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Case No: CR-2024-001526

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

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 20 June 2024

Before:

THE HONOURABLE MR JUSTICE HILDYARD

IN THE MATTER OF THE LAKES DISTILLERY COMPANY PLC

-and-

IN THE MATTER OF THE COMPANIES ACT 2006

Stephen Horan (instructed by Muckle LLP) for the **Applicant** (The Lakes Distillery Company PLC)

Martin Moore KC (instructed by Ashurst LLP) on behalf of Nyetimber Wines and Spirits Group Ltd

Hearing dates: 21 May 2024 and 11 June 2024

APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30 on 20 June 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

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The Honourable Mr Justice Hildyard:

Scope and purpose of this judgment after an adjourned hearing

1. After an adjourned hearing on 11 June 2024 of an application by The Lakes Distillery Company Plc (“the Company”) seeking sanction of a proposed scheme of arrangement to facilitate and effect the acquisition of all its ordinary shares in a £46.1 million takeover, I made an Order as sought, but indicated that I would supplement the short reasons that I then gave in a written judgment. This is that judgment.
2. I should very briefly explain, at the very outset, though I shall have to return to it at greater length later, why it is that the hearing of this application came to be adjourned from the original hearing date of 21 May 2024 to 11 June 2024.
3. In a nutshell, this is because at the original hearing, and in the course of Mr Horan’s submissions then in support of the Scheme, I questioned and cast doubt on the sufficiency and accuracy of the disclosure of directors’ interests in the Explanatory Statement, and in particular as regards their interests in Convertible Loan Notes (“CLNs”) of £2 million nominal value due to be repaid in full and with a premium of 100% in consequence of the change of control in which the takeover would result. After some discussion with Mr Horan, I directed that the matter should be adjourned in order to allow the Company further to consider the matter and (if so advised) to provide further evidence and submissions as to (a) the history of the CLNs and how and when the relevant directors of the Company came to invest in them and (b) the impact (if any) on the question of class composition in consequence of them holding such investments and the proposed repayment to them of principal with a 100% premium.
4. In the event, a longer adjournment than had initially been anticipated was required for these purposes. But this has resulted in there being provided to me, to address my concerns, helpful and comprehensive evidence, a draft possible supplementary circular, and additional written submissions both from Mr Horan and from Mr Martin Moore KC, who now appears for the bidder.
5. As I have said, I shall have to return later to my assessment of the further evidence and submissions, and to the issue whether this further round has, as it were, saved the day; but in the meantime, I turn to explain the context, purpose and terms of the Scheme and the steps taken prior to the original hearing by way of compliance with the statutory requirements.

Context and purpose of the Scheme

6. The application is made pursuant to Part 26 of the Companies Act 2006. The Claim Form is dated 9 April 2024.
7. The Company is one of the leading English Single Malt Whisky producers and a distiller of whisky and other spirits, based in Cumbria. The acquiring company, Bidco, is Nyetimber Wines and Spirits Group Limited, a company formed for the purpose of the bid, and part of a group which produces the well-known English sparkling wine called Nyetimber.

8. The purpose of the Scheme is for Bidco to acquire all the issued and to be issued 2p ordinary shares of the Company.
9. Under the Scheme, Scheme Shares will be transferred to Bidco. In return, Scheme Shareholders will receive £1.16 in cash for each Scheme Share held by them. It is thus a conventional transfer scheme for cash consideration.
10. There are 284 Scheme Shareholders. There is no trading facility for the Company's shares. The Company's share register has remained static, except for the addition of new investors. All Scheme Shareholders have subscribed for their Scheme Shares.
11. One of the Scheme Shareholders is Crowdcube Nominees Limited (**CCNL**), which is the nominee entity used by Crowdcube, an equity crowdfunding platform in the UK, through which the Company has sought equity investment. CCNL holds 1,438,455 Scheme Shares (3.8% of the Scheme Shares). There are 3,931 Crowdcube investors who hold a beneficial interest in the Company's shares through CCNL. About 61% of the Crowdcube investors beneficially hold 100 or fewer Scheme Shares. CCNL's practice is to vote all the shares held by it in accordance with the majority response from the underlying investors. It voted in favour of the Scheme.
12. The takeover to be effected by the Scheme is subject to the City Code on Takeovers and Mergers ("the Code"). Although the Company is unlisted, it is a public company and the Company's central management and control is in the UK; the Code therefore applies.
13. Being Code governed, Bidco was required, amongst other things, to obtain a cash confirmation i.e., confirmation by an appropriate third party that resources are available to Bidco sufficient to satisfy full acceptance of the offer: rule 24.8. Bidco's financial adviser, Rothschild & Co, has confirmed that sufficient financial resources are available to Bidco to enable it satisfy in full the cash consideration.
14. The background to the Scheme is summarised in Part I, sections 4 and 5 of the Scheme Document. In short, the Company's directors, in assessing its funding options, considered there was uncertainty about capital raising over the next three years to meet its ten-year plan without compromising that plan or diluting the future equity return for current shareholders. They are confident that joining the Nyetimber group will benefit the long-term prospects of the Company, whilst providing fair value for shareholders now.
15. The Company's directors have been advised by Singer Capital Markets Advisory LLP ("Singer") as to the financial terms of the bid. Singer has provided independent financial advice to the Company's directors for the purpose of rule 3 of the Code. A rule 3 adviser must advise the board of a target company as to whether the financial terms of any offer (including any alternative offer) are fair and reasonable. The Company's directors unanimously recommended the bid, and that Scheme Shareholders vote in favour of the Scheme.
16. A scheme such as this, if it is to be given the Court's sanction, must be approved at a court meeting or meetings of scheme shareholders. Further to directions given by the Court in an order dated 15 April 2024, a Court Meeting of Scheme Shareholders was held on 10 May 2024.

17. As further elaborated later, the Scheme had strong support from the Scheme Shareholders at the Court Meeting: 91.02% by value and 83.43% by number approved the Scheme. Although there has been some small opposition to the Scheme based on value, no intention to oppose the sanctioning of the Scheme has been communicated to the Company.
18. The ordinary shares comprise the only class of shares in the Company. There is a definition of “Excluded Shares” in the Scheme, which excludes from being Scheme Shares any (i) shares owned by Bidco or the Nyetimber group, (ii) treasury shares held by the Company, or (iii) shares which Bidco and the Company agree will not be subject to the Scheme. However, in fact, none of the Company’s shares fall into any of the three categories of Excluded Shares.
19. The definition of “Scheme Shares” picks up any shares issued after the Voting Record Time (8 May 2024, two days before the Court Meeting) but before the Scheme Record Time (being 6pm on 17 June 2024, the evening preceding the Scheme becoming effective on 18 June 2024), provided they were issued on terms that the holders are bound by the Scheme, or where the holders have agreed to be bound.
20. The Company’s Articles of Association were amended in the conventional manner at a general meeting of the Company (“the General Meeting”) on 10 May 2024, immediately following the Court Meeting, to provide that any shares issued after the adoption of the relevant article (art. 139.2) but on or before the Scheme Record Time would be issued subject to the Scheme, and therefore be Scheme Shares.
21. There are options for certain directors and employees to be issued in aggregate 1,805, 520 shares in the Company, which have been exercised conditionally on the Scheme being sanctioned. If the Scheme is sanctioned, they will be issued before the Scheme Record Time and be acquired under the Scheme. There is an arrangement for cashless exercise of these options such that the option holders will receive the net proceeds of their shares through the Company’s payroll, where the exercise price and tax liabilities will be retained by the Company. This is the customary way to deal with such shares, and the Scheme makes provision for this differential treatment on Scheme consideration: clause 3.2.
22. In addition, and as I indicated in my introductory remarks to explain the adjournment, certain of the Directors of the Company subscribed for CLNs to be repaid in accordance with their terms, or more accurately as I shall come back to explain what are agreed to be their terms notwithstanding some uncertainty in the contractual language.

Terms of the Scheme

23. Turning to the provisions of the Scheme, Clause 1 deals in conventional terms with the mechanics and protections for Bidco on the transfer of the Scheme Shares.
24. Clause 1.1 provides for the acquisition of the Scheme Shares by Bidco with full title guarantee to the shares and free of encumbrances or third-party interests.

25. Clause 1.2 empowers the Company to appoint a person to execute any instruments of transfer or give instructions for transfer on behalf of any Scheme Shareholder.
26. Clause 1.3 is a residual protection for Bidco, giving it control of the Scheme Shares in the period between the Scheme becoming effective and the transfers of the Scheme Shares being completed.
27. Clause 2.1 sets out the consideration via the definition of “Acquisition Price” (which is 116 pence per Scheme Share) to be paid to each holder of Scheme Shares at the Scheme Record Time. Consistent with the requirements of the Code, Clause 3.1 provides for settlement of the consideration within 14 days of the Scheme becoming effective. Where cheques have not been encashed within 6 months of the Effective Date, the relevant consideration will be held by the Company’s share registrars in a designated account until claimed for 12 years: Clause 3.1(c).
28. Clause 7.1 states that the Scheme becomes effective upon delivery of a copy of the order to the Registrar of Companies, which is consistent with s.899(4) of the Act which provides that the Court’s order has no effect until a copy of it has been delivered to the Registrar of Companies.
29. As mentioned above, the effective date of the Scheme is 18 June 2024: this was delayed to accommodate the adjournment.

Convening of Court Meeting

30. A scheme such as this, if it is to be sanctioned, must have been approved by the stipulated majorities of members at such class meetings as are directed by the Court in accordance with section 896 CA 2006.
31. In this case, the Court, by order of ICC Judge Burton, on 15 April 2024 (“the Directions Order”) gave permission for the convening of a single meeting of holders of Scheme Shares, to consider, and if thought fit, approve the Scheme.
32. Posting of the relevant documents notifying the Court Meeting occurred on 17 April 2024. Witness statements on behalf of the Company’s share registrars, Link, and their printers, Perivan, address service of these documents on Scheme Shareholders. The Company has three means of communicating with its shareholders, depending upon their preferences: (i) hard copies by post; (ii) letter by post notifying of the availability of documents on the Company’s website; and (iii) email communication notifying the availability of documents on the Company’s website. In each case, proxy forms for meetings are sent in the post by hard copy. One issue has arisen in relation to service: see paragraphs [48] to [54] below.

Irrevocable Undertakings

33. As explained at paras 28 to 32 of the witness statement of Mr Timothy Farazmand (“Mr Farazmand”) dated 9 April 2024, and is commonplace, irrevocable undertakings to vote in favour of the Scheme had been given at the announcement of the recommended bid.

These were by directors of the Company in respect of their own shareholdings (5.9% of the Scheme Shares in total), and by three other Scheme Shareholders holding in total 21.9% of the Scheme Shares. The directors' undertakings were "hard", being binding in the event of a competing bid; the other shareholders' undertakings were "soft", falling away if there were a competing bid.

34. Details of the irrevocable undertakings were provided in section 6 of the Chairman's Letter, Part I of the Scheme Document and section 7 of Part VII of the Scheme Document.

Shareholder correspondence

35. On 14 May 2024, four days after the Court Meeting, the Company received emails from Mr Peng, a shareholder holding 0.91% of the Scheme Shares who did not vote and was opposed to the Scheme. He complained that he did not receive the information in good time. He also complained about the result of the meeting, displaying what was described to me as, and which I accept was, a misunderstanding of the voting at the meeting, and about the value of the acquisition. A response was sent to him the same day. There is an explanation of the Company's various attempts over time to obtain Mr Peng's correct details in the evidence.

The Court's jurisdiction

36. I must of course satisfy myself that what is proposed is within the jurisdiction of the Court. The jurisdiction of the Court is derived from ss.895-899 CA 2006. The power to sanction the Scheme is in s.899.
37. In order to constitute a "scheme" under Part 26 of the Act, there must be a compromise or arrangement between the Company and its members. A compromise or arrangement requires "give and take". It is established that a scheme involving the transfer of members' shares to another company in return for members receiving cash or shares in the other company involves the necessary element of "give and take": *Re Jelf Group Plc* [2015] EWHC 3857(Ch) and *Re SAB Miller plc* (sanction hearing) [2016] EWHC 2670 (Ch), [5]-[11].
38. The Scheme does not involve any reduction of capital or other change in the capital base or underlying business of the company, and so it will not have any adverse impact on the interests of the company's creditors.
39. A number of jurisdictional requirements must be satisfied. These have been set out fully in the helpful skeleton argument provided by Mr Stephen Horan (for the Company).
40. These requirements, which are usefully summarized and explained in *Buckley on the Companies Acts* at paras. 219-220, are as follows:

- (1) the scheme must amount to a "*compromise or arrangement proposed between the company and... its members, or any class of them*" (section 895(1) CA 2006). To amount to a compromise or arrangement, there must be an element of "*give and take*" as between the company and its members (*Re NFU Development Trust*

Limited [1972] 1 WLR 1548, *Re Jelf Group PLC* [2015] EWHC 3857 (Ch); *Re SABMiller Plc* [2016] EWHC 2153 (Ch)).

- (2) the members (or any class of member) must approve the scheme by a majority in number representing 75 per cent. in value of those shareholders who attend and vote at a meeting of those members (section 899(1) CA 2006);
 - (3) the meeting is convened by order of the Court (section 896(1) CA 2006) on the application of the company (or other permitted applicants) (section 896(2) CA 2006) and as to which the Court is the master of its own procedure;
 - (4) the notice convening the “*Court meeting*” must be accompanied by an explanatory statement;
 - (5) the explanatory statement must: (i) explain the effect of the compromise or arrangement, and (ii) state (a) any material interests of the directors of the company (whether as director or as members or as creditors of the company or otherwise), and (b) the effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and
 - (6) finally, the scheme must be sanctioned by the Court.
41. The statutory requirements have been supplemented by the current *Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)* (the “Practice Direction”) which (a) sets out the circumstances in which an application for permission to convene a meeting of members ought to be made before a High Court Judge rather than an Insolvency and Companies Court Judge; and (b) stipulates that the terms and purpose of the scheme must be explained in an Explanatory Statement.
42. Mr Horan’s skeleton argument has directed me to the relevant parts of the evidence in this regard.

There is an arrangement

43. I am satisfied that the Scheme involves the necessary element of “*give and take*” between the Company and the Scheme Shareholders. Clause 1.5 of the Scheme imposes an obligation on the Company to register the share transfers provided for by clauses 1.1 and 1.2 of the Scheme. That obligation ensures that the Scheme is an “*arrangement*” for the purposes of Part 26 CA 2006 (see *RE NFU Development Trust Limited* [1972] 1 WLR 1548 and *Re Jelf* [2015] EWHC 3857 (Ch)).

Class composition and directions

44. Even though, in the event, I have felt it necessary to revisit the matter, I am satisfied that at the convening stage, the directions given by ICC Judge Burton on 15 April 2024 for a

single class meeting were in order. The matter is, however, a little more complex than perhaps was appreciated then, as will emerge later in this judgment.

45. Subject to an issue relating to the CLNs, each Scheme Shareholder holds ordinary shares, has the same rights in respect of those shares and is being treated the same under the Scheme; and subject to that same issue, there is nothing to suggest that any of the Scheme Shareholders has entered into arrangements collaterally with the Scheme.
46. A question arose in relation to certain consumer rights which may have arisen in respect of offers or promises to shareholders of discounts or benefits. I return to these later. For the present suffice it to say that I have considered and am satisfied that they do not fall to be considered to be rights attaching to the Scheme Shares nor to have been altered because of the Scheme.
47. I have noted previously that undertakings were given by both the directors and certain shareholders. I am satisfied that the undertakings did not cause any class composition issues. They were given in conventional circumstances, the givers of them not receiving any additional consideration, other than the promise by Bidco to make the bid at 116 pence per share.

Explanatory statement and service

48. Before dealing with the more difficult question I have flagged already as to the sufficiency of its explanation of directors' interests having regard to the fundamental requirement that the Scheme documentation must contain the elements required by Part 26 and a full and proper explanation of the Scheme and its effects on Scheme Shareholders, I can for convenience clear away now the issue which arose in relation to service which I briefly mentioned in paragraph [32] above.
49. The Company has three means of communicating with its shareholders, depending upon their preferences: (i) hard copies by post; (ii) letter by post notifying of the availability of documents on the Company's website; and (iii) email communication notifying the availability of documents on the Company's website. In each case, proxy forms for meetings are sent in the post by hard copy.
50. The notification of the Scheme Document by email that the Scheme Document was available on the Company's website was mistakenly omitted. There are 284 Scheme Shareholders: 60 have elected to receive communications by email. Instead, these 60 shareholders were sent the letter by post notifying them of the availability of the Scheme Document on the website, which was also sent to the 105 web notification Scheme Shareholders.
51. Mr Horan submitted that this does not appear to have caused prejudice. His argument was to the following effect.
52. First, the Company had an earlier mailing on 2 April 2024, notifying shareholders of the announcement of the deal which had been duly sent out in accordance with the three methods. The email only shareholders therefore received that by email, and this letter

referred to scheme related documents becoming available on the Company's website in due course.

53. Second, 49 of the 60 email only Scheme Shareholders voted at the Court Meeting, a far higher turnout by both number and value, than the other two categories of notified shareholder. The 11 who did not vote held only 0.017% of the Scheme Shares and their votes would not have affected the outcome of the Court Meeting, even if it were to be assumed that they were unaware of the Court Meeting.
54. I am satisfied that these issues would not of themselves impede sanction.

Court Meeting

55. The Court Meeting directed by the Directions Order was duly held on 10 May 2024 at which the requisite statutory majorities under s.899(1) of the Act (75% by value and a majority by number of Scheme Shareholders present and voting) approved the Scheme.
56. As had been anticipated, Mr Farazmarand was not available on 10 May 2024. In his absence, Mr Neep, a non-executive director of the Company who habitually acts as Chairman in such circumstances and who was the first person nominated by the Directions Order, acted as Chairman.
57. I am satisfied that the directions given by the Court were sufficiently complied with and that the Court Meeting was regularly convened and conducted.
58. Mr Neep's report of the Court Meeting is in evidence. Annex 1 to the Report records an outline of the questions and answers at the meeting, from which it is apparent that some opposition to the Scheme was expressed at the Court Meeting regarding value and the need for a sale.
59. Most of these questions inevitably arose out of or by reference to the fact that many of the shareholders (some 40% or more) subscribed for their shares at an issue price some way in excess of the bid price, giving the appearance of a distressed sale, and in any event causing inevitable disappointment and questions whether the bid was really the best available in all the circumstances. I have considered the Questions and Answers carefully, and they have reinforced my view that there was open and informed debate, and a satisfactory conclusion of proceedings thereafter.
60. Mr Neep also noted at para 11 of his report that two proxy forms arrived after the deadline for delivery to Link, the Company's share registrars, but before the Court Meeting. These were in favour of the Scheme, amounting to 0.06% of the Scheme Shares. They were brought by Link to the Court Meeting and handed to the Chairman, as the Scheme Document stated was permissible, and counted.
61. There was also a problem with a more substantial shareholder, holding 3.2% of the Scheme Shares, who wished to vote against the Scheme. This arose because her registered address was in Hong Kong, to where the documents had been posted, but she had been in Beijing in the relevant period. Arrangements were made immediately before the Court Meeting for her to receive and return a proxy form. Her Scheme Shares were

voted against the Scheme and counted. This is addressed at para 12 of the Chairman's Report.

Turnout

62. At the Court meeting, there were 181 Scheme Shareholders (out of 284) attending and voting in person or by proxy 31,057,169 Scheme Shares (out of 37,894,799 Scheme Shares).
63. This represents a turnout at the Court Meeting of 63.73% by number of Scheme Shareholders and 81.96% by value of Scheme Shares eligible to vote as at the Voting Record Time. This is, by the standards of scheme meetings of this sort, a strong turnout, with a high headcount, compared with most takeover schemes.

Voting

64. The Chairman's Report includes a table of voting at the Court Meeting. The statutory majorities required under s 899(1) CA 2006 were easily achieved. There were 91.02% of the Scheme Shares voted in favour of the Scheme and 83.43% by headcount (i.e. number of Scheme Shareholders).

General Meeting

65. As previously mentioned, at the General Meeting of the Company which immediately followed the Court Meeting, special resolutions were passed:
 - (1) authorising the directors of the Company to take all actions they consider necessary or appropriate for the purpose of carrying the Scheme into effect;
 - (2) amending the Company's articles to provide that any shares issued after the Voting Record Time and before the Scheme Record Time would be Scheme Shares and any shares issued after the Scheme Record Time will be transferred to Bidco or its nominee for the same consideration as under the Scheme; and
 - (3) authorising the re-registration of the Company as a private company upon the Scheme becoming effective.

The issue which required an adjournment in greater detail

66. Having dealt with what might be termed the usual matters to be addressed in relation to the issue of jurisdiction, I must now return to the issues relating to certain of the director shareholders' interests in CLNs which are to be paid out at a premium, and the manner of their disclosure that caused the adjournment. Before considering their inevitable impact on the exercise of my discretion, I must be satisfied that they do not give rise to a jurisdictional impediment.

67. More particularly, I need to address whether the fact that some of the shareholders are also interested under the CLNs, and in particular in their repayment at a premium of 100%, causes a class issue. That issue is further complicated because there is a question as to the proper interpretation of the relevant clause in the terms of the CLN.
68. It seems to me that the questions to be considered are as follows: (a) what rights the CLNs conferred on their holders on true interpretation of their terms; (b) whether the arrangements for repayment of the CLNs at a premium could be viewed as part of the Scheme or collateral to it such as to be part of the overall arrangement that the Scheme comprises and of which sanction is sought; and (c) whether in light of that analysis the class of shareholders was thereby fractured.
69. The reason for my concern in relation to the true interpretation of the relevant provisions of the CLNs in question (question (a) in paragraph [68] above) is to satisfy myself that the proposed redemption payments in discharge of the liabilities of the Company that the CLNs represent would not involve any element of bounty or benefit in excess of strict contractual entitlement. The concern would be lest that would amount to additional consideration under or as a side or ancillary part of the Scheme. That can only be determined by establishing what that contractual entitlement is; and that involves resolving an apparent inconsistency in the wording of the relevant repayment provision in the CLNs.
70. The provision for repayment itself is worded as follows:

“REDEMPTION

7.1 Subject to clause 7.2, in the event the Notes have not been converted under clause 6.1, [which provides conversion rights] they shall be redeemable immediately upon the earlier of:

7.1.1 an Event of Default

7.1.2 The Termination Date,

following which the Company shall pay the relevant principal amount together with accrued interest on the Notes and any unpaid fees. All Notes redeemed shall be cancelled and the Company shall not reissue the same.

7.2 The Company may redeem the Notes prior to the Termination Date. In the event of a redemption prior to the Termination Date under this clause 7.2, the amount payable by the Company to each Noteholder shall be the aggregate of:

7.2.1 the nominal amount of the Notes issued and outstanding to the Noteholder at the time of redemption, together with all accrued interest and unpaid fees;

7.2.2 such additional amounts as may be required to ensure that the Noteholder receives an aggregate amount under this clause 7.2 which is equal to twice the nominal amount of the Notes issued and outstanding to that Noteholder at the time of redemption; and

7.2.3 *the amount of any default interest accrued under clause 8.5.”*

71. The definitions in clause 1.1 provide that “*Event of Default*” includes any change of control, and “*change of control*” is broadly defined. “*Termination Date*” means “*the date falling 60 months from the date of the first issuance of Notes under this instrument.*”
72. The question is whether the provision in clause 7.2.2 for a 100% repayment premium is confined to redemption prior to the Termination Date under “*this clause 7.2*”, and does not extend to an immediate redemption under clause 7.1.1 (such as in the present case) triggered by an “*Event of Default*”.
73. The wording, on its own, seems more consistent with the latter: that is, the wording at first blush confines payment of premium to the case of a pre-Termination Date falling within clause 7.2 and not 7.1.
74. However, both the “*Indicative Terms and Conditions*” preceding the execution of the CLNs and the contemporaneous communications when the CLNs were being negotiated reveal that if construed in that way, the wording would not entirely or accurately capture what was truly intended. In particular:
 - (1) The Company had first issued a CLN in 2019. It issued further CLNs in 2020 in response to an emergency funding gap following the global pandemic and UK lockdown. The Company urgently required £4.5 million. To meet this need, the Company’s largest shareholder, called Comhar Capital Limited (pronounced “core”) invested £1.25 million via Comhar Capital (1804) Limited (“Comhar”). Others invested in aggregate £1 million. An entity called The Future Fund, which was a UK government-backed initiative, delivered by British Business Bank to support UK-based companies facing financial difficulties due to Covid, match-funded the rest in the sum of £2.25 million. All these loans were on terms incorporated in a CLN in a form (“the original FF CLN”) mandated by The Future Fund and providing for a 100% premium on change of control.
 - (2) When the Company’s continuing difficulties necessitated further funding in 2023, Comhar initially agreed to cover the requirement on the terms of a CLN which they intended should substantially replicate the “make whole and premium” provisions of the original FF CLN.
 - (3) When, on about 14 November 2024, Comhar changed its mind and reduced the amount that it was prepared to invest, so that the Company was obliged to turn to its director shareholders for replacement funds to make up the difference, it appears that all proceeded on the basis that the CLN would include like terms.
 - (4) Mr David Peter Robinson, an executive director and Chief Financial Officer of the Company, who has never been a holder of loan notes and who was designated to act on behalf of the Company in negotiating the terms of the CLN instrument (initially, exclusively with Comhar) has provided a witness statement (dated 9 June 2024) containing the following:

“It has been brought to my attention...that there may be some ambiguity in the drafting of clause 7 of the instrument as to whether the contractual obligation on the Company to pay the make whole to loan note holders arises automatically on a change of control. I had always understood this to be the deal. It was agreed at the outset of the negotiations between the Company and Comhar that an early termination of the CLN, for any reason (which would include as a result of change of control of the Company), would entitle Comhar (and any other loan note holders) to the make whole provision, this being consistent with the make whole provision in the FF CLN. I was of the view at the time, and remain of the view, that the terms of the CLN reflected that agreement.”

- (5) When in October 2023, and in the context of a potential approach by Nyetimber, the Takeover Panel required further information *“as the proposed loan is being provided by the Company’s largest shareholder...on whether the terms of the loan are on arm’s length, market standard terms and not on more favourable terms for Comhar”*, the Company formally responded in relevant part that

“The terms of the loan provide that on a change of control, the loan and early repayment premium [i.e. the “make whole”] will be repayable in cash.”

75. I have considered whether the agreement of the parties now may be vitiated by self-interest, given the advantage for them of a premium in circumstances then foreseeable. However, I am satisfied also that the agreement between the parties was ‘arms-length’, and I have no sufficient reason to doubt the evidence provided to me of true accord.
76. Having regard to the above, and also to the fact that the parties to the CLNs are in apparently genuine agreement as to their intended meaning, I am satisfied that I should proceed on the same basis that they (and the Panel) have proceeded, that the “make whole” provisions provide for a 100% premium upon a change of control (in default of conversion). It is not necessary for present purposes to develop the point further than to say that I have been persuaded that insofar as the wording itself (by inclusion of the reference in clause 7.2 only to *“this clause 7.2”*) suggests that the premium is not payable when the trigger for redemption is an Event of Default within clause 7.1.1, it does not reflect the Indicative Terms and pre-execution exchanges of the parties to the instrument, nor their agreed view as to their true intent. Either the instrument should be treated as rectified accordingly, or I should read the reference in clause 7.2 to *“this clause 7.2”* as a reference to clause 7 as a whole. I prefer the latter course; but the same result would be obtained either way.
77. The second question to be considered (as identified at (b) in paragraph [68] above) is whether the arrangements for repayment of the CLNs at a premium could be viewed as part of the Scheme or collateral to it such as to be part of the overall arrangement that the Scheme comprises and of which sanction is sought.

78. My concern here is lest the CLNs and/or the agreement that the “make whole” and premium provisions apply in the context of the takeover to be effected by the Scheme constitute in reality a second or incidental part of overall arrangements such that the Scheme should be viewed as having (in effect) two parts. This would affect the issue of class composition, because the arrangements might result in the destruction or undermining of the uniformity of rights which has been the premise of the Court Meeting and the resulting fracturing of the single class. That in turn, of course, affects my jurisdiction.

79. In this regard, in *Re PA Consulting Group Ltd* [2021] EWHC 29 (Ch) at [22], Snowden J (as he then was) explained (in the fifth of his statement of the principles applicable to issues of class composition) that:

“(v) in assessing whether the classes have been correctly constituted for the purposes of a scheme, the Court should not simply look at a scheme in isolation, but should do so together with other arrangements entered into collaterally with the scheme.”

80. Snowden J expressly derived this fifth principle from *Re Baltic Exchange Limited* [2016] EWHC 3391 (Ch) at [15]-[17]. That case involved a takeover scheme for the Baltic Exchange. The scheme company that had been incorporated in 1900 to own and run the Exchange. Membership of the company was separate from membership of the Exchange which had run for some 300 years, but there was considerable overlap. For some time there had been informal arrangement that some members of the Exchange had been panellists, providing information on which the Baltic Exchange’s indices were based. The acquirer, the Singapore Stock Exchange, wanted to put this arrangement on a more formal footing as a result of the acquisition. It therefore arranged for contracts with the panellists to provide the information and agreed payments for it. Some panellists were also scheme shareholders. The Court considered that it is not confined to looking at the scheme in the narrow sense of the formal scheme of arrangement which is voted on:

“Where a scheme is part of, or accompanied by, other arrangements that confer rights or benefits upon some or all of the members or creditors who are to be bound by the scheme, the class question must be answered by reference to all those arrangements taken as a whole.”

81. Mr Horan accepted that it is not sufficient to look at the Scheme as a narrow and limited document and that it is necessary to consider any other arrangement entered into collaterally with the Scheme itself. However, he submitted that this was restricted to arrangements entered into pursuant to the terms of the Scheme and rights conferred thereby, or in documents or agreements envisaged by the Scheme to be entered into as part and parcel of the Scheme; and that rights that are created independently of the Scheme, and therefore not causally linked to the scheme, are not part of the arrangement for these purposes. He submitted further that if the scheme triggers the exercise of rights, but the rights themselves were conferred outside of the arrangement, there cannot be a class issue. He suggested that a common illustration of this distinction is found in employee share options, which normally provide that they vest on a takeover, and in the case of takeover by scheme of arrangement on the sanction of the scheme. These are put in place as part of a company’s incentives programme.

82. In light of this distinction, Mr Horan went on to submit that on the facts of this case, the evidence shows that the CLN was not part of the arrangement relating to the Scheme. In particular, its genesis and terms were entirely separate from anything to do with Nyetimber's approaches, or the terms of the Scheme or any wider arrangement causally connected to the Scheme. Neither the Company nor the participants were motivated by the likelihood or even possibility of an offer from Nyetimber, or any other offeror. He drew my attention also to a further submission made to the Takeover Panel on 9 November 2023, this time by Singer (which had by then been instructed as the Company's independent financial adviser), expressly confirming that:

(a) there was a potential offeror, but it was *"yet to give any indication of the likely terms of the possible offer"* ;

(b) the CLN documentation was

"at an advanced stage, with formal execution expected within a matter of days on the agreed subscription terms, regardless of any possible offer in the meantime..." and further,

(c) its agreed terms

"were not influenced in any way by prior knowledge on either Comhar's or the Company's part of the likely possible terms of the possible offer..."

83. Mr Horan also emphasised that, at the point of urgent need in November 2023, when maintenance of the possibility of an offer by Nyetimber might have relieved the Company from its pressing financial difficulties, and removed the considerable risk that the CLN holders would be taking on losing their CLN investment, the Company instead unequivocally rejected Nyetimber. It insisted on a price that was considerably higher than Nyetimber would be likely to offer, and emphasised that one reason for it was focused on the price of investment by other shareholders. The CLN allowed the Board and its major shareholders to pursue its real objective, which was equity investment in the Company. Only when all avenues for Project Gold, as referred to below [at para 84(c)], were exhausted did the Board accept that there was no other option than the Scheme.

84. In all the circumstances, and having considered carefully the evidence provided both in the witness statement of Mr Robinson to which I have already referred and in a witness statement of Mr Craig Wilkinson as Managing Director of Comhar, also dated 9 June 2024 (as well as their exhibits) I am satisfied that:

(a) the CLNs in question were negotiated and their terms were agreed as an urgent response to a pressing cash crisis in the Company and the need for an immediate injection of cash, and not in anticipation of a premium on a takeover which though a real possibility was inchoate;

(b) as indeed the Company had assured the Takeover Panel in October 2023, *"The terms of the loan are consistent and comparable with previous loan arrangements entered into by the Company..."* and also in line with *market standard for a company in its position, i.e. a small, loss making company at*

this stage of its development” and the Company’s existing and previous borrowing; and

- (c) the CLN was entered into not in anticipation of early premium repayment but to give the Company breathing space to pursue its hitherto preferred objective of retaining its independence by securing equity investment further to a project which it named “Project Gold”. It was because of that being its preferred objective that the Board rebuffed Nyetimber’s first offer; and it was only when all avenues for that project were exhausted did the Board accept that there was no other option than to court Nyetimber once more and accept its only marginally increased revised offer.

85. In these circumstances, I accept Mr Horan’s submission that the CLNs should not be regarded as part and parcel, or an associated or ancillary element, of the Scheme, and nor should the agreement as to their true interpretation. The fact that the premium provisions are triggered by the change of control resulting from the sanction of the Scheme and the implementation of the takeover it effects is nothing to the point.

86. I should add that in re-addressing the issue of class composition, I have stood back to consider in the round whether in consequence of their having an interest in the CLNs caused them to have such inconsistent interests as to make it impossible for them to consult together with other shareholders not having such an interest. That reflects the classic formulation of the applicable test of whether creditors fall within the same class in the judgment of Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 583 (in that case, in relation to creditors in a creditors’ scheme), that is to say that their

“rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.”

87. Even assuming that their “rights” under the CLNs give them an additional or different perspective, I have concluded that, in the circumstances, and in particular in light of the lack of any realistic alternative which I am satisfied is disclosed by the further evidence filed for this hearing, it is not impossible for the shareholders with an interest in the CLNs to consult with the other shareholders.

88. It follows that my answer to the third question identified at (c) in paragraph [68] above, whether in light of that analysis the class of shareholders was thereby fractured, is that I am satisfied that it was not.

The issue as to adequacy of disclosure in the Explanatory Statement

89. However, that leaves for consideration in relation to the CLNs the important question which was the principal reason for the adjournment: whether the disclosure provided in the Explanatory Statement on the basis of which shareholders were invited to make up their minds and vote, was adequate; and if not, whether and in what way any deficiency may be made good.

90. I have considered whether this point too is one going to my jurisdiction to sanction the Scheme, given the fundamental importance of providing to those intended to be bound a clear and sufficient explanation to enable them to determine what is proposed, the potential effect upon them, whether to attend the meeting, and how they should vote. I have borne especially in mind, and consider it appropriate to emphasise, that in considering the adequacy of disclosure, the court must have regard to compliance by the proponent company with any applicable disclosure obligations under the general law or, in particular, under the Companies Act or under the Articles of Association. In that regard, the Companies Act 2006 specifically requires, for example, that the explanatory statement must disclose any material interests of the directors, and the effects of those interest on the scheme: see section 897(2) and (3).
91. However, despite the fundamental importance of full and candid disclosure in a reasonable and fair, readily understandable and concise manner sufficient fully to inform the class intended to be bound, I consider that any failure or shortcoming ordinarily (at least) does not raise a jurisdictional impediment, though it is highly relevant in the context of the exercise of my discretion. I therefore defer my consideration of this issue until after I have explained briefly the factors relevant to the exercise of my discretion.

Discretion in exercising jurisdiction

92. Even if satisfied as to its jurisdiction, the discretion of the court must, of course, be exercised judicially and in accordance with legal principles which have been honed over a number of years.
93. The criteria to be satisfied at the sanction stage court are set out in in the following extract from *Buckley on the Companies Acts* at [219]-[232]:

“Sanction of the court

Once the meetings have approved the scheme, the sanction of the court must be sought. The sanction of the court is not a mere formality. Although the court has an unfettered discretion as to whether or not to sanction the scheme, it is likely to do so, as long as: (1) the provisions of the statute have been complied with; (2) the class was fairly represented by those who attended the meeting and the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (3) the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

...

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting. The court will decline to sanction the scheme if the class has not been properly convened and properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme which had

been unobserved when it had been approved by members or creditors, but will otherwise be slow to differ from the meeting.”

94. More recently, Morgan J in *TDG Plc* [2009] 1 BCLC 445 identified and drew together four matters which required the specific attention of the court. These are:
- (1) First, that the court must be satisfied, as I am satisfied, that the provisions of the statute have been complied with.
 - (2) Secondly, the court must be satisfied that the class of shareholders, subject to the court meeting, was fairly represented by those who attended the meeting and the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.
 - (3) Thirdly, its terms and effect are such that an intelligent and honest person, a member of the class concerned and acting in respect of his own interests might reasonably approve the scheme.
 - (4) Fourthly, there must be no what is called “blot” on the scheme. A “blot” is generally thought to refer to some technical or legal defect in the scheme, for example, that it does not work according to its terms or would infringe some provision of the law.
95. My principal concerns in respect of these matters, as to which (subject to an issue in respect to certain consumer rights also addressed later) I am otherwise satisfied, once again relate to the CLNs and the related issues already touched upon as to (a) whether the prospect of a premium may have fundamentally skewed the approach of the director shareholders (in both capacities) so as, even if not so as to make it impossible for them to consult together with other shareholders (which would fracture the class) (see paragraph [87] above) nevertheless to undermine the weight to be given to their support when in its discretion the Court considers whether to give its sanction and (b) whether the disclosure of their interest in the CLNs in the Explanatory Statement was adequate and if not, (c) what should now be done. Additional piquancy is given to these points given that a substantial proportion (according to the evidence, some 40%) of shareholders are “underwater” in the sense that the price they paid for their shares materially exceeds the bid price.
96. As to (a) in the preceding paragraph [95], for broadly the same reason that I do not think the interest and additional benefit to CLN holders that their contractual entitlement to payment of a premium confers fractures the single class, I have concluded that their perspective is not so different as to cause me to discount their support; and I do not consider that there is evidence to suggest that any person voting in favour of the Scheme at the Court Meeting was promoting interests adverse to those of the class of Scheme Shareholders.
97. I note, however, that in any event, the evidence of Mr Robinson shows that if the voting results at the Court Meeting are adjusted to remove all votes relating to those who participated in the CLNs, 84.39% of the Scheme Shares voted would have been voted for the Scheme and 81.82% of Shareholders who voted would have voted for the Scheme,

so that the Scheme would still have passed with the statutorily required majorities. If the votes of persons related to CLN participants are also removed, the relevant percentages would be 83.78% and 80.72% respectively. I take further comfort from the fact that (again according to Mr Robinson's witness statement) of the known 77 "underwater" shareholders who voted, 59 (or 77%) voted in favour of the Scheme.

98. However, I have found more problematic the issue as to sufficiency of disclosure referred to in (b) in paragraph [95] above. In short, I continue to consider, as I did at the original sanction hearing, that the disclosure was deficient in form and substance, so that the real question is whether and how the position can be rectified so as to enable the Scheme to be sanctioned.
99. As I acknowledged at both the original and at the adjourned hearing, my approach has in part been informed by the simple, and perhaps personal, point that although I read the initial skeleton argument carefully, and considered also the body of the Explanatory Statement (as Counsel had suggested) the reference in the latter (only) to "*the interests of the Lake Directors in the share capital of The Lakes*" under the heading "*The Lakes directors and the effect of the Scheme on their interests*" (on page 23 of the Explanatory Statement) did not, in point of fact, alert me to their holdings of CLNs or their potential significance. I accept that there was a reference to the "*details of the interest...in the share capital*" being "*as set out in paragraph 3.5 of Part VII (Additional Information) of this document*", but I took it that the details would relate to shares and not debt instruments. Even had I taken up the reference and gone to paragraph 3.5.9 (on page 55 of the Explanatory Statement) which sets out the CLN interests, the "make-whole provisions" were not mentioned there (though it is fair to acknowledge that there were references to those provisions in an earlier section), and I think there is a real risk that readers would not have appreciated their import from the referenced section. Counsel's skeleton argument did not mention the CLNs at all, though I must record and emphasise that subsequently (at the original hearing) Mr Horan, in his assiduous oral presentation, did direct my attention to the CLNs and their relevant "make-whole" provisions.
100. Thus, although I should not be taken to be suggesting that there was a breach of section 897 of the Companies Act 2006, and I accept that the directors' interests were referentially disclosed, they were not properly and sufficiently highlighted in the body of the Explanatory Statement, and their disclosure was insufficient and incomplete.
101. Mr Martin Moore KC, who appeared at the adjourned hearing for the bidder, sought in his skeleton argument to reassure me that "the format of the disclosure of the Directors' interest in the Scheme Circular was, in [his] experience, entirely conventional, he accepted that "it was right of the Court to raise questions". I took note of and was grateful for the latter, but I was not reassured by the reference to the "entirely conventional" format.
102. The standard is not formalistic; the requirement is for clear and sufficient disclosure, in plain language and in a context which a reasonably careful addressee of the Explanatory Statement could be expected or specifically alerted to read, of matters which might reasonably affect their decision whether to attend and which way to vote. The adequacy of disclosure is not a matter of convention: it must be tested according to the particular circumstances.

103. I do not consider that the standard was sufficiently achieved in this case: the wording in the body of the Explanatory Statement was deficient in referring only to interest in share capital, readers were not properly or sufficiently alerted to the rather different details later provided as to their other interests, and the further details to which reference was made did not explain or even set out or describe the relevant “make whole” and premium provisions, still less their import.

Whether a further meeting should be directed

104. As noted in ‘*Schemes of Arrangement*’ 2nd ed., *Jennifer Payne* (at page 39), in many, if not most, cases, if the members or creditors (according to the nature of the scheme) have been provided with materially inaccurate, incomplete or otherwise inadequate information, and this has not been revised, the court will not be able to place any reliance upon, or give effect to, an affirmative vote at a class meeting and may well withhold sanction. Put another way, in considering schemes of arrangement the court is not in a position to make a commercial assessment; the Court has repeatedly noted that shareholders acting on full information are normally the best judge of their commercial interests and best placed to decide where their interests lie (see *Re English, Scottish and Australian Chartered Bank Limited* [1893] 3 Ch 385 at pp 408-409 *per* Lindley LJ and also *Re Telewest Communications plc (No.2)* [2005] 1 BCLC 772 at [20] – [22] *per* David Richards J (as he then was)). Rather, the Court’s role is to satisfy itself that any jurisdictional pre-conditions are satisfied, and then as to the fairness and reasonableness of the views of the majority as expressed at duly constituted class meetings. If the majority have not been informed properly, the Court cannot safely rely on them.
105. However, the courts have been prepared, I would say exceptionally, to apply a more relaxed standard to enable salvage of the scheme where the judge is persuaded that in all probability no reasonable member or creditor would have changed their decision on the scheme had the information been properly and sufficiently disclosed.
106. Mr Horan and Mr Moore referred me in this context to two exemplifying decisions, (a) *Re Heron International NV and others* [1994] 1 BCLC 667, and (b) *Re Minster Assets plc* [1985] BCLC 200. In *Heron*, the Court had further evidence put before it by the scheme company in response to criticism from opposing creditors about the inadequacy of the information in the scheme circular. The Court, which concluded that there was no good reason to depart from the views of the statutory majority and ultimately gave its sanction without requiring a further meeting, observed (at 672-673) that:

“The extent of the information required to be supplied depends on the facts of the particular case. On one or two points the information provided can fairly be criticised but (subject to what I shall say) in each instance, when firmly challenged and further information was produced in affidavit evidence, the further information seems to me not to be information which would have caused any assenting creditor to have changed his view or any abstaining creditor to have voted against the schemes.”

107. In *Re Minster Assets plc*, the Court considered a change in directors’ interests following the publication of the circular. The Court found that:

“Those were transactions which, had they been specifically disclosed in a separate circular to shareholders before the meeting, could not have changed the mind of a reasonable shareholder in considering the commendation made by the directors in respect of all their then holdings in the circular of 14 September and could not have led to any reasonable shareholder taking a different view from those which were in fact taken.” (at page 201)

108. Counsel urged me to follow these examples. Mr Horan:

“respectfully submitted that little is served by holding another meeting. Given the evidence, including the new information since the Scheme Document in April proposed for the draft supplementary circular as to the bleak prospects for the Company and the shareholders if the Scheme does not proceed, and the strong earlier vote, it can reasonably be inferred that no assenting shareholder at the Court Meeting would change their view at a further meeting nor would any abstaining shareholder now vote against the Scheme. In fact, it is submitted that it is likely that dissenting shareholders would change their views and now vote in favour of the Scheme.”

109. Initially, I was minded nevertheless to require a further meeting, although I would have been prepared to allow existing proxies to stand unless changed and to require only 14 days' notice. However, in the particular circumstances of this case, I have in the end concluded that a further meeting would in all probability be an act of supererogation, with a real risk of confusing more than it clarified, or worse, resulting in torpor amongst shareholders who may well not understand why they are being asked to do again what they may consider they have done already and may not be motivated to do so. Furthermore, the evidence does suggest (and as Mr Moore submitted) that if the acquisition by Nyetimber does not proceed the Company faces a very uncertain future and current shareholders face at best a massive dilution and at worst the loss of their entire investment.

110. Accordingly, I have decided, in the particular circumstances not to require another meeting, and that I may accept the result of the class meeting which was strongly in favour of the Scheme proposals.

111. I also confirm, for the avoidance of any doubt, that none of the above discussion seems to me to affect the validity of the General Meeting, which appears validly to have been held in accordance with the Companies Act 2006 and the Company's Articles.

Consumer Rights

112. I have mentioned previously that the Company has, over time, made certain offers or promises to certain persons regarding discounts on products or tours of the distillery. The entitlement to these discounts and benefits has not been uniformly applied by the Company. These consumer rights are outlined in evidence.

113. Some of these consumer rights have fallen away over time. To the extent that they continue in relation to some Scheme Shareholders is because they were granted in tandem with investment by those shareholders in the Company and they have not expired. This

is similarly the case with some Crowdcube investors, whose investment was indirect, through Crowdcube.

114. In each case, the consumer rights arose because of the subscription for shares, or the indirect subscription via Crowdcube. However, the important point for present purposes is that the rights that arose, such as they are, are not tied to the holding of shares (directly or indirectly) but to the fact of having invested money in the Company. Thus, the acquisition of shares by Bidco does not change those consumer rights, such as they are, which are personal to the original investors, and non-transferable. They are not considered to be rights attaching to the Scheme Shares nor are they considered to have been altered because of the Scheme.

No blot or valid objection

115. Lastly, I have considered the various objections which I do not think I need to rehearse because they do not go to the matters truly in issue and were satisfactorily answered at the Court Meeting and/or in correspondence.
116. Further, I am satisfied that there is no blot on the Scheme, having considered both the Scheme and the explanatory statement as explained by Mr Horan.

Conclusion and general remarks

117. Being satisfied that the jurisdictional requirements have been fulfilled, and that there is no blot or other impediment sufficient, in the light of all the evidence, to undermine the view of the majority or otherwise cause me to withhold approval in the exercise of my discretion, I therefore determined to sanction the scheme.
118. I consider, however, that this matter should serve to re-emphasise certain points of more general importance:
- (1) The scheme jurisdiction is salutary; but its exercise may result in compulsion in respect of a shareholder's personal property (which their shares represent) or a creditors' contractual rights and it must be exercised with care.
 - (2) The fact that the use of the scheme jurisdiction to facilitate takeovers has become popular and that many takeover or transfer schemes raise no material issues out of the ordinary and have been sanctioned without difficulty may recently have encouraged the notion that the court process is something of a ritual. That is not so: each must be carefully considered. It is frequently repeated that the Court acts judicially and not ministerially: this is more than an incantation, and must be seen to be so.
 - (3) To enable the Court to give focused consideration, and given that most sanction hearings are *ex parte*, it is important that the skeleton argument in support of the scheme should alert the Court to any difficulties or wrinkles which may require further thought or explanation. Issues as to particular benefits to result from arrangements outside the scheme, even if submitted not to be part of it or ancillary

to it, should, except in the plainest case of sufficiency of existing disclosure, be highlighted, and the adequacy of disclosure should be addressed specifically.

- (4) As I have stated, convention, whether in regard to substance or to format, may be a guide but it is not the test. Disclosure, both in terms of its format and its content, must be specific to, and fair and reasonable in, the specific context of the particular scheme.
- (5) Any deficiency in disclosure is of fundamental importance because it goes directly to the reliance that may fairly be placed on the views expressed by the majority by which the Court necessarily has to be guided. Save in an exceptional case such as I have been persuaded this is, such a deficiency, if material, will most usually result in sanction being refused, at least pending a further meeting after full and proper further disclosure.
