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Claim No. CR-2023-005726

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 9th May 2024

Before:

MR. JUSTICE HILDYARD

IN THE MATTER OF PEOPLE'S ENERGY (SUPPLY) LIMITED
(IN ADMINISTRATION)

AND IN THE MATTER OF THE COMPANIES ACT 2006

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MR. DANIEL BAYFIELD KC and **MS. IMOGEN BELTRAMI** (instructed by **Freshfields Bruckhaus Deringer LLP**) appeared for the **Company.**

MR. BASAK appeared as a **litigant in person** to oppose the scheme.

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Approved Judgment

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MR. JUSTICE HILDYARD:

1. This is an application made pursuant to section 899 of the Companies Act 2006 for an order sanctioning a proposed scheme of arrangement. The Company proposing the Scheme is in administration and the sanction of the court is therefore sought under the statutory provisions by its Joint Administrators.

2. The Company, called People's Energy (Supply) Limited ("the Company"), is incorporated in England and Wales, and there is no jurisdictional issue in that regard, but its parent Company, The People's Energy Company Limited ("PEC"), which is also in administration, is incorporated in Scotland and is in administration in Scotland accordingly. This raises an issue, to which I shall return later, as to whether the Scheme, if sanctioned by this court, would be given full effect in Scotland.

3. Until September 2021, the Company was a retail energy supplier. Prior to the appointment of the Joint Administrators, the Company faced volatility in both gas and electricity wholesale energy prices in the UK. The difference between these prices and the regulatory pricing cap created cash pressure for many energy suppliers in the market. The Company was exposed to volatile prices which for some months were much higher than the pricing cap applied to prices that it was able to charge its customers, negatively impacting the Company's cash position. The Company also suffered from a lack of liquidity, increasing price competition from other market competitors and cash shortfall due to winter energy prices. Ultimately, faced with the revocation of its supply licenses by Ofgem, the Company was forced to file a notice of intention to appoint administrators.

4. Prior to that and the collapse into administration of both the Company and PEC, on 15 December 2020, the Company and PEC suffered a data breach affecting almost 376,000 accounts relating to approximately 300,000 customers (the "Data Breach"). As a result, it is possible that some of those approximately 300,000 customers have claims under the relevant legislation, being the General Data Protection Regulation as it applies in the United Kingdom now, which I refer to as UK GDPR. A data breach claim under UK GDPR requires proof of financial loss or other harm which is material; that is to say more than *de minimis*. In other words, some value has to be put on the consequences of the Data Breach though an innominate claim may be permitted.

5. As regards the responsibility for this data breach, the regulator issued a reprimand - the regulator is the Information Commissioner's Office - which was notified on the subsequent day, 16 December, and that notification was extended to customers on the next day, 17 December. The reprimand was directed to 'People's Energy' for breach of the UK GDPR on 25 June 2021.

6. The reprimand did not distinguish between the Company and PEC but given the respective roles played by them in obtaining and processing the data compromised in the breach, the Administrators have concluded that it is likely that the Company was the controller of the data, but that PEC's role made it either a joint data controller or a data processor of the data compromised in the Data Breach. By virtue of Articles 82(4) and (5) of the UK GDPR, the Company and PEC are, on either of those bases, likely to be jointly liable for any valid Data Breach Claims. Mr. Bayfield KC, who represented the Company before me, took me to relevant provisions which

demonstrate that it is likely that there will either be shared responsibility or rights of recourse by either one of the companies held liable against the other.

7. Although made known to the Company some time previously, up to the date of the administration in September 2021 only four Data Breach Claims had been made. A further approximately 300 such claims were threatened prior to the promulgation of the Scheme but the relevant customers have taken no further action since the Company's administration. However, it may well be that once claims are invited, more claims will emerge, with Data Breach Creditors potentially being encouraged to pursue such claims by claims management companies. That risk is increased because, as I next describe, recoveries have been made in the course of the Company's administration such as that the Company can expect to meet its liabilities in full, making litigation potentially worthwhile.

8. I shall return to describe its provisions; but put shortly, the Scheme for which sanction is now sought has been devised and promoted to deal with the Data Breach Claims and other claims against the Company.

9. I turn to the first of three other background matters which I should mention: this is the changed financial position of the Company since administration. Although this cannot have been expected at the time that the administration was commenced, a substantial amount has been paid to the Company pursuant to close-out payments made under energy hedging contracts with BP Gas Marketing Limited ("BP"). In consequence, the context in which the Scheme must be assessed is radically different than it was when the administration started, because the Company now appears to be solvent. The estimate of the Administrators is that all claims - and I shall come to a second batch of claims which have more recently emerged - will be payable together with statutory interest contrary, as I say, to what must have been their expectations at the beginning of the process.

10. The second matter I need to mention by way of background is that the Company has had the benefit of an insurance policy against corporate legal liability purchased by PEC. The insurer is Hiscox Insurance Company Ltd ("Hiscox"). The policy includes data breach coverage of up to £1 million for indemnity and defence costs. The cover of £1 million has eroded to about £680,000, now that Hiscox has incurred some £320,000 of costs in considering and responding to claims.

11. Now that the Company and PEC are in administration, and under the operation of the Third Parties (Rights Against Insurers) Act 2010, a Data Breach Creditor who wishes to assert a Data Breach Claim must, in the first instance, assert it against Hiscox. Hiscox has thus far refused to pay claims on the grounds that they lack substance or are otherwise invalid. Data breach creditors who do wish to make a claim in the administration will be able to do so as contingent creditors but estimating the value of those claims will be difficult.

12. In order to bring some certainty to this aspect of the matter the Administrators have negotiated a confidential commercial settlement with Hiscox that if the Scheme is sanctioned Hiscox will be released from all liability to Scheme Creditors for data breach and any other claims under the corporate liability section of the policy. That is in return for a lump sum payment, the details of which I do not think are necessary to examine, by Hiscox to the Company. The effect of this is, in a sense, to bring all of

the data breach claims home so that no other party is involved hereafter if the Scheme is sanctioned.

13. The third matter that I need to explain by way of background is that after a hearing before Richard Smith J, to which I shall return, at which directions were sought for the convening of a meeting to approve the Scheme by creditors ("the Meeting"), another species of claim emerged. These were referred to before me as the misrepresentations claims and they were of two sorts, some customers asserting the claim that they were promised that they would receive shares in 'People's Energy' (that being the expression and it being unclear which Company that referred to); or secondly, other customers claiming that they would receive a share of People's Energy's profit in certain circumstances. Again, the identification of which Company is said to have made the alleged misrepresentation and is sought to be made liable appears to be unclear.

14. In light of the emergence of these new potential claims, and although by this time the Meeting had already been convened, it was considered appropriate and in fact requisite that any customer who might potentially have a Misrepresentation Claim, should also be given the opportunity to attend and vote at the Meeting. Accordingly, it was determined that all those former customers of the Company who could possibly have Misrepresentation Claims should be notified and the meeting which had originally been convened for January 2024 was under the powers vested in him pursuant to the terms of the Convening Order adjourned by the Chairman until April 2024.

15. One other matter which may or may not be considered part of the background but which I should now mention is that there has appeared before me one of the Company's former customers, Mr. Basak, who has been most helpful in explaining to me what his objections to the Scheme are. I do not think he advances these claims as either the holder of a Misrepresentation Claim or a Data Breach Claimant, though he may have a claim as the latter. His complaint ranges further as to the whole way in which he has been dealt with by the Company, including, so he says, that he was enrolled as a customer by a rogue employee or agent of the Company who set up on his behalf direct debit arrangements and he wishes to make a complaint in respect of that. He also has a broader complaint about the cost and manner of the administration and as to the independence of the process which is envisaged in the Scheme. I shall return to Mr Basak's concerns later.

16. The Scheme itself, though Mr. Basak was inclined to have reservations about its complexity, is, cutting through it, not a very complex one. It is, in substance, what is sometimes called a cut-off scheme whereby three objectives are hoped to be achieved. The first objective is to set a hard bar date for the making of claims against the Company which is referred to in the Scheme as the Claims Submission Deadline. That was to be three months after it was originally envisaged that the Scheme was to become effective. But that date has been advanced in light of the delay also to this hearing which was occasioned by the background events which I have described and which will now expire on 9 August 2024.

17. The Scheme secondly provides that if claims are not made by the Claims Submission Deadline then they will be released not only against the Company, but also, and this is one of the wrinkles which is required to be ironed out in the Scheme, against the

holding Company PEC (which, as I have mentioned, is technically in another jurisdiction).

18. Thirdly, if claims are made there will be a streamlined process outside the court process for dealing with disputed claims. Under this provision of the Scheme disputed claims will be determined by a Scheme Adjudicator at the expense of the Company without creditors needing to engage solicitors, or to incur court fees, and without them being at risk to pay adverse costs. In other words, an inquisitorial system will be put in place instead of the adversarial system which is the norm in English proceedings. Any scheme Claim will first be assessed by the Scheme Supervisors whose decision can be challenged by referring it to the Scheme Adjudicators, being a panel of at least two suitably legally qualified persons with appropriate experience to be appointed by the Scheme Supervisors. The Scheme Adjudicators presently nominated are two King's Counsel, one experienced in data breach claims and the other experienced in commercial matters including the resolution of such claims as the misrepresentation claims. Mr. Timothy Pitt-Payne KC has been nominated as the data breach counsel and Mr. John McCaughran KC has been nominated in respect of other commercial claims.

19. As I have explained, when the matter came before Richard Smith J at the convening stage, the misrepresentation claims were not yet known to the Company or the Administrators. At the Convening Hearing it was I contended that there should be one meeting of all creditors only. Richard Smith J gave a full and helpful judgment on 16 October 2023 acceding to that submission and directing accordingly that there should be a single class meeting to consider, and if thought appropriate, approve the Scheme. Richard Smith J also, as is required, considered a practice statement letter which had been circulated in accordance with the practice statement still applicable to Schemes of this kind, and was at that stage content with that, and in fact with the further communications to Scheme Creditors.

20. As the practice statement also recommends, the judge went a little further in considering whether there were any impediments to the Scheme. He identified, and this assisted him in acceding to the submission there be a single class, to the relevant comparator the Scheme as being either a distributing administration or possibly liquidation given that the Company had realised substantial assets.

21. He also considered what I have briefly mentioned as being further provisions in the Scheme for the releases of both PEC and Hiscox. He considered briefly the question as to whether the court would be acting in vain by sanctioning the scheme because the Scheme is premised upon its recognition in Scotland and it being given effect there, and he concluded at that stage that there was no obvious reason why recognition should be declined. In summary, and necessarily on a preliminary basis at that stage, he concluded as to those releases and as to the Scheme in general that there was no insuperable "show stopper" nor any obvious jurisdictional impediment, though he acknowledged that the question of whether releases of both companies should be sanctioned would be a matter to be more fully addressed dealt with at the sanction stage, which we have now reached.

22. Mr Justice Richard Smith also was invited to make an order with respect to a confidential exhibit containing the terms of the Hiscox compromise which has remained confidential and which although Mr. Bayfield was good enough to say I was

at liberty to see, I have in fact in the event not seen. He made an order accordingly on 17 October 2023.

23. I turn now having described the background and the nature and results of the Convening Hearing to consider the actual task before me as to whether this is a scheme which can and should properly be sanctioned. Mr. Bayfield's clear and helpful skeleton argument set out for me the principles to be considered by the court when dealing with sanctioning a scheme of arrangement. He quoted the judgment of David Richards J (as he then was) in *Re Telewest Communications (No. 2) Ltd* [2005] 1 BCLC 772, at [20]-[22], from which Mr. Bayfield distilled a four-stage test elaborated and pithily explained by Snowden J (as he then was) in *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) at [16].

24. In that case, Snowden J said:

> "The relevant questions for the court at the sanction hearing can therefore be summarised as follows:
>
> i) Has there been compliance with the statutory requirements?
>
> ii) Was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the class meeting?
>
> iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?
>
> iv) Is there some other 'blot' or defect in the scheme?"

25. There is a further element in the case of a scheme such as this with an international element, which is the question of whether the court would be acting in vain, which I have lightly touched on and which was equally lightly addressed by Richard Smith J.

26. The first question I must address therefore is whether there has been compliance with the statutory requirements. This can be broken down into the following three sub-issues: first, whether the statutory majorities were obtained at the Meeting; secondly, whether there has been compliance with the terms of the Convening Order; and thirdly, whether the classes in respect of the Scheme were properly constituted.

27. It is clear that as to the first of these issues the requisite statutory majorities, both in number and value, were obtained by a substantial margin at the adjourned meeting which took place. The details have been set out in the evidence and in particular in the Chair's Report where the Chairman Mr. Berkovi described the conduct of the Meeting.

28. The results in summary were that Scheme Creditors representing 99.54% by number and 99.99% by value of the Scheme Creditors present in person or by proxy at the virtual Meeting which was held voted in favour of the Scheme. Secondly, Scheme Creditors representing 0.46% by number and 0.01% by value of the Scheme Creditors present in person or by proxy voted against the Scheme.

29. Mr. Berkovi also explained that 256 claims were submitted for voting purposes with a proposed vote in favour or against the Scheme (251 votes in favour and five votes against), but he rejected after careful evaluation some of these claims. Had the claims which he rejected been admitted for voting purposes i.e. if he was wrong in any sense to reject those claims and they should have been allowed, the Scheme would still have been approved by 98.99% of Scheme Creditors by number and 99.7% by value. The total number of Scheme Creditors admitted to vote at the Meeting was 434, of whom 432 voted in favour and two were against the Scheme.

30. Mr. Bayfield very fairly drew my attention to the fact that if that constituency is compared to the entire customer base, all of whom might have some claim for data breach or misrepresentation, that the percentage of creditors who actually were engaged in the process was small. I think Mr. Bayfield said 0.08%. That of course is an arresting figure at first blush; but nevertheless, Mr. Bayfield has satisfied me that it is not really a fair comparison in the circumstances of this case (given that many hundreds of thousands of those notified may well have no claim at all) and that what I should have my eye on is whether there were any persons properly excluded or whether there were any signs that people did not attend for some good reason. None, subject to one argument made to me by Mr. Basak about his personal difficulties in joining the Meeting on-line, which I address later but which I do not consider alters the result, has been demonstrated.

31. In the round, therefore, I am satisfied that the jurisdictional pre-requisite that the Scheme for which sanction is sought has been approved by the stipulated statutory majorities has been satisfied.

32. I am also satisfied, having considered the evidence of Mr Berkovi and his Chair's Report that the Company has complied with the Convening Order made by Richard Smith J.

33. I do not think it is necessary for me to set out that evidence in detail. The directions are set out and explained in the judgment of Richard Smith J and the Convening Order he made. The evidence of compliance was clear, and was also helpfully summarised in Mr Bayfield's comprehensive skeleton argument, which carefully identified the various steps and processes directed, explaining to my satisfaction how each was addressed and satisfied. It seems to me that I need elaborate on only one matter, the effect of the emergence of the potential misrepresentation claims after the Convening Hearing and which accordingly Richard Smith J could not have known about.

34. As to that, in summary:

    (1) The Meeting was adjourned to provide all potential Scheme Creditors with the opportunity to vote on the Scheme by giving notice of the Meeting to additional customers and to draw the attention of all customers to the possibility of Misrepresentation Claims. This resulted in the Meeting being adjourned by more than 3 months to 26 April 2024.

    (2) The Explanatory Statement was amended to detail the possible Misrepresentation Claims along with an explanation as to why the Administrators considered these claims unlikely to succeed. The amended Explanatory Statement stated the date of

the adjourned Meeting and the changes to the Scheme timetable caused by that adjournment.

(3) The Scheme Document was amended to clarify that Scheme Adjudicators are entitled to engage professional advisers and/or administrative support to assist them with the conduct of their functions under the Scheme. This amendment was made to assist with the effective conduct of the Scheme Adjudicators' role.

(4) Existing Scheme Creditors were informed of the proposed adjournment to the Scheme timetable in light of the Misrepresentation Claims and sent a copy of the amended Explanatory Statement by email and post on 12 January 2024. This correspondence informed Scheme Creditors how to join the adjourned Meeting on 26 April 2024.

(5) Notification of the proposed Scheme and an explanation of how to vote on it along with details of the adjourned Meeting were sent, on 24 January 2024, to those customers of the Company who had become customers after the Data Breach and who had not previously been given notice of the Scheme because it was not considered that they would have any claims to bring against the Company (i.e. those with potential Misrepresentation Claims). All communications sent to potential Scheme Creditors to date were also provided.

(6) After the emergence of the Misrepresentation Claims and the adjournment of the Meeting, additional advertisements were published (i) in all UK print editions of The Sun (including The Scottish Sun) on 12 March 2024; and (ii) in all print editions of The Herald on 11 March 2024. The second set of advertisements were more prominent than the first to increase visibility of the Scheme and ensure maximum reach to all potential Scheme Creditors.

(7) The process of adjudication and quantification of claims for voting purposes is addressed in the Chair's Report. This makes clear that the Administrators made significant (and to my mind sufficient) efforts to ensure that claims were adjudicated properly (including both Data Breach and Misrepresentation Claims) and that those claims which were admitted for voting purposes were given appropriate values.

(8) Adjustments were made to the Meeting to allow for the full participation of one creditor with hearing loss who had raised accessibility issues prior to the Meeting. These adjustments included the use of live captioning both during the Meeting itself and any breakout rooms that the Scheme Creditors chose to utilise. Whilst the creditor with hearing loss did not end up joining the Meeting, the adjustments had been made to allow him to do so effectively. There were no other material difficulties affecting Scheme Creditors' ability to participate or speak and consult at the Meeting (which was held virtually across a remote online conferencing platform hosted by Lumi Global, with voting and teleconferencing capabilities). I am satisfied that the platform and arrangements enabled and resulted in an effective Meeting.

35. In summary, I am satisfied that the further jurisdictional requirement that the meeting at which the statutory majorities were obtained was validly convened and held has been satisfied.

36. I turn next to the third sub-issue: class composition. In the course of considering the results of the meeting and, as part of my assessment of the overall fairness of the Scheme, I have also had to consider, or reconsider, the matter which was dealt with fully by Richard Smith J as to the propriety of a single class.

37. Reconsideration of this is particularly appropriate in this case, though Mr. Bayfield reminded me that in the normal course, the judge at the sanction hearing ought not to depart from the decision made at the Convening Hearing in the absence of some obvious effect or some change in circumstances. But here there is a change of circumstance, at least to the extent that the misrepresentation claims were not part of the known constituency of claims which were addressed by Richard Smith J because they were simply not known at the time.

38. I have been concerned to check that both the Convening Order and the Scheme itself were not drafted in terms which made them inapplicable after the introduction of this new constituency (Scheme Creditors with potential misrepresentation claims), and I am satisfied in both regards. More particularly, I accept Mr Bayfield's submissions that:

    (1) Any Misrepresentation Claims against the Company would rank as general, unsecured claims, as would all other Scheme Claims (including Data Breach Claims). As such, it remains the case that all of the Scheme Creditors' pre-Scheme rights give rise to unsecured claims which would rank *pari passu* between themselves under the comparator to the Scheme.

    (2) All Scheme Creditors, including those with Misrepresentation Claims, will benefit from the same set of post-scheme rights namely: (i) a right to make a claim prior to the Claims Submission Deadline; and (ii) the streamlined claims and adjudication process.

    (3) All Scheme Creditors will benefit from earlier payment of their claims so long as they submit their claims prior to the Claims Submission Deadline.

    (4) In light of the above, it remains the case that the single class is confined to those creditors whose rights are sufficiently similar so as to make it possible for them to consult together with a view to their common interest (*Re UDL Holdings Ltd* (2001) 4 EIKCFAR 358 at [27] (Lord Millett NPJ).

39. It seems to me therefore, that a single class remained appropriate and it was confined to creditors whose rights were sufficiently similar so as to make it possible for them to consult together with a view to their common interest. Further, a single class meeting of creditors is the only way of avoiding a very unfortunate fragmentation of classes which would undo the salutary purpose of the legislative provisions and that I should proceed on the basis, as did Richard Smith J and for the reasons he gave as amplified by me, that a single class meeting sufficed.

40. The second of the questions identified as requiring consideration by the court (see paragraph 24 above) is whether the class was fairly represented and whether the majority acted in a bona fide manner and for proper purposes when voting at the Meeting.

41. This question, in a sense, may best be addressed the other way round. That is to say whether there is any suggestion that the majority acted in some self-interested way other than a bona fide manner and for proper purposes when voting at the Meeting. I have no evidence before me that that is the case. It seems to me therefore that I can take it that there was no disqualifying interest, though I should add that I did make sure my questions to Mr. Bayfield (on which he took instructions) that none of the shareholders at the top of the tree who may ultimately be the beneficiaries of any surplus surplus, as I called it during the hearing, were not present and were not in a position to be influenced at the single class Meeting that was held.

42. Secondly, and as to the fair representation of the class, the Administrators have to my satisfaction conducted a careful analysis of the turn-out and, for example, adopted a number of methods for checking that all those creditors with possible claims were aware of the Scheme and the Meeting. They also regularly reviewed the processes for participation at the virtual meeting, making changes to improve them in the light of difficulties which initially arose. Having read the detailed evidence as summarised in Mr Bayfield's skeleton argument, I am satisfied that the class was fairly represented and that the majority were not acting otherwise than bona fide and for proper purposes when voting at the Meeting. I have already dealt with the adequacy of the turn-out and the fairness of the result.

43. I have also been concerned to assess whether the means made available to creditors to inform themselves as to the background and purpose of the Scheme were sufficient. This process was conducted via a portal designed for general use to facilitate voting at a creditors meeting in a manner consistent with the requirements of the Insolvency Act.

44. There were some initial difficulties with the portal and its use but these were identified before the adjourned Meeting and, as I understand it, resolved. There were provisions electronically vote for or against the Scheme, and also to abstain from voting which is more unusual, on the proposals. There were voting guides explaining what would be the consequences of the decision made.

45. On 12 April 2024, that is only fourteen days I think before the meeting, the Administrators became aware that a number of the Scheme Creditors who had tried to vote on the Scheme found that their option to do so was unavailable because they had selected, the continuing proxy option on the online voting form, but to deal with this the Administrators contacted all Scheme Creditors who had been affected and informed them that no vote had been submitted so that they could if they wish resubmit their vote.

46. I am told that the portal and the virtual Meeting were handled by third parties experienced in these matters and I do not think there is any evidence to suggest that there was either any instability or inadequacy of the portal or in the process at the Meeting, though I should note (because I will need to return to this also) that Mr. Basak himself personally did have difficulties which may relate to the circumstances in which he became a customer.

47. Next I must consider whether the Scheme is one that an intelligent and honest man, acting in respect of his interests, might reasonably approve. This, put in that way, rather puts the onus on the court to sit in judgment on the honesty and reasonableness

of the Scheme, but ultimately, what is really before the court is an issue of fairness and as Snowden J (as he then was) explained in *Re KCA Deutag UK Finance plc*, which I have already had occasion to mention:

> "[28]… 'fairness' in this context has a specific and limited meaning. The court simply has to be satisfied that the Scheme is one that an intelligent and honest man, acting in respect of his interests, might reasonably approve. It does not mean that the court is required to form a view of whether the Scheme is, in some general sense, or even in the court's own opinion, the 'fairest' or 'best' Scheme.
>
> [29] Moreover," - Snowden J continued, and as David Richards J had earlier explained - "provided that the Scheme meeting was properly consulted (viz., by creditors having the necessary time to consider sufficient information in an adequate explanatory statement), that attendance at the meeting was representative of the class, and that the majority were not actuated by any form of improper motive or purpose, the court will generally take the view that in commercial matters the majority of Scheme Creditors are much the better judges of their own interests than the court…"

48. I have already explained that the Scheme was approved by the requisite statutory majority and the vote was, in my judgment, representative.

49. It seems to me that all Scheme Creditors including those with misrepresentation claims will take as well as give some benefit. The benefit that they will give the Company, and other persons interested in the Company, will be early resolution of their claims against the Company. Scheme Creditors will also release claims which they might otherwise be able to pursue at law in court. But they will take a benefit also because of the speedy and much cheaper process which the adjudication process in the Scheme permits.

50. Conversely, if the Scheme is not sanctioned, those wishing to pursue Data Breach or Misrepresentation Claims against the Company or PEC will be unable to do so unless and until they have first pursued those claims against Hiscox, and then only to the extent that they are unable to recover their claim from Hiscox because the limit under the insurance policy has been exceeded. This will likely lead to a delay in the payment of any valid claims and will involve a more difficult route to payment for creditors than that offered by the Scheme.

51. The Scheme takes into account the expense and delay in court of pursuing claims and the reduction in the amounts available for creditors already evident from the fact that the insurance policy has been reduced from £1 million to £680,000 because of costs incurred in that context.

52. Schemes providing for cut off of claims and an adjudication regime in place of court process are not unusual. However, Mr Bayfield, towards the end of his oral submissions, has very fairly raised with me a question whether it is permissible to, in effect, modify or contract out of the rules which would otherwise apply to the

establishment of claims against a company which is already in a formal insolvency process, as this one is. Mr. Bayfield assured me that this is a not uncommon use of the jurisdiction in such a context but I hope I am not being unfair in saying that the only case he actually referred to me, though there may of course be others, was the Privy Council case relating to a Bermudian case *Kempe v Ambassador Insurance Company* [1997] UKPC 55.

53. It seems to me that that authority does, implicitly at any rate, recognise that it should not be a prohibition against the introduction of what would otherwise be a sensible adjudication process that the insolvency rules would normally establish a different regime. Mr. Bayfield also made the point, which struck me likely to carry weight, that there is express provision in the statute for administrators to promote a scheme of a company in administration and implicit within that is that they would be able to promote a scheme such as this being the most natural scheme in that particular context.

54. In summary, it seems to me that, in light of the 'give and take' I have previously described, the Scheme as a whole (with certain discussed refinements which Mr Bayfield has obtained instructions to accept) strikes a reasonable balance and should achieve the salutary objective of resolving claims with earlier certainty and finality at proportionate cost.

55. The final matter to be considered before the issue as to the effectiveness of the Scheme elsewhere, and before dealing with Mr. Basak's own submissions, is whether there is some blot or defect in the Scheme.

56. Mr. Bayfield submitted that there was not. In his written submissions he drew my attention to a letter of 17 April 2024 from Ofgem indicating that they were minded to abstain from voting on the Scheme based on their suggestion that they were unable to decide whether the three-month period for assessing Scheme Claims set by the Claims Submission Deadline was sufficient for customers to submit their claims, in the context of the fact that there would be in the ordinary case of court proceedings a much broader six-year limitation period typically afforded.

57. Mr. Bayfield's answer to this was first that the Administrators had taken all reasonable steps to draw the Scheme along with the Claims Submission Deadline to the attention of the Scheme Creditors so they had had time not only after the Scheme but before it to consider their position and assemble their case, and then to submit their claims. In reality, the Scheme Creditor body had had over three months to submit claims since communications were sent to those with the possible Misrepresentation Claims whereas the Scheme Creditors with data breach claims had had over six months to submit claims since the documents were uploaded to the portal on 19 October 2024.

58. Secondly, Mr. Bayfield stressed that the data breach itself occurred almost three years prior to the formulation of the Scheme and the Misrepresentation Claims originate from representations made from the time that People's Energy was first started to approximately November 2020. As such, all claims could have been brought some time ago.

59. Thirdly, he submitted that, in any event, the three-month period is reasonable, and he made the point that the six-year limitation position is not really a great analogy when a Company has already entered administration and administrators and liquidators are empowered to set last dates for approving claims often sooner than six years into the administration process even if those are not and they cannot be firm bar dates.

60. I will discuss later with Mr. Bayfield whether an extension of the time to the Claims Submission Deadline would be appropriate given that I have not been able to identify any particular urgency and I am concerned about the holiday period over the summer. It might, and I will put this to him for further argument, be fairer for the Claims Submission Deadline to be extended by one or two months in case people are away over an extended period.

61. But subject to that it does not seem to me that the Claims Submission Deadline constitutes a blot.

62. I have also been concerned to satisfy myself that a fundamental part of the Scheme, namely the provisions to cut off third party claims, is appropriate and workable. I was initially a little troubled about this and concerned by the basic fact that creditors of the Company will be asked to release claims not only against the Company in exchange for whatever they get under the adjudication process provided under the Scheme but also and at the same time claims against the PEC up the line. I therefore asked for specific guidance on this from Mr. Bayfield who provided it very comprehensively by reference to a number of cases, principally, I think, *Noble Group Ltd [2018] EWHC 3092*, a decision of Snowden J's but also the decision of the Court of Appeal in Re Lehman Bros [2010] Bus LR 489 1012. He also referred to me my own decision in a subsequent *Lehman* case in 2018.

63. I am persuaded on the basis of those submissions and those authorities that where what is proposed by the Scheme cannot really be given any practical effect unless these other claims are also released, because they would simply come back on a ricochet basis, the analogy being with a guarantor and an original commitment, that it is proper and in fact necessary if the Scheme is to have proper effect to include those releases. I note that in the context of PEC that there will also be provision for a deed of release to be signed under power of attorney which will, as it were, be the belt to the braces of what I have described.

64. Next, I must address the question whether this Scheme if sanctioned will be workable and given effect as regards PEC in Scotland: if not, the court could be acting in vain.

65. As to the Scottish element, not only do I have recourse to the statutory provisions which seem to accord recognition of English schemes in Scottish courts, but I have a very interesting opinion commissioned by the Administrators and provided by a Scottish advocate, Mr. Garry Borland KC, who, whilst accepting that there was no direct authority in Scotland approving recognition of releases of this kind, nevertheless, by reference to cases both in Scotland and in England concluded that there was at the very least, as he put it, and I am quoting from paragraph 83 of his opinion:

> "… a reasonable prospect that the Scottish court would recognise and give effect to the proposed Scheme and in

> particular the release of PEC's liabilities which will be affected by the Scheme and the Deeds of Release which are intended to form part of it."

Indeed he concluded:

> "I consider that a Scottish Court would be very likely to do so." He added, quoting further for completeness, "It is my opinion that there is no clear and obvious ground of repugnancy or public policy which would lead to the Scottish court refusing to give effect to the proposed Scheme in Scotland. Indeed there is a strong public policy reason justifying implementation of the proposed Scheme in Scotland, namely what would be an inherent desire on the part the Scottish Court to allow the application, in an effective way, of an English Court order made pursuant to legislative provisions with UK-wide effect."

66. I explained to Mr. Bayfield I had some reservations about that last part because I understand that there are separate processes in Scotland for schemes of arrangement but nevertheless concur in the conclusion, or see no reason to doubt it.

67. That leaves me to consider finally the submissions of Mr. Basak and his particular concerns and then finally to address a certain residual anxiety that I felt and which, I suspect slightly to his exasperation, I shared with Mr. Bayfield.

68. Mr. Basak provided to me seven pages of written submissions, which despite his diffidence in doing so were admirably clear, albeit that I only had the opportunity to see these over the short adjournment.

69. His story is an unsettling one. According to Mr. Basak, he never had any intention of becoming a customer of the Company and was perfectly happy to continue to deal with his existing supplier or provider. But by some process of which he is unclear it appears that he was enrolled without his consent as a customer and, furthermore, that his bank details were obtained sufficiently to enable someone within the Company to set up direct debit arrangements with his bank which then were put into effect leaving Mr. Basak paying but, and this was a further problem, with all correspondence being addressed to someone else at Mr. Basak's address which Mr. Basak did not dare open for fear of committing an offence, it being such to open someone else's mail.

70. Obviously this is a very unsettling picture, if established, and Mr. Basak made clear that he was not satisfied that the Scheme process would enable this aspect, and in fact all aspects of this matter impartially to be assessed. He submitted that there was what he called a lack of true independence among what he called "the Scheme operators" who he specifically defined as extending both the Scheme administrators and Supervisors and the Scheme Adjudicators, although in this case the Scheme Supervisors are to be the Joint Administrators.

71. Secondly, he complained that there had been insufficient involvement of creditors in the formulation of the Scheme and in the course of the administration process and that insufficient opportunity had been afforded to creditors to be involved in their development and in monitoring the administration process. He also said in that

context that the expenses of the administration had been inordinately high and that there was no creditors committee supervising the process.

72. Thirdly, he said that the adjudication process under the Scheme imposed what he called a "high bar needed to prove creditors' claims". Fourthly, that there was a lack of recourse to creditors who were unhappy with the result of the adjudication process given that their right of recourse to the court was released or shut off. Fifthly, that he considered there would be potential problems with the implementation of the Scheme in practice. Sixthly, that the lack of information or clarity in the information or documents currently made available had made it difficult for him properly to consider the Scheme. And seventhly, the Scheme had what he described as "complexity".

73. With all respect, I feel bound to point out that some of these concerns may really relate to the administration as a whole rather than to the Scheme as such, and it is only to the Scheme that my attention must be directed. Matters as to the conduct of the administration and its costs must be left to other processes which are provided for in the legislation and also in the professional rules which apply to the Administrators and no doubt to all those concerned in processing the administration in the past and from now on.

74. It does not seem to me, as to Mr Basak's first complaint, that his concern of lack of true independence has really been made good, because, as it seems to me, the Scheme Supervisors being the Administrators is really the only sensible course in the circumstances or there would be tremendous further costs with unnecessarily different entities or parties. It seems to me that there is nothing to suggest that the two KC I have suggested, or any KC which may hereafter be recommended responsibly by the solicitors and by the professionals concerned, will lack independence and objectivity, and nor will there be any reason for them to pursue some hidden or different objective. They will simply be professional men experienced in the business seeking to bring an honest judgment to bear.

75. I do not think, for the same reasons broadly, that it is appropriate for me to determine whether the involvement of creditors was or was not sufficient in the administration process. It seems to me that the opportunities for creditors to understand the resulting Scheme and then participate in the meetings have broadly speaking been sufficient.

76. I think ultimately, and I hope I have not misunderstood him, Mr. Basak acknowledged that he probably did receive documentation before the Meeting, albeit it was in a form because accompanied by so many other documents, that he may not have been easily able to identify what is important and what is not. I do not know whether the bundle signposted the specific and particular importance of the practice statement which really is what is meant to be the digestible form of what are often rather long documents, and it may be that some red hand ought to be imposed in the future but nevertheless I do not think it is the basis for a conclusion of any blot or impropriety either in the convention of the Meeting or in terms of the Scheme as a whole.

77. It is regrettable that there were initial problems with the portal and it is regrettable that Mr. Basak did find personal difficulties in joining the Meeting. It is never comfortable for a judge to, as it were, marginalise such complaints but the question is really whether that should upset the entire apple cart. Mr. Basak estimated his claim to be £6,000 or thereabouts at most, and even taking that into account, had he

participated in the Meeting it really would not have shifted the figures in the least bit, leaving only the question of whether his own submissions made virtually would have entirely changed the result, and, with respect, I do not think that that is sufficiently likely.

78. As to his complaints with regard to the adjudication process, I do not share his view that some greater hurdle is placed in front of creditors than would be the case in terms of the burden of proof. It seems to me that under the Scheme the burden of proof would be on the creditors to establish on a balance of probabilities that it is more likely than not that they suffered the loss by fault of the Company. I think it is the same as would be applicable under the general law and I wish to reassure Mr. Basak that his worries that some greater imposition was being placed on the creditors does not appear to me to be the case.

79. As to lack of recourse to the courts, that is of course an incident of the Scheme and in fact one of its purposes in order to achieve a speedy resolution of creditor claims. That has been approved in the past. It seems to me that it is a sensible provision in the circumstances, and so I do not accept that objection.

80. I do not feel that Mr Basak pointed to any potential problems in the manner of the implementation of the Scheme but I did draw Mr. Bayfield's attention to two aspects of the scheme adjudication process both relating to the availability of documents which I asked for agreement to be amended. Mr. Bayfield, having swiftly taken instructions, confirmed, and this should reassure Mr Basak that there will be an obligation on the Scheme Supervisors to provide documentation, including maybe documentation which assists him in his case, to the Scheme Adjudicators if they require it. Of course, in an inquisitive process I cannot be sure that they will think it necessary but they are responsible and experienced KCs of long standing who would I am sure if prompted wish to get to the bottom of what seems to me a very unsettling situation.

81. Arising out of that I also shared with Mr. Bayfield, as I have indicated previously, a slight general disquiet that I have had that the problem inherent in any swift but private process is lest it be thought or not by those promoting it but by others who may be interested identified as a way of sweeping under the carpet matters which they would prefer to be swiftly and privately dealt with but not exposed.

82. Mr. Bayfield's answer to this seemed to me to be a realistic one. It is in two parts. The first is that under the Insolvency Act and under their own guidance as Joint Administrators and Scheme Supervisors will be under a duty to, for example, report what appears to them to be any criminal activity and, in any event, secondly, in these days of very many avenues for expressing dissent this would not in truth remain confidential or private. I do not think there are any non-disclosure arrangements or anything else which would require or visit problems on someone who shared the result of the Scheme adjudication process.

83. All in all, though I stress my indebtedness to Mr. Basak who has also had to endure a very long day, when I suspect, though he was kind enough not to mention or dwell on it, he would have preferred or maybe even needed to be elsewhere, I do not think there is sufficient substance in them to destabilise or refuse to sanction the Scheme,

though I very much hope the small amendments will assist in making good his claim if it is well established on the documents.

84. In all the circumstance therefore, and with apologies for an over-long and certainly rambling judgment, I conclude that there is no sufficient reason for me to depart from the view of 99 plus per cent of the creditors to approve what in effect is a different adjudication process which should, in light of the amounts likely to be involved, be fair in the circumstances.

85. The last concluding point that I would make is to again share concerns which I shared with Mr. Bayfield, that it has come to my notice that it may very well be that if there is a surplus surplus, as I have called any amounts still available for distribution after payment of established claims and statutory interest, it may be in a significant amount and may inure to the benefit of the shareholders. This has prompted some press commentary and adverse creditor reaction. However, as Mr. Bayfield pointed out, creditors' claims are creditors' claims and to the extent of them they are entitled to pursue them but beyond them they are not. This should adequately deal with their appropriate rights and any other repercussions in terms of benefit, reward or difficulty will have to await other processes. Whether the regulators wish to review the position, in light of the expense to the public purse of the 'rescue' operation and having to transfer contracts to another supplier, will be matter for them.

(for continuation of proceedings see main transcript)

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