on a criticism that the Explanatory Statement did not disclose the precise figures to be

paid, eg to RBC, I am not persuaded this was required. In any event, the Rose 1 affidavit has provided more information about this. When pressed at the Sanctions Hearing, Senior Counsel for the first respondent was unable to identify any other basis to support this submission. I give this criticism no weight.

The "new majority"

[187] I have already considered ARCM's submissions in relation to the amendment of the voting rights, to the extent it was said that these kinds of rights were not susceptible to the Part 26 jurisdiction or that the amendments amounted to a confiscation. ARCM advanced a discrete argument relevant to stage two of the *Buckley* test, that, if amended, the new (lower) majorities under the voting rights had the effect of conferring control over the Groups' affairs in favour of the "new majority" (as ARCM termed it) and that this incentivised those who would constitute that new majority to vote for the Schemes.

[188] As noted above, there is nothing unique in ARCM's ability under the present voting regime to block certain waivers or amendments. Lloyds also have a blocking vote in the Term Loan Facilities (one of the two debt instruments in which ARCM have a veto). Other creditors have sufficient debt to exercise a veto in other debt instruments (eg the USPP debt instruments), and every private creditor has a veto for certain kinds of waivers or amendments. Furthermore, the new voting regime proposed results in every dollar of debt (regardless of the debt instrument under which it is held) having the same voting power attached to it. The weighting of each vote is the same for every creditor in the defined class. Accordingly, in my view, there is no sound basis to contend that the voting rights of the first respondent (or of ARCM) are being treated differently. There is no discrimination in legal

rights or voting power. It may be described as a fair regime. *Prima facie* the equal treatment of the legal voting rights militates against a "special interest" argument.

[189] It must be noted, too, that there is a curiously binary quality to ARCM's argument, as they necessarily assume that they will be in the minority for every vote and all of the other creditors necessarily in the majority. There is also self-fulfilling quality to ARCM's argument, too, because they attribute a fixity and cohesion to the "new majority" (as they term it). However, there is no basis for presupposing that (in effect) all other Scheme Creditors (whether Private or Retail Bondholders) will necessarily or always vote *en bloc* (or do so against ARCM), or that ARCM will never form part of that majority for any vote, regardless of subject matter. There is no basis for assuming the kind of predetermination of creditor groupings or voting alignments that ARCM presuppose. There is nothing in the amended provisions of the Override Agreement that prescribes any "new majority" as a matter of legal right or that consigns ARCM to be in the minority. I am not persuaded that the proposed amendments to the voting rights create any special interest as ARCM contend.

Trading out

[190] This argument was based on a passage from the Explanatory Statement, to the effect that one result of the Schemes will be to "facilitate a broader and deeper trading market than currently exists, which in turn should have a positive impact on the price of the debt in the secondary market." ARCM's position is that this will be uniquely disadvantageous to them as the Group's largest creditor (this argument is not open the first respondent) and that it will be more difficult for them to trade out (ie sell their debt in the enhanced trading market), while smaller creditors could (and ARCM surmised, will) trade out. While ARCM

is the Group's largest creditor, their position is not unique as there are other creditors also holding very substantial amounts of debt to whom this might also apply. In any event, this submission is based on speculation as to what other creditors may or may not do. Returning to the passage from the Explanatory Statement quoted: if it is the case that there will be a "positive impact" on the price of debt in the secondary market, this will be available to all of the creditors. Whether or to what extent a creditor takes advantage of that does not constitute a "special" interest (it cannot be "special" if the effect is universal). In any event, it is not a feature of the Schemes themselves, in the sense of a right that is conferred or created and from which only some of the creditors will benefit.

ARCM's complaints anent Mr Rose's comments at the start of each of the Scheme Meetings

[191] It may be here convenient to address one of ARCM's other complaints. ARCM take issue with Mr Rose's comments at the outset of each of the Scheme Meetings (that the Group reserved its position in relation to ARCM's hedge) and suggest that this was an attempt to sway the vote (see Answer 76.1). On this point, I accept the Supporting Creditors' submission that ARCM have produced no evidence indicating any possibility that any Scheme Creditor was swayed. ARCM did not attend, but they had a representative (Mr Lawford) who was present and spoke before the votes were cast. At the Scheme Meetings Mr Lawford made the point, on behalf of ARCM, that they had no collateral reason for voting against the Schemes. In these circumstances, there is no basis for a charge of procedural or substantive unfairness arising from Mr Rose's comments. Further, there is nothing to suggest that the Scheme Creditors were acting in bad faith.

Other factors relevant to consideration of stage 2 of Buckley

[192] The petitioners identified additional factors that were said to displace the contention that there was a special interest of one sort or another operating. These include the following:

1) *Turnout*: turnout is a relevant consideration at stage two of Buckley (*Re The British Aviation Insurance Co* Ltd [2006] BCC 14 at para 116). More than 600 Scheme Creditors, representing 96.82% of the Senior Creditors and 99.81% of the Super Senior Creditors (in value) were represented (in person or by proxy) at the Scheme Meetings. The Supporting Creditors' description of this as "exceptionally high" is apt;

2) *The range of creditors who voted*: The Schemes were supported by some of the largest banks in the world (eg Deutsche Bank), by other leading institutions and by entities with considerable financial experience in this section. At the other end of the spectrum from the Private Creditors are the Retail Bondholders, 97% of whom voted in favour of the Schemes. The vast majority of these have not entered into any contractual agreement or Support Letter agreeing to vote in favour of the Schemes;

3) *No consent fees*: This was noted above, but no consent fees or other inducement was paid in consideration of signing a Support Letter or agreeing to vote in favour of the Schemes; and

4) *Support across every debt instrument*: There was a broad range of support for the Schemes across every debt instrument within the Senior and Super Senior Liabilities. Apart from ARCM, very few other Private Creditors voted against.

> These were two lenders in the Converted facility and a handful of Retail Bondholders who held, respectively, less than .5% and less than .05% (by value) of the total Senior Creditor Liabilities).

The first respondent did not challenge these factors; nor did it suggest that these were irrelevant to the Court's consideration. In my view, these factors do displace any inference of "special interests" operating, such as the first respondent and ARCM contended.

The Reporter's view and conclusion on the second stage of Buckley

[193] Finally, in this context I note the Reporter's conclusion that those voting in favour of the Schemes were acting in good faith and that the classes were fairly represented at the Scheme Meetings: see paras 5.6 to 5.8 of the Report. Of course, that view informs but does not bind the Court. However, having considered ARCM's challenges relevant to this stage, nothing in them has persuaded me that the classes were not fairly represented at the Scheme Meetings.

[194] For the foregoing reasons, I find that stage two of the *Buckley* test has been met.

The third stage of the Buckley test: Are the Schemes fair and which a creditor could reasonably approve?

The Court's discretion and the test to be applied

[195] In terms of section 899(1) of the 2006 Act, the Court has a broad discretion when it considers whether to sanction a scheme: "the court **may** ... sanction" (emphasis added). There is a considerable body of caselaw which provides guidance of how that discretion is

exercised. The first and second stages of the *Buckley* test involve consideration of procedural, formal and jurisdictional matters. It is at stage 3 that the Court's discretion is engaged. At the third stage, the Court must consider whether the arrangement proposed in a scheme is such that an intelligent and honest person, a member of the class concerned and acting in respect of his or her interest, might reasonably approve it. (See Lindley LJ's formulation of the test in *Alabama*, above). I reiterate that the Court does not substitute its own assessment for what is fair and reasonable for the view of the relevant scheme creditors. The Courts have long recognised that the creditors are better judges of what is in the commercial interests of the class they represent: see *English Scottish and Australian Chartered Bank* [1983] 3 Ch 385 at 409 *per* Lindley LJ; *Apcoa* at para 128 *per* Hildyard J and *Noble* at paragraph 17(iii) *per* Snowdon J. For that reason, the Court is not concerned with whether the scheme proposed is the only fair scheme or the best scheme. In this context, the Supporting Creditors cite an observation from Hildyard J in *Apcoa* (at para 128) to the effect that the authorities "must give **full weight** to the decision of the creditors" (the Supporting Creditors emphasis). This may simply be a different way of making the point already made: the nature of the Court's jurisdiction under Part 26, involving a consideration of the sanction of a scheme of arrangement or compromise which the requisite majority of the creditors have approved, is a form of review (within certain parameters) of whether it is a fair scheme, as well as to ensure compliance with the procedural requirements of the statute. It has also been observed that the Court should be slow to differ with the view of the Scheme Meetings unless something is brought to the Court's notice to show that there has been some "material oversight or miscarriage" (*per English, Scottish and Australian Chartered Bank* at p 409).

Caveats from the case law

[196] It is important, too, to bear in mind the power the Court wields and the care with which it must be exercised. ARCM stress the "formidable compulsion" (*per* Bowen LJ in *Sovereign Life*, at p 583) which takes place if a scheme is approved, because it is rendered binding (now by virtue of section 899(3) of the 2006 Act) on all creditors. They also emphasise the unusual nature of the Court's power; that it is not an exercise in rubber stamping, and that the Court should not lightly allow parties "to forcibly change such obligations with the assistance of the judge". In support of these submission,s they refer to observations in *Alabama* (eg *per* Bowen LJ at pp 242, 243 ("this is a very remarkable act of Parliament"; "the object … is not confiscation"). To illustrate these points, they also cite a number of cases where sanction was refused, including *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch) (Lewison J), *Re Colt Telecom Group plc (No 2)* [2002] EWHC 2815 (Ch), [2003] BPIR 324 (Jacob J) and *Re Prudential Assurance Company Ltd* [2019] EWHC 2245 (Ch) (Snowdon J).

Has the test at stage 3 of Buckley been satisfied?

[197] The petitioners and Supporting Creditor submit that the Schemes satisfy the third stage of the *Buckley* test, namely, that they are Schemes which an intelligent and honest person, as a member of each of the classes concerned and acting in respect of his or her interest, might reasonably approve. They also point to the votes overwhelmingly in favour of the Schemes. For completeness, I note that in his Report, the Reporter has concluded that the Schemes are fair and reasonable (see especially paras 4.78 to 4.92 and 5.5 of the Report).

[198] ARCM contest this and make the following points:

1) It belies commercial good common sense for the petitioners to make Acquisitions (for an overall purchase price of about US $870m) while at the same time maintaining they are insolvent;

2) It also belies commercial good common sense that the petitioners value the Acquisitions at c US $1 billion (see Explanatory Statement, pages 47-48, paragraph 6 (E)), but obtained for a purchase price of about US $870m, especially as the vendors are highly expert players in the oil industry; that the assumptions that purport to justify the purchase price are fundamentally flawed and the RBL capacity that the petitioners expect, does not exist;

3) There remain concerns about the decommissioning liabilities (eg as outlined in Mr Ercil's email to Mr Durrant of 10 November 2019); and

4) (reverting to a matter raised under ARCM's challenge to the adequacy of the Explanatory Statement), they contend that, as the Xodus and NERA Reports make clear, there remain very concerning risks that have not been properly aired, discussed, and taken on board.

[199] At bottom, these criticisms amount to no more than a disagreement with the commercial judgement underpinning the Schemes. The first mischaracterises the directors' more nuanced views on the Group's prospects (noted above, under the discussion of the meaning of insolvency for the purposes of the comparator). The first three points above are all directed at the Acquisitions; the fourth is indirectly related to the Acquisitions, too, because many of the asserted deficiencies of the Explanatory Statement relate to the (it is said) inadequate disclosure or analysis of the risks that the Acquisitions will bring (eg whether those be underestimations of decommissioning liabilities, overestimations of reserves or the risks of enlarging the Group's exposure to the gas market). The petitioners

note that a consistent theme of ARCM's opposition is their preference for their alternative proposal. The details of this alternative and ARCM's grounds of opposition are set out in the Explanatory Statement. A *leit motif* of ARCM's position throughout is their determined opposition to the Acquisitions. As they submit above, certain aspects of the Acquisitions are said to bely "commercial good common sense" or in respect of which "concerns remain". Notwithstanding the use of the passive voice, those are *ARCM*'s concerns. The fundamental difficulty for ARCM's submission is that their opposition to, and concerns about, the Acquisitions, and their preferred alternative, were all placed before the Scheme Creditors. The Scheme Creditors (apart from ARCM) voted overwhelmingly in favour of the Schemes and, by the same token, the majority overwhelmingly rejected ARCM's proposed alternative.

Comment on the ARCM Reports

[200] Turning to the ARCM Reports, I did not find these assisted the Court with the relevant issues it had to determine. As the Reporter has not had the opportunity to comment on them in his Report, it is appropriate that I comment on them.

[201] There is considerable overlap in the Fuller and NERA Reports, in that each reviews the Acquisitions, and their assessed benefits and risks, and each expresses disagreement with assumptions or the commercial assessments underpinning the Schemes. Mr Rose responds to these Reports in Rose 2 (at paras 28 and 29). He notes that the author of the NERA Report has no knowledge or experience in the oil and gas sector, in RBL financing, in restructuring or schemes of arrangement. Mr Rose explains that the Group's RBL assumptions had been developed following extensive discussions with lenders experienced

in RBL facilities and that these assumptions were confirmed by PWC in the PWC Report, and by two recognised experts in the sector, Rothschild and DNB (included as appendices 60 and 61 to Rose 1). Mr Rose's explanations suffice to demonstrate that there was a reasoned and tested basis for these features of the Schemes. In relation to Mr Prest's criticism that the PWC Report lacked independence, because it applied the Group's working assumptions, I have already noted Mr Rose's comment (in Rose 2) is that PWC nonetheless reviewed the Group's RBL assumptions, and they confirmed that these were all within a reasonable range (see PWC Report at p 59). Furthermore, PWC's views are supported by other expert analysts, namely Rothschild and DNB. PWC were also clear that it was outwith their expertise to consider the reserve assumptions for decommissioning liabilities.

[202] Of the ARCM Reports, the Boyle Report is the one that offers the most comprehensive consideration of the Schemes as well as suggested alternatives to them. What is notable is that many aspects of the Boyle Report *support* the petitioners' case about the need to address the impending maturity date of the Scheme Debt Facilities (the circumstance that was critical to the question of comparator). For example, Mr Boyle agrees:

(1) That the failure of the Schemes and the Scheme Debt Facilities becoming current in June 2020 will increase market concern about the Group's financial position (see para 4.9.10);

(2) That the Group will not have sufficient liquidity to repay the Scheme Debt Facilities ahead of the Scheme Maturity Date (see paras 5.5.5 and 5.5.10);

(3) That an extension of the Scheme Maturity Date is not feasible prior to the SDF becoming current in June 2020 (para 7.3.5);

(4) That a full refinancing ahead of the Scheme Maturity Date in May 2021, is not a "viable alternative" to the Schemes (para 7.4.8 and 7.12.21);

(5) That, at most the disposal of non-core assets could assist with deleveraging, but it does it not provide a standalone solution to the Scheme Maturity Date falling due in June 2021 (para 7.5.13, 7.5.18 and 7.5.19); and

(6) That a number alternatives he considered are not feasible (such as a full M&A, a debt for equity swap) alternative to the Schemes.

One of the critical features of Mr Boyle's report is, in fact, its acknowledgement that the Group did not have the liquidity to repay the Scheme Debt Facilities before the Scheme Maturity Date. That is the very problem which the Schemes seek to address.

[203] In respect of his consideration of alternatives to the Schemes, the analysis is superficial, often generic and, at times, his assertions that these could be achieved in the necessary timescale borders on glib. The first alternative he considers is that of partial refinancing, an option which the Group has considered and rejected for the reasons set out in the Explanatory Statement and Mr Rose's affidavits.

[204] On the prospect of an A&E, in response to the Group's and the creditors' concern about the impact of the Scheme Maturity Date on the Group's solvency, Mr Boyle blandly states that an A&E would resolve that concern (at para 7.3.2). He enjoins the directors (without apparent irony) to consider the "commercial and legal options" to manage the risk of a hold-out by dissentient creditors (at para 7.3.17). He suggests that an A&E would "appear to be relatively simple to implement", although he concedes that "negotiations amongst a relatively diverse group of stakeholders can be complex" (at para 7.3.19). At best, an A&E would provide a stable platform "for the Group to explore more short to medium terms options to delever or finance in the future ". Implicit in this comment is the recognition of the continuing need to deleverage the Group's debt position, and that any

A&E is only an *interim* measure. In my view, that is utterly destructive to ARCM's contention that the true comparator for the purpose of class composition is an A&E (see para 51 of the first respondent's Submissions). In respect of his consideration of disposal of non-core assets, most of this section is taken up with recording of prior disposals in the market by third parties. Mr Boyle acknowledges that disposal of non-core assets on their own "will not generate sufficient funds to repay the existing debt in full" prior to the Scheme Maturity Date (para 7.5.13). He couples this with the assertion that this, in conjunction with other alternatives, such as A&E and partial refinancing "could represent an alternative" to the Schemes. He does not identify any non-core assets that might be sold and, indeed, does not have the expertise to know within what timescale such disposals might take place (see para 7.5.18).

[205] Turning to his consideration of the equity raise element of the Schemes, Mr Boyle is not an equity market specialist and he is unable to comment with any confidence on the prospects of a substantial or even a lesser equity raise; both of those options are heavily qualified (with the phrase "if achievable" (para 7.7.13 and 7.7.15)). The most he can say in respect of an equity raise is that it is not a standalone solution (he similarly qualifies the prospects of a more limited raise ("if achievable")) and he accepts it would need to be combined with some other solution.

[206] Notwithstanding its length and the multitude of appendices, Mr Boyle's Report offers nothing new. The options he explores have been considered by the Group with its advisers. He identifies no options, or combination of options, that realistically address the problem of the debt wall in the time before the Scheme Maturity Date.

[207] His conclusions, such as they are, are expressed in the most tentative language. At best, he concludes that the options he has identified are "the most likely areas that could

feasibly be explored by the Group" (para 2.5.6), and that one or more of the options he identified "could be explored in combination … [with] a disposal of assets combined with a voluntary or involuntary [amendment and extension] of facilities". The alternatives are discussed in generic terms and, where he lacks expertise, he defers to the view of a colleague which is provided in the most summary terms. Any application of these to the Group is so qualified ("may", "could", "if", "if achievable") as to be wholly unpersuasive.

[208] Mr Rose responded in Rose 2 to *inter alia* the Boyle Report. I accept the grounds on which Mr Rose rejects the Boyle Report, and in particular, the detailed reasons he provides as to why the theoretical alternatives Mr Boyle postulates are not feasible. While an A&E is clearly essential, Mr Rose explains that it is not itself sufficient to resolve the Group's financial difficulties, and that an equity raise would also need to accompany any extension of debt maturity (see Rose 2, para 24(A)). However, Mr Rose explains (as is perhaps self-evident) that an equity raise for paying down debt would be challenging, especially after the Scheme Debt Facilities become current (in May 2020). A partial refinancing is not a viable solution to the 2021 Maturity. The proceeds from disposal of non-core assets would not suffice to repay the Group's indebtedness. There is nothing in the Boyle Report that undermines Mr Rose's essential position that the Schemes are the product of "a long period of work in looking for alternatives" and that the Proposed Transaction "is the only viable transaction the Group has been able to identify during the time which addresses the 2021 Maturity, paves the way for a full refinancing in the medium term and has the clear support of a significant majority of its creditors" (Rose 2, para 27).

[209] In my view, there is considerable force in Mr Rose's observation, that the Boyle Report is a largely theoretical exercise without the benefit of experience in the sector or of the Group, and that there are no consequences for Mr Boyle if he gets it wrong. It is not

simply that Mr Boyle does not have to live with the consequences of failure; there is an air of unreality in Mr Boyle's speculations about alternatives. This is seemingly considered without addressing the duties incumbent upon Mr Rose and his fellow directors (and which they must take cognisance of) in respect of responsible trading in the face of the risk of insolvency in the short to medium term. Furthermore, the fact that, as Mr Rose explained (eg see Rose 2 at para 25), it took 17 months to produce the 2017 Scheme belies Mr Boyle's bland assumption, and on which his discussion of alternatives is premised, that the 14 months remaining before the Scheme Maturity Date would suffice.

[210] I find that, fundamentally, there is nothing in the Boyle Report (or the other ARCM Reports) to provide a cogent basis to challenge or undermine the Schemes or the directors' conclusion that the Schemes are the best way forward for the Group. The majority of the Scheme Creditors at the Scheme Meetings endorse the directors' views. There is nothing in ARCM's submissions or in the ARCM Materials that persuades me that, in the exercise of my discretion, I should disregard the views of the majorities voting at the Scheme Meetings or the collective exercise of their commercial judgement of where their best interests lie. To the extent that the ARCM Reports are relied on to invite the Court to consider the commercial merits of some alternative to the Schemes, the petitioners' and Supporting Creditors' submission is in my view well made that this is not relevant to the Court's consideration of sanction of the Schemes. It is not the function of the Court in Part 26 proceedings to adjudicate between differences of commercial judgement, which, in substance, is what ARCM seek to do at a proof. It is indisputable that the Group as a formidable "problem" (in the *Scottish Lion*-sense) in the form of the debt wall. Having considered the Schemes proposed, and the ground of ARCM's challenges to them with particular care, I am persuaded that the Schemes are fair in the relevant sense. It remains for

me to consider the impact of ARCM's remaining grounds of challenge (and which were presented as free-standing or not readily accommodated within the 4 stages of the *Buckley* framework).

Unfairness of exclusion of ARCM from discussions in late 2019

[211] ARCM complain that they were excluded from the late stages of the discussions amongst the Group and its creditors. This coincided with ARCM's disclosure of its hedge position. The import of this exclusion might, at its highest, amount to a claim that ARCM could not influence the outcome of the final form of the Schemes. Mr Rose explained the commercial sensitivity of matters placed in confidence before the creditors and how ARCM's disclosure affected that. Be that as it may, I accept the petitioners' and Supporting Creditors' submissions that this complaint is irrelevant. What the Court considers are the *Schemes to be sanctioned*, not prior or alternative iterations of the same. In any event, in this case, it is difficult to see that there was any prejudicial impact. ARCM's final position was to oppose the Acquisitions. As these emerged as central features of the Schemes, it was unlikely that even continued closer involvement by ARCM would have changed that. More importantly, once the Schemes were in their final form, there was no differential treatment of ARCM in respect of the information placed before them and the other Scheme Creditors (all parties had the Explanatory Statement) or in the opportunities for ARCM to express its views. To the extent that ARCM's complaint of exclusion was said separately to constitute a "blot" (*per* para 5(4) of the first respondent's Submissions), the foregoing comments also apply to this argument. Any exclusion of ARCM from the final stages preceding the petitioners finalising the form of the Schemes is not a blot on, or arising from, the Schemes.

For completeness, I record the Supporting Creditors' observations that at about this time ARCM set up a website to promote the options they favoured and to garner opposition to the Schemes.

Market volatility

[212] ARCM advance a separate argument said to go to the overriding unfairness of the Schemes, which was that the recent market volatility in oil prices undermines the commercial rationale or viability of the Schemes (and that volatility subsists during the several weeks that this opinion has been at avizandum). This is one of the many topics on which ARCM say proof is necessary. Apart from the doubtful utility of a proof on parties' respective predictions of future oil and gas prices (or the markets' perception of how these might affect the Schemes), in my view this matter is best left to be determined by the market itself. This is appropriate because of how the different elements of the Schemes are structured. As noted above, if the equity raise does not generate sufficient new capital, the Acquisitions cannot be funded. The first step is the equity raise. There is no better predictor of the success of the Schemes in the market than the market itself. Accordingly, the current market volatility does not lead me to conclude that the Schemes fall to be refused on that ground.

Is there overriding unfairness?

[213] Under reference to *Prudential Assurance Co Ltd* [2019} EWHC 2245 (Ch), the first respondent submits that it is always open to the Court to refuse to sanction a scheme that

was inconsistent with an expectation of creditors, even where there was no vested right (see para 100 of the first respondent's Submissions). That harks back to its submission (made in the context of its "confiscation of voting rights" submission) that promises and covenants that were made by way of the 2017 Schemes were "empty promises" if the Schemes are sanctioned (see para 22 of its Submissions and references there to paras 21 to 43 of Ercil 1 and to *Re Old Silkstone Colliers Ltd* [1954] 1 Ch 169 ("*Old Silkstone*") at p 189). Having considered these materials, I am not persuaded that the first respondent has identified a clear and specific representation or promise by the Group made at the time of the 2017 Schemes, to the effect that the 2017 Override Agreement would be immutable, or that the first respondent assented to the 2017 Schemes in reliance on such a promise or representation. In Mr Ercil's view, the 2017 Override Agreement was final and binding (see Ercil 1 at para 43). That may have been so, but, as noted above, the 2017 Refinancing was presented as an incremental step towards better financial health, not itself as the final means to achieve that end. That apart, and more fundamentally, there is nothing in clause 23 or any other part of the 2017 Override Agreement, which is the measure of the parties' rights, which creates this immutability. In relation to *Old Silkstone*, in my view, that case provides no support for this submission. It is readily distinguishable: (i) it rose in a different statutory context (being a reduction of capital), and therefore there was no requirement for "give and take" to be considered; (ii) in that case there were specific representations made in the circulars themselves (ie that the company would proceed in a particular way and would preserve the possibility of compensation for certain stockholders), but I have concluded that there are no like representations in this case, much less any contained in a document equivalent in stature to a circular; and (iii) that the subsequent (third) reduction of capital in *Old Silkstone* was promoted on the basis that those retained rights of the stockholders were

worthless and it was that element of unfairness that led the court to refuse the reduction in capital. In this case, the first respondent has not identified any specific or clear representation or promise equivalent to that in *Old Silkstone*. Skilfully and subtly presented though this argument was, it is in substance a complaint against the proposed amendment of rights (particularly voting rights) via a scheme under Part 26. I have already addressed the nature of the Part 26 jurisdiction which permits this.

The fourth stage of the Buckley test: Are there blots on the Schemes?

[214] It is at the fourth stage of the *Buckley* test that the Court considers if there are any "blots" on the scheme. A '*blot*' is a technical or legal defect in a scheme, eg that the terms of the scheme are inoperable or infringe some mandatory provision of law: see *Re The Co-operative Bank Plc* [2017] EWHC 2269 (Ch) (at para 22, *per* Snowden J).

[215] The first respondent has identified what it says are three "blots" on the Schemes. These are:

1) the Schemes cannot validly appoint an agent or attorney to execute a particular document (the 'Implementation Deed') and perform various other actions on behalf of the Scheme Creditors (see Answer 4.1 (this is the "power of attorney issue" referred to earlier));

2) the Acquisitions are subject to an excessive number of conditions (see Answer 4.2.2); and

3) the Schemes include powers of amendment which are impermissibly broad in scope (see Answer 53.10.1)

The petitioners' undertaking, offered at the Sanctions Hearing (and recorded above) is sufficient to address blot (3). In respect of blot (2), which in large measure repeats aspects of ARCM's voting rights confiscation arguments and those on market volatility (on which, see below), I am not persuaded that this is a "blot" in the relevant sense. Complex schemes are bound to have different elements which may be conditional on one another. I would be reluctant to conclude that that feature of conditionality necessarily constitutes a "blot", lest the flexibility inherent in the Part 26 jurisdiction and the concept of what may constitute an "arrangement" be unduly constrained. As I understand the gravamen of ARCM's challenge, it is the uncertainty resulting from that conditionality or that the conditionality removes the Court's control (*per Re Lombard Medical Technologies Plc* [2014] EWHC 2457 (Ch) at para 26). In my view, there is no substance to this challenge. While elements of the Schemes are conditional, there is *legal* certainty as to what will follow if the different elements of the Schemes take effect. The Court has approved the elements of the Schemes and the sequence and conditions on which they will take effect. There is no excessive conditionality such as to remove the Court's control. If it were the uncertainty which concerns ARCM, this is simply the context in which the Schemes may take effect. In my view, that market uncertainty is not a technical or legal defect.

The power of attorney issue: Can the Schemes validly appoint an agent or attorney on behalf of the Scheme Creditors?

[216] The first respondent contends that it is not competent for the Schemes to constitute PO as an attorney under a power of attorney to execute certain deeds on behalf of the Scheme Creditors, in the event the Schemes are sanctioned. The petitioners' position is that

the first respondent's contention is incorrect. Both have lodged an Opinion of English Senior Counsel.

[217] Before turning to the first respondent's argument, I first note the two clauses of the Schemes on which this challenge is based, namely clauses 4.1 and 4.3. By clause 4.1 of the Schemes, PO will be appointed as agent and attorney under a power of attorney on behalf of the Scheme Creditors to execute the Implementation Deed (and to perform certain other actions in relation to it). The rationale behind this provision (which the petitioners describe as essentially a mechanical one), are as follows:

1) In order for the Schemes to become effective, the Implementation Deed must be duly executed;

2) In theory, the Scheme could require the Scheme Creditors themselves to execute the Implementation Deed (and to comply with any other appropriate instructions by the Parent Company);

3) However, this approach would suffer from serious practical difficulties. There is no guarantee that the Scheme Creditors would execute the Implementation Deed in good time or at all. That is particularly true in relation to a dissentient creditor; and

4) In order to avoid these difficulties, Clause 4.1 of the Schemes simply appoints the Parent Company as agent and attorney on behalf of the Scheme Creditors to execute the Implementation Deed (and to perform various other actions relating to the Implementation Deed).

Clause 4.3 of the Schemes provides as follows:

> "The authority granted under Clause 4.1 above in favour of an Attorney under the Schemes shall also be treated for all purposes whatsoever and without limitation as having been granted by a deed under English law."

The first respondent's ground of challenge to the use of these to constitute PO an attorney of the Scheme Creditors

[218] Under reference to section 1 of the Powers of Attorney Act 1971 ("the 1971 Act") and section 47 of the 2006 Act, the first respondent submits that as a matter of English law "a Scottish company signing an English law deed by Power of Attorney would need an English law power of attorney to do so" (Answer 4.10). Section 1(1) of the 1971 Act provides "(1) An instrument creating a power of attorney shall be executed as a deed by the donor of the power". Section 47(1) of the 2006 Act provides:

> "(1) Under the law of England and Wales or Northern Ireland a company may, by instrument executed as a deed, empower a person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf...".

[219] The first respondent's short point is that, unless the Scheme Creditors actually execute a deed appointing PO as their attorney for the purpose of executing the Implementation Deed, then PO will not be validly appointed for that purpose. A scheme with such a clause is not a deed granted by the donor of the power (ie the Scheme Creditors), as section 1 of the 1971 Act requires. It submits that the issue can only be resolved with the benefit of expert evidence of English law and it has produced a short Opinion of David Alexander QC, of South Square Chambers, ("the Alexander Opinion"). Consistent with his letter of instruction, which simply asked him to identify and recite the relevant parts of the 1971 Act and the 2006 Act concerning powers of attorney and to consider the effect of these provisions on the Schemes (and especially clause 4 and the

proposed Implementation Deed), Mr Alexander addresses only these provisions. (He gives no consideration, for example, to section 899 of the 2006 Act.)

[220] Under reference to section 1(1) of the 1971 Act, Mr Alexander notes that it is a requirement of English law that an appointment of a power of attorney can only be made by deed executed by the donor of the power (para 13 of the Alexander Opinion) and that this requirement extends to a company donor of the power (para 14). He notes that the same is true if a company wishes to appoint a person as its attorney (*per* section 47 of the 2006 Act). He also notes passages from the 10th edition of Bowstead on Agency (namely, article 10 at page 70 and the comment thereon) and the case of *Powell* v *London & Provincial Bank* [1893] 2 Ch 555 which is quoted in the comment, and which are to the effect that an agent authorised to execute a deed on behalf of his principal under a power of attorney must be given that power of attorney by a deed.

[221] From these he concludes that, if the Schemes were governed by English law, clause 4.1 of the Schemes would "not appear to be a valid appointment" of PO as an attorney of the Scheme Creditors (para 18). This is because a deed of the granter (ie, here, each of the Scheme Creditors) is required; the Schemes are not such a deed. He refers to an observation of Snowden J in *Re Van Ganswewinkel Groep BV* [2015] EWHC 2151 (Ch) (at para 64), in which he appeared to accept this as a practical mechanism. However, Mr Anderson points out (at para 21 of the Anderson Opinion) that this observation was made without the benefit of argument or without the Court's attention having been drawn to the 1971 or 2006 Act provisions noted in the Alexander Opinion and which disallow this as a practical solution.

[222] The petitioners invite the Court to reject that submission and they rely on the opinion they have obtained from Daniel Bayfield QC ("the Bayfield Opinion"), also of South Square Chambers. Mr Bayfield QC was asked to consider:

> "whether (as a matter of English Law) a Part 26 scheme of arrangement is capable of granting an English law power of attorney to the scheme company such that the scheme company may validly sign deeds, agreements and other documents connected with implementation of the scheme on behalf of the scheme creditors?"

In Mr Bayfield's opinion, a Part 26 scheme of arrangement *can* have that effect (although he acknowledges (at para 14) that there is no binding authority on the point). He observes that it has become common for schemes of arrangement promulgated before the courts in England and Wales to include provisions of the type the first respondent challenges in these applications and, further, that it is implicit that in sanctioning schemes with such clauses, that the judges of the Chancery Division of the High Court of England and Wales consider that a scheme of arrangement is capable of granting an effective authority or power of attorney to the scheme company to enter into ancillary documents on behalf of creditors bound by the scheme (para 15). He notes, too, that a number of judgments make it clear that it is commonplace for the operative provisions of schemes proposed within the context of restructuring an insolvent company to provide a like mechanism for execution of a number of restructuring documents by an attorney appointed under the scheme to act on behalf of scheme creditors (para 16).

[223] What leads Mr Bayfield to this conclusion is that a scheme of arrangement is given effect by a combination of the Court's order sanctioning the scheme (and which is "binding on … all creditors": section 899(3)(a)) and its delivery to the registrar of companies (section 899(4)). The essential point he makes is that a scheme has binding force not as a

matter of contract, but by virtue of the 2006 Act. In support of that he cites Lord Hoffman's observation (in *Kempe* v *Ambassador Insurance Co* [1988] 1 WLR 271 at 276D-E)) that it is the Act "which gives binding force to the scheme". Upon sanction of a scheme by a court and the delivery of a copy of the court order to the registrar, the scheme becomes effective according to its terms. Accordingly, there is no need for compliance with any additional formalities as would be required under the general law. So, for example, there is no need for offer or acceptance (as would be required under the general principles of contract law) and, by a parity of reasoning, there is no need to comply with the section 1 of the 1971 Act. Accordingly, clause 4.1 is sufficient in its terms (so long as the Schemes are sanctioned and the court orders duly delivered to the registrar).

[224] In relation to clause 4.3, which provides that authority granted under clause 4.1 shall "be treated for all purposes whatsoever" as having been granted by a deed under English law, in Mr Bayfield's view, this is a "belt and braces" provision because clause 4.1 is sufficient in his view. A clause such as clause 4.3 creates a fiction that the requisite power of attorney was granted by deed. This, too, is given binding force by the 2006 Act.

[225] For completeness, Mr Bayfield notes, under reference to *Phillips* v *Allan* (1828) 108 ER 1120 (*per* Bayley J at 1121)), that regardless of the legality and effectiveness of clauses 4.1 and 4.3 as a matter of English law, a Scottish scheme sanctioned under the 2006 Act (an Act of the UK Parliament) "would automatically be recognised in England".

[226] Turning to the absence of binding precedent in England on the point at issue, he notes that the point has never been raised by any applicant company, by opposing creditor or by any judge considering a scheme promulgated before the English High Court, and that is notwithstanding (i) that there is an obligation to raise issues going to jurisdiction or other "roadblocks" (as this issue would be); (ii) that a company proposing a scheme has a duty to

make full and frank disclosure of all material facts (which would include this issue); and (iii) that traditionally the judges themselves will raise such jurisdictional and other issues *ex proprio motu*. Mr Bayfield fairly and rightly accepts that this is not determinative, and nor is the fact that many schemes in England containing a similar clause have been sanctioned. (He refers to the schedule appended to the Bayfield Opinion identifying 12 schemes approved in the past two years with such clauses, including the 2017 Schemes approved by the Court of Session). Nonetheless, Mr Bayfield is fortified in his view that clauses 4.1 and 4.3 are considered to be inoffensive by judges and Senior Counsel eminent in this field, and he cites observations expressly about power of attorney clauses in four recent cases determined by extremely experienced and careful judges: *T&N Limited* [2007] 1 All ER 851 (*per* David Richards J (as he then was) at para 55); *Re Van Gansewinkel Groep Ltd, cit supra*, (*per* Snowden J at para 16); *Re Global Garden Products Italy SpA* [2017] BCC 637 ((*per* Snowden J at para 11); and *Noble cit supra* (*per* Snowden J at para 24). He considered it unlikely that judges of this eminence, or the skilled Senior Counsel appearing before them in such cases, would be unaware of the 1971 Act, and "close to inconceivable" that these judges would have all entirely missed this issue (or "roadblock"). For completeness, he notes that many of the leading firms in this area of practice (among whom are the first respondent's London Agents) have advised and acted for scheme companies which have promulgated schemes containing clauses similar to clauses 4.1 and 4.3 of the Schemes.

Consideration on the power of attorney issue

[227] I am not persuaded that the power of attorney issue gives rise to any issue of English law. The short point is that clause 11.1 of the Schemes provides that they are governed by

Scots law and, furthermore, the interpretation or effect of Part 26 of the 2006 Act, as it bears on a scheme of arrangement being considered by the Scottish Courts, are matters for the Scottish Courts. No party suggested that, on the application of Scots law, clauses 4.1 or 4.3 gave rise to any "blot". Nor was it suggested that there was any provision in Scots law akin to section 1 of the 1971 Act. By virtue of section 899(3) of the 2006 Act, a scheme of arrangement binds all the creditors regardless of whether they consent to it (and regardless of whether they perform any formal act to record their consent). And I have noted above, Mr Bayfield's observation that a Scottish scheme sanctioned by this Court would automatically be recognised in England (a point Mr Anderson did not address). That is conclusive of this issue. Nonetheless, in the event that English law did properly apply to the power of attorney issue, it is right that I express my opinion on the two opinions parties provided.

[228] Mr Bayfield and Mr Anderson are both Senior Counsel experienced in this area of practice. I need not rehearse their credentials. However, on the power of attorney issue I find the reasoning in the Bayfield Opinion to be wholly persuasive. Schemes of arrangements under Part 26 are creatures of statute. They are given binding force *by virtue of* the 2006 Act. As Lord Hoffman observed, once a scheme becomes effective, its provisions will be binding on their terms *by operation of* the 2006 Act. In respect of the power of attorney issue, upon the Schemes becoming effective, clause 4.1 itself grants the irrevocable authority. (Absent that clause (and clause 4.3) a separate power of attorney would be required.) I also accept Mr Bayfield's position that clause 4.1 alone suffices and that clause 4.3 is another means by which the same practical result could be effected - it is a "belt and braces" provision. Accordingly, even as a matter of English law, there is, therefore, no

need for a separate power of attorney or one which must comply with section 1 of the 1971 Act.

[229] Consistent with the scope of his instruction, Mr Anderson referred to section 47 of the 2006 Act. In the present context, this is a red herring. Section 47 concerns the grant of a power of attorney *by* a company; by contrast, the power of attorney issue relates to the grant of powers of attorney *to* a company (PO). Perhaps mindful that he was only asked to consider the relevant provisions of *inter alia* the 2006 Act "concerning formalities of powers so attorney" and to "consider the effect of **these** provisions" (emphasis added), Mr Anderson is tentative in his conclusions ("would not appear to be a valid appointment."). However, Mr Anderson did not address himself to the precedents and practice narrated by Mr Bayfield (see paras 51 to 61 and the table of recent cases sanctioning schemes (and the text of similar clauses) appended thereto). More importantly, Mr Anderson did not consider section 899(3) of the 2006 Act, which in my view is determinative of this issue if English law is relevant. For completeness, I note that clause 11.1 of the Schemes provides that the Schemes are governed by and are construed in accordance with the laws of Scotland. The reasoning underpinning Lord Hoffman's comments applies with equal force in Scotland. The efficacy of the Court's order sanctioning the Schemes is governed by section 899(3) and there is no doubt that the orders of this Court under Part 26 are recognised in England and Wales. There was no suggestion by Mr Anderson that, once the order of this court is brought into effect by intimation to the Registrar of Companies, it would not be given effect to eg on the grounds of repugnancy or public policy.

[230] For these reasons, I find that neither the terms of clause 4.1 or of 4.3 constitute a blot on the Schemes.

Other Issues

ARCM's submission that the Reporter erred in law

[231] While ARCM maintained that the Reporter has erred in his understanding of the law, it is not necessary to address this. His approach to the law, and indeed to any issue, is not binding on the Court. In any event, I have fully and carefully considered all issues and materials (including those, such as the ARCM Materials, which he did not comment on). I have also had the benefit of the parties' written Submissions, the many authorities produced to me (not all of which I have recorded in this Opinion) and three days of argument at the Sanctions Hearing.

The relevance of the ARCM hedge

[232] The hedge issue generated a considerable amount of heat and, it must be said, ill-feeling amongst the parties. The petitioners and the Supporting Creditors cast doubt on ARCM's good faith and motives and urge me to discount ARCM's complaints on this basis. ARCM put in issue whether it is a hedge or a short, another issue they contend cannot be resolved without proof. I am not persuaded that the hedge has any relevance to the issues the Court has addressed.

First respondent's motion for a proof

[233] Finally, I consider the first respondent's motion for a proof, which was made at the hearing on 8 March and renewed at the end of the Sanctions Hearing. Throughout my consideration of the many issues, I have also borne in mind the first respondent's motion for a proof and its contention that there are areas of disputed fact necessitating this mode of

disposal. It will be apparent that I have not relied on the Report to resolve the issues; the Reporter's inability to resolve contested matters was one of the bases on which the first respondent sought a proof (see para 156 of its Submissions). It will also be apparent from the foregoing, that I have found that the matters canvassed in the ARCM Reports (and other ARCM Materials) are not relevant to the issues to be determined by this Court, properly analysed. Indeed, on none of the issues the first respondent identified (eg in its Note of Proposals for Further Procedure or in its Submissions) do I find that evidence is either necessary or would assist the Court in its determination of the issues. In relation to the power of attorney issue, had I found that this was one which fell to be determined by English law, I would not have considered a proof necessary to resolve this. While Senior Counsel suggested that parole evidence was necessary to enable me to assess the credibility and reliability of Mr Bayfield and Mr Anderson, I very much doubt this would have assisted the Court: both are experts and it is rare for credibility and reliability to be an issue, much less to be material, in the consideration of conflicting expert evidence. The critical factor in preferring the Bayfield Opinion to the Anderson Opinion, is the thoroughness and cogency of the reasoning of the former. No proof was needed, even on this issue.

Disposal

[234] It follows that I will sanction the Schemes (as amended by a minor amendment the petitioners proposed in the course of the Sanctions Hearing (and which no party opposed)).

I will reserve meantime the question of expenses and will further reserve and continue the other outstanding motions to a by order afterwards to be fixed.