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

The Rolls Building
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Fetter Lane, London EC4A 1NL

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**Before**:

**THE HONOURABLE MR JUSTICE RICHARD SMITH**

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**IN THE MATTER OF OIC RUN-OFF LIMITED**

**AND IN THE MATTER OF THE LONDON AND OVERSEAS INSURANCE COMPANY LIMITED**

**AND IN THE MATTER OF THE COMPANIES ACT 2006**

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**DANIEL BAYFIELD KC** and **RYAN PERKINS** for the **Applicants**

**MARTIN MOORE KC** for **Nationale-Nederlanden Overseas Finance Investment Company**

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# APPROVED JUDGMENT



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**MR JUSTICE RICHARD SMITH:**

## INTRODUCTION

1. This morning I heard an application by OIC Run-Off Limited (**OIC**) and the London and Overseas Insurance Company Limited (**L&O**, together the **Companies**), for permission for each of them to convene a single meeting of creditors to consider and, if those creditors think fit, to approve, two cross-conditional schemes of arrangement (**Final Schemes**) with those creditors (**Final Scheme Creditors**) under Part 26 of the Companies Act 2006.

2. The Companies are insurance companies. They ceased underwriting and entered run-off in 1992. Two sets of cross-conditional schemes of arrangements between the Companies and their policyholders have been previously sanctioned by the Court, the first in 1997, the second in 2016. The Companies' affairs are under the control of scheme administrators from the accountancy firm PwC (**Scheme Administrators**).

3. The Final Schemes are part of a wider set of proposals advanced by the Scheme Administrators to bring an end to the process by which the Companies' assets have been distributed amongst their creditors. The Final Scheme Creditors comprise a small proportion of the Companies' policyholders who have parallel claims against both companies. The approval of the Final Schemes by policyholders and, if sanctioned, the Court, will crystallise certain long-tail future and contingent claims held by the Final Scheme Creditors under a small number of policies, enabling them to share in an enhanced pool of assets which would not otherwise be available to them.

4. In addition to the Companies' skeleton argument, I have read the witness statement of Mr Dan Schwarzmann of PwC, the draft Explanatory Statement, the Practice Statement letter and the notice to Final Scheme Creditors dated 22 November 2024 as well as the Scheme itself. I have also received a short skeleton argument from Nationale-Nederlanden Overseas Finance and Investment Company (**NNOFIC**) and I am grateful to the author, Mr Moore KC, for attending today to assist the Court.

## BACKGROUND

5. The background to the matter is set out in Mr Schwarzmann's statement from which it is apparent that there is quite some history and complexity to it. L&O was incorporated in 1893, OIC in 1931, both companies writing a range of risks encompassing marine, aviation, property damage and healthcare risks, most policyholders being corporate insureds. L&O is a subsidiary of OIC. OIC is beneficially owned by NNOFIC. NNOFIC is a subsidiary of NN Group NV (**NN**), one of the largest insurance companies in the Netherlands. NN originally acquired the majority of OIC's share capital in 1970.

6. The Companies were both members of a trade association called the Institute of London Underwriters (**ILU**). Membership of the ILU was confined to companies underwriting marine, aviation or transport insurance business in London. Though not a formal condition, where the ILU member company was a subsidiary within a group of companies, the ILU would usually seek to obtain a parent company guarantee of the liabilities of that member company in favour of policyholders with policies signed and issued through the ILU on that member company's behalf. So, in this case:-

(i) When OIC acquired L&O in March 1969, OIC provided a parent company guarantee in respect of sums due both to policyholders of the ILU and to the ILU in the event of a default by L&O;

(ii) When NN acquired OIC in August 1970, NN provided a parent company guarantee in respect of sums due to policyholders of the ILU and to the ILU in the event of a default by OIC.

7. Those guarantees are described as the ILU guarantees, the policies benefitting from the ILU guarantees enjoying a special status in comparison to the Companies' other policies.

8. In the 1970s, the Treasury required the companies to execute cross-guarantees of their liabilities to policyholders such that any policyholder of OIC has an identical guarantee claim against L&O and vice versa.

9. By the late 1980s, continuing into the early 1990s, the Companies began to experience financial difficulties, caused in part by a continuing rise in pollution, mesothelioma and other asbestos-related claims by US policyholders and, to a lesser extent, by the Companies' exposure to losses arising from one-off catastrophic events.

10. In 1992, the Companies ceased underwriting and entered run-off, entering provisional liquidation two years later. A dispute apparently arose as to whether the ILU guarantees were valid and binding, subsequently resolved by a new agreement executed by NN on 20 October 1994 which replaced and superseded the ILU guarantees (**1994 Agreement**).

11. Under the 1994 Agreement, NN agreed to establish a letter of credit (**Letter of Credit**) to pay any liabilities arising under insurance and re-insurance policies

benefitting from the parent company guarantees, limited to those policies with an inception date on or after 20 March 1969 in respect of L&O and on or after 28 August 1970 in respect of OIC (**Qualifying ILU Policies**). As a result, the Qualifying ILU Policies benefited from security not available to the Companies' other policyholders. However, the Letter of Credit was time limited, with no payments required to be made for claims under Qualifying ILU Policies notified after 31 December 2035.

12. The 1994 agreement has since been superseded by the Claims Payment Loan Agreement entered into on 30 June 1995 (**CPLA**), with NNOFIC rather than NN now being a counterparty. The CPLA has been amended and restated and a revised version is currently in force but the essence of the agreement is that NNOFIC agreed to provide the Companies with funding of up to $450 million to pay claims of Qualifying ILU Policyholders notified by 31 December 2035. Again, the Qualifying ILU Policyholders benefit from security not available to other insureds. As at 31 December 2023, the Companies had used $228 million of that funding under the CPLA to pay Qualifying ILU Policyholders claims. It is said that the full facility limit of $450 million will not be reached.

13. The provisional liquidators of the Companies determined that it would be appropriate to deal with the Companies' insolvency and run-off by way of two cross-conditional schemes of arrangement (**Original Schemes**). The Original Schemes were sanctioned by the Court and became effective on 7 March 1997, with the provisional liquidators then being discharged and the related winding-up petition against the Companies was dismissed. The Original Schemes were designed to enable the insurance businesses of the Companies to run off over time, with the creditors to be paid a percentage of

their claims. The Scheme Administrators were responsible for calculating the appropriate payment percentage from time to time.

14. The Original Schemes operated successfully for many years but, 17 years or so after they were sanctioned, the Scheme Administrators concluded that a new approach was desirable and they proposed new cross-conditional schemes of arrangement (**Amending Schemes**) to crystallise the claims against the Companies, as those schemes were subsequently sanctioned by this Court on 14 January 2016. The background to the Amending Schemes was that the majority of the Companies' liabilities had been quantified and agreed by 2016, with those remaining being mostly long-tail, likely taking many years to be agreed. However, with the large number of remaining creditors having relatively low claim values, the Original Schemes no longer represented a cost effective method for supporting further increases in the payment percentage.

15. The purpose of the Amending Schemes was to accelerate distribution of assets and to increase returns to creditors by crystallising and quantifying as many of the remaining claims as possible and so, with certain exceptions, the Amending Schemes required all claims to be submitted by 12 September 2016 (**Amending Schemes Bar Date**). Those claims would then be quantified in accordance with a claims determination procedure.

16. Importantly for present purposes, Qualifying ILU Policyholders were entitled to opt out of the key provisions of the Amending Schemes, including the Amending Schemes Bar Date and the quantification procedure. Those who did make such an election are described as the **Opt-Out Qualifying ILU Policyholders** and they are entitled to have their claims paid in the normal course in accordance with the Original

Schemes. To the extent they notify their claims by 31 December 2035, those claims will be paid in full out of the funding provided by NNOFIC under CPLA. The rationale for the opt-out reflects the entitlement of Qualifying ILU Policyholders to recover the entire value of their agreed claim(s) notified by 31 December 2035.

17. As a result of the Amending Schemes, the vast majority of claims have now been quantified, such quantified claimants known as General Scheme Creditors, entitled to receive a payment percentage currently standing at 76%. A final, small uplift of the payment percentage will eventually be announced and a final dividend to General Scheme Creditors will be declared once certain issues, including tax issues, have been resolved.

18. To opt out of the Amending Schemes, the Qualifying ILU Policyholders had to submit an opt-out form prior to the Amending Schemes Bar Date. A total of 214 forms were received but only 144 of those creditors have provided evidence that they held a qualifying ILU policy. The remaining 70 have failed to do so (**Unsupported Opt-Outs**). Since the Amending Schemes Bar Date, the Scheme Administrators have initiated contact with the 70 Unsupported Opt-Outs on various occasions to seek evidence of a Qualifying ILU Policy. The run-off manager has likewise sought to identify any Qualifying ILU Policies associated with them, albeit none has been. Nevertheless, those Unsupported Opt-Outs have still been given notice of the Final Schemes under consideration today and they will be given an opportunity to provide evidence that they did indeed hold a Qualifying ILU Policy by the **Final Schemes Bar Date**.

19. The Opt-Out Qualifying ILU Policyholders are mainly US Corporates, with any claims they might have likely to relate to asbestosis or pollution losses. Only a single

claim has been notified by an Opt-Out Qualifying ILU Policyholder in the seven years since the Amending Schemes Bar Date. To the extent that the Opt-Out Qualifying ILU Policyholders notify any claims by 31 December 2035, such claims will be paid in full out of the funding provided by NNOFIC. To the extent that the Opt-Out Qualifying ILU Policyholders notify any claims after that date, such claims can only be met out of the assets of the Companies in accordance with the Original Schemes. The Scheme Administrators consider that fewer than 20 Opt-Out Qualifying ILU Policyholder claims are likely to be notified after that date, at which point it is anticipated that the Companies will have assets to the tune of US$265,000 available to pay any such claims. That residual asset figure has been reviewed and confirmed to be reasonable by the Scheme Adjudicator.

## The Final Schemes

20. With that detailed background, I now turn to what is actually proposed by the Final Schemes. As to that, the only creditors whose rights will be affected by the Final Schemes are the Opt-Out Qualifying ILU Policyholders. The Final Schemes will only compromise any claim of the Final Scheme Creditors that are or would otherwise be notified after 31 December 2035 (**Final Scheme Prospective Liabilities**). Those claims would not benefit from NNOFIC funding under CPLA although, in light of the cross-guarantee arrangements between the Companies, the Final Scheme Creditors would have parallel claims against both Companies in identical amounts. The Final Schemes are designed to provide a mechanism for crystallising and paying the Final Scheme Prospective Liabilities, the basic terms being that a sum of $2 million will be made available to pay those liabilities consisting of whatever is left in the Companies to pay those liabilities after 31 December 2035, expected, as I have said, to be

$265,000 plus the difference between that amount and $2 million to be contributed by NNOFIC. So if, as expected, the Companies' remaining assets as at 31 December 2035 do amount to $265,000 NNOFIC would contribute $1.735 million. NNOFIC has also agreed to contribute an additional sum of $1 million to pay general expenses.

21. Under the Final Schemes, it is proposed that the Final Scheme Prospective Liabilities will be established in the following way: between 1 July 2035 and the **Final Schemes Bar Date** of 31 December 2035, Final Scheme Creditors will be entitled to assert that they expect to notify valid claims against the Companies after the latter date. A mere assertion to that effect will not be sufficient and the Final Scheme Creditor will be required to obtain a statement from a qualified actuary stating that the Final Scheme Creditor can justifiably assert that they reasonably expect to submit valid claims against the Companies after 31 December 2035. That actuarial confirmation will not require any Final Scheme Creditor to value its prospective liability. All Final Scheme Creditors who submit a valid actuarial certificate will be entitled to receive an equal share of the Final Scheme assets of $2 million (**Final Scheme Payment**). The quantum of the Final Scheme Payment will depend solely on the *number* of Final Scheme Creditors who submit such a valid actuarial certificate by the Final Schemes Bar Date and not the *quantum* of their expected claims.

22. It is said that the Final Schemes are likely to produce a better outcome for the Final Scheme Creditors than will exist under the present status quo, largely as a consequence of additional contributions to be made by NNOFIC. The Final Schemes provide a mechanism to receive an accelerated claim against a larger pool of assets than would otherwise be available and, from NNOFIC's perspective, the incentive or commercial benefit of making these contributions is to reduce the administrative costs

of dealing with the relevant prospective liabilities between 2036 and 2060 which would apparently amount to approximately $3.2-5.5 million. Those future costs would, in economic terms, be borne by NNOFIC because of its pre-funding of them, with any unused surplus to be returned to NNOFIC under the relevant provisions of the Amending Schemes. In this way, the contributions to be made by NNOFIC under the Final Schemes should save money for NNOFIC in the long run. At the same time, the contribution will produce a better outcome for the Final Scheme Creditors who, in economic terms, will receive a substantial part of the administrative costs that would otherwise have been incurred absent the Final Schemes.

23. Finally, I should also say that the Final Schemes are part of a broader strategy by the Scheme Administrators to bring to an end the entire process of winding down the Companies' affairs by as early as 2040 (rather than in approximately 2060), with the Companies' tax position to be resolved and a final dividend to be paid to the General Scheme Creditors in 2037 or 2038 rather than much later. That final dividend to the General Scheme Creditors may be accelerated yet further by a new agreement involving NNOFIC and the General Scheme Creditors. As to this, an offer will be made to the General Scheme Creditors (**Early Final Dividend Offer**) in terms that will allow accepting parties to receive a final dividend payment in 2025 of an additional 4% over and above the 76% already declared. That will be in full and final compromise of the claims of those parties that accept the offer. The implementation of the Early Final Dividend Offer is conditional on the sanction of the Final Schemes but the Final Schemes are not conditional on the implementation of the Early Final Dividend Offer. The terms of that dividend offer have been explained in the papers supporting the application before me, although it is said that these details are not material for present purposes since they do not impact the position of the Final

Scheme Creditors, the Court's jurisdiction to sanction the Final Schemes or class composition and they create no 'roadblock'. At most, the details of the Early Final Dividend offer might have some indirect relevance to the fairness of the Final Schemes but that will be for consideration at any sanction hearing.

24. I should also say that, in addition to being referred in the evidence to the support of the Companies' Creditors' Committee for permission to convene the Final Schemes creditor meetings as sought on the application before me, I was also shown today three letters, one from the Prudential Regulation Authority, one from the Financial Authority and one from the ILU, all of them either supporting, or indicating no objection to, the convening of those meetings.

**The convening hearing**

25. Turning to the application before me, s.896(1) of the Companies Act 2006 provides that:-

> "*The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.*"

26. The procedure for a convening hearing is governed by the Chancellor's Practice Statement from June 2020. The Court's function today is to consider first whether the Final Scheme Creditors have been given sufficient notice of the convening hearing; second, whether there is a jurisdictional roadblock that would prevent the Court from sanctioning the Final Schemes and; third, whether the class meetings proposed by the Companies are properly constituted. The function of the court at this convening

hearing is not to consider the merits or the fairness of the proposed scheme which would arise for consideration at the sanction hearing, if approved by the relevant creditors (see *Re Telewest Communications Plc* [2004] BCC 342 at [14]).

**Notice of convening hearing**

27. In terms of notice of the convening hearing, the Practice Statement contemplates that the scheme creditors will be given adequate notice. The appropriate period is a fact sensitive matter, depending on the complexity of the scheme, the urgency of the company's financial position, the sophistication of the relevant scheme creditors, the extent of prior consultation with those creditors and other similar matters (see *Re Selecta Finance UK Ltd* [2020] EWHC 2689 (Ch) at [37]-[41]).

28. In this case, Mr Schwarzmann explains that the Practice Statement letter was circulated to the Final Scheme Creditors on 28 May 2024, the Scheme Administrators have contact details for all 214 policyholders that are potentially Final Scheme Creditors, being those entities which previously submitted an opt-out form prior to the Amending Schemes Bar Date, with a small number of representatives acting for a large number of them making that notification process somewhat simpler.

29. In some cases, initial e-mails resulted in delivery failure notification and certain postal deliveries failed as well. Where that occurred, the relevant Final Scheme Creditors were contacted through alternative addresses identified by the Scheme Administrators and, where a creditor did not acknowledge receipt, follow-up communications were sent. Ultimately, the Scheme Administrators had direct contact with, or confirmation of successful delivery from, 208 of the 214 potential Final Scheme Creditors. Five of the remaining six entities were dissolved corporations and one was uncontactable by e-mail (and the postal letter undeliverable by courier), that one potential creditor

being a timber company based in Tennessee, the Scheme Administrators having come to the conclusion that there is nothing they can realistically do to make contact, albeit they have not received any evidence that that is, in fact, a Final Scheme Creditor rather being an Unsupported Opt-Out. The Companies also point out in that connection to there being no absolute requirement for every member the class to be notified and that is a matter for the Court at the sanction hearing to consider whether the meetings were properly held (see *Re Rhythmone plc* [2019] EWHC 967 (Ch) at [15]).

30. The original date proposed for the convening hearing was in July 2024 but that was postponed to allow time for further negotiations with NNOFIC and other stakeholders in relation to the Early Final Dividend Offer, the Scheme Administrators considering that the substantive commercial terms of that offer should be finalised and agreed prior to circulating the Explanatory Statement for the Final Schemes so as to give as much clarity and transparency as possible to the Final Scheme Creditors.

31. Agreement on the commercial terms having been reached, the Companies issued notice to all potential Final Scheme Creditors on 22 November 2024, explaining why there had been delay and identifying the revised date of this convening hearing, the Companies using the same contact details as for the Practice Statement letter.

32. The Companies therefore say that the period of notice that they have given has been very substantial and far longer than usual, with the Scheme Administrators having taken the extensive steps they have to ensure that the Final Scheme Creditors were properly notified of the hearing. Notwithstanding such notification, no Final Scheme Creditor has indicated that it wishes to attend the convening hearing and none has attended today.

33. In all the circumstances that have been described to me and explained in the evidence, I am satisfied that adequate notice of the convening meeting has been given to Final Scheme Creditors.

## Jurisdiction

34. At the convening hearing, the court may indicate whether it is obvious that it has no jurisdiction to sanction the scheme or whether there are other factors which would unquestionably lead the court to refuse to exercise its discretion to sanction the schemes (see *Re Noble Group Ltd* [2019] BCC 349). As to this, the Companies say they are both incorporated in England and they are companies as defined in section 859(2)(b) of the Companies Act 2006. Indeed, they have already been subject to prior schemes approved by this Court.

35. It is also said that the Final Scheme Creditors are creditors of both Companies, for the reasons explained and that the Final Schemes involve the requisite element of give and take between the Companies and the Final Scheme Creditors such as to constitute a compromise or arrangement within Part 26 of the Companies Act 2006, the Final Scheme Creditors being eligible to share in a significantly increased pool of assets in return for the effective commutation of their claims under their policies.

36. I accept that there is no obvious impediment to sanction in this case.

## Class composition

37. As for class composition, the basic rule is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see *Sovereign Life Assurance v Dodd* [1892] 2QB 573 at 583 and the summary of the key principles in *Re Gategroup*

*Guarantee Ltd* [2021] BCC 549 at 183). The Companies also point to this court's prior statements to the effect that the unnecessary proliferation of classes should be avoided (see, for example, *Re Noble Group Ltd* [2019] BCC 349 at 87-88).

38. In this case, I accept that the Final Scheme Creditors should vote in a single class, one for each Final Scheme since they currently have the same existing rights and will have the same rights under the Final Schemes. The comparator to the Final Schemes is the continued entitlement of the Final Scheme Creditors to notify claims after 31 December 2035 and their continuing eligibility to share in whatever assets might then be available. As noted, it is expected that the available assets would amount to approximately $265,000, far less than the $2 million available for distribution under the Final Schemes. All the Final Scheme Creditors would have the same rights in the comparator, just as they will under the Final Schemes.

39. Finally, the Companies say that there are no fees or special benefits available to any Final Scheme Creditors going beyond the terms of the Final Schemes themselves and, as such, identical rights are conferred on them.

**Notice, timing and conduct of meetings**

40. As for the proposed directions for the summoning and conduct of the meetings, it is proposed that these will take place at 3pm on 24 April 2025 remotely via video conference because the vast majority of the Final Scheme Creditors are based in the US and are very unlikely to travel to London to vote. I accept that remote meetings do not present an issue here (see *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch) at [42]-[43]) and that the timing is appropriate as well, given the time difference with the US in particular. If there are any technical difficulties or otherwise with the meeting, they can be identified at the sanction hearing.

41. I also accept that the proposed date of 24 April 2025 will give Final Scheme Creditors ample time to review the Explanatory Statement and then to certify the voting values of their claims. As far as that is concerned, and as was explained to me in further detail in submissions today, the same approach taken for the Amending Schemes will be used again at the forthcoming meeting. Each Final Scheme Creditor will be required to estimate the value of their prospective liabilities in accordance with one of the methods indicated in the Amending Schemes' estimation guidelines, with a short explanation of the rationale for the estimate to be provided by reference to that individual creditor's policy exposure and claims experience hitherto. Any such estimation received by the Scheme Administrators at or before the meeting will be subject to their approval and, where agreement cannot be reached, the matter will be referred to a vote assessor for inclusion in his report on the reasonableness of the voting values for submission to the court. Any issue relating to such voting will be addressed at the sanction hearing which I understand is presently listed to be heard on 30 April 2025. I am also satisfied that the proposed arrangements as have been outlined are satisfactory.

## Conclusion

42. In conclusion, for the reasons given above, I am satisfied that it is appropriate for a single meeting of the Final Scheme Creditors to be convened in respect of each of the Final Schemes. I therefore make an order in terms of the draft convening orders that have been provided.

43. I should also say that I was specifically taken through the terms of the draft orders today and one provision in particular was specifically drawn to my attention, namely paragraph 18, requiring anyone wishing to inspect the court file in relation to this

matter to do so having made an application on notice. Given the financially sensitive matters described in the evidence which I have reviewed for the purpose of this convening hearing, I am satisfied that such an order is appropriate. It does not preclude such inspection; it simply means that the Companies are put on notice of a request for inspection.

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