Approved Judgment

Neutral Citation Number [2023] EWHC 407 (Ch)

CR 2022 004652
CR 2022 004631

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
IN THE MATTER OF HAWKWING PLC
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 28/02/2023

Before :

ICC JUDGE BARBER

- -

Between :

HANOVER INVESTORS MANAGEMENT LLP
(ON BEHALF OF HANOVER CATALYST FUND)

Applicant

- and –

HAWKWING PLC

Respondent

- -

Stephen Robins KC (instructed by **Cadwalader, Wickersham & Taft LLP)** for the **Applicant**
Timothy Collingwood KC and Timothy Benham-Mirando (instructed by **Fladgate LLP**) for the **Respondent**

Hearing date: 10 February 2023

- -

Approved Judgment

This judgment was handed down remotely by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 28 February 2023.

ICC Judge Barber

1. On 10 February 2023, after a one-day hearing, I ordered that Sarah Megan Rayment and Robert John Armstrong of Kroll Advisory Limited be appointed as joint administrators of Hawkwing Plc, with written reasons to follow. This judgment sets out my reasons for that decision.

Background

2. Hawkwing Plc ('the Company') was incorporated on 16 August 2011 and is registered in England and Wales. Its registered address is at its current solicitors, Fladgate LLP. According to its financial statements, the Company is a 'cash shell whose principal activity is to identify potential acquisition opportunities'. The Company's shares are listed on the London Stock Exchange. It is subject to the UK City Code on Takeovers and Mergers.

3. According to the Company's website (1) the directors of the Company are Keith Sadler, Ken Wotton, Ian Robinson and Dwight Mighty; and (2) its shareholders are as follows:

Company	No of Shares	Percentage
Gresham House Asset Management	14,227,380	28.29%
Strand Associates	5,893,586	11.72%
Nigel Wray	5,629,000	11.19%
OBERON Investments	2,374,999	4.72%
David Walker	2,500,000	4.97%
Stephen Hemsley	1,950,000	3.88%
Adam Reynolds	1,666,666	3.31%
Jonathan Satchell	1,666,666	3.31%
Current shares in issue	50,288,019	68.09%
Percentage of shares not in public hands	-	33.10%

Reverse Takeover Heads of Terms: July 2021

4. On 12 July 2021, the Company announced the signing of a non-binding agreement to acquire a company incorporated in England and Wales called Internet Fusion Group Limited (company number 08751197) ('IFG Limited') through a reverse takeover transaction whereby shareholders in IFG Limited would be offered shares in the Company as the purchase consideration ('the Reverse Takeover').

5. In the lead-up to the Reverse Takeover, the Company proposed making a loan to IFG Limited to fund two acquisitions and the associated transaction costs of these acquisitions ('the Acquisitions'). The target companies of the Acquisitions were Northcore Limited ('Northcore') and Shade Limited trading as Shade Station ('Shade Station').

The CULS Instrument: August 2021

6. To raise funds for this process, in August 2021, the Company issued £16,500,000 Convertible Unsecured Loan Notes ('the Notes'). The Applicant, Hanover, subscribed for £2,000,000 of the Notes.

7. Clause 2.3 of the Convertible Unsecured Loan Note Instrument (the 'CULS Instrument'**)** provided that the Company would use the proceeds of the Notes as follows:

> '(a) in an amount not exceeding £13,000,000, the making of one or more loans by the Company (on such terms as the Company shall see fit) to IFG or members of its Group for the purposes of financing the Northcore Acquisition and/or the Shade Station Acquisition (the aggregate of such loans being the 'IFG Loan') and related fees, costs and expenses;
>
> (b) the making of one or more other loans by the Company (on such terms as the Company shall see fit) to IFG or a member of its Group and related fees, costs and expenses;
>
> (c) the fees, costs, expenses, stamp and similar taxes and other transaction costs incurred by the Company in connection with the Acquisition; and
>
> (d) the working capital requirements (including advisory fees) for the time being of the Company'

8. The term 'IFG' was defined in the CULS Instrument to mean Internet Fusion Group Limited (company number 08751197) or a newly incorporated parent undertaking of that entity.

9. The Notes bore interest at 8% per annum, payable annually on the anniversary of issue in cash, save for the first interest payment, which fell due on 12 August 2022, which was to be paid in kind by being capitalised and added to the outstanding amount of each note. Following the capitalisation, the outstanding principal amount of the Notes was £17,820,000.

10. The initial plan was that, upon the purchase of IFG Limited by the Company, the debt interests of the Noteholders would convert into a shareholding equity. Under the terms of the CULS Instrument, the Notes are therefore convertible into shares in the Company upon the occurrence of certain events.

Announcements to the Market

11. On 17 September 2021, the Company announced to the market that it had, on 16 September 2021:

> 'provided Internet Fusion Group Limited ("Internet Fusion Group" or "IFG") with a secured loan of £13.7 million ('the IFG Loan') to fund two acquisitions' [ie Northcore and Shade Station].

12. This statement was repeated by the Company (using the term 'IFG', which had been defined in the announcement of 17 September 2021) in further announcements to the market on 13 December 2021, 24 December 2021 and 1 June 2022.

13. These statements were factually incorrect. In fact, the Company had on 16 September 2021 made a loan in the sum of £13.7 million to IFG SPP Limited, a company incorporated in Guernsey which was not a member of the IFG Group ('IFG SPP').

14. IFG SPP provided fixed and floating charges to the Company over Shade Station and Northcore. The Company also obtained a guarantee from IFG Limited for IFG SPP's obligations under the loan ('the IFG Guarantee'). The IFG Guarantee ranks second behind a debt owed by IFG Limited to HSBC.

15. The loan of £13.7 million to IFG SPP ('IFG Loan') was, however, contrary to the express terms of the CULS Instrument.

16. Under Condition 3.3 of the CULS Instrument, the Company was obliged to notify holders of the Notes promptly upon becoming aware of any 'Event of Default' (as defined). It did not do so.

17. In a statement to the market on 30 September 2022, the Company revealed (for the first time) that it had loaned £13.7 million to IFG SPP. This revelation, made over a year after the IFG Loan, was tucked into a narrative overview contained in an Interim Management Report ('IM Report') for the Company. The loan to IFG SPP was presented in neutral terms; that is to say, it was not flagged in the IM Report as having been a breach of the CULS Instrument.

18. By this stage, negotiations for the Reverse Takeover had collapsed; talks had ceased in December 2021. The IM Report confirmed this. The IM Report also stated that it was 'not possible to ascertain' whether the full amount of the loan to IFG SPP was recoverable.

19. The IM Report did not spell out why it was said to be 'not possible to ascertain' whether the loan was recoverable from IFG SPP. In fact, on or about 29 September 2022, the Company had been informed by IFG Limited that a statutory demand had been served on IFG SPP on 16 September 2022 (Mighty (1), [18]).

IFG SPP's entry into liquidation: October 2022

20. On 26 October 2022, the Company announced that IFG SPP had gone into liquidation in Guernsey. By that announcement, the Company also confirmed that IFG SPP owed

the Company the full outstanding principal of the IFG Loan, together with interest, costs and exit premiums.

Shade Station and Northcore: Appointment of Receivers: October 2022

21. On 27 October 2022, the Company issued a further announcement in which it stated that it had appointed Graham Bushby and Nicholas Edwards of RSM UK Restructuring Advisory LLP ('RSM') as receivers of IFG SPP Limited's shares in Shade Limited and Northcore Limited and IFG SPP Limited's book debts and other debts.

Amendment and Waiver Request Letter

22. The CULS Instrument allows for a 'Noteholder Majority', defined as more than 50% of the Noteholders, to give 'prior written consent' to any amendment to the CULS Instrument (clause 5.2) and for such majority consent to bind all other Noteholders. The CULS Instrument also allows a Noteholder Majority to waive an 'Event of Default' (Condition 3.4 of Schedule 2).

23. In or about September 2022, the Company decided to put these provisions to some use.

24. By an amendment and waiver request letter dated 29 September 2022 ('the AW Letter'), circulated to some (but not all) of the Noteholders in October 2022, the Company sought (1) waivers from Noteholders of certain Events of Default and/or breaches under the CULS Instrument and/or the Subscription Agreement (2) consent to certain amendments to the CULS Instrument.

25. The AW letter was addressed 'To: All Noteholders' but circulated only to some. Paragraphs 1 and 2 of the AW Letter provided as follows:

> '1. Introduction
>
> 1.1 The Company wishes to amend certain terms and conditions of the Notes as set out in Schedule 2 to this letter (Amendments).
>
> 1.2 Pursuant to clause 5.2 of the CULS Instrument, the Amendments would become effective with, and upon, the prior written consent of a Noteholder Majority, the dates of which consent being the Effective Date.
>
> 1.3 Accordingly, by this letter, the Company is seeking written Noteholder consents to the Amendments.
>
> 1.4 Additionally, the Company is, for certainty, seeking waivers from Noteholders of certain matters … as set out in Schedule 3 to this letter (Waivers). Pursuant to Condition 3.4, the Waivers would become effective in respect of the CULS Instrument on the Effective Date.

> 1.5 Should the Amendments and the Waivers become effective in respect of the CULS Instrument, the Company will notify all Noteholders following the Effective Date in accordance with clause 5.4 of the CULS Instrument.
>
> 1.6 Except as set out in Schedule 2 and Schedule 3 to this letter, the CULS Instrument shall continue in full force and effect.
>
> 2. Action to be taken
>
> 2.1 Noteholders who consent to the Amendments and the Waivers are asked to indicate their consent by signing and dating this document against their names as set out in Schedule 1 and returning it to the Company using the following delivery method: [there is then provision for delivery by email to given email addresses]…
>
> 2.2 If Noteholders do not consent to the Amendments and the Waivers, they do not need to do anything. Noteholders will not be deemed to consent if they fail to reply.
>
> 2.3 Consent given to the Amendments and Waivers is irrevocable. Once a Noteholder has indicated their consent to the Amendments and Waivers, the Noteholder may not revoke such consent.
>
> 2.4 If you are signing this document on behalf of a person under a power of attorney or other authority please send a copy of the relevant power of attorney or authority when returning this document'

26. No deadline for a response was provided in the AW Letter. It will also be noted (from paragraph 2.2 of the AW Letter) that those who opposed the waivers and amendments were told that they need not respond at all.

27. Schedule 1 to the AW Letter contained a list of Noteholders, the principal amount of Notes held by each, and a designated space for the printed name and signature of each Noteholder consenting to the Amendments and Waivers.

28. The Noteholders listed in Schedule 1 were as follows:

    (1) BNY (OCS) Nominees Limited UKREITS (6,259,531 Notes);

    (2) HSBC Global Custody Nominee (UK) Limited a/c 426361 (1,300,469 Notes);

    (3) Oberon Investments Limited (135,000 Notes);

    (4) Dowgate Capital Limited (JIM Nominees Limited) (5,875,740 Notes);

    (5) Dowgate Capital Limited (JIM Nominees Limited a/c ISA) (111,240 Notes);

(6) Dowgate Capital Limited (Global Prime Partners Nominees Limited) (1,336,608 Notes);

(7) Dowgate Wealth Limited (641,412 Notes); and

(8) Hanover Catalyst Fund (2,160,000 Notes).

29. Schedule 2 to the AW Letter set out the amendments to the CULS Instrument for which consent was sought. The opening words of the schedule were:

> 'With effect from the Effective Date, the CULS Instrument will be amended as follows:'

30. The proposed amendments set out in Schedule 2 ('the Amendments') included the following:

(1) an amendment of clause 2.3(a) and (b) to include IFG SPP Limited (by name) as an authorised recipient of the IFG Loan;

(2) a proposed extension of the maturity of the Notes from 12 August 2024 until 12 August 2025;

(3) provision for accrued but unpaid interest on each Note to be capitalised on each Interest Payment Date (as defined) and added to the Principal Amount of that Note, rather than paid out annually in cash, as originally envisaged by the CULS Instrument; and

(4) an amendment of Condition 3.1(f) (the 'Insolvency EoD Amendment') to exclude a revaluation or impairment of the IFG Loan in the books or accounts of the Company from being an Event of Default. The proposed amendment of Condition 3.1(f) was as follows (with emphasis added):

> 'the Company or any of its material subsidiaries, for the purposes of section 123 Insolvency Act 1986 (or any equivalent legislation), is unable to pay its debts (<u>other than in respect of or in connection with or arising from any revaluation or impairment of the IFG Loan in the books or accounts of the Company or any member of its Group</u>) or compounds or proposes or by reason of financial difficulties enters into any reorganisation or special arrangement with its creditors generally'

31. Schedule 3 to the AW Letter set out the breaches for which a waiver was sought. So far as material, the opening words of Schedule 3 were:

> 'With effect from the Effective Date, the following breaches … and Events of Default … up to and including the Effective Date are waived, consented to and agreed:'

32. The breaches and Events of Default listed in Schedule 3 to the AW Letter were as follows:

(1) 'The advance of the IFG Loan to IFG (SPP) Limited, which is an affiliated party of IFG, but which is not itself a member of the IFG Group' (contrary to Clause 2.3(a) of the CULS Instrument and Clause 3.2(a) of the Subscription Agreement);

(2) 'The failure of the Company to obtain the referenced shareholder approvals by 31 March 2022' (an Event of Default under Condition 3.1(j) of the CULS Instrument);

(3) 'Any failure to comply with Condition 3.3 [an obligation requiring the Company to give written notice to the Noteholders promptly on the Company becoming aware of any Event of Default as defined in Condition 3.1 or any waiver by a Noteholder Majority under Condition 3.4] in relation to the breaches or Events of Default identified in paragraphs 1 to 3 of this Schedule 3' (contrary to Condition 3.3 of the CULS Instrument).

33. Notwithstanding the fact that the AW Letter was headed 'To All Noteholders', the Company failed to send a copy of the AW letter to Hanover. On behalf of Hanover, Mr Robins submitted that the plan was obviously to send the document to a 'friendly majority' and then to present Hanover with a fait accompli.

34. The Company denies this. By his first witness statement, Mr Mighty states whilst the AW Letter was dated 29 September 2022, there was 'a delay in sending out the waiver document to the Noteholders as, separately, the Company was notified by IFG on or about 29 September 2022 that a statutory demand had been served on IFG (SPP) on 16 September 2022'.

35. Mr Mighty goes onto to state that he sent the AW Letter to Gresham House and to Strand Associates, (described in his statement as 'two of the entities holding a large proportion of the CULS and the shares in the Company through their nominees, BNY and HSBC and JIM Nominees [Dowgate] respectively'). He says that he 'asked Dowgate to send it to the other Noteholders including Hanover'. No contemporaneous correspondence recording or referencing this curious request was adduced in evidence. No satisfactory explanation was given in the evidence for adopting this course either.

36. Mr Mighty maintained that 'the delay in Dowgate sending out the document' to Hanover was due to 'internal inefficiencies at Dowgate' and that the AW Letter was 'certainly not deliberately' withheld from Hanover. He did not state how, when or from whom he discovered the fact or cause of such delay, however; and he did not adduce in evidence any contemporaneous correspondence of any enquiries which he had made in that regard. The statement of Mr Cook of Dowgate was notably silent on the issue of whether the omission to send Hanover a copy of the AW Letter was deliberate or inadvertent.

37. In the event, Hanover only learned of the AW Letter from a chance conversation with an adviser to the Company on 14 November 2022. Hanover then requested a copy from Dowgate and received the same on the evening of 14 November 2022.

38. Hanover was concerned by these developments. First, the Company had advanced £13.7 million to IFG SPP, contrary to the express terms of the CULS Instrument. Second, IFG SPP had gone into liquidation, and the Company had made clear that the recoverability of the loan was uncertain. Third, the Company had not provided a copy of the AW Letter to Hanover (whether promptly or at all).

Redemption Notice: 16 November 2022

39. Accordingly, Hanover decided to exercise its right under the CULS Instrument to redeem the Notes.

40. Condition 3.4 in Schedule 2 to the CULS Instrument provides:

> 'Upon the occurrence of any Event of Default that has not been remedied or waived by a Noteholder Majority:
>
> (a) a Noteholder may by notice to the Company require the redemption of all outstanding Notes held by that Noteholder at the Principal Amount, together with all accrued but unpaid interest on such Notes on the date specified in such notice; and
>
> (b) upon receipt of such notice, the Company shall redeem all outstanding Notes held by that Noteholder at the Principal Amount, together with all accrued but unpaid interest on such Note on the date specified in such notice.'

41. On 16 November 2022, pursuant to Condition 3.4, Hanover sent an email to the Company attaching a written demand for redemption of its Notes. Having summarised the Events of Default relied upon, the written demand provided at paragraph 6:

> 'Accordingly, pursuant to Condition 3.4 of Schedule 2 (Conditions) to the CULS Instrument, we require the redemption of all outstanding Notes held by us at the price specified in the CULS Instrument being £2,160,000, together with all accrued interest on the date of this notice.'

42. The written demand itself was undated but the accompanying email was. Mr Robins maintains that the date of the 'notice', for the purposes of Condition 3.4, must be considered in context as the date upon which it was sent by email.

43. On a belts and braces basis, Mr Jason Carley, a senior partner of Hanover, sent to the Company a further email the same day (16 November 2022), stating:

> 'I refer to the Notice of Redemption dated today and referred to in the email below.
>
> For the avoidance of any doubt, for the purposes of condition 3.4(b) of the CULS Instrument, the date specified for payment of the redemption price is 16 November 2022.'

44. On the evening of 16 November 2022, Mr Carley spoke with Mr Mighty, who confirmed that the Company did not have sufficient cash with which to redeem Hanover's Notes.

Statutory Demand: 24 November 2022

45. On 24 November 2022, Hanover served a statutory demand for the sum of £2,209,709.59 ('the Statutory Demand').

46. Following service of the Statutory Demand, Hanover's lawyers ('CWT') received a letter from the Company's solicitors, Fladgate LLP. By that letter, sent on 25 November 2022, the Company disputed that the debt sought by the Statutory Demand was due and asserted that the Company remained solvent (without stating the grounds for that assertion).

Written Noteholder Majority

47. On 30 November 2022, Dowgate Capital Limited (JIM Nominees Limited) (representing £3,208,140 in principal amount of Notes) and Dowgate Capital Limited (JIM Nominees Limited a/c ISA) (representing £111,240 in principal amount of Notes) consented to the Amendments and Waivers sought by the Company by signing and dating the AW Letter and returning it to Mr Mighty by email. This brought total written consents up to £10,879,380 and was the point at which a written Noteholder Majority was achieved.

Shade Station and Northcore: Appointment of Administrators

48. On the same day (30 November 2022), the Company appointed Graham Bushby and Nicholas Edwards of RSM (together with Matthew Haw) as joint administrators to Shade Station and Northcore.

Application to restrain presentation

49. On 8 December 2022, the Company issued an application for an injunction to restrain Hanover from presenting a winding up petition.

Administration Application

50. On 9 December 2022, Hanover issued an application seeking the appointment of administrators in respect of the Company.

51. The first hearing of Hanover's administration application took place before ICC Judge Prentis on 16 December 2022. Directions were given for the filing and service of evidence.

52. Further evidence was duly served by both the Company and Hanover.

Evidence

53. For the purposes of the hearing, I have read and considered the following witness statements and their respective exhibits:

(1) the witness statement of Jason Edward Carley dated 9 December 2022;

(2) the witness statement of Sarah Megan Rayment dated 9 December 2022;

(3) the first witness statement of Dwight Mighty dated 7 December 2022;

(4) the second witness statement of Dwight Mighty dated 11 January 2023;

(5) the witness statement of Adam Stephens dated 11 January 2023;

(6) the witness statement of Samee Khan dated 11 January 2023;

(7) the witness statement of Russell Cook dated 11 January 2023;

(8) the second witness statement of Sarah Rayment dated 20 January 2023; and

(9) the witness statement of John Mark Buckley dated 6 February 2023.

54. I have also read and considered other documents contained in the bundle prepared for use at the hearing, to which reference will be made where appropriate.

Legal principles

55. The legal principles applicable to an administration application were largely uncontroversial.

56. By Paragraph 11 of Schedule B1 to the Insolvency Act 1986 ('Schedule B1'), the court may make an administration order in relation to a company only if satisfied that (1) the company is or likely to become unable to pay its debts; and (2) the administration order is reasonably likely to achieve the purpose of the administration. The court then retains a discretion whether to grant the order.

Standing

57. An application for an administration order may be made by one or more creditors of the company: paragraph 12(1)(c) of Schedule B1 to the Insolvency Act 1986. The term 'creditor' expressly includes a contingent creditor and a prospective creditor: paragraph 12(4) of Schedule B1.

58. For these purposes (ie standing), a 'creditor' is a person who has a good arguable case that a debt is owing to him: Hammonds v Pro-Fit USA Ltd [2008] 2 BCLC 159; Fieldfisher LLP v Pennyfeathers Ltd [2016] BCC 697 per Nugee J at [11]-[12]; Re Berkshire Homes (Northern) Ltd [2018] Bus LR 1744 per HHJ Hodge QC at [38].

Inability to pay debts

59. Pursuant to paragraph 111(1) of Schedule B1, the words 'unable to pay its debts' appearing at paragraph 11(a) of that Schedule have the same meaning as they do in section 123 of the Insolvency Act 1986, which provides that a company is deemed unable to pay its debts:

(1) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due (ie cashflow insolvency): section 123(1)(e); or

(2) if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities (ie balance sheet insolvency): section 123(2).

60. The burden of proof in demonstrating a company's inability to pay debts (or likely inability to pay debts) rests on the applicant.

61. The requirement that the company is likely to become unable to pay its debts will be satisfied where it is more probable than not that this will occur: Re Colt Telecom Group plc [2002] EWHC 2815 (Ch) at [21]-[27] per Jacob J.

62. If a creditor is relying on the non-payment of a disputed debt in order to establish cash flow insolvency, the creditor bears the burden of proving that it is due to it on a balance of probabilities: Re Berkshire Homes [2018] EWHC 938 (Ch), at [38].

63. Under section 123(1)(e), however, the question whether a company is unable to pay its debts as they fall due may also require the consideration of future debts: Re Cheyne Finance Plc (in receivership) (No 2) [2008] 1 BCLC 741 per Briggs J. Cashflow insolvency is therefore not limited to the non-payment of a debt which has already fallen due. It may also be proved by showing that the company lacks the means to pay a debt falling due in the reasonably near future: BNY Corporate Trustee Services Ltd v Eurosail-UK 2007 3BL Plc [2013] 1 WLR 1408 at [37] per Lord Walker.

64. For the purpose of ascertaining balance sheet insolvency, the leading authority is Eurosail.

65. In Re Casa UK Limited: Bucci v Carman [2014] BCC 269, Lewison LJ helpfully summarised some key principles emerging from Eurosail. At [27] he stated:

> 'In my judgment the following points emerge from the decision of the Supreme Court in Eurosail (and in particular the judgment of Lord Walker):
>
> (i) The tests of insolvency in s.123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986: [37]
>
> (ii) The cash-flow test looks to the future as well as to the present: [25]. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business: [37]. The test is flexible and fact sensitive: [34].
>
> (iii) The cash-flow test and the balance-sheet test stand side-by-side: [35]. The balance-sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: [30]. The express reference to assets and liabilities is a

> practical recognition that once the court has to move beyond the reasonably near future any attempts to apply a cash flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: [37].
>
> (iv) But it is very far from an exact test: [37]. Whether the balance-sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: [38]. It requires the court to make a judgement whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: [42].

66. At [38] in Re Casa, Lewison LJ went on to consider whether, on the facts, there were grounds to interfere with Warren J's conclusion that the company was balance-sheet insolvent notwithstanding that it was able to raise funds via other lending to pay its creditors on a cash flow basis. Lewison LJ observed that, in the case of a trading company, 'unless there was credible evidence that the balance sheet would improve in the near future' it would be difficult to conclude that the company was not insolvent if its liabilities exceeded the value of its assets. This observation echoes the approach taken by the Court of Appeal in the case of Byblos Bank SAL v Al-Khudhairy [1987] BCLC 232, in which it was held that, in assessing a company's balance sheet solvency, the court should *not* take into account, in addition to assets owned by the company, any *hope or expectation* that the company would or might acquire further assets in the future. In that case, Nicholls LJ held (at 246g-h) that:

> 'In my view, in determining whether on 3 June 1985 Rushingdale was able to pay its debts within the meaning of sec.223 of the Companies Act 1948, it is not correct to take into account, in addition to assets presently owned by it, any hope or expectation Rushingdale then had that it would acquire further assets in the future without any accompanying right to such further assets'.

67. Byblos was affirmed in Eurosail.

68. The balance-sheet test under section 123(2) thus excludes the potential for future profit. It follows that, in circumstances of excess liabilities over assets, the non-mechanical application of the balance-sheet test described by Lord Walker in Eurosail permits a finding of solvency only if there is 'credible evidence that the balance sheet would improve in the near future'.

Purpose of administration

69. The 'purpose of administration' is the purpose in paragraph 3(1) of Schedule B1, namely, the objective of '(a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely

if the company were wound up (without first being in administration) or (c) realising property in order to make a distribution to one or more secured or preferential creditors'.

70. An administration order will be reasonably likely to achieve the purpose of administration if there is a 'real prospect' that one or more of the statutory objectives might be achieved: Re AA Mutual International Insurance Co Ltd [2005] 2 BCLC 8, Auto Management Services Ltd v Oracle Fleet UK Ltd [2008] BCC 761, Hammonds v Pro-Fit USA Ltd [2008] 2 BCLC 159 at [24].

71. If the Court is satisfied that the company is unable to pay its debts within paragraph 11(a) but is not satisfied that 'the administration order is reasonably likely to achieve the purpose of administration' within paragraph 11(b), the Court may 'treat the application as a winding up petition and make any order which the court could make under section 125' (including a winding up order): paragraph 13(1)(e) of Schedule B1.

Discretion

72. Even if the threshold criteria are met, the court has a discretion as to whether or not to make an administration order: Rowntree Ventures Ltd v Oak Property Partners Ltd [2017] EWCA Civ 1944 at [24].

73. In exercising that discretion, however, the court will have regard to a number of settled principles. These include the following:

(1) In a winding up context, a petitioner is prima facie entitled ex debito justitiae to a winding up order: Bowes v Hope Life Insurance & Guarantee Co (1865) 9 HLC 388 at 402; Re a Debtor (No 452 of 1948) [1949] 1 All ER 652 at 655 per Cohen LJ.

(2) When deciding whether or not to make an administration order or winding up order, the court should take into account the views of unsecured creditors: see Re Maud [2016] EWHC 2175 (Ch) at [78]-[81] and the authorities summarised therein. This is because the order is not for the benefit of the individual creditor, but for a class of which he is a member.

(3) Where the petition or application is opposed by a majority of creditors, the court has a discretion to refuse to make an administration order or a winding up order. As put by Neuberger J in Re Demaglass Holdings Ltd [2001] 2 BCLC 633 at 638:

> 'where, as here, the battle is between the creditors of the company, some in favour of a winding up order being made and others against, there is authority for the proposition that a winding up order will be made if the majority of creditors support the petitioner and can only be refused if the majority support the opposition'.

Similarly, in Re Southard & Co Ltd [1979] 1 WLR 546, Brightman J observed at 550:

> 'the court ought not to deprive the petitioning creditor of his prima facie right to a winding up order unless there is an

> opposing majority, and, if there is no voluntary liquidation in existence or in contemplation, unless there are good reasons for such opposition. I have been told that there is no reported case where the court has denied a creditor its prima facie right to a winding up order ex debito justitiae at the instance of a minority of opposing creditors'.

(4) The court's role in determining whether or not to give effect to the class remedy is not limited to a question of simple mathematics: Re Maud [2016] Bus LR 1243 per Snowden J ('the exercise to be carried out by the court in this respect is not a simple counting of heads or value of debts'); Edgeworth Capital (Luxembourg) SARL v Maud [2020] EWHC 974 (Ch) at [78]; and Re P & J Macrae Ltd [1961] 1 WLR 229 at 238-239 per Upjohn LJ ('it is not simply a matter of calculating percentages in value').

(5) Where an overwhelming proportion of creditors in number and value oppose the petitioner, their view should be given great weight in the absence of special circumstances: Re P & J Macrae Limited [1961] 1 WLR 229 per Upjohn LJ.

(6) Even where the petition is opposed by a majority of creditors, however, their views are not conclusive: Re Vuma Ltd [1960] 1 WLR 1283 at 1286 per Lord Evershed MR ('I do not think it was right simply to treat the fact of the majority opposition as conclusive') and Re P & J Macrae Ltd [1961] 1 WLR 229 at 235 per Willmer LJ:

> 'I am certainly not prepared to accept the view that the bare fact of the opposing creditors being in a majority is of itself sufficient, still less conclusive. So to hold would be to leave the court with virtually no judicial function to perform, and to take away from it the discretion which the words of the Act plainly confer'.

(7) Where the majority of creditors oppose a winding up petition or administration application, the Court will be astute to enquire into the views of the majority and to consider whether they are commercially well-founded: Re Demaglass Holdings Ltd [2001] 2 BCLC 633 per Neuberger J at 639:

> 'it is not enough if the majority of creditors oppose the making of a winding up order in the normal case. The court must also be satisfied that they have good reason for refusing to wind up the company'.

See too Re P & J Macrae Ltd [1961] 1 WLR 229 per Willmer LJ at 235:

> 'It seems to me that, before a majority of creditors can claim to override the wishes of the minority, they must at least show some good reason for their attitude'.

(8) The views of connected creditors (such as shareholders and directors) should ordinarily be afforded less weight: Re Palmer Marine Surveys Ltd (1985) 1 BCC 99,557 at 99,562 per Hoffmann J:

> 'creditors who are also shareholders or connected with the former management may have less weight given to their views than those who have no interest except in their capacity as creditors'.

Similar observations can be found in Re Lowestoft Traffic Services Co Ltd (1986) 2 BCC 98,945 at 98,948 per Hoffmann J:

> 'it is, I think, proper to discount the opposition of those opposing creditors who are closely associated with the management of the company'.

See too Re Lummus Agricultural Services Ltd [1999] BCC 953 at 958 per Park J:

> 'if the opposing creditors are not independent outsiders but are associated with the company itself and with its directors (who oppose the petition), their views should be discounted, or at least in the judge's discretion may be discounted.'

(9) Conversely, the views of independent creditors will be particularly important to the Court's assessment of the position: Re Demaglass Holdings Ltd [2001] 2 BCLC 633 at 639 per Neuberger J:

> 'the court will have greater regard to the views of independent creditors as opposed to creditors connected with the company '

(10) As helpfully summarised by Snowden J in Edgeworth Capital (Luxembourg) SARL v Maud [2020] EWHC 974 (Ch) at [78]:

> 'the court will also look at the reasons advanced by the creditors on each side of the debate in order to assess whether those reasons are commercially rational and will have regard to other evidence to assess whether the weight and rationality of a particular creditors approach is diminished by any extraneous factors such as personal antipathy or affection on the part of the creditor for the debtor (or those connected with it in the case of a company)'.

(11) The views of the company itself have no weight: Re Crigglestone Coal Co Ltd [1906] 2 ch 327 at 331-332 per Buckley J ('the debtor has no voice'), as echoed in Maud at [72] per Snowden J: 'it is also clear that this is a question on which Mr Maud, as the debtor, has no voice'.

Discussion and Conclusions

Standing

74. There was no issue between the parties on standing. On any footing, Hanover is a creditor of the Company, as it holds £2,160,000 of the Notes. Even on the Company's case, therefore, Hanover is (at the very least) a prospective creditor of the Company in respect of the Notes, which (on the Company's case) will be repayable

on their maturity date at the latest. Accordingly, Hanover is a creditor within paragraph 12(1)(c) of Schedule B1: see paragraph 12(4).

Inability to pay debts: cash flow insolvency

75. Hanover contends that the Company is cashflow insolvent. It maintains that this is readily demonstrated by the Company's failure (and inability – Mighty (1) [22] and [23]) to pay the sums due to Hanover following service of the redemption notice.

76. The Company contends that the sum of £2,160,000 (plus interest) is not currently due to Hanover, as (1) there had already been a waiver by the time of the redemption notice and (2) on a proper construction of the agreement, the redemption notice was invalid as it was undated.

77. I turn then to consider whether Hanover's debt is currently due.

78. Mr Robins submitted that there are three questions which arise under Condition 3.4 (the text of which is reproduced at paragraph 40 above):

(1) Has an Event of Default occurred?

(2) If so, has that Event of Default been remedied?

(3) If not, has that Event of Default been waived by a Noteholder Majority?

79. Mr Collingwood argued that the position was not as simple as that. He maintained that no redemption notice could be served whilst a voting process was underway. He submitted that there were two rival constructions of the words 'Upon the occurrence of any Event of Default that has not been remedied or waived by a Noteholder Majority'. He argued that these words could mean (1) 'an Event of Default that has *currently* not been remedied or waived' or alternatively (2) 'an Event of Default that has *certainly* not been remedied or waived'. He submitted that the latter of these two constructions 'makes sense in the context of the agreement and accords with business common sense'. I reject Mr Collingwood's submissions on this issue. In my judgment, the wording of Condition 3.4, considered in the context of the CULS Instrument as a whole, is clear; it is a window of opportunity. Mr Collingwood's construction would give rise to the possibility of an indefinite suspension of the right to redeem where, as here, no voting deadline is set and those who oppose are told that they need not respond at all. To adopt a construction of Condition 3.4 which allows for an indefinite suspension of the right to redeem does not 'accord with business common sense' at all.

80. In my judgment, Mr Robins is correct in submitting that the issue of whether a Noteholder is entitled to serve a redemption notice under Condition 3.4 turns on three questions: (1) has there been an Event of Default (2) if so, has it been remedied and (3) if not, has it been waived.

81. I shall address each question in turn.

Has there been an Event of Default?

82. Mr Robins relied upon two Events of Default:

(1) The advance of the loan to IFG SPP, which was not a member of the IFG Group, contrary to clause 2.3(a) of the CULS Instrument. This breach falls within Condition 3.1(g) of Schedule 2 to the CULS Instrument, which provides:

> '(g) a breach of this Instrument and, if capable of remedy, the same is not remedied to the reasonable satisfaction of a Noteholder Majority within 10 days after notice in writing of such breach has been given by a Noteholder Majority.'

(2) The failure of the Company to obtain Shareholder approvals to allow for the issue of Ordinary Shares on conversion of all of the Notes by 31 March 2022. This falls within Condition 3.1(j) of Schedule 2 to the CULS Instrument, which provides:

> '(j) the Company fails to obtain the necessary Shareholder approvals to allow for the issue of Ordinary Shares on conversion of all of the Notes by 31 March 2022'

83. There was some debate between the parties as to whether the first breach (the loan to IFG SPP) was a breach 'capable of remedy'. Mr Collingwood maintained that it was. Mr Robins maintained that even if such a breach was theoretically capable of remedy (by repayment of the loan or by IFG SPP becoming a member of the IFG Group), on the facts of this case, it was not a breach capable of remedy at any material time, as by 26 October 2022, IFG SPP had gone into liquidation in Guernsey.

84. On balance I consider Mr Robins' analysis on this issue to be correct. Even if such a breach was in principle capable of remedy, by 26 October 2022 at the latest, it was not capable of remedy. It follows that the '10 day notice' limb of Condition 3.1(g) is not relevant in this case. By 26 October 2022 at the latest, the loan to IFG SPP was an Event of Default.

85. Even if I am wrong in that conclusion, however, the point is academic, as on any footing, the second Event of Default relied upon (the failure to obtain shareholder approval by 31 March 2022) is made out on the evidence. Mr Collingwood tried to play down this Event of Default on the footing that it was merely 'technical' as, by 31 March 2022, the reverse takeover of IFG Limited was off the table. As rightly observed by Mr Robins however, there is nothing in the CULS Instrument which supports a division of Events of Default into 'technical' and 'non-technical'; they are all Events of Default and may be relied upon as such by a Noteholder wishing to redeem. Moreover, if the failure to obtain shareholder approval by 31 March 2022 was truly as insignificant as Mr Collingwood sought to suggest, it would not have been given the status of an Event of Default in the first place.

86. For all these reasons, I conclude that by the time of the redemption notice, two Events of Default had occurred. Even if I am wrong in that conclusion however, on any footing one Event of Default had occurred.

Were the Events of Default remedied?

87. On the evidence before me, I am satisfied that by the date of the redemption notice, the Events of Default had not been remedied and were not capable of being remedied.

Had the Events of Default been waived?

88. The Company maintained that the Events of Default were waived by 2 November 2022, ahead of service of the redemption notice on 16 November 2022. Hanover maintained that waiver did not occur until 30 November 2022, this being the date on which the Company had received a sufficient number of written waivers to constitute a Noteholder Majority.

89. On 2 November 2022, BNY (OCS) Nominees Limited (the holder of £6,259,531 in principal amount of Notes) and HSBC Global Custody Nominee (UK) Limited (the holder of £1,300,469 in principal amount of Notes) had signed and dated the AW Letter as requested and had returned it to Mr Mighty by email in the manner stipulated in the AW letter. This was a total of £7,560,000 in principal amount of Notes, which did not constitute a Noteholder Majority.

90. The Company maintains that an additional oral waiver had been given by 2 November 2022 and that, taking such oral waiver into account, a Noteholder Majority was achieved by 2 November 2022. Mr Mighty's evidence (at Mighty (1), [20]) was that Global Prime Partners Nominees Limited, 'as nominees of Dowgate Capital Limited and Dowgate Wealth Limited (10.45%)' had orally waived the Events of Default 'by 2 November 2022'.

91. Mr Collingwood submitted that whilst the AW Letter requested written waivers, the underlying contract did not require waivers to be in writing. He submitted that in the absence of an express provision in the contract to the contrary, the default position under the common law is that a waiver does not have to be in writing and can be given orally: Chitty on Contracts (34th ed) para 25-043.

92. Mr Robins submitted that the Company's evidence on this issue is highly unsatisfactory. Among other things, he observed:

(1) Mr Mighty's evidence did not address when the oral waiver was allegedly provided or name the individuals who were parties to the conversation in which it was allegedly given;

(2) No contemporaneous correspondence or attendance notes recording or referencing the alleged oral waiver had been adduced in evidence;

(3) Mr Mighty had not explained in his evidence why Dowgate Capital Limited (via JIM Nominees Limited and JIM Nominees Limited a/c ISA) had then delayed until 30 November 2022 before consenting in writing in relation to their other Noteholdings;

(4) Mr Mighty's evidence in Mighty (1) was contradicted by the witness statement of Mr Cook of Dowgate, which made no mention of an oral waiver on 2 November 2022 and stated (on behalf of Dowgate Capital and Dowgate Wealth):

(a) that following the Company's request for a waiver, 'Dowgate began contacting the Noteholders in the week commencing 31 October 2022, speaking initially with the discretionary fund managers at Dowgate. The feedback from the Dowgate fund managers was that they required further information regarding current trading and the

purpose of the waiver document. This was prepared and sent out by email on 14 November 2022' (para 13);

(b) that a meeting was arranged between Dowgate and Hanover on 15 November 2022, together with Mr Mighty, to discuss issues surrounding the appointment of liquidators to IFG SPP and the waiver document (para 14);

(c) that Mr Mighty provided the Dowgate fund managers with an update regarding current trading and the purpose of the waiver document on 22 November 2022 (para 13); and

(d) that Dowgate 'gave the waivers sought by 30 November 2022 through its nominees' (para 15);

(5) Mr Mighty's assertions regarding an oral waiver on 2 November 2022 were also inconsistent with the Company's RNS announcement dated 2 December 2022, which gave the date of consent to the waivers and amendments set out in the AW Letter as 30 November 2022, not 2 November 2022.

93. Mr Robins maintained that Mr Mighty had simply 'got it wrong' when he stated in Mighty (1) that a Noteholder Majority had been achieved by 2 November 2022.

94. Mr Robins went on to argue that even if, contrary to Mr Cook's evidence and the RNS announcement, an oral waiver had been given by 2 November 2022, it was of no effect, as the waiver had to be in writing.

95. In this regard he referred to Clause 7.1 of the CULS Instrument, which provides:

> 'Any notice or other document required to be given under this Instrument shall be in writing'

96. In response, Mr Collingwood submitted that a waiver was not a notice or a document and so did not fall within Clause 7.1.

97. I agree with Mr Robins that Mr Mighty's evidence on the issue of an oral waiver is highly unsatisfactory. It is self-serving, unsupported by any contemporaneous attendance notes or correspondence, and inconsistent with both the evidence of Mr Cook and the Company's own RNS announcement.

98. In the circumstances of this case, however, the shortcomings of Mr Mighty's evidence on this issue are ultimately irrelevant.

99. In my judgment, construed in the context of the CULS Instrument as a whole, the term 'notice' as employed in Clause 7.1 is wide enough to embrace notice of any waiver given by a Noteholder to the Company under Condition 3.4. It follows that any waiver given pursuant to Condition 3.4 had to be in writing.

100. Moreover, even if I am wrong in that conclusion, the point is ultimately academic. Even if (a) an oral waiver was given by 2 November 2022 and (b) it is assumed for present purposes, in favour of the Company, that Clause 7.1 did not cover waivers, the two Events of Default relied upon by Hanover had not been waived by 2 November 2022. The oral waiver, even assuming it to be of immediate effect, represented only

10.45% of the vote. The only other waivers provided by that date were written consents *to a waiver with effect from the Effective Date*, as defined: see generally paragraphs 25 to 31 above. In the events which occurred, the Effective Date (as defined) was 30 November 2022. It follows that the Events of Default were not waived by a Noteholder Majority by 2 November 2022.

101. For all these reasons, I am satisfied that the two Events of Default relied upon by Hanover had not been waived as at 16 November 2022, when the redemption notice was served.

102. The Company next contends that the redemption notice was not valid, as it did not expressly bear a date. I turn next to consider this issue.

Validity of the redemption notice

103. Condition 3.4 is reproduced at paragraph 40 above.

104. The written demand for redemption sent by email to the Company on 16 November 2022 provided by clause 6:

> '… pursuant to Condition 3.4 of Schedule 2 (Conditions) to the CULS Instrument, we require the redemption of all outstanding Notes held by us at the price specified in the CULS Instrument being £2,160,000, together with all accrued interest on the date of this notice.'

105. In my judgment, read in context, 'the date of this notice' was the date upon which the written demand for redemption was emailed to the Company, namely, 16 November 2022. For these purposes, the written demand should be read together with the covering email (which bears a date). Taken together, in my judgment the two documents comprise a valid redemption notice.

106. Even if I am wrong in that conclusion, however, I am satisfied that the demand for redemption sent by Hanover to the Company on 16 November 2022 may be read together with the follow up email sent by Hanover to the Company on the same day, which provided that 'For the avoidance of any doubt, for the purposes of condition 3.4(b) of the CULS Instrument, the date specified for payment of the redemption price is 16 November 2022'. Taken together, in my judgment the written demand for redemption and the follow up email sent the same day qualify as a valid redemption notice.

107. For these reasons, I am satisfied on a balance of probabilities that the redemption notice is valid and that by virtue of the redemption notice, the Hanover debt fell due for payment in November 2022. I am further satisfied that the Hanover debt remains due and payable.

108. Mr Collingwood submitted that even if the Hanover debt is due and payable, the Company is not cashflow insolvent as it will have sufficient funds with which to pay Hanover shortly, if a sale of Shade Station and/or Northcore goes ahead as planned.

109. As matters stand, however, the Company is unable to pay its debts as and when they fall due. The Company has been unable to pay the sum due to Hanover at any time since the redemption notice was served on 16 November 2022. As at 15 November 2022, cash at bank stood at £1.9m. It has steadily decreased since that date and now stands in the sum of approximately £1.3m/£1.4m.

110. In my judgment, the Company's current inability to pay the Hanover debt, which fell due for payment in November 2022, is of itself sufficient to establish cashflow insolvency.

111. In this case however it is also readily apparent from the evidence that the Company lacks the means to pay debts owed to the other Noteholders in the reasonably near future: Eurosail. In the circumstances of this case, I consider 2025 to be the 'reasonably near future'.

112. For all these reasons, on the evidence before me, the cashflow insolvency threshold is cleared. The Company is unable to pay its debts as and when they fall due.

113. Moreover, even if I am wrong in that conclusion, on the evidence before me I am satisfied that it is more probable than not that the Company will become unable to pay its debts as they fall due. That of itself would suffice for present purposes.

114. I turn next to consider balance sheet solvency.

Balance sheet solvency

115. The Company's balance sheet as at 30 November 2022, which was exhibited to Mr Mighty's first witness statement, discloses only three material assets:

(1) £16,229,376 owed to the Company by IFG SSP (which has gone into liquidation in Guernsey);

(2) Cash at bank of £1,885,260 (since reduced to c. £1.3m); and

(3) 'Project Hurricane Recovery' in the sum of £1,385,615.

116. I shall deal with these in turn.

117. On the evidence before me, the loan to IFG SSP plainly does not have a value of £16,229,376. The Company acknowledged on 30 September 2022 that it was 'not possible to ascertain if all of the IFG liability will be recoverable' and since then, the position has worsened considerably, because IFG SPP has gone into liquidation in Guernsey.

118. In addition, Northcore and Shade Station have each gone into administration and have experienced a prolonged period of cessation of trading. The administrators of Northcore have predicted a maximum return of £35,000 for the company under its floating charge security, whilst the administrators of Shade Station predict a return of £1,925,000 for the Company under its floating charge security. The administrators consider that any fixed charge recoveries are uncertain. Subject to any fixed charge recoveries, the Company would suffer a shortfall of £15,584,000.

119. By letter dated 8 February 2023 from the Company's solicitors, Fladgate LLP, to Hanover's solicitors, CWT, Fladgate reported that in the ongoing bid process for Shade Station, the highest 'indicative offer' received was '£10 million or more'. Even assuming that the indicative offer of c.£10 million progresses to a formal offer in the same region, however, the Company still faces a shortfall of over £5 million. I was taken to no evidence to suggest that any fixed charge recovery on Northcore would meet the £5 million+ shortfall and on the evidence as a whole I consider it legitimate to conclude that it will not. Northcore has at all material times been worth much less overall than Shade Station (as apparent from the share prices paid by IFG SPP for Shade Station and Northcore in 2021), it has experienced a longer period of cessation of trading than Shade Station (which will impact on any goodwill value) and from the administrators' updates in evidence, there has been much less interest in Northcore than in Shade Station.

120. I acknowledge that the loan to IFG SPP has been guaranteed by IFG Limited. Mr Collingwood was at pains to point out that IFG Limited is still a going concern which owns and operates nine retail businesses. IFG Limited is however balance sheet insolvent, with a substantial deficiency. According to the balance sheet contained in its audited accounts to 30 November 2020, it was balance sheet insolvent in the sum of £42 million. Moreover, the IFG Guarantee ranks behind the secured claim of HSBC against IFG Limited. The terms of the deed of subordination prevent the Company from demanding or receiving any payment from IFG Limited without the consent of HSBC. It is against this backdrop that Ms Rayment, one of the proposed administrators, (in my judgment rightly) observed in her second witness statement that the guarantee 'is likely to be of dubious value'.

121. The 'Project Hurricane Recovery' is a claim by the Company against IFG SPP under a Cost Cover Letter. IFG SPP is in liquidation. According to the notes in the company's annual report and financial statements for the year ended 31 December 2021, this sum became payable within 10 days of a demand by the Company, was due and payable by 31 December 2021 and has still not been paid. To the extent that IFG Limited might be said to be liable to pay this sum under the IFG Guarantee, IFG Limited is balance sheet insolvent with a substantial deficiency: see paragraph 120 above.

122. Turning next to the Company's liabilities, the balance sheet exhibited to Mr Mighty's first witness statement records that the Company owed at least £17,013,936.77 (including interest) to the Noteholders as at 30 November 2022, as well as deferred tax of £326,517 and sundry creditors of £120,828 falling due within one year.

123. The Company maintains that its liabilities might drop significantly if at some stage in the future the debt interests of the Noteholders are converted into shares. In this regard, Mr Collingwood reminded me that the initial purpose of the CULS was to enable investment to fund the reverse takeover of IFG Limited. Upon that happening, the debt interests of the Noteholders would have automatically converted into shares. Whilst the reverse takeover of IFG Limited was now off the table, a Noteholder Majority had since expanded the terms of the CULS to cover the reverse acquisition of any company or business. As Mr Collingwood put it in his skeleton argument (at [58.2]): 'If another target is identified, then the conversion to shares may still take place'. He adds (at [58.3]): 'Targets that have been identified so far are Shade Station and Northcore. If these are acquired, then this conversion may still happen'.

124. Shade Station and Northcore, however, are both insolvent and in administration. Northcore is not trading. Shade Station has recommenced trading in administration but is running at a loss of approximately £10,000 a day. I was taken to no evidence to demonstrate how the Company, in its current financial position, would be able to fund the ongoing working capital requirements of the businesses once acquired, even assuming a successful purchase by credit bid.

125. On the evidence before me, the possibility that the CULS liability of in excess of £17m might at some stage in the future be waived or converted into equity is little more than speculation: Eurosail. In this regard I again remind myself of the guidance given in Byblos. At page 246g-h, Nicholls LJ observed:

> 'In my view, in determining whether on 3 June 1985 Rushingdale was able to pay its debts within the meaning of s223 of the Companies Act 1948, it is not correct to take into account, in addition to assets presently owned by it, any hope or expectation Rushingdale then had that it would acquire further assets in the future without any accompanying right to such further assets.'

126. Overall, on the evidence before me, I am satisfied on a balance of probabilities that the value of the Company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. The Company is accordingly balance sheet insolvent within the meaning of s123(2).

127. Even absent that conclusion, on the evidence before me, it is, at the very least, more probable than not that the Company will become balance sheet insolvent: Colt Telecom.

128. This is tacitly acknowledged by the Company's decision to seek Noteholder consent to an amendment of Condition 3.1(j) in Schedule 2 to the CULS Instrument (the Insolvency Event of Default): see paragraph 30(4) above.

Conclusion on insolvency threshold

129. For all these reasons, on the evidence before me I am satisfied that the Company is or is likely to become unable to pay its debts.

Purpose of administration

130. By her first and second witness statements, Ms Rayment has confirmed that, in her professional opinion, there is a real prospect of achieving the purpose of administration, which in this case is either rescue of the Company as a going concern or, if that purpose cannot be achieved within a reasonable time, the achievement of a better result for the company's creditors as a whole would be likely if the company were wound up without first being in administration.

131. Mr Collingwood maintained that it was not reasonably likely that an administration would achieve any of the statutory purposes.

132. He submitted that the Company is a viable going concern and that there was no prospect of it ceasing to be so. For the reasons previously explored, I reject this submission. The Company is both cash flow and balance sheet insolvent. Given its current financial position and the absence of any concrete alternative, on any footing it cannot be permitted to continue outside of a formal insolvency process.

133. Mr Collingwood also contended that there was no need for a moratorium at the moment, since a Noteholder Majority had agreed to the amendments set out in the AW Letter, which (inter alia) pushed back the maturity date for the Notes to 2025. As I have found, however, the Hanover debt is currently due and payable. The suggestion that a moratorium would serve no purpose is thus unsustainable.

134. Mr Collingwood went on to argue that there were good commercial reasons to oppose an expensive administration 'when Hawkwing is in the middle of working hard to secure a positive return for shareholders and creditors alike'. On the evidence before me however, even on the best projected figures available, there will be a shortfall in the return to creditors of in excess of £5 million. The Company is woefully insolvent. It would be entirely inappropriate to permit the directors to conduct their own informal liquidation.

135. Mr Collingwood also submitted that an administration might disrupt the sales process underway in respect of Shade Station. That sales process, however, was being undertaken by the administrators of Shade Station, not the Company. Mr Collingwood suggested that the Company's ongoing involvement in the bidding process for Shade Station (and its intended involvement in the bidding process for Northcore) would serve to increase bids, and that following its entry into administration, that benefit would be lost. In reality, however, the evidence pointed the other way; the administrators of Shade Station had confirmed that potential purchasers had found the prospect of a credit bid by the Company to be a disincentive, rather than an incentive.

136. Mr Collingwood also relied upon the anticipated returns for the Company from the administrators of Shade Station following a sale of Shade Station, which was believed to be imminent. As previously addressed, however, even on the best projected figures available, there will be a shortfall in the return to creditors of in excess of £5 million. The Company is hopelessly insolvent. As Mr Robins rightly observed, any imminent prospect of the Company receiving cash funds from the sale of Shade Station makes it all the more important to ensure that the Company is placed into a formal insolvency process without further delay.

Discussion and Conclusions on Purpose

137. On the evidence before me, I am satisfied that there is a real prospect that one or both of the stated purposes of the administration will be achieved.

138. As the Hanover debt is due, the moratorium will be of positive benefit to the creditors as a whole, providing a breathing space in which the administrators can interrogate the financial position of the Company and thereafter explore the options realistically open to it with all interested parties on an informed and independent basis. Administration will afford greater flexibility and a wider range of options than are available in liquidation.

139. Any funds realised from a sale of Shade Station and Northcore to which the Company is entitled will be paid to independent officeholders and applied in the interests of the creditors of the Company as a whole. This is of particular importance given that the Company is both cash flow and balance sheet insolvent. On any footing, given its current financial position and the absence of any concrete alternatives, the Company cannot be permitted to continue outside of a formal insolvency process.

140. There are also a number of aspects of the Company's affairs which in my judgment require immediate investigation by independent officeholders. These include but are not limited to:

(1) the circumstances surrounding the unauthorised loan of substantial noteholder funds to IFG SPP, a company which was to enter liquidation only one year later;

(2) the decision to advance the IFG Loan to IFG SPP at a time when there was no legally binding obligation on IFG Limited to complete the Reverse Takeover;

(3) the numerous false and misleading statements made to the market on the Company's behalf (referred to at paragraphs 11 and 12 above);

(4) the Company's marked delay in notifying Noteholders of Events of Default under the CULS Instrument, in breach of the express requirements of that instrument, a delay for which no satisfactory explanation has been given in the evidence;

(5) the Company's failure to send all Noteholders a copy of the AW Letter;

(6) the timing of the decision taken to enforce the Company's security and appoint administrators over Shade Station and Northcore, two retail trading businesses, shortly before the Christmas trading period, without any clear planning on proposed strategy, occasioning a long period in which the businesses did not trade and potentially putting at risk returns on the Company's security;

(7) the Company's continued trading outside of a formal insolvency process when it was both cashflow and balance sheet insolvent; trading which has significantly depleted the balance of Noteholder funds held by the Company after the IFG Loan, at a time when the Company was generating no income, had no obvious path to improving its cash position, and was facing the prospect of only a partial return on the IFG Loan.

141. These are merely examples of the matters which require immediate investigation. The existing management of the Company cannot be left to investigate themselves. It is plainly in the interests of the creditors as a whole that independent officeholders do so. Such investigations may well result in an application to the court for an order requiring the directors to compensate the Company or make a contribution to its assets. Any such contribution will swell the assets of the Company and will benefit the creditors as a whole.

142. Overall, on the evidence before me, I consider that the administration has greater prospects of achieving the second purpose (better result) than the first (survival as a going concern). In this regard however, I remind myself that a 'real prospect' in this context does 'not equate to a more than 50 per cent probability': AA Mutual

International Insurance Company Limited [2004] EWHC 2430 (Ch) per Lewison J at [20].

143. On the evidence before me, I consider that the threshold requirements on purpose are cleared in relation to both survival and better result, albeit by a wider margin in the case of better result.

Discretion

144. I turn finally to the issue of discretion.

145. I take into account the fact that, as an actual creditor of the Company, Hanover would prima facie be entitled ex debito justitiae to a winding up order. Whilst the threshold requirements for an administration order differ from those for a winding up order, in my judgment this consideration forms part of the relevant backdrop to the current application.

146. I also have regard to the views of other creditors.

147. I was taken to no evidence that any actual creditor actively opposes Hanover's application and in the absence of any such evidence consider it legitimate to conclude that no other actual creditor does oppose. The other Noteholders are prospective or contingent creditors. Whilst this is undoubtedly a factor to take into account, however, given the imminence of the maturity date of the other Notes, the distinction is of relatively minor significance and, taken alone, would not be determinative.

148. A further factor to take into account is that the witness statements of Mr Cook (Dowgate, 44.69%) and Mr Khan (Gresham House, 42.43%) are witness statements of advisers rather than the beneficial noteholders themselves and it is unclear from their statements how many of the beneficial noteholders they consulted before preparing their witness statements. This factor falls to be considered together with the connections between the Company, Dowgate and Gresham House explored below.

149. A number of connections between the Company, Dowgate, Gresham House and Oberon are readily apparent from the evidence. By way of example:

(1) It was Dowgate who first introduced IFG Limited to Mr Wotton, a director of the Company, as a potential investment opportunity (Cook (1) at [9]).

(2) Dowgate also subsequently worked with the Company to explore how the Company might assist with IFG Limited's working capital requirements, a 'protracted' albeit 'ultimately unsuccessful' process undertaken in an attempt to achieve the Reverse Takeover (Cook (1) at [19(c)]).

(3) It was to Dowgate that the Company apparently turned with a request that Dowgate forward the AW Letter to certain other Noteholders (Cook (1) [12]) and it was Dowgate who then 'began contacting the Noteholders' in the week commencing 31 October 2022 and engaging in discussions with them.

(4) Gresham House and Oberon are substantial shareholders in the Company. Dowgate also has links with Strand Associates, another substantial shareholder of the Company.

(5) Mr Wotton, a director of the Company, is also Managing Director of Public Equity at Gresham House (Khan (1) [3]).

(6) Mr Mighty, a director of the Company, previously worked as a senior director with Gresham Private Equity (Mighty (2) [6]).

150. In my judgment, these connections significantly affect the weight to be given to the opposition expressed by Dowgate and Gresham House (and reportedly, by Oberon).

151. I also take into account the conduct of Dowgate, Gresham House and Oberon. Their conduct in consenting to the amendments and waivers proposed by the AW Letter in November 2022 is curious in certain respects. In particular, the decision to consent to amendments to clause 2.3(a) and (b) of the CULS Instrument to authorise a loan to IFG SPP, at a time when (i) IFG SPP had already gone into liquidation, (ii) receivers had already been appointed by the Company over the IFG SPP's subsidiaries, Shade Station and Northcore and (iii) both Shade Station and Northcore were about to be placed by the Company into administration and to cease trading (the timing of appointment of administrators dovetailing neatly with the date that a Noteholder Majority was achieved) is in certain respects counterintuitive. Whilst there was some reference in the evidence to consideration of 'current trading' (Cook (1)), I was taken to no evidence to suggest that fresh valuations of IFG SPP or its subsidiaries Shade Station and Northcore were undertaken or considered by any of Dowgate, Gresham House or Oberon prior to their decision to consent to the amendments and waivers. In the absence of any such evidence I consider it legitimate to conclude that Dowgate, Gresham House and Oberon did not undertake or consider any such valuations prior to giving their consent.

152. I also take into account the reasons put forward by Mr Cook of Dowgate and Mr Khan of Gresham House for opposing the administration application. In my judgment, these reasons are not commercially well-founded. Neither Mr Cook nor Mr Khan appears to appreciate (or at least acknowledge) that the Company is both cashflow and balance sheet insolvent, or how that impacts on the duties owed by the directors of the Company.

153. Mr Cook, a director of Dowgate (at [21] of his statement) states that 'we at Dowgate, on behalf of our clients, believe that [the Company has] the ability and resources to manage the Shade Station and Northcore operations through to a return to improved profitability and more stable market conditions, at which point we believe it should be possible to identify a willing buyer (s) for the business at a significant premium to current valuations'. Yet both Shade Station and Northcore are in administration. Their affairs are managed by the administrators, not by the Company.

154. At [23] Mr Cook continues 'It is our expectation that the most likely outcome will be the sale or refinancing of Shade Station and Northcore and that the proceeds will be applied to repay the CULS'. Yet it is clear from the current projections of the administrators that there will be a significant shortfall to the Company on the IFG SPP loan on a sale of Shade Station and Northcore and the Company has no meaningful funds with which to run those businesses itself. Mr Cook adds (at [23]) 'Alternatively it may well be possible to recapitalise [the Company] once Shade Station and Northcore return to their anticipated growth path, and this recapitalisation will include repayment and/or conversion of the CULS to equity'. On the evidence before me, this

is pure speculation. Shade Station is running at a loss and Northcore has not even recommenced trading as yet, after a prolonged cesser of trading following its entry into administration.

155. Mr Khan (a director of Gresham House) is no more persuasive. His statement is largely based upon information provided by Mr Ken Wotton (who is managing director of Public Equity at Gresham House, as well being as a director of the Company). I pause here to note that it was Mr Wotton who, on behalf of Gresham House, was the first to sign a written consent to the amendments and waivers proposed by the AW Letter.

156. It is 'based on information from Mr Wotton' that Mr Khan states (at [10] of his statement) that Gresham House, on behalf of the Noteholders, has 'no concerns about the management or the currently projected cash flow of the Company which would necessitate the appointment of administrators or liquidators'. He adds (at [10]), 'I understand from Mr Wotton that the currently projected cash flow demonstrates that [the Company] is able to meet its debts as they fall due'; a comment which suggests that Mr Khan has not looked at the cashflow himself. Had he troubled to do so, he would have learned, as made clear from the observations of Ms Rayment's second witness statement (which I accept), that the cashflow prepared by the Company is based on dubious premises and makes no provision for payment of the Hanover debt.

157. At paragraphs 13 and 14 of his statement, Mr Khan continues:

> '13. I understand, based on information received from Mr Wotton, that there is a chance that the Noteholders' interests under the CULS will be converted to an equity interest. I understand from Mr Wotton that this may happen if:
>
> (a) Shade Station and/or Northcore are acquired by [the Company] and operated as trading businesses such that a path to meaningful equity value can be envisaged; or
>
> (b) a cash recovery is obtained through a sale of Shade Station and/or Northcore, as well as any potential additional recovery under the IFG group guarantee, and the directors of [the Company] and the CULS holders conclude that a strategy to use some or all of those proceeds to seek an alternative reverse acquisition target should be pursued in line with the original strategy of the Company (which was set up as a cash shell).
>
> 14. I understand from Mr Wotton that this is highly uncertain at this stage while the administration of Shade Station and Northcore are ongoing. However, should the acquisition or sale of Shade Station and/or Northcore proceeds as described at 13 above, and the CULS holders proceed to converting their CULS to equity, [the Company's] equity will increase substantially. I understand from Mr Wotton that the position on the value of Shade Station and Northcore will be clearer in mid-February once RSM, the administrators of Shade Station

> and Northcore, have completed their current marketing exercise'

158. As will be seen from this extract, Mr Khan is effectively acting as the mouthpiece for Mr Wotton and his focus is entirely on equity. As put by Mr Robins, the Khan statement is 'just a vehicle for the Company to express its own views'. At this stage I remind myself that the debtor has no voice.

159. In my judgment, the views expressed by Mr Cook and Mr Khan of Dowgate and Gresham House are not commercially rational or well-founded. I am not satisfied that they have good reason for opposing the administration application.

160. In addition, the views expressed by Mr Cook and Mr Khan of Dowgate and Gresham House are not the views of arms-length creditors. In this regard I remind myself that creditors who are also shareholders or connected with the management 'may have less weight given to their views than those who have no interest except in their capacity as creditors': Re Palmer (loc cit) per Hoffmann J at 99,562; Re Lowestoft (loc cit) per Hoffman J at 98,948; Re Lummus (loc cit) per Park J at 958; and Edgeworth Capital (loc cit) at [78].

161. In the circumstances of this case, I have concluded that their views should be afforded very little weight.

162. Oberon has not filed any evidence setting out its reasons for opposing the administration application and in any event represents less than 1%. In my judgment very little weight can be attached to its (reported) opposition to the administration application.

163. On the evidence before me, the only independent, arms-length creditor to engage with these proceedings is Hanover. At this point I remind myself that the court should have greater regard to the views of independent creditors than creditors connected with the Company: Re Demaglass.

164. For all of these reasons, the threshold requirements for an administration having been met, in the exercise of my discretion I have granted the order sought.

ICC Judge Barber