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Case No: 7492 OF 2008/CR-2008-000012 CR-2018-003713

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

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

Date: 27th July 2018

Before:

# MR JUSTICE HILDYARD

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Between :

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE COMPANIES ACT 2006

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MR. WILLIAM TROWER QC, MR. DANIEL BAYFIELD QC and MR. RYAN PERKINS appeared for the Administrators of Lehman Brothers International (Europe) (In Administration).

MR. ROBIN DICKER QC, MR. RICHARD FISHER and HENRY PHILLIPS appeared for the Senior Creditor Group.

MR. DAVID ALLISON QC and MR. ADAM AL-ATTAR appeared for Wentworth.

MR. PETER ARDEN QC and MS. LOUISE HUTTON appeared for LB Holdings Intermediate 2 Limited (In Administration) and its Administrators.

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Hearing dates: 13 & 15 & 18 June 2018

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HILDYARD

**Mr Justice Hildyard** :

## Part A: the purpose and scope of this judgment, and the broad context of the application

1. The ultimate question considered in this judgment is whether the Court should sanction a scheme of arrangement between Lehman Brothers International (Europe) (in administration) ("LBIE") and certain of its creditors pursuant to Part 26 of the Companies Act 2006 (the "CA 2006"). The Scheme has been proposed by LBIE's Administrators pursuant to section 896(2)(d) of the CA 2006, which empowers an administrator to propose a scheme of arrangement on behalf of the company.

2. This is my second judgment in this matter. I have already provided, on 15 June 2018, a short ex tempore judgment sanctioning the Scheme. I considered that necessary in order to explain my decision both to the Court of Appeal given the then imminent hearing before it of one of the proceedings compromised by the Scheme, and to the US Bankruptcy Court, given the Administrators' stated intention to apply on 19 June 2018 for recognition of the Scheme as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code. However, as I indicated at the time, and with the encouragement of the parties, I have also thought it right, in the context of an administration which has been in being for nearly a decade and has involved multiple proceedings of very considerable value and complexity, to provide an additional full judgment elaborating my reasoning. I had hoped to provide this before the Scheme became effective; but it proved a more time-consuming task. This judgment should be read with the fact in mind that the Scheme has already come into effect; and any inappropriate use of tenses which abides should impliedly be corrected.

3. Turning to the substance of the matter, the basic purpose of the Scheme is to compromise various complex legal proceedings so as to facilitate the distribution of the surplus in LBIE's estate (and, in due course, to bring the administration to an end). The Administrators present the Scheme as providing the only realistic way of enabling the distribution of the surplus in LBIE's estate without years of further
litigation.

4. LBIE, an unlimited company incorporated in England and Wales, was the Lehman Group's main trading company in Europe. It has been in administration since September 2008. Its immediate holding company, LB Holdings Intermediate 2 Ltd ("LBHI2"), which holds all of the ordinary share in its capital, has been in administration since January 2009. The purpose of each administration was to realise the respective assets of these companies to their best advantage, rather than the preservation of the companies as going concerns. Each has become a distributing administration.

5. The collapse of the Lehman Group in September 2008 shook the

financial world. Its effects are still being felt today. It is perhaps ironic that in the result, at least in the case of LBIE, the process of administration has yielded a very substantial surplus; and that the litigation sought to be resolved by the Scheme, and which is delaying the completion of administration, relates not to deficiencies but to the unusual legal issues relating to surplus assets ("the Surplus").

6. After four dividends to creditors with an aggregate value of 100p in the £ (including distributions to unsecured creditors of approximately £12.6 billion), LBIE's general estate contains liquid assets with a total value of some £6.6 billion. Total estimated future realisations range from approximately £1.2 billion to £1.7 billion. Although not all of these assets will be available (or, in any event, immediately available) for distribution as part of the Surplus, since it is necessary for the Administrators to hold a proportion of the assets in reserve for expenses and any unresolved provable debts, on any view, however, the Surplus is substantial.

7. There has never, at least in this jurisdiction, been an administration like it. The issues to which it has given rise have been correspondingly novel, with very considerable amounts in dispute. There has at every stage been every likelihood that the issues requiring resolution to establish rankings and priorities as to entitlement to the Surplus (in what has become known as the 'Waterfall proceedings') would eventually proceed to the Court of Appeal and onward to the Supreme Court: see, for example, *Re Lehman Brothers International (Europe) ('Waterfall I')* [2017] UKSC 38 (in the Supreme Court); *Re Lehman Brothers International (Europe) (Nos 6 and 7) ('Waterfall IIB')* [2017] EWCA Civ 1462 (in the Court of Appeal) and *In re Lehman Brothers Europe (No. 9) ('Waterfall IIC')* [2017] EWHC 20131 (Ch), which, at the time of my earlier decision, was imminently due to come before the Court of Appeal at a hearing commencing on 3rd July 2018.

8. There are a variety of further proceedings, some still in the foothills, others well on their way up the judicial ladder. I shall return later to describe the matters in issue. For the present it suffices to say that prior to the implementation of the Scheme (a) there remained important issues outstanding (in the sense that they have not finally been determined) which could, according to their resolution, have a fundamental effect on the calculation of creditors' entitlements to the Surplus and (b) until such proceedings ("the Relevant Proceedings") were compromised or finally determined (such that all appellate processes have been exhausted), as I understand they now have been by effect of the Scheme, it would have been impossible for the Administrators to make further substantial progress in the distribution of the Surplus.

9. That is because, if the Administrators were to distribute the Surplus on a basis which was later held to be wrong by the Court of Appeal or the Supreme Court, they would be exposed to the risk of personal liability. That is not a risk that any office-holder can reasonably be expected to bear. Thus, until the Relevant Proceedings are dealt with, the Surplus will remain locked in the estate.

10. Further long delay in the conclusion of the Administration is inherently unsatisfactory. But there is a further reason why delay is damaging to all creditors. Creditors' entitlements to statutory interest (at 8%) ceased once all admitted provable claims had been paid in full (since the underlying debts have been paid), and creditors will not receive any compensation for the period during which the Surplus remains locked in the estate: see *Re Lehman Brothers International (Europe) (Waterfall IIB)* [2018] Bus LR 508 at [43]- [49] (Gloster LJ). In the context of such a substantial Surplus the effect is significant. I can take the following illustrative figures from the Administrators' skeleton argument:

    (1) Assume that the total amount of statutory interest is £5bn.

    (2) Assume that creditors could earn an average total return of 15% over three years on any distributions made to them (representing a return of 5% per annum, without compounding). On that basis, the "time value" of £5bn over three years is £750m.

    (3) If the Surplus is not distributed for three years, creditors would effectively lose £750m (being the assumed "time value" of £5bn), and would not receive any further statutory interest or other compensation for that loss.

    (4) The figure of £750m is a conservative estimate. Nearly all LBIE's investors are sophisticated investment funds or banks, which may be able to earn a significantly higher return than 15% over three years.

11. Any further delays will lead inexorably to a continuing loss of the time value of money, increasing with every day that the Surplus is not distributed. In such circumstances, the Administrators have had to consider whether any viable solution is available. They have concluded that (a) the existing judgments in the Waterfall proceedings already provide the Administrators with sufficient guidance to distribute the Surplus; (b) although any further appellate litigation might, of course, lead to a reversal of the existing judgments (to the benefit of some creditors and the detriment of others), such litigation is not necessary to enable the Administrators to distribute the Surplus; and (c) it is plainly desirable, looking at the interests of creditors as a whole, for the Administrators to pursue a compromise of the Relevant Proceedings so as to facilitate the distribution of the Surplus: and that is what the Scheme has been conceived to achieve.

## Part B: structure of this Judgment and representation of creditors at the Hearing

12. After that introduction, I propose, in assessing whether to sanction the Scheme, largely to follow the sequence of the Administrators' full and helpful skeleton argument, as follows:

    (1) In Part C, I describe in greater detail both (a) the directions so far given by the Court on the basis of which the Administrators propose to proceed (and which the Scheme thus reflects) and
    (b) the Relevant Proceedings;

(2) In Part D, I summarise the relevant terms of the Scheme (largely incorporating for that purpose the summary provided in the Administrators' skeleton argument);

(3) In Part E, I describe the composition of the Scheme Meetings and the voting results at such meetings;

(4) In Part F, I set out the principles which are to be considered by the Court in determining whether to sanction a scheme such as this;

(5) In Part G, I consider an important element in the application of those principles, being what significance the Court should attach to the voting results at the class meetings, and whether there were cross-holdings or other interests such as should reduce or negate reliance on the majority approvals that those votes expressed;

(6) In Part H, I consider the overall fairness of the Scheme, and in that context, objections put forward in respect of it in correspondence;

(7) In Part I, I address questions as to the Court's international jurisdiction in respect of the Scheme and as to recognition internationally of the exercise of jurisdiction.

(8) Part J is my conclusion.

13. In my consideration of the Scheme I have been greatly assisted by Counsel and their respective teams, as follows (in the order in which they made oral submissions):

(1) Mr William Trower QC, Mr Daniel Bayfield QC and Mr Ryan Perkins appeared for the Administrators;

(2) Mr Robin Dicker QC, Mr Richard Fisher and Mr Henry Phillips appeared for supporting creditors, namely Burlington Loan Management Limited, CVI GVF (Lux) Master S.a.r.l, and Hutchinson Investors LLC (collectively, the "Senior Creditor Group");

(3) Mr David Allison QC and Mr Adam Al-Attar appeared for another group of supporting creditors, namely the Wentworth Group, which comprises investment funds controlled by King Street and Elliott, LBHI, and certain SPVs, including, Wentworth Sons Sub-Debt S.à r.l. (the "Subordinated Creditor") and Wentworth Sons Senior Claims S.à r.l.;

(4) Mr Peter Arden QC and Ms Louise Hutton appeared for LBHI2 and its Administrators.

14. The Wentworth Group and the Senior Creditor Group are the two largest creditors in the estate. The Senior Creditor Group holds approximately 40% of all admitted unsubordinated provable debts. The Wentworth Group includes: (i) the Subordinated Creditor (which holds the Sub-Debt); (ii) Wentworth Sons Senior Claims S.à r.l.; (iii) Lehman Brothers Holdings Inc. ("LBHI"); and (iv) a

number of investment funds controlled by King Street and Elliott. The entities referred to in (ii) to (iv) above hold approximately 38% of all admitted unsubordinated provable debts (the "Wentworth Senior Creditors"). The Subordinated Creditor is a member of the Wentworth Group but is not a Wentworth Senior Creditor, and does not hold any claims apart from the Sub-Debt. The shareholder of LBIE (LBHI2) also has an economic interest in the Wentworth Group.

15. It is an important factor to be acknowledged at the outset that, by reason of the quantum of their respective claims, both the Wentworth Group and the Senior Creditor Group hold a blocking position. That being so, it has always been essential that any proposed compromise should have the support of both the Wentworth Group and the Senior Creditor Group. This is an inescapable commercial reality.

16. Contrary to expectations voiced by three opposing creditors at the hearing to determine the composition of the classes to consider and vote upon the Scheme ("the Convening Hearing"), in the event no-one appeared before me at the Sanction Hearing to object to the Scheme. However, one of the creditors who opposed the class composition proposed by the Administrators and directed by the Court at the Convening Hearing, namely Deutsche Bank AG ("Deutsche"), also put forward in correspondence (through Clifford Chance) detailed objections to the sanctioning of the Scheme, though it withdrew its opposition shortly before the Sanction Hearing (by letter dated 11 June 2018). Further, two creditors, namely Goldman Sachs International ("GSI") and SRM Global Master Fund Limited Partnership ("SRM"), raised concerns in correspondence which they asked to be considered and taken into account. SRM's concerns largely mirrored concerns earlier raised by Deutsche. I shall address these concerns later notwithstanding that neither party exercised its right to attend by Counsel at either hearing, and I did not therefore have the benefit of adversarial argument.

## Part C: the directions so far given and the Relevant Proceedings

17. The Waterfall proceedings have been sponsored (as it were) by the Administrators for the purposes of obtaining directions as to the admissibility of certain categories of claims and as to the rankings or priorities between creditors. The form of the proceedings has been that in the context of an application for directions, parties have been selected to represent competing interests with a view to enabling the Court to resolve the matter after full adversarial contest. The parties so selected have not formally been appointed representative claimants or defendants: but all creditors have been notified of the proceedings and in substance the results are intended to bind them all, given the Administrators' express purpose and intention of acting in accordance with the Court's decisions on those applications.

18. Amongst the principal concerns and disputes in this context have been:

(1) Whether the Sub-Debt claims ranked ahead or behind statutory interest claims pursuant to rule 2.88(7) of the Insolvency (England and Wales) Rules 2016 (the "IR 2016");

(2) Whether creditors who had suffered a currency loss as a result of the conversion of their debts from foreign currency into sterling as at the date of the commencement of the administration could claim and prove for such losses, and if so whether such a claim would rank ahead of or behind the Sub-Debt claims and/or statutory interest claims;

(3) Whether contractual interest was provable or statutory interest was payable for the period of administration if it was immediately followed by a liquidation.

19. On final appeal in Waterfall I the Supreme Court determined that (1) statutory interest ranks in priority to the Sub-Debt; (2) currency conversion claims do not exist; and that (3) the insolvency regime contains a "lacuna" such that, if LBIE moves from administration into liquidation, any unpaid statutory interest under rule 14.23(7) in respect of the period between the commencement and the termination of the administration would not be payable out of the Surplus or provable in the liquidation.

20. In simplified terms (and ignoring various complications which are not material for present purposes), it now seems clear, since that decision of the Supreme Court in Waterfall I, that the Surplus must be distributed in the following order of priority:

(1) First, the Surplus must be applied towards the payment of statutory interest in accordance with rule 14.23 of the IR 2016. Statutory interest is payable on provable debts at the greater of 8% per annum or the "rate applicable to the debt apart from the administration" (typically a contractual rate): see rule 14.23(7). Some creditors have a contractual discretion to certify the rate of interest applicable to their claims, which could (in principle) enable them to claim statutory interest at a rate greater than the 8% minimum. However, the exercise of any such contractual discretion is capable of giving rise to a number of disputes, and creates significant uncertainty in quantifying the total amount of statutory interest which falls to be paid: see below. Total statutory interest entitlements are likely to exceed £5bn, and are likely to be paid in full out of the Surplus.

(2) Second, after statutory interest and any non-provable liabilities have been paid in full, the Surplus must be applied towards the payment of the subordinated debt (the "Sub-Debt") held by Wentworth Sons Sub-Debt S.à r.l. (the "Subordinated Creditor", as previously defined). As its name indicates, the Subordinated Creditor is part of the Wentworth Group. The ranking of the SubDebt was established by the decision of the Supreme Court in *Re Lehman Brothers International (Europe) (Waterfall I)* [2017] 2 WLR 1497 at [56] (Lord Neuberger). The Sub-Debt has a total value of approximately £1.24bn (excluding interest).

(3) Third, any remaining Surplus falls to be distributed to LBHI2 as the sole shareholder of LBIE. LBHI2 has an economic interest in the Wentworth

Group. A possible mechanism for effecting a distribution to LBHI2 is described in *Re Lehman Brothers Europe Ltd (No. 9)* [2018] Bus LR 439 (Hildyard J) at [22].

21. There remained, however, a variety of disputes as to (1) the calculation of statutory interest, (2) the extent of entitlements to contractual interest under ISDA Master Agreements and similar contracts and (3) the admission of proofs disputed by other creditors. Thus, although two further applications (known as the Barclays Application and Waterfall III) have been compromised, there remained outstanding the Relevant Proceedings, which can briefly be summarised as follows:

    (1) The Waterfall IIA Application. The Waterfall IIA Application raised a number of questions relating to the calculation of statutory interest, including, most significantly (in financial terms), whether dividends paid in the administration should be treated as notionally having discharged interest before principal. This is known as the Bower v Marris issue, after the case of the same name: see (1841) Cr & Ph 351. In October 2017, the Court of Appeal upheld the judgment of David Richards J at first instance: see [2018] Bus LR 508. As at the date of the Sanction Hearing, there was a pending application by the Senior Creditor Group for permission to appeal to the Supreme Court. The Supreme Court had agreed to postpone its determination of that application to facilitate the implementation of the Scheme. If the Scheme were not to become effective, the Supreme Court would be invited to determine the application. If the Scheme were to become effective, the application would be dismissed by consent.

    (2) The Waterfall IIC Application. The Waterfall IIC Application raised a number of questions relating to the exercise of a contractual discretion to certify a rate of interest under various financial master agreements (including, in particular, ISDA Master Agreements). The hearing of the appeal (brought by the Senior Creditor Group and GSI) against my judgment (reported at [2016] EWHC 2417 (Ch), [2017] Bus LR 1475) was listed to commence before the Court of Appeal on 3 July 2018. If the Scheme were to become effective prior to that date, the appeal would be withdrawn by consent. Otherwise, the appeal would proceed. The Court of Appeal had been informed of the Sanction Hearing for the Scheme, but had declined to re-list the Waterfall IIC appeal for a later date until the outcome of the Sanction Hearing was known.

    (3) The Olivant Application. This was an application by the Subordinated Creditor to challenge the Administrators' decision to admit a proof of debt submitted by another creditor known as Olivant Investments Switzerland S.A. ("Olivant"). The application was made pursuant to rule 14.8(3) of the IR 2016, which provides a procedure whereby one creditor can challenge the admission of another creditor's proof. In December 2017, I gave directions for the trial of various preliminary issues following a lengthy CMC, commenting as follows:

        > "This is another episode in the saga of the Lehman administrations, reflecting continuing disputes between rival creditors in the multitude of companies still in administration as

> they seek to obtain for themselves a greater share of the considerable surpluses which have been collected."

(4) The Lacuna Application. This application arose out of the Supreme Court's conclusion (in the Waterfall I decision) that, if LBIE moves from administration into liquidation, any unpaid statutory interest under rule 14.23(7) of the IR 2016 in respect of the period between the commencement and the termination of the administration would not be payable out of the Surplus or provable in the liquidation. That conclusion has come to be known as the "lacuna issue". The Subordinated Creditor has attempted, in reliance on the lacuna issue, to take steps towards placing LBIE into liquidation before statutory interest can be paid to creditors. In response to those attempts, the Administrators applied for directions in January 2018.

22. The Lacuna Application and the Olivant Application were stayed by consent on 12 January 2018, to facilitate the implementation of the Scheme. If the Scheme were to become effective, the Olivant Application and the Lacuna Application would be withdrawn. If the Scheme did not become effective, the stay would be lifted, and the Olivant Application and the Lacuna Application would proceed before the High Court.

23. Failing a compromise of all the Relevant Proceedings, the Administrators estimated (and no one before me suggested any more optimistic view) their likely continuance until 2020 at the very earliest. Repeated appeals to the Supreme Court would be entirely foreseeable and perhaps inevitable. Moreover, it seemed entirely possible that new applications similar to the Olivant Application (where one creditor challenges the admission of another creditor's proof) could be brought.

    As I put it in *Wentworth Sons Sub-Debt S.à r.l. v Lomas* [2017] EWHC 3158 (Ch) at [18]:

> "… the [Olivant] Application raises inevitably the status and effect, not only of the Olivant CDD, but potentially of all Claims Determination Deeds entered into by LBIE, of which there have been many, in aggregate of very considerable value. To some of these Wentworth and/or members of the SCG are party. In such circumstances, the Administrators are concerned that this Application could merely be the first in a series of similar challenges under Rule 14.8(3). The outcome of this Application therefore has, at least potentially, broader ramifications for the administration of LBIE."

24. The Administrators were satisfied that the Scheme represents the only fair and realistic way to prevent many more years of continued litigation and to facilitate the distribution of the Surplus. In the absence of the Scheme, they reached the conclusion that no other solution would be likely to be available: in all likelihood, the litigation would simply continue for the foreseeable future.

## Part D: summary of the terms of the Scheme

### (a) Application of the Scheme

25. Subject to express exceptions (see below), the Scheme is intended to bind all legal or natural persons who have any "Provable Claim" (as defined in the Scheme) against LBIE, whether paid or unpaid (the "Scheme Creditors"). It is to be noted that for the purposes of the Scheme, the definition of "Scheme Creditor" expressly extends to a person holding Sub-Debt, such extension possibly being necessary (at least for the avoidance of doubt) in light of the view of David Richards J (as he then was), which was approved (in preference to the view of the Court of Appeal) by Lord Neuberger in the Supreme Court in Waterfall I (at [68] to [69]) that no proof can be lodged for the SubDebt until all "Senior Liabilities" have been paid in full.
26. The claims of a Scheme Creditor in respect of statutory interest entitlements are also within the scope of and intended to be compromised by the Scheme. Indeed, since the vast majority of provable debts have already been discharged in full, creditors' statutory interest entitlements are the primary claims which are compromised by the Scheme.

27. The following creditors are excluded from the Scheme: (i) Storm Funding Limited ("Storm"); and (ii) any Relevant Employees or Relevant Jurisdiction Clause Creditors (as defined below) who have not lodged a proof of debt in LBIE's administration. As to these creditors:
    (1) Storm has undertaken to be bound by the Scheme. This reflects the fact that Storm has a bespoke arrangement in relation to statutory interest pursuant to a commercial settlement dated 17 March 2014, which provides that any payment made to Storm in respect of statutory interest would be paid in respect of its admitted claim at an effective rate of 8% simple interest per annum, but calculated from a date later than the date of the commencement of LBIE's administration to the date when Storm's admitted claim was paid in full. Storm and the Scheme Creditors are collectively described as the "Scheme Parties". For convenience, in this Judgment I refer simply to the Scheme Creditors, but it should be understood that Storm is also bound.

    (2) The purpose of excluding from the Scheme any Relevant Employees or Relevant Jurisdiction Clause Creditors who have not lodged a proof of debt in LBIE's administration relates to a jurisdictional issue explained below.

    (3) LBHI2 (in its capacity as shareholder of LBIE) is not a Scheme Creditor but has signed a deed of undertaking containing certain obligations in connection with the Scheme given in consideration for third party rights and undertakings granted in LBHI2's favour.

## (b) Termination of Relevant Proceedings

28. Pursuant to the Scheme, and in accordance and fulfilment of its principal objective, the Relevant Proceedings will be brought to an end. This will involve: (i) the withdrawal of the application for permission to appeal to the Supreme Court in the Waterfall IIA Application (such that the judgment of the Court of Appeal is final and binding); (ii) the withdrawal of the appeal to the Court of Appeal in the Waterfall IIC Application (such that the judgment at first instance is final and binding); and (iii) the withdrawal of the Olivant Application and the Lacuna Application. Under the terms of the Scheme the Administrators are given authority to provide and file the relevant court documentation for these purposes. (c) Waiver of challenge and appeal rights

29. Further:

    (1) Each Scheme Creditor waives its right to challenge the admission of any other creditor's proof of debt (where the relevant proof was admitted prior to the Record Date). This will avoid the risk of the Olivant Application being repeated for other proofs of debt, which would be likely to lead to significant delays and costs.

    (2) Subject to certain exceptions, each Scheme Creditor waives its right to appeal any first instance decision (of any court of competent jurisdiction) which relates to an exercise of the Administrators' functions after the date when the Scheme becomes effective (the "Effective Date"). Thus, by way of example, in the unexpected event that a new proof of debt is submitted prior to the Effective Date and rejected by the Administrators after the Effective Date, any challenge to the Administrators' decision would be resolved by the High Court, and there would be no possibility of any appeal to the Court of Appeal or the Supreme Court. This provision is intended to avoid the substantial delays and costs that would be likely to result from appellate proceedings.

## (c) Bar Date

30. In order to enable the Administrators to distribute the Surplus, it is necessary to determine the total quantum of provable claims against LBIE. As matters stand, there is nothing to prevent creditors from lodging new proofs (despite the fact that the administration has been ongoing for nearly a decade). Any such new proofs could affect the size of the Surplus available for distribution to others.

31. To that end, and conventionally, the Scheme imposes a bar date for the submission of claims (the "Bar Date"). Subject to certain exceptions, any claims held by a Scheme Creditor which have not been notified prior to the Bar Date will be discharged on that date. The Bar Date applies to all types of claims held by a Scheme Creditor: that includes provable claims, non-provable claims and expense claims (subject to certain exceptions).

32. Less conventionally, the Bar Date is fixed as the date when the Scheme becomes effective (the Effective Date). It would be more conventional to provide a longer period before the bar. The unusually short period is presented as justified in the context of the fact that the administration has been ongoing for a nearly a decade, and that the Administrators first invited creditors to prove their claims in December 2009. Further, creditors were notified of the intention to impose a Bar Date on 22 December 2017, and the Bar Date is clearly signalled in the First Practice Statement Letter (paragraph 6.1.4) dated 18 April 2018 and sent to Scheme Creditors in accordance with the usual practice.

(e) Statutory Interest Claims and the adjudication process

(i) The various statutory interest entitlements

33. Central to the Scheme is the mechanism it provides for the

adjudication of creditors' statutory interest entitlements, effectively in substitution for the Relevant Proceedings. I shall return later to assess the fairness of the mechanism: I confine myself now to a statement of its essential features, as described in the Applicants' skeleton argument (which statement I gratefully adopt with only minor alterations).

34. Three groups of creditors must be distinguished in this regard:

(1) 8% Creditors. As noted above, statutory interest is payable on provable debts at the greater of 8% per annum or the "rate applicable to the debt apart from the administration" (typically a contractual rate): see rule 14.23(7). For many creditors, there is no "rate applicable to the debt apart from the administration". Such creditors can only receive interest at the statutory minimum of 8% per annum. These creditors are described as "8% Creditors".

(2) Specified Interest Creditors. One claim arises under a contract which requires LBIE to pay a specific rate of interest in excess of 8% per annum. The sole creditor holding this claim is described as the "Specified Interest Creditor".

(3) Higher Rate Creditors. A number of claims arise under financial master agreements which give the creditor a contractual discretion to determine the rate of interest payable by LBIE. For example, the ISDA Master Agreements require LBIE to pay interest at the "Default Rate", which is defined as the "rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum". The relevant payee has a broad discretion to certify its cost of funding. There are similar provisions in the AFB/FBF French Master Agreements (which empower the payee to certify its "overnight refinancing rate") and the AFTB French Master Agreements (which empower the payee to certify

its "average overnight rate"). A certificate cannot be impugned unless it was made irrationally or in bad faith, or the certificate was founded on a manifest numerical or mathematical error or otherwise than in accordance with the Waterfall IIC judgment: see *Re Lehman Brothers International (Europe) (No. 6) (Waterfall IIC)* [2017] Bus LR 1475 at [207] (Hildyard J). Creditors holding claims arising under an ISDA Master Agreement, AFB/FBF French Master Agreement or AFTB French Master Agreement are described as "Higher Rate Creditors". These creditors may be able to claim more than the statutory minimum of 8%, depending on the outcome of the certification process.

35. The Scheme provides for the statutory interest entitlements of the 8% Creditors and the Specified Interest Creditors to be calculated in accordance with the existing Waterfall judgments. For example, the Administrators will proceed on the basis that the rule in *Bower v Marris* does not apply to the calculation of statutory interest (as David Richards J and the Court of Appeal held in the Waterfall IIA Application), and no further appeal to the Supreme Court in relation to that issue will be possible: see above.

36. Further, the Scheme contains a detailed procedure for determining the statutory interest entitlements of Higher Rate Creditors. The avowed purpose of the procedure is to ensure that the statutory interest entitlements of Higher Rate Creditors can be determined in a manner that is both fair and expeditious, so as to avoid protracted disputes which could delay the distribution of the Surplus. The procedure can be summarised as follows:

(1) Each Higher Rate Creditor is entitled to elect between two alternative options:

(a) The first option is for the creditor to receive statutory interest at a simple rate of 8% per annum, plus an additional payment equal to 2.5% of the value of the creditor's admitted provable claim (the "Settlement Premium") in full and final satisfaction of the creditor's statutory interest entitlement. The Settlement Premium represents the quid pro quo for waiving the right to certify a rate higher than the statutory minimum of 8%. Alternatively:

(b) The second option is for the creditor to certify the rate and amount of interest applicable to the creditor's claim in accordance with the underlying contract. The certification must be submitted by the Effective Date. Creditors who choose the second option are not entitled to receive the Settlement Premium.

(2) The stipulated deadline for certification is the Effective Date. The justification advanced for this (which I have accepted) is as follows: (i) the

first progress report which disclosed the possibility of a surplus in the estate was issued in April 2013 (at which point all Higher Rate Creditors should have realised that certification could be necessary); (ii) the Waterfall IIC judgment was handed down in October 2016 (which set out the key legal principles relating to certification); and (iii) creditors have been aware of the proposed certification deadline since 18 April 2018, when the first Practice Statement Letter ("First PSL") was circulated; so that (it is submitted) (iv) Higher Rate Creditors have had sufficient time to assess whether to certify and prepare any such certification. This is borne out by the Chairman's Report: see below.

(3) If a Higher Rate Creditor failed to make an election at the time of voting on the Scheme, the creditor is deemed to have elected to receive the Settlement Premium.

(4) Where a Higher Rate Creditor submits a certification by the Effective Date, LBIE may either: (i) accept the certification; (ii) reject the certification entirely (on the basis that the creditor should not receive more than the statutory minimum of 8%); or (iii) make a counter-offer (higher than the statutory minimum but lower than the certified amount).

(5) If the Higher Rate Creditor is not satisfied with LBIE's decision, the creditor is entitled to require that the dispute be resolved by an independent adjudicator.

(iii) Key features of adjudication process

37. The key features of the adjudication process are as follows:

(1) The adjudicator will be either Sir Bernard Rix, Michael Brindle QC or Tim Howe QC (or, if none of them is available, another English law-qualified QC or retired judge).

(2) The adjudicator will act an as expert, not an arbitrator.

(3) The adjudication will be determined on paper, without an oral hearing. The relevant Higher Rate Creditor and LBIE are both entitled to file written submissions and supporting evidence.

(4) In reaching a decision, the adjudicator must have regard to a number of legal principles referred to as the "Relevant Principles". These are set out in the Explanatory Statement prepared by the Company and the Administrators, and dated 31 May 2018.

(5) The Relevant Principles comprise the following: (i) the principles set out in the judgment and order in the Waterfall IIC Application;
(ii) the principles relating to the AFB/FBF French Master Agreements which were agreed to be correct by the parties to the Waterfall IIC Application (but which were not the subject of any formal determination

by the Court); (iii) the principles set out in the judgments and orders of David Richards J and the Court of Appeal in the Waterfall IIA Application; and (iv) a further principle regulating the calculation of the amount of Statutory Interest defined in the Scheme as the Compounding Principle, and further explained subsequently in the Scheme.

(6) Although the adjudicator must "have regard" to the Relevant Principles, it is recognised that these principles do not provide an exhaustive codification of the law. The parties are able to file legal submissions in relation to any issues which may arise, and the adjudicator is entitled to take those submissions into account when reaching his decision.

(7) The adjudicator must uphold the creditor's certification unless the adjudicator is satisfied, on the balance of probabilities, that it was made irrationally, in bad faith, or contrary to the Relevant Principles. The burden of proof falls on LBIE. (There is also a mechanism for addressing and correcting any mathematical or numerical errors which the adjudicator identifies.)

(8) If (and only if) the adjudicator concludes that the certification was made irrationally, in bad faith, or contrary to the Relevant Principles, then the adjudicator must award the creditor the statutory minimum of 8% or (if any counter-offer was made) the amount of LBIE's counter-offer. There is no other option available to the adjudicator. In particular, the adjudicator is not permitted to award some amount falling between the creditor's certification and LBIE's counter-offer.

(9) The timetable for the adjudication is deliberately compressed, as explained in a useful flow chart at Part II, paragraph 10.10 of the Explanatory Statement, which identifies the number of business days between each step in the adjudication process. For example, once the adjudicator receives LBIE's written submissions, the adjudicator is required to use reasonable endeavours to reach a final decision within 20 business days.

(10) The adjudicator will not give reasons for the decision; and that decision is final and binding, and is not capable of being appealed (except in the case of fraud or bias by the adjudicator).

38. The costs of the adjudication follow the event: they must be paid by LBIE or by the creditor, based on the "loser pays" principle.

39. Another important facet of the proposed adjudication system, and one which caused controversy, is the special role accorded to the Wentworth Group. In the course of negotiations leading to the development of the Scheme, the Wentworth Group stated that it would only support the Scheme if the Subordinated Creditor was permitted to have input in respect of the determination of matters which are likely to affect the recovery of the Sub-Debt. The upshot is that the Scheme requires LBIE to engage with the Subordinated Creditor in relation to various matters. For example:

(1) LBIE must consult with the Subordinated Creditor in deciding

whether or not to accept a certification, although LBIE has the sole discretion as to whether or not to accept any certification.

(2) LBIE must consult with the Subordinated Creditor as to the amount of any counter-offer, although (once again) LBIE has the sole discretion as to the amount of any counter-offer. The counteroffer must be made in accordance with the Relevant Principles. (Under a previous version of the Scheme (which was placed before the Court at the Convening Hearing), the Subordinated Creditor had the right to determine the amount of any counter-offer. Some creditors objected to this provision at the Convening Hearing. In order to accommodate the concerns that were raised, the Scheme was amended (prior to the Scheme Meetings) so as to remove the Subordinated Creditor's right to determine the amount of any counter-offer. That right is now vested in LBIE, and the Subordinated Creditor merely has a right of consultation.) Thus, the Subordinated Creditor cannot require LBIE to make a counteroffer: if LBIE considers that the creditor's certification should be accepted without any modification, that outcome cannot be prevented by the Subordinated Creditor. Further, the counter-offer can be rejected and the matter appealed through the adjudication procedure.

(3) Where a certification is subject to adjudication, LBIE must use reasonable endeavours to appoint (in order of priority) Sir Bernard Rix, Michael Brindle QC or Tim Howe QC as the adjudicator. If such individuals are not able to accept the appointment, then another suitably qualified candidate (who must be an English lawqualified QC or former judge[1]) will be selected in consultation with the Subordinated Creditor. However, the final decision as to the selection of the adjudicator rests with LBIE and the terms of appointment are to be agreed by LBIE without regard to the Subordinated Creditor.

(4) During the "Consultation Period" (where LBIE and a certifying Higher Rate Creditor are seeking to agree the amount of the certification), the Subordinated Creditor is entitled to receive information relating to the negotiations, including confidential information. The Subordinated Creditor is under an obligation to keep such material confidential, and not to use such material for a collateral purpose. The information must be destroyed or returned to the Company once it is no longer reasonably required for the purposes of the Scheme. These information rights are a necessary consequence of the Subordinated Creditor's consultation rights as set out above, since it is impossible to consult without the relevant information.

40. Having considered the matter carefully, the Administrators are satisfied that it is appropriate for the Subordinated Creditor to be involved in this way. Where a Higher Rate Creditor certifies its cost of funding, the Subordinated Creditor has a significant economic interest in the outcome of the certification and adjudication process. It is therefore appropriate for the Subordinated Creditor to play a role in the process. Quite apart from the provisions of the Scheme, the

[1] See the Scheme at paragraph 23.1.2 [1/3/45]. This was clarified by way of an amendment to the Scheme (after the Convening Hearing but prior to the Scheme Meetings).

Administrators would be expected to consult with the Subordinated Creditor on matters affecting its interests, and the Subordinated Creditor would be entitled to intervene in any legal proceedings relating to a disputed certification: see below.

(f) Other matters relating to the Scheme: Lock-Up Agreement and consent fee

41. The Wentworth Group and the Senior Creditor Group have entered into a lock-up agreement dated 22 December 2017 (the "Lock-Up Agreement"), pursuant to which they have agreed to support the Scheme. Further details relating to the Lock-Up Agreement are set out in the First PSL published on 18 April 2018 at paragraphs 5.11 to 5.16.

42. Also pursuant to the Lock-Up Agreement, the Wentworth Group and the Senior Creditor Group have agreed to accept the Settlement Premium in respect of all Higher Rate Claims (rather than seeking to certify their cost of funding).

43. The Lock-Up Agreement does not provide for the payment of any consent fee, however:

(1) Late in the evening on 25 April 2018 (after the First PSL had already been circulated to creditors), the LBIE Administrators received a letter from LBHI2's administrators [CH2/RD2/8] which indicated that Wentworth Sons Senior Claims S.à r.l., the Subordinated Creditor and certain members of the Senior Creditor Group had entered into a separate settlement agreement in parallel with the Lock-Up Agreement (the "Settlement Agreement").

(2) The Settlement Agreement provided that (amongst other things) the Senior Creditor Group would receive from those Wentworth parties the sum of £35m by way of a "consent fee" in the event that the Scheme becomes effective. The Administrators received a copy of the Settlement Agreement on 29 April 2018.

(3) No similar consent fee was offered to other creditors. The Administrators had not previously been aware of these arrangements. As a result of this disclosure, the Administrators sent a second PSL (the "Second PSL", published on 2 May 2018) referring to and explaining the consent fee, and proposing that the Senior Creditor Group should vote in a separate class in order to avoid a dispute about class composition: see below.

(g) Third party releases

44. The Scheme additionally provides for the release of the following claims by Scheme Creditors against third parties:

(1) Any "Administration Claims (being Claims against the Administrators or the Released Third Parties (who are parties connected to the Administrators, their firm or the Company), where such Claims arise from actions taken by such person on or after the Administration Date but prior to the Effective Date), but only to the extent that the Administrators or

Released Third Parties would have an indemnity or other similar claim against the Company"; and

(2) Subject to certain exceptions, any "Released Scheme Implementation Claims (being Claims against the Company, the Administrators, the Released Third Parties or the Locked-Up Parties) where such Claims arise from or in connection with action taken by any such person on or after 1 November 2017 in relation to the proposal or implementation of the Scheme)".

(3) There are also various releases in favour of LBHI2, e.g. in relation to any Creditor Contributory Claim Rights (as defined).

45. The give and take evident in these provisions is clear. There is no doubt that the Scheme constitutes a "compromise or arrangement" within Part 26 of the CA 2006 (as those words were explained in Re Savoy Hotel Ltd [1981] Ch 351 and Re NFU Development Trust Ltd [1972] 1 WLR 1548). That is, of course, a necessary condition for the application of Part 26 and it is appropriate to record its satisfaction in any event; but I do so in this case also because in correspondence one creditor (Deutsche) at one time suggested that the Scheme was not a "compromise or arrangement", though the suggestion, which was never explained, was (rightly, so it appears to me) not pursued.

46. The questions then are whether the Scheme has been approved by appropriately constituted classes and, if so, whether it is fair and free from 'blot' so that the Court should give it its sanction.

**Part E: composition of classes and the Scheme Meetings**

47. The first in the three stages (after development of the proposals themselves of course) which are mandated by Part 26 of the CA 2006 before a scheme may be sanctioned is an application to the Court for an order convening Scheme Meetings to consider and vote on the Scheme.

48. In this case, the Administrators applied (by Part 8 claim form) for such an order on 2 May 2018, and on 18 April 2018 published the First PSL as required by present practice (see Practice Statement [2002] 1 WLR 1345, "the Practice Statement"), followed by a Second PSL (dated 2 May 2018) in circumstances already described.

49. The Convening Hearing (as such hearings are often referred to) took place before me on 9, 10 and 11 May 2018. The Administrators submitted that the Scheme Creditors should vote at four Scheme Meetings, namely:

(1) A meeting of the 8% Creditors and the Specified Interest Creditor, excluding claims legally held by the Senior Creditor Group (the "8% Meeting");

(2) A meeting of the Higher Rate Creditors, excluding claims legally held by the Senior Creditor Group (the "Higher Rate Meeting");

(3) A meeting of all members of the Senior Creditor Group (the "SCG

Meeting"); and

(4) A meeting of the Subordinated Creditor (the "Subordinated Creditor Meeting").

50. At the Convening Hearing, the Administrators' proposals were opposed by three creditors, namely Deutsche and CRC Credit Fund Limited ("CRC"), both of which are Higher Rate creditors, and Marble Ridge Special Situations GP LLC ("Marble Ridge") which also is a Higher Rate creditor. These creditors were represented respectively by Mr Andrew Twigger QC, Mr Andrew de Mestre and Ms Hilary Stonefrost.

51. After adjourning for a short time to consider the matter, I accepted these proposals, and made a Convening Order accordingly, for reasons that I sought to set out fairly summarily in an oral judgment, now I think to be found at [COUNSEL PLEASE COMPLETE].

52. When I gave that judgment, I anticipated that there would or might be further evidence adduced, especially as to the claimed identity between all the Wentworth companies. In the event, however, CRC and Marble Ridge voted in favour of the Scheme (after its amendment in respect of aspects of the adjudication process) and (as previously mentioned) Deutsche has withdrawn its objection stating in its solicitors (Clifford Chance's) letter of 11 June 2018 that it

> "does not…object to the court's sanctioning the proposed scheme, should the court see fit to do so."

53. GSI, which did not appear at the Convening Hearing or the Sanction Hearing, indicated in correspondence (and, in particular, in a letter to the Administrators dated 5 February 2018) which was before the Court and carefully considered at the Convening Hearing, its "concerns relating to both the process by which the Proposed Scheme has been developed, and the substance of the Proposed Scheme", and I took it to support Deutsche's objections. But GSI never made clear any other reasoned basis for objection to the class composition; and, as I say, did not see fit to pursue that before me at either hearing other than in the somewhat indirect way I have described, save in one instance. The one instance is this: during the course of the Sanction Hearing its solicitors, Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb") requested the Administrators specifically to draw to my attention two matters by reference to a table in the Chairman's Report on the meetings, which record the voting results at the four class meetings. I shall return to these matters in due course; but I shall first describe the procedure and results at the four meetings. Procedure and voting results

54. The Chairman's Report on the scheme meetings which took place at the offices of Linklaters LLP after a short preliminary session dealing with administrative matters has described carefully the process followed and the outcome of the voting.

55. Inevitably, the class meetings 3 and 4 were formalistic: the Chairman held proxies at each on behalf of all Scheme Creditors within the class and cast them

in favour of the Scheme, thus resulting in 100% support in terms of both number and value.

56. The process at those meetings and the more contentious class meetings was entirely regular. I think the only matter I need mention before assessing the actual voting is that nine Higher Rate Creditors (participating in scheme meeting 2) exercised an entitlement pursuant to the Convening Order to submit Increased Voting Rights Requests on the basis that they should be entitled to voting rights greater than those calculated by applying an interest rate of 8% per annum. The Chairman's Report records that in the exercise of his discretion he accepted all the requests and that of the nine, seven voted for the Scheme and two against.

Voting results at the class meetings

57. The voting results at the meetings for (1) 8% Creditors and Specified Interest Creditors ("the 8% Creditor Meeting") and (2) Higher Rate Creditors (excluding the Senior Creditor Group, "the Higher Rate Creditor Meeting") can be summarised as follows:

(1) At the 8% Creditor Meeting, the Scheme was approved by 129 out of the 132 votes cast, representing 97.7% in number and 96.3% in value of those voting. The turnout by reference to claim value at the 8% Creditor Meeting was equal to 96.1% of those entitled to vote.

(2) At the Higher Rate Creditor Meeting, the Scheme was approved by 74 out of the 78 votes cast – representing 94.9% in number and 88.0% in value. The turnout by reference to claim value at the meeting was equal to 94.9% of those entitled to vote.

(3) Only 3 creditors (out of 130) voted against the Scheme at the 8% Creditor Meeting, and only 4 creditors (out of 77) – two of which are members of the same corporate group – voted against the Scheme at the Higher Rate Creditor Meeting.

(4) The Senior Creditor Group voted in a separate class from other 8% Creditors and Higher Rate Creditors. Accordingly, the voting figures for the 8% Meeting and the Higher Rate Meeting do not include claims held by the Senior Creditor Group.

(5) Those statutory majorities would have been obtained even if all of the Increased Voting Rights Requests had been rejected in their entirety or if only the Increased Voting Rights Requests made by the "no" voters were admitted.

(6) If the Wentworth Senior Creditors had been excluded from the 8% Creditor Meeting, the Scheme would still have been approved by 115 creditors, representing 97.5% in number and 93.7% in value.

(7) If the Wentworth Senior Creditors had been excluded from the Higher Rate Meeting, the Scheme would still have been approved by 62 creditors, representing 93.9% in number: but they would have represented only

62.2% in value (thus falling short of the statutory majority required of 75%).

58. These voting results, and a further analysis of the split between the votes of Wentworth entities in the two relevant classes and the votes of others, are summarised in the Table referred to above, as follows:

**Table A – Summary of Votes Cast at Scheme Meetings:**

| Units | Votes FOR | Votes AGAINST | TOTAL | Turnout | Analysis of Votes FOR[1] | |
|---|---|---|---|---|---|---|
| | | | | | WW | Others |
| **Scheme Meeting 1 8% Creditors and Specified Interest Creditors (excluding the SCG)** | | | | | | |
| Number | 129 | 3 | 132 | 130/249[2] | 14 | 115 |
| % by number | 97.7% | 2.3% | 100.0% | 52.2% | 10.6% | 87.1% |
| Value (£) | 1,979,607,051 | 76,428,555 | 2,056,035,606 | 2,056,035,606 /2,139,015,278 | 851,498,338 | 1,128,108,713 |
| % by value | 96.3% | 3.7% | 100.0% | 96.1% | 41.4% | 54.9% |
| **Scheme Meeting 2 Higher Rate Creditors (excluding the SCG)** | | | | | WW | Others |
| Number | 74 | 4 | 78 | 77/110[3] | 12 | 62 |
| % by number | 94.9% | 5.1% | 100% | 70.0% | 15.4% | 79.5% |
| Value (£) | 1,471,874,244 | 201,170,254 | 1,673,044,498 | 1,673,044,498 /1,763,362,308 | 1,140,479,940 | 331,394,304 |
| % by value | 88.0% | 12.0% | 100.0% | 94.9% | 68.2% | 19.8% |
| **Scheme Meeting 3 Members of the SCG** | | | | | | |
| Number | 55 | 0 | 55 | 55/55 | | |
| % by number | 100.0% | 0.0% | 100.0% | 100.0% | | |
| Value (£) | 1,537,022,589 | 0 | 1,537,022,589 | 1,537,022,589 /1,537,087,315 | | |
| % by value | 100.0% | 0.0% | 100.0% | 100.0% | | |
| **Scheme Meeting 4 Subordinated Creditor** | | | | | | |
| Number | 1 | 0 | 1 | 1/1 | | |
| % by number | 100.0% | 0.0% | 100.0% | 100.0% | | |
| Value (£) | 1,242,162,410 | 0 | 1,242,162,410 | 1,242,162,410 /1,242,162,410 | | |

[1] Votes for the Scheme Resolution at Scheme Meeting 1 and Scheme Meeting 2 are split out into votes cast by legal entities which are members of the Wentworth Group ("**WW**") and votes cast by legal entities which are not members of the Wentworth Group ("**Others**").

[2] 130 Scheme Creditors voted at Scheme Meeting 1. As some Scheme Creditors did not control all of their claims and had submitted Split-Holdings Requests, 132 votes were cast in total.

[3] 77 Scheme Creditors voted at Scheme Meeting 2. As some Scheme Creditors did not control all of their claims and had submitted Split-Holdings Requests, 78 votes were cast in total.

One Scheme Creditor voting at Scheme Meeting 3 split its voting rights and abstained from voting in respect of one of its claims. Because the Scheme Creditor concerned voted in favour of the Scheme in respect of the remainder of its claims, however, percentage turnout by number remained 100.0%.

59. The two points made by Cleary Gottlieb as referred to above at paragraph [53] can be seen from that Table, being as follows (quoting their e-mail directly):

    (1) "The votes referred to in the "Others" column of the table…includes votes that are controlled by entities that are part of the Wentworth Group and the Senior Creditor Group. Our client does not know the extent of the claims controlled by the Wentworth Group and Senior Creditor Group within the "Others" column.

    (2) Recognising that the Judge has indicated that he is not minded to revisit class composition issues, if [the Higher Rate Creditors Meeting] had proceeded without claims held directly by the Wentworth Group (i.e. of the Wentworth Group votes are excluded from the votes at [that meeting]), then the scheme would not have obtained the required statutory majority by value [at that meeting]. All the more so if claims controlled but not directly held by the Wentworth Group and the Senior Creditor Group had been excluded."

60. These were fair points, neatly made: and though, like other points of objection, they were not pursued in oral argument (GSI and Cleary Gottlieb having apparently taken the decision not to appear, though it was of course open to them to do so), they seem to me to be relevant at every stage of the assessment of the Scheme, including any review of the class composition issue. That is a convenient point to turn to the three-stage approach which the Court has become accustomed to adopting in determining whether to sanction a scheme.

Part F: the Court's jurisdiction and principles as to its exercise

61. The relevant statutory provision is section 899 of the CA 2006 Act, which provides as follows:

    "(1) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting summoned under section 896, agree to any compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

    (2) An application under this section may be made by – (a) the company ...
    (3) A compromise or arrangement sanctioned by the court is binding on – (a) all creditors or the class of creditors or on the members or a class of members ... and (b) the company ..."

62. The term 'company' in this context means any company liable to be wound up under the Insolvency Act 1986, including a foreign company which though unregistered under the Companies Act has a "sufficient connection" with England or Wales (see *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2012] BCC 459). LBIE, which was incorporated here, is plainly a qualifying 'company'.

63. The term 'creditor' for the purposes of a scheme has a broader meaning than it has for the purposes of liquidation. For the purposes of the scheme jurisdiction, any person who has a monetary claim against the company that, when payable, will constitute a debt is a 'creditor'; and it matters not whether that claim is actual, prospective or contingent: see *Re Lehman Brothers International (Europe) (in administration)* [2009] EWCA Civ 1161, [2010] BCLC 496 at [58]; and *Re Midland Coal, Coke & Iron Co* [1895] 1 Ch 267 at 277.

64. Similarly, the terms 'compromise' and 'arrangement' have been construed widely by the Courts: all really that is required is a sequence of steps involving some element of give and take, rather than merely surrender or forfeiture.

65. In *Re Telewest Communications (No. 2) Ltd* [2005] BCC 36, David Richards J explained the principles to be considered by the Court when deciding whether to sanction a scheme of arrangement (at [20]-[22]):

> "The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:
>
> 'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that 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 thirdly, that 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; but at the same time the court will be slow to differ from the meeting, unless either the class has not been 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.'
>
> This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s 425 [the predecessor of section 899], which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts.

> Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'."

66. The passage from Buckley quoted by David Richards J effectively

involves a three-stage test:

(1) At the first stage, the Court must consider whether the provisions of the statute have been complied with.

(2) At the second stage, the Court must consider whether the class was fairly represented by the meeting, and whether the majority are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent.

(3) At the third stage, the Court must consider whether the scheme is one which a creditor might reasonably approve. If the scheme is one which a creditor could reasonably approve, it is said to be "fair", even though the Court retains ultimate and unfettered discretion whether to sanction a scheme, and to withhold sanction if it considers there is nevertheless some overriding unfairness in the scheme or the manner in which it has been presented or notified and explained, or in the event that some 'blot' is found. Indeed, there is no entitlement to have a 'fair' scheme sanctioned: the exercise of its jurisdiction being discretionary, the Court is not obliged to sanction a scheme.

67. The breadth of its jurisdiction emphasises the care that must be taken by the Court in its exercise. In addition to satisfying itself as to the matters above, the Court must also be satisfied as to the adequacy and accuracy of the explanatory statement provided in respect of the scheme, and that its recipients have been afforded adequate time to consider their position and to give vitality to their right to object.

68. However, the most troublesome of the preconditions for the exercise of jurisdiction (in the sense of its propensity to give rise to difficult issues) is that the scheme must have been approved by the statutory majorities in value and number at class meetings in each case constituted by the Court and comprised only of

> "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] 2 QB 573 at 583 (Bowen LJ) and *Re UDL Holdings Ltd* [2002] 1 HKC 172 at [27] (Lord Millett NPJ). The issue is a fundamental one: for the jurisdiction of the Court to enable a majority to bind the minority on the terms of a scheme is dependent on the correct identification and composition of classes, and the passing of resolutions by the statutory majorities at properly constituted class meetings convened and held in accordance with the Court's directions: and see *In re Apcoa (No. 2)* at [45].

69. But also fundamental, at least to the modern approach, is to distinguish between the legal rights which the scheme creditors have against the company, and their separate commercial or other interests or motives (whether or not related to the exercise of such rights). As Lord Millett clarified in *UDL* at 184-5:

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

70. Even then, a material difference in legal rights does not necessarily preclude their respective holders from being included in a single class: for the second part of the test enables that provided that they are not "so dissimilar as to make it impossible for them to consult together with a view to their common interest". That, unusually and perhaps confusingly, introduces into a jurisdictional issue a subjective assessment, which may account for changing judicial perceptions over the years as to class constitution in the light of the developing and prevailing inclination of judges to recognise the dangers of giving a veto to a minority group by (in Lord Neuberger's words in *Re Anglo American Insurance Co Ltd* [2001] 1 BCLC 755 at 764) being "too picky about different classes" and ending up "with virtually as many classes as there are members of a particular group." Hence my statement in *Re Primacom Holding GmbH* [2013] BCC 201 at [44]-
[45]:

> "… The golden thread of these authorities, as I see it, is to emphasise time and again … [that] in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing and the rights offered in replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.
>
> I emphasise this point because it … enables the court to take a far more robust view as to what the classes should be and to determine a far less fragmented structure than if interests were taken into account."

71. In parallel with this development of the Court's approach to this issue of jurisdiction, the Court has also changed its practice and accepted that the identification of proper class composition is one to be addressed at the time of the Convening Hearing. Prior to Re Hawk Insurance Company Ltd [2002] BCC 300 the Court had declined to engage with the issue until the final (sanction) hearing, leaving it to the proponents of the scheme to live with their choices until the potential sudden death of disapproval at the final hurdle.

72. The purpose of the change of practice introduced pursuant to the observations of Chadwick LJ in Re Hawk, and now embodied in the Practice Statement, was and remains to accelerate to the first stage (at the Convening Hearing) consideration by the Court of the issue of class composition. Whilst the Court's decision at that stage is not final, the applicant has a legitimate expectation that, unless circumstances materially alter or fresh considerations are put before it which the Court accepts should be addressed, the Court will not of its own motion change its mind, since (as I put it in *In re APCOA Parking Holdings GmbH (No.2)* "to do so would subvert the purpose of the revised practice": and see also In re Hawk itself at [21] and *Re Global Garden Pructs Italy SpA* [2017] BCC 637, [2016] EWHC 1884 (Ch) at [43].

73. In the present case, there was substantial opposition to the proposals for class composition put forward by the Administrators at the Convening Hearing (which lasted two days). As I have said, three creditors each represented by Counsel put forward arguments why the proposals should be rejected. I sought to describe the arguments then advanced, and my assessment and adjudication of them, in an oral judgment given after time for consideration. As appears from that judgment, the focus at that stage was on (a) whether all the Wentworth entities, including the entity holding the Sub-Debt, should be seen as one, so that the proposal simply to establish a separate class meeting for the Sub-Debt entity did not really or sufficiently address the problem, on the principal basis, as Mr Twigger put it on behalf of Deutsche, of its suggested "failure to recognise that the benefits to be obtained from the Scheme by some of the Wentworth Parties with a view to their being shared among the Wentworth Parties as a whole means that none of the Wentworth Parties can consult with the independent Higher Rate Creditors who do not stand to receive those benefits"; and/or more particularly, (b) whether the right negotiated by the Wentworth Sub-Debt entity to be consulted in respect of the certification and adjudication process was a right shared (at least in economic or commercial terms) by all Wentworth entities so as to place them all in a different class from others; and (c) whether (as Marble Ridge submitted) there was a requirement for a separate class of creditors (like itself) which had acquired rights under a ISDA Master Agreement from a now insolvent entity which in consequence had especial difficulties in certifying its claim to interest, and thus was disadvantaged in and by the adjudication process. For reasons I sought to summarise, I did not consider any of these arguments justified rejection of the proposed class composition.

74. I had envisaged that there might be further evidence or reason adduced at the Sanction Hearing in support of the over-arching proposition that all the Wentworth entities were to be regarded in law as one: but that did not eventuate. As already stated, in point of fact, both CRC and Marble Ridge in

the end supported and voted in favour of the Scheme, and Deutsche withdrew its objection (having all obtained some improvements to the adjudication process).

75. Thus, the reference in Cleary Gottlieb's letter (to which I have referred in paragraph [53] above, and which was sent to the Administrators but produced to the Court at Cleary Gottlieb's request during the Sanction Hearing), to my indication that I was not minded to revisit class composition issues at the hearing should be viewed in the light of the considerable exploration of the issue at the Convening Hearing, my outline judgment following it, and the fact that no further submissions were sought to be made to me by objectors.

76. However, I should perhaps make clear that, whilst I did not encourage further submissions on the point from proponents and supporters of the Scheme, I have nevertheless reviewed the issue precisely because it goes to jurisdiction, and also because I accept that in this case the question of class composition has not been straightforward.

77. I have been concerned especially to re-satisfy myself in respect of five features of the Scheme and its context, even though some were not the subject of objection at any stage: (a) the close association between the Wentworth companies; (b) the entitlement to consultation in some aspects of the adjudication process which the Wentworth Subordinated Creditor has obtained in the process of the Scheme's development; (c) the Lock-Up Agreement; (d) the consent fee payable by Wentworth Group companies to the Senior Creditor Group; and (e) the fact that some provable debts though not legally owned by the Senior Creditor Group are or may be ultimately controlled by it.

78. As to (a) in paragraph [77] above, it appears to be obvious that the Wentworth Group companies are very closely associated, and likely that in economic terms, unlike other creditors, they have, as a group, legal rights and commercial interests as subordinated creditors which mean that what they lose as Higher Rate Interest creditors they stand to gain in that other capacity. The question I have had to consider is whether that introduces a difference of class rights; and, for example, whether I should take each Wentworth Group entity as having, for the purposes of class composition, cross-holdings and/or the legal rights enjoyed by each other, or another, Wentworth Group entity so as should have been taken to require all such entities to vote in a class separate to other creditors. I remain satisfied that it does not. It might have been different had evidence been advanced such as to persuade me that the Wentworth Group entities were not merely connected but in law each alter egos of the other; but it was not. Further, by analogy, cross-holdings (where a member of one class is also, in respect of another legal right, a member of another class) does not, of itself at least, fracture the class composition: see *Re Telewest, UDL Holdings* and also *Re Primacom*.

79. Similarly, as to (b) in paragraph [77] above, I also remain of the view that the fact that the Wentworth Group entity holding the Sub-Debt (which itself has no other claims), has (apparently as a condition of its support for the Scheme) negotiated to have various powers under the Scheme in relation to the adjudication process, does not raise a class issue (beyond the fact that it has

been required to vote in a class of its own). In the event, I should note, these powers have been modified since the Convening Hearing to remove aspects of them which have caused especial concern to objectors: in particular, the final form of the Scheme no longer allows the Subordinated Creditor to determine the amount of any counter-offer by LBIE. This was the only real objection that the opposing creditors identified at the Convening Hearing, and it has now been removed. In any event, and as submitted by the Administrators:

(1) To the extent that any of the Wentworth Senior Creditors is an 8% Creditor, a Specified Interest Creditor or a Higher Rate Creditor, the rights given to them under the Scheme (in their capacity as such) are precisely the same as the rights given to other creditors.

(2) Even if the Wentworth Senior Creditors were motivated to exercise their voting rights as 8% Creditors, Specified Interest Creditors or Higher Rate Creditors in order to enhance the recovery of the Sub-Debt, that is a classic example of a point that may go to fairness, rather than class composition.

(3) In the absence of a relevant difference between the legal rights of the Wentworth Senior Creditors (qua 8% Creditors, Specified Interest Creditors or Higher Rate Creditors) and the legal rights of other creditors in those classes, the question of whether those creditors can "consult together with a view to their common interest" does not arise. As explained above, there is no relevant difference in rights.

80. As to (c) in paragraph [77] above, one aspect of the Lock-Up Agreement, which was advanced (if at all) only tangentially at the Convening Hearing, has since then caused me some further pause for thought. This is whether the fact that the Wentworth Group, as well as the Senior Creditor Group, have agreed not only to support the Scheme but also to accept the Settlement Premium in respect of all Higher Rate Claims (rather than seeking to certify their cost of funding) signifies or entails that their rights as against the company now are different from those of other Higher Rate Creditors, and could be said to make it impossible for them to "consult together with a view to their common interest" (the basic principle as classically stated by Bowen LJ in Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583) since they no longer can participate in the adjudication process, and thus have no interest in it or in discussing it. I have added to my consideration of this point the potentially linked fact of the agreement between Wentworth Group and the Senior Creditor Group (but not the Administrators or LBIE) for the payment by Wentworth Group companies of a fee of £35 million. I have concluded, however, that these matters do not unsettle the class composition, principally because the Lock-Up Agreement does not, on my analysis, remove the common rights of all the Higher Rate Creditors, but simply commits Wentworth Group as to which of two ways of exercising that right it will choose. In my view, the fact of the agreement in advance as to which of two options offered under the Scheme in respect of the right to select does not signify any material divergence of relevant right, any more than a firm internal and unexpressed election on its part (such as all such Higher Rate Creditors had to make before voting), without binding commitment or agreement, would do so. Furthermore, I do not consider that this precontracted choice is such as to prevent constructive discussion of the

overall Scheme and the balance of benefit that it is intended to bring; and that is so taking into account the arrangements between Wentworth Group and the Senior Creditor Group. Whilst I accept all this is relevant to stages two and three of the three-stage test originally formulated in Buckley on the Companies Acts (13th edn, 1957) and approved by David Richards J (as he then was) in *Re Telewest Communications (No. 2) Ltd* I was satisfied that it does not cast doubt on the composition of the classes convened.

81. I need add little more to what I have already said about the consent fee (see (d) in paragraph [77] above). In the end, the point was pursued principally in correspondence on behalf of GSI and was presented clearly and sharply as follows in a letter dated 8 June 2018 from Cleary Gottlieb to the Administrators' solicitors (Linklaters LLP), as follows:

> "As you know, our client Goldman Sachs International ("GSI") has raised concerns about the fairness of the Scheme, and for that reason voted against the proposed scheme. GSI continues to consider that the proposed scheme is unfair, in particular because of the arrangements between the SCG and Wentworth, where the SCG is being paid at least £35 million to support the proposed scheme and compromise its appeal rights in the Waterfall IIC appeal. The same incentive is not available to other Higher Rate Creditors including GSI which will be deprived of its appeal rights under the proposed scheme. In effect, the SCG is being paid at least £35 million in consideration of it not pursuing the Waterfall IIC appeal, while GSI is simply being stripped of that right without compensation. Other Higher Rate Creditors who stand to benefit if GSI succeeds in the Waterfall IIC appeal are similarly prejudiced."

The objection is expressed as being on grounds of unfairness. I consider it later at the second and third stages of my assessment. It is not presented as an objection to class constitution. Although it is fair to acknowledge that this may be in deference to the decision already made on 11 June 2018, I think that the point does really go to fairness. As it seems to me, these matters are relevant at a subsequent stage in the assessment of the Scheme, and I consider them later accordingly at the second and third stages of my assessment. But for the purposes of this first stage, I remain satisfied that the fact that, after the arrangements (to which the Administrators were not party) were revealed, a separate class for the Senior Creditor Groupwas conceived to be advisable and probably necessary, has removed that source of concern in the context of class composition.

82. I have again considered, in relation to (e) in paragraph [77] above, whether the fact that some provable debts are not legally owned by the Senior Creditor Group, but are ultimately controlled by one or more members of the Senior Creditor Group (for example, through a trust structure or a sub-participation arrangement) ought to have required the holders of such claims to vote in a separate class. Again, I remain of the view that this is not the case. For the purposes of class composition, the relevant "rights" are the rights of the legal owner of the relevant claim. The fact that the legal owner of the claim may be required to vote in accordance with the instructions of a third party (e.g. a

beneficial owner or sub-participant) is not relevant to class composition: see *Re Zodiac Pool Solutions SAS* [2014] BCC 569 at [21] (Morgan J) and *Re Abbey National plc* [2004] EWHC 2776 (Ch) at [4] and [13] (Evans-Lombe J). The scheme company's contractual relationship is with its legal creditors, and it would be unworkable to compose classes by reference to the position of third parties who may be able to control the exercise of the legal creditor's voting rights. The involvement of such third parties may be relevant in assessing the fairness of the scheme at the Sanction Hearing, but I do not consider that it is relevant for the purposes of class composition.

83. In summary, after careful review, I have remained satisfied that the class meetings proposed, and approved, convened and held, were properly constituted.

84. However, that is the basis of the Court's jurisdiction but it does not conclude the inquiry (see per Street J in *Re Jax Marine Pty Ltd* and Companies Act 1961 [1967] 1 NSWR 145 at 147 (lines 25 to 27)): for conflicting interests or motives may be highly relevant at the second stage of considering whether, as matter of discretion, to sanction the scheme. That is the stage of assessing whether the class was fairly represented at the meeting, to which I now turn.

Part G: whether each class was fairly represented by those attending

85. Again, the main focus at this second stage is on the Higher Rate Creditor meeting. Neither the SCG Meeting nor the Subordinated Creditor Meeting, where all those Scheme Creditors entitled to vote did so in favour, nor the 8% Creditor Meeting, where the requisite majorities would have been obtained by a substantial margin even if Wentworth Senior Creditors had been excluded from it, are in issue.

86. The issue arises in respect of the Higher Rate Creditor Meeting principally because (as the Cleary Gottlieb e-mail referred to in paragraph [53] above emphasised) the votes of the Wentworth Senior Creditors were necessary for the approval of the Scheme by the requisite 75% majority in value at that meeting. (As explained above, if the Wentworth Senior Creditors had been excluded from the Higher Rate Meeting, the Scheme would have been approved by 62 creditors, representing 93.9% in number and 62.2% in value.)

87. As also mentioned previously, the principal objector at the Convening Meeting, Deutsche, did not pursue its arguments at the Sanction Hearing; and (Cleary Gottlieb having expressly confirmed in their letter of 8 June 2018 that GSI did not propose to be represented at the hearing or to serve any evidence or submissions in relation to it) there was no one who appeared before me to elaborate adversarially the argument that, even if not improperly constituted for the purposes of the first stage of assessment, nevertheless the Higher Rate Creditor class was not fairly represented at the Higher Rate Creditor Meeting. That does not, however, excuse the Court from its task of assessment, even if dialectic argument might have assisted it.

88. The questions at the heart of the matter at this stage are (a) whether the majority creditors had some 'special interest(s)' different from and adverse to the other members of the Higher Rate Creditor class by which it is shown (b) they were predominantly motivated in voting as they did; if so, (c) whether their votes are to be (i) disregarded or (ii) discounted, and (d) what effect that should have in terms of whether or not the Court should decline to sanction the Scheme. I shall first discuss these tests in general, and then come on to apply them in this case.

89. I agree with Counsel for the Administrators that the mere fact that the majority creditors have a special interest for supporting the scheme does not, without more, entail that the class was not "fairly represented". As appears from Plowman J's formulation of the guiding principles in Re National Bank Ltd (see paragraph [65] above), the concern is whether the relevant creditors have a special interest which is adverse to, or clashes with, the interests of the class as a whole. A special interest which merely provides an additional reason for supporting the scheme (without clashing or conflicting with the interests of the class as a whole) does not undermine the representative nature of the vote. This is well established in the authorities both before and after National Bank Ltd. Thus, for example:

(1) In *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 at 238-239, Lindley LJ said:

> "... what the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it."

(2) In *Re Dee Valley Group plc* [2018] Ch 55, Sir Geoffrey Vos C.

said this (at [42]):

> "The meeting or meetings are called to establish whether or not the court's discretion to sanction a scheme can, as a matter of jurisdiction, be invoked. It is, however, most

> important in my judgement to consider what the court is doing once it embarks on exercising that discretion. It is then deciding, amongst other things, first whether the statutory pre-requisites have been fulfilled, and secondly whether the class attending the meeting the court called was fairly represented by those attending the meeting, whether the statutory majority were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent. It is quite clear from that exercise that the court is indeed concerned with those matters in sanctioning a scheme. The clue as to what members are supposed to be doing in voting at the court's class meeting is also, I think, to be found in that second well established formulation. The members are supposed to be fairly representing their class, and acting bona fide, and not coercing a minority in order to promote interests adverse to the class they purport to represent ...
>
> The test itself is, as I have said, made clear by the exercise that the court undertakes at the sanction stage. That points clearly to the need for the class members at the court meeting to be voting in the interests of the class and not to promote interests adverse to the class they purport to represent ..."

(3) I said much the same in *In Re Apcoa* [supra]:

> "... if an allegation is made that a creditor had improper regard to interests other than those of the class to which he belonged, it is necessary for there to be a 'but for' link between the collateral interest and the decision to vote in the way that he did. The person challenging the relevant vote must therefore show that an intelligent and honest member of the class without those collateral interests could not have voted in the way that he did. It is not sufficient simply to show that the collateral interest is an additional reason for voting in the manner in which he would otherwise have voted."

(4) The same view has recently been taken by the Grand Court of the Cayman Islands in *Re Ocean Rig UDW Inc* (18 September 2017, Parker J) with the benefit of full adversarial argument, including the citation of all relevant English and Australian authorities.

91. Further, and particularly as to (b) in paragraph [89] above, I agree also with Counsel for the Administrators that the bare existence of an adverse interest is not enough to impugn a creditor's vote as being unrepresentative of the class.

> There must be a strong and direct causative link between the creditor's decision to support the scheme and the creditor's adverse interest such that it is the adverse interest which drives the creditor's voting decision. In the absence of such a link, there is simply no sufficient reason to treat the creditor's vote any differently from those of the rest of the class.

92. As Counsel for the Administrators also pointed out, the commercial affairs of sophisticated creditors, particularly where the creditors are hedge funds or global financial institutions, are often so complex and interconnected that any given transaction will throw up a whole host of potential conflicts between them. It would be highly unsatisfactory, and in reality impracticable, if the need to establish the dominant causative reason why a relevant creditor supported the scheme required assessment of that creditor's subjective state of mind. An objective test is required.

93. In Apcoa, my suggestion was as follows (at [130]):

> "if an allegation is made that a creditor had improper regard to interests other than those of the class to which he belonged, it is necessary for there to be a 'but for' link between the collateral interest and the decision to vote in the way that he did. The person challenging the relevant vote must therefore show that an intelligent and honest member of the class without those collateral interests could not have voted in the way that he did."

94. Although this 'but for' test was approved and applied by the Grand Court of the Cayman Islands in Ocean Rig at [122], it has elsewhere been doubted, especially (and recently) in *Re Boart Longyear Ltd (No 2)* (2017) 122 ACSR 437 at [134], where it was submitted (incorrectly) that the causal analysis stated in Apcoa was "in the nature of obiter dicta" and, without deciding the point, Black J said that he was

> "inclined to think that test was put at too high a level, and that it should be sufficient to establish that an interest was likely to have, for example, a real or substantial impact on the vote of a member of a class, to raise a question whether that class member's vote is representative of the class as a whole".

95. In submissions before me, Counsel for the Administrators supported the 'but for' test; but I think it fair to characterise the submissions of Counsel for the Senior Creditor Group (supported by Counsel for Wentworth Group) as more nuanced in this regard. On behalf of the Senior Creditor Group, Mr Dicker QC in his oral submissions put it this way: "So far as stage 2 is concerned, the phrase used by Plowman J was whether the statutory majority are acting bona fides not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent. In our submission, one needs to have regard to that phrase as a whole. It is a unitary concept, essentially: Were they voting with a view to the interests of the class or not? The reason you asked that

> question is that, having at class stage allocated creditors by reference to their legal rights, what weight do you put on their votes when it comes to the sanction hearing, when deciding how to exercise your discretion. In our submission, the answer to that will often depend critically on the facts, including the precise nature of the collateral interest. So, for example, if the interest is adverse, one may say, "Well, actually, I am not going to put much weight on the fact they voted in favour in deciding whether or not to exercise the court's discretion to sanction the scheme." Conversely, if the interests are aligned, again, depending on the facts, one may put a lot of weight, not so much weight on the votes that they have expressed, depending on the nature and extent of the collateral interest. So, in our submission, the result is likely to be in most cases the same as that advocated for by Mr. Trower. However, in our respectful submission, it might be preferable to preserve as it were a little bit of flexibility reflecting the fact that ultimately this is a question of discretion for the court and unlikely to be capable of being reduced to a sort of rigid flow diagram of analysis."

96. I unhesitatingly agree that the discretion of the Court should not be circumscribed by inflexible rules; and certainly that was not my intention in adopting a 'but for' test in Apcoa. Rather, I intended to illustrate that to show that the vote was the product of a creditor's special adverse interest such as to make the result unrepresentative of the class the creditor's adverse interest must be shown to be what impelled it to vote as it did.

97. The problem to be addressed is in distinguishing between an adverse interest and an additional one in circumstances where commercial creditors may be expected to have a variety of additional interests which may be in competition, but which are not the dominant causative reason for casting a vote one way or the other.

98. In that context, it is, to my mind, important that at the second stage what the Court is guarding against is coercion of a class by a self-interested majority within it voting in its perception of its own interests rather than the class interest (see, for example, Alabama at 239); and that the authorities do seem to make clear that at this stage the question is not whether one or more creditors had, in voting, an interest not enjoyed by others and adverse to them which could or even would have had a material bearing on the voting creditor's point of view; it is whether the voting creditor's special interest is adverse to, or even inconsistent with the interests of the class, and in objective reality the factor which caused the creditor to vote as it did.

99. In Dee Valley, Sir Geoffrey Vos C. went on (after the passage quoted in paragraph [90(2)] above) to say this (at [47]):

> "I have therefore concluded that members voting at a class meeting directed by the court must exercise their power to vote 'for the purpose of benefiting the class as a whole, and not merely individual members only': see Viscount Haldane's formulation in the British America Nickel case [1927] AC 369, 371. I am not sure that the gloss suggesting that members at such

> a meeting must not vote for extraneous reasons is helpful. The key is that the members of the class must vote in the interests of the class as whole and not in their own specific interests if they are different from the interests of the class."

100. British American Nickel (in the Privy Council) is also interesting. The question on appeal concerned the validity of a vote by the majority debenture-holders to bind a minority under the terms of the debenture. One of the debenture-holders (Mr John R Booth) was induced to vote in favour of the scheme by a promise of receiving US$2m in ordinary shares. His vote was necessary to secure the majority. On the evidence, the judge (Kelly J in the Supreme Court of Ontario) held

> "the votes neither of Mr Booth nor of the British Government would have been given for the scheme had they been influenced only by what was most in the interest of the bondholder."

101. As it strikes me, that formulation is similar to the "but for" test in *Apcoa*. The focus is on whether the special interest in question is the only, or at least the deciding, factor.

102. In British American Nickel the Privy Council upheld Kelly J's approach. Viscount Haldane LC stated as follows (at 371):

> "[The votes] must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only."
> (emphasis added)

103. In summary, and whilst wary of any exclusive or binary test and not intending to suggest any mechanistic restriction on the discretion of the Court at each stage, I continue to think that with suitable caution or nuance in its application, the 'but for' test may be helpful in conveying the extent to which the special interest must be demonstrated to be an adverse one before the vote of a member of a class at a duly constituted class meeting is to be discounted or even disregarded. As it was put in the Administrators' skeleton argument, "the 'but for' test is a useful heuristic for determining whether the causal link exists."

104. In the application of such a test, or a nuanced version of it, two important and inter-linked considerations are, and, as it seems to me, usually will be, (a) whether other creditors without the special interest have, apparently reasonably, approved the scheme proposed as being in their interests as members of the class concerned and (b) whether having regard to what would be the position if there were no scheme there is more to unite the members of the class than divide them.

105. The first speaks for itself: if creditors in the class without the special interest have, on an informed basis, voted in favour of the proposed scheme that further supports the conclusion that the majority had the interests of the class in mind, and not merely their own.

106. As to the second issue, the 'comparator' is always very important at both the second and the third stage, as was recognised as long ago as the decision in *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at 415, though it should not be used as "a solvent for all class differences" even in a context where the alternative is insolvent winding-up or its real likelihood (which will destroy value and negate any real economic value in the competing interest): see *Apcoa (No 2*) at [117].

107. It is important also, I think, to recognise that whilst the class meeting is comprised of those having the same or sufficiently similar legal rights against the company, the interests in play may not be limited to but rather may transcend the class right, and any special advantage as regards a particular class right may need to be weighed against the overall benefits to be obtained under the scheme proposed. Thus, even if perceptions may differ acutely as to the separate class interest, and/or some members of the class enjoy a special interest or an overall advantage relative to others in the class, the broader interests that members of the class have in common may neutralise or displace any suggestion of a coordinated majority having voted in order to obtain the special interest or advantage. The critical question for each Scheme Creditor is whether it is content with the overall "deal" which the Scheme represents. Albeit in rather different circumstances of apparently imminent insolvency, this was the point I sought to make in *Apcoa (No 2)* at [116].

108. The final issue in this context is as to what the effect would be if the Court were to conclude that a creditor's special interest was the dominant causative reason for it having voted in favour of a proposed scheme, and in particular, whether the Court could in its discretion nevertheless sanction the scheme.

109. It is the passing of resolutions by the requisite statutory majorities at properly composed and constituted class meetings duly convened and held which gives the Court jurisdiction on application made to it pursuant to Part 26 of the CA 2006 to sanction a scheme. Unless the 'special interest' is such as to demonstrate some flaw in the class composition, the Court retains that jurisdiction even if it is established that a vote at a class meeting was unrepresentative of the class.

110. In such circumstances, the Court may either (a) discount the weight given to the majority vote and consider the fairness of the scheme without adopting any particular presumption in favour of the majority or (b) altogether disregard the relevant votes of 'special interest' creditors so that the relevant votes are void, and do not count at all towards the statutory majority, in which case if the requisite majorities are not achieved the scheme must fail.

111. The distinction between "discounting" and "disregarding" a vote is apparent from a number of authorities:

(1) One of the earliest relevant decisions, *Re Alabama*, depicts the treatment of an unrepresentative vote as a discretionary matter for the Court. See, for example, the speech of Bowen LJ at 244:

> "[A]lthough in a meeting which is to be held under this section it is perfectly fair for every man to do that which is best for himself, yet the Court, which has to see what is reasonable and just as regards the interests of the whole class, would certainly be very much influenced in its decision, if it turned out that the majority was composed of persons who had not really the interests of that class at stake."

(2) In *Re UDL*, Lord Millett said at 185:

> "The court will decline to sanction a scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question."

These remarks draw a clear distinction between discounting and disregarding a vote. The word "may" indicates that the matter is discretionary.

(3) In the course of his analysis, Lord Millett referred to three Australian decisions: *Re Chevron (Sydney) Ltd* [1963] VR 249, Re Jax Marine Pty Ltd [1967] 1 NSWR 145 and *Re Landmark Corp Ltd* [1968] 1 NSWR 759. In *Chevron* at 255-256, Adams J clearly indicated that the treatment of an unrepresentative vote is a matter of discretion:

> "In so far as members of a class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the views of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class.
>
> Whether that has been the case here or not does not appear from the evidence, and for that reason I have felt that I should be satisfied of the benefits which might reasonably be considered to accrue to the debenture stockholders from the scheme without paying too much regard to the majority obtained at the meeting.

> The true position appears to be that where the members of a class have divergent interests because some have and others have not interests in a company other than as members of the class the Court may treat the result of the voting at the meeting of the class as not necessarily representing the views of the class as such, and thus should apply with more reserve in such a case the proposition that the members of the class are better judges of what is to their commercial advantage than the Court can be."

(4) In *Jax Marine*, Street CJ said at 134:

> "When the petition, if there be a petition, comes before the Court there is ample room within the Court's statutory discretion to decide the petition in accordance with the requirements of justice and equity as those requirements appear to affect the rights of the class and its members. Quite frequently it is necessary to discount, even to the point of discarding from consideration, the vote of a creditor who, although a member of a class, may have such personal or special interest as to render his view a self-centered view rather than a class-promoting view … This Court is accustomed on the hearing of petitions under s. 181 (that is to say at the second stage of the proceedings) to recognizing and taking appropriately into account any special motives or factors affecting particular creditors."

(5) In the recent Boart sanction judgment (see *Re Boart Longyear Ltd* (No 2) (2017) 122 ACSR 437), it was expressly held that the treatment of an unrepresentative vote is a discretionary matter. Black J commented at [152]:

> "It seems to me that the lesser weight to be given to the votes of interested creditors, in the exercise of the Court's discretion whether to approve the schemes, in their original or altered forms, is not a mathematical exercise".

112. As to the exercise of the Court's discretion in this respect, the Administrators submitted that since the effect of disregarding the 'special interest' creditor's vote is effectively its disenfranchisement, and since (they submitted) if the Court were too ready to disregard a creditor's vote on the grounds of a special interest, then the test for class composition would be undermined (since a creditor could be excluded from the class meeting by reason of his interests rather than his rights), and 'special interest' creditors would always be disenfranchised, wholly disregarding the vote should be the last and most unusual resort. I am not persuaded by this line of argument. I would not agree that there is or should be such a hierarchy of response: but if one were required, if anything I might reverse the approach. The Court has always been, and should always be, especially disposed to guard against coercion of a minority by a self-interested majority. I would prefer to leave it that the discretion is to

be exercised according to all the circumstances of the case, including (often most importantly) the level of support from unconnected creditors and the Court's view of the balance of benefit offered by the scheme.

**Application of these principles in the present case**

113. I turn to the application of these principles and guidelines to their application in the present case.

114. To quote the Administrators' skeleton argument for the Sanction Hearing:

> "It is accepted that the Wentworth Senior Creditors have an interest not shared by other members of the classes to which they belong. The special interest arises out of the relationship between the Wentworth Senior Creditors and the Subordinated Creditor. It is understood that the Wentworth Senior Creditors (or those controlling them) are entitled to a proportion of the recoveries of the Subordinated Creditor, pursuant to a joint venture arrangement between the various members of the Wentworth Group.
> It is understood that the joint venture was established in January 2014, but the Administrators do not know the precise terms of the joint venture. The Administrators have received a term sheet which describes the terms of the Wentworth joint venture (the "WW Term Sheet")… The WW Term Sheet requires members of the Wentworth Group to promote the "Underlying Principle":
>
> "The parties (i) shall act or, to their knowledge, omit to act, in accordance with the underlying principle of enhancing the recoveries for the Recovery Pool and the Preferred Equity and (ii) shall not act in a manner adverse to the economic interests of the
> LBHI2 Scheduled Creditors (in their capacity as such) …"
>
> The "Recovery Pool" is defined as: "the recovery pool consisting of all the assets in, or deriving from, the LBHI2 Contribution, the KS Contribution and the Elliott Contribution (as adjusted to include the LBHI Contribution, to the extent required)." The WW Term Sheet contains a complex series of provisions which deal with the parties' obligations to contribute to, and the parties' rights to share in, the Recovery Pool."

115. Nevertheless, the Administrators submitted that none of this creates any impediment to the sanction of the Scheme, and in particular that:

(1) Properly understood, the Wentworth Senior Creditors' interest in the Sub-Debt is not adverse to the interests of the other Higher Rate Creditors in the context of the Scheme, but aligned.

(2) There has been no coercion of the minority, as can been seen from the high level of support obtained from "independent" creditors.

(3) Further, the Wentworth Senior Creditors' interest in the Sub-Debt is not (and cannot rationally be) their dominant causative reason for supporting the Scheme.

(4) Even if that is wrong (such that the Wentworth Senior Creditors are not representative of their respective classes), their votes should be discounted rather than disregarded.

116. More generally, the Administrators sought to emphasise what they presented as being "the fundamental fact" that all of the Scheme Creditors, including all of the 8% Creditors, the Higher Rate Creditors and the Subordinated Creditor, share a collective interest in facilitating the speedy distribution of the Surplus; that is the principal purpose of the Scheme; and that it thus affects all creditors in a similar way.

117. I agree with the Administrators that it is important to have in mind the overall purpose and effect of the Scheme. That is especially so in this case because the context of the debate as to class composition and fair representation of the class tends to focus attention very much on the loss by objecting creditors of their rights of appeal in the Waterfall IIC application, and to obscure in consequence both the exposures to which the holders of such rights are also subject and the overall benefits of early resolution.

118. The Scheme is a multi-faceted commercial compromise of considerable complexity, with 'give and take' on all sides. The exact balance between the parties is probably impossible accurately to establish, just as are the prospects in the various applications described compositely as the Relevant Proceedings. Lehman debt has been actively traded, especially given the high rate of interest it attracts, and the position as to sub-participatory, hedging and cross-holdings is as a practical matter likely to be complex, changing and less than transparent.

119. The essential or overall deal was and remains that in return for giving up the possibility of establishing a greater quantum of interest on appeal, creditors obtain the advantage of a speedy mechanism to return the Surplus, stemming the continuing loss of the time value of money, free of the costs of continued litigation and any benefit or burden in consequence of the Relevant Proceedings.

120. These include the possibility of a successful appeal to the Supreme Court in the Waterfall IIA Application on the applicability of the rule in *Bower v Marris* (which could have a fundamental effect on the calculation of creditors' entitlements to the Surplus), and the uncertainties inherent in the Olivant and Lacuna Applications, as well as the inevitability of delays and thus costs and expense of further delays.

121. There is no reasonable doubt that in the absence of the Scheme, the Administrators would be unable to distribute the Surplus for an indeterminate but almost inevitably lengthy period. As previously explained (and see paragraphs [10] and [11] above especially), material delay is inherently and inevitably prejudicial to all creditors: it would lead to a continuing loss of the

time value of money, a loss which will increase with every day that the Surplus is not distributed, and which will be suffered by all Scheme Creditors equally.

122. Whenever the trade or compromise is between an uncertain right or obligation and actual payment the quantification of the benefit or detriment is largely subjective; and the problem is exacerbated by the fact that the amounts in play in respect of different creditors is both variable and uncertain. It is necessary at this second stage to assess not the balance of advantage but whether there is some factor or reason to suppose that one set of Higher Rate Interest Creditors has an interest adverse to the interests of the others in the class.

123. I consider it fair to focus primarily in this assessment on the way in which the remaining Objectors contend that there is such an adverse interest. I have previously quoted from the letter sent by Cleary Gottlieb on behalf of GSI to the Administrators dated 8 June 2018: see paragraph [81] above. As already noted, the substance of the objection is that the Senior Creditor Group is being paid "at least £35 million"
"in consideration of it not pursuing the Waterfall IIC appeal", whereas GSI is simply being stripped of the right "without compensation". Insofar as this point was intended to suggest adverse interest, the short response is (as will already be apparent) that in light of the emergence of the arrangements for the payment to them, the Senior Creditor Group was not included in the Higher Rate Interest creditor class and was placed in a class of its own.

124. I accept that that may not be a complete answer, given the suggestion floated (by Cleary Gottlieb in its email dated 13 June 2018 provided to the Court during the course of the Sanction Hearing (see paragraphs [53], [59] and [87] above) that the Senior Creditor Group may control some other members of the Higher Rate Creditor class; but it is in my view sufficient given that there was never any demonstration of that floated suggestion.

125. As also previously noted, during the course of the Sanction Hearing Cleary Gottlieb advanced further points that may be thought relevant at this second stage, now concerning the interests of the Wentworth Group entities: see paragraph [53], [59] and [87] above. Although not elaborated on behalf of GSI (or, so far as I am aware, even mentioned by Cleary Gottlieb in its correspondence prior to the Sanction Hearing) this struck me as a stronger point than the one as to the Senior Creditor Group which it primarily advanced, since the interests of Wentworth Senior Creditors as a Higher Rate Creditor are plainly in competition with GSI in relation to the particular issue focused on by GSI, the Waterfall II Application, as simply demonstrated by them being ranged against each other (albeit as quasi-representative parties) in those proceedings. This initially (and intermittently thereafter) caused me some real concern.

126. However, it is important again to return to the question: which is whether the interests of Wentworth Group have been shown to be, or are objectively likely to be, contrary to the interests of the relevant class in which their vote had influence in relation to the question really before the class as such: whether to accept the give and take of the Scheme as a whole.

127. Now as regards that question, as it seems to me, the competition between GSI and Wentworth Group as litigants in the Waterfall IIC Application is substantially beside the point. There is enough Surplus to cater for victory on appeal for GSI without impacting on Wentworth, unless Wentworth Groupwould garner more from GSI's claims being compromised in some other way. That is why, no doubt, Deutsche, who did always advance this point until they withdrew their objection, focused on the Wentworth Group Sub-Debt interest as the feature giving the Wentworth entities as a whole what was said to be a special interest adverse to the class (since recoveries in respect of the SubDebt would be enhanced by the reduction of Higher Rate interest claims).

128. I would be disposed to accept that this is not only a special interest (as is accepted indeed by the Administrators, as previously noted) but also, if all the Wentworth Group entities are treated economically as one, as being 'adverse' to some in the class, and to the class as a whole in the sense that it is not an interest which is enjoyed by any other members of that class.

129. However, I do not accept that, even on that basis, it is demonstrated or likely that this was the dominant or causative reason for the support given by the Wentworth Group entities to the Scheme. As the Administrators have pointed out, the Wentworth Senior Creditors own some 38% of all provable claims. They have an obvious and very significant interest in ensuring, if that can be done, that statutory interest is distributed quickly and properly, and that any potential for the 'lacuna' identified by the Supreme Court (such that, if LBIE moves from administration into liquidation, any unpaid statutory interest under rule 14.23(7) in respect of the period between the commencement and the termination of the administration would not be payable out of the Surplus or provable in the liquidation) is removed (see paragraph [21(4)] above).

130. Further, subject to the issue raised late as to the control over others in the class that it is suggested that either Wentworth Group or the Senior Creditor Group may have, the conclusion that it is not (or not so much) the 'special interest', but the principal objectives of the Scheme as a whole, which explains why Wentworth Senior Creditors' vote is supported by the voting results. These support the Administrators' short summary that it is not "all about the Sub-Debt".

131. Thus, excluding the Wentworth Senior Creditors, 62 Higher Rate Creditors – representing 93.9% in number and 62.2% in value of the Higher Rate Creditors – have voted in favour of the Scheme. Of those 62, the majority have accepted the Settlement Premium, but a nontrivial minority of creditors (6 in total) have elected to certify their cost of funding. Indeed, two sophisticated Higher Rate Creditors – CRC and Marble Ridge – are in precisely that position, and (though they previously opposed) now support the Scheme. I would accept the submission that it cannot credibly be suggested that the position taken by CRC or Marble Ridge (or any of the other 62 Higher Rate Creditors who support the Scheme) is an irrational one.

132. In all the circumstances, I do not therefore consider that the votes at the class meetings were unrepresentative of the class interest, nor that coercion has been demonstrated.

133. Even if I am wrong and it is thought that the class meetings were unrepresentative, I would also accept that, in all the circumstances of the case, it would not be right to disregard the votes of the Wentworth Senior Creditors as being unrepresentative of their respective classes, and to conclude accordingly that the Scheme must fail for want of sufficient majorities for the purposes of the statutory requirements. It would not be right to treat the vote as the independent view of the regiment such as would ordinarily (in the absence of any 'blot') be the litmus test of a scheme's commercial good sense and fairness of a scheme. But nor would it be right entirely to disenfranchise and negate the views of a majority member of a class which is the largest creditor group in the LBIE estate and which, even ignoring its special interest, has, in common with many others, much to gain from the fulfilment of the central purpose of the Scheme as proposed and perceived by the Administrators.

134. In that context, I consider that the fact of support by a solid majority in number having claims with a value of over 60% of the total is an important factor, distinguishing this case from, for example, one where there is no real indication of general class support either in numerosity or value terms.

135. However, if that is the (as it were) potentially saving grace of the Scheme, the onus on the proponents of the Scheme to persuade the Court of its overall fairness is all the greater.

**Part H: the overall fairness of the Scheme**

136. Many, if not most, of the matters to be taken into account in considering, at this third stage of the Court's assessment of the Scheme, whether "the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve", have already been addressed in the context of the two earlier stages. However, whilst more usually the Court has the guide (and the reassurance) of a regiment of commercial men marching in step, in this case, the differences in view, and the issues as to ulterior purposes objectives, do invite more anxious scrutiny of what appears to be the minority position.

137. A useful checklist for this purpose is provided by the objections put forward by Deutsche in its solicitors' letter of 5 June 2018. Although, in the event, Deutsche did not pursue these objections and confirmed (on 11 June 2018) that it did not intend to be represented at the hearing and, having secured the Administrators' agreement to a contribution to its costs, "does not object to the court's sanctioning of the scheme, should the court see fit to do so", its objections were adopted by another Higher Rate Creditor, namely SRM, as previously explained (see paragraph [16] above). SRM was one of the four Higher Rate Interest Creditors which voted against the Scheme.

138. By letter to the Administrators dated 12 June 2018, SRM especially identified as its "principal reason for its objection to the Scheme" two features of the Certification procedure, being (a) Wentworth's special rights of consultation and (b) the provision for the surrender of SRM's "right to the supervisory control of the Court in respect of Certification". I shall return to these later, in

the course of dealing with Deutsche's seven headline points (which also incorporate them).

139. Deutsche's first objection was as follows:

> "Higher Rate Creditors who control a number of different Claims should be able to take the Certification Option for some of those Claims and the Settlement Option for others. The merits of pursuing the Certification Option for ISDA claims will, absent any other considerations, be entirely fact and circumstance specific to each relevant payee. Creditors should therefore have the freedom to exercise different options in respect of their different claims, and not be subjected to the unfair penalty of being deprived of the 2.5% premium for claims which they would otherwise not certify, simply because a Creditor elects to pursue its legitimate rights of certification in respect of other claims."

140. In short, Deutsche proposed that a creditor holding two claims should be able to receive the Settlement Premium for one claim and pursue the certification route for the other claim.

141. This was, in effect, a suggestion for what was presented as an improvement to the Scheme. Although there is reference to it being an "unfair penalty" to be deprived of the 2.5% premium for claims that they would not certify simply because they are required to make an election across the board of their claims, as if this was a prejudicial defect, that is something of a misplaced forensic flourish. There is no unfair penalty: the Settlement Premium is offered in consideration for the relevant creditor agreeing to spare LBIE the time and expense of dealing with a certification. If a creditor holding two (or more) claims were permitted to "cherry pick" in this way, it is obvious what would happen. Each creditor would choose the Settlement Premium for claims with a comparatively low cost of funding, and would choose the certification route for claims with a comparatively high cost of funding. That would not achieve the cost or time savings that the Settlement Premium is designed to secure. There is no unfair prejudice; and the 'solution' proposed would have destroyed the rationale of the proposal.

142. Deutsche's second objection, which GSI continued to press in Cleary

Gottlieb's letter dated 8 June 2018, was as follows:

> "As it stands, the Scheme provides no form of compensation for the loss of appeal rights against the Waterfall IIC judgment. Whether equivalent to the £35m 'consent fee' payable to the SCG or otherwise, such compensation should fairly be paid to all Higher Rate Creditors."

143. I accept that this was and is a point of substance; however:

(1) It is not likely to be correct to regard the agreed sum of £35 million as being in consideration of not pursuing the Waterfall IIC appeal. Pursuant to the Lock-Up Agreement, the Senior Creditor Group agreed not to certify the cost of funding for any of its claims. This may have involved a significant transfer of value (if some of the Senior Creditor Group's claims had a high cost of funding) from the Senior Creditor Group to the 8% Creditors, the Specified Interest Creditors and the other Higher Rate Creditors (in the event that the Surplus is not sufficient to pay statutory interest in full) or to the Subordinated Creditor or LBHI2 (if the Surplus extends beyond that needed to pay statutory interest in full).

(2) It is simplistic or tunnel-visioned to depict GSI as receiving no consideration. It receives consideration in the form of the benefits which all creditors will obtain from the Scheme, and especially accelerated payment of the Surplus. Other Higher Rate creditors appear to accept the give and take.

(3) These objectives in common seem to me to be ones which any creditor, including a Higher Rate Interest creditor (and, in particular, Wentworth) could well and entirely reasonably be willing to support.

(4) Moreover, the consent fee is not part of the Scheme, but is a private arrangement between the Wentworth Group and the Senior Creditor Group.

(5) The Scheme has been approved by a large majority of creditors who are not entitled to receive any consent fee, and there is no reason for the Court to second-guess their commercial assessment.

144. Deutsche's third objection was as follows:

> "Higher Rate Creditors which take the Certification Option should not be effectively subordinated to Specified Interest Creditors, those with 8% Interest Claims and those Higher Rate Creditors which take the Settlement Premium Option through the delay in payment. Higher Rate Creditors which take the Certification Option should be paid the minimum of 8% simple interest at the same time that all other interest is paid by the Company (provided, of course, that the Company has sufficient funds to do so), with only payment of any excess arising from the Certification process deferred."

145. It is true that, where a Higher Rate Creditor elects to certify, that creditor will only receive payment of statutory interest once the certification process is complete. That is because the creditor's statutory interest entitlement will not be determined until the certification process has concluded. The burden of Deutsche's suggestion was that such a creditor should be paid the minimum amount of statutory interest up front (as an interim distribution), with the balance (if any) payable upon the completion of the certification process.

146. Again, this was not so much a point of alleged unfairness, so much as a suggestion for the Scheme's improvement (in Deutsche's perception).

However:

(1) As Mr Russell Downs put it on behalf of the Administrators,

> "…this concern overlooks the fact that Certifying Creditors will still receive their Statutory Interest far sooner than they would but for the Scheme and any delay to receipt of their entitlement will be minor."

(2) The procedure has been designed to be expeditious and streamlined. The timetable for the adjudication is deliberately compressed so as to avoid any substantial delay. For example, once the adjudicator receives LBIE's written submissions, the adjudicator is required to use reasonable endeavours to reach a final decision within 20 business days. A certifying creditor will receive its statutory interest far more quickly than it would but for the Scheme. Pending the adjudicator's determination, LBIE will hold a reserve equal to the certified sum so as to prevent any prejudice to the certifying creditor.

(3) A two-stage process would by contrast be more expensive, less straightforward and likely to be productive of delay.

147. Deutsche's fourth objection was as follows:

> "The Wentworth Group should have no right to be informed of Certification Claims or to be consulted by the Company on those Claims. Certification Claims should be confidential as between the Certifying Creditor and the Company, whose Joint Administrators should approach the Claims in good faith and in a manner consistent with their obligations as officers of the court."

148. This objection did cause me some concern. It is uncomfortable to give any creditor some special status, even if carefully controlled, as regards the proof of another creditor; and the fact that the creditor in question (the Subordinated Creditor) has a considerable interest is no real answer. However, my concern is not such as should in my view upset the Scheme.

149. In particular:

(1) A right to consult is not a right to dictate. The Administrators retain their discretion in its entirety, and are not fettered by the preferences of the Subordinated Creditor. The Administrators are free to deal with a certification in any way they think fit. There is nothing that prevents the Administrators from "acting in good faith and in a manner consistent with their obligations as officers of the court".

(2) As Counsel for the Administrators pointed out, the information and consultation rights afforded to the Subordinated Creditor have parallels outside of the Scheme. For example:

(a) Creditors are allowed to inspect the proofs lodged by other creditors (see rule 14.6 of the IR 2016), and are empowered to challenge the admission of proofs filed by other creditors (see rule 14.8 of the IR 2016 and paragraph 74 of Schedule B1 to the Insolvency Act 1986).

(b) In the event of a challenge, the challenging creditor would be entitled to obtain disclosure of all relevant documents (including any relevant confidential materials) and would be fully involved in the proceedings.

(c) Conversely, if a creditor could demonstrate that it had a financial interest in any legal proceedings between the office-holder and another creditor, it could apply to be joined to the proceedings as a respondent pursuant to CPR 19. In practice, the Subordinated Creditor has frequently been joined to litigation in the LBIE administration for precisely this reason. Consider, for example, the role adopted by the Subordinated Creditor in the Waterfall IIC Application in relation to the German Master Agreement, where the Subordinated Creditor successfully argued against a statutory interest claim by the Senior Creditor Group: see Waterfall IIC (Costs Judgment) [2018] EWHC 924 (Ch).

(d) In the event of a proposed compromise between a creditor and the estate, any other creditors whose position would be affected by the compromise are entitled to be consulted, and their wishes are relevant to the decision of the office-holder or the Court (as the case may be): see *Re Greenhaven Motors* [1999] BCC 463 at 643.

(3) The Subordinated Creditor is under an obligation to keep the relevant material confidential, and not to use it for a collateral purpose. The information must be destroyed or returned to the Company once it is no longer reasonably required for the purposes of the Scheme.[2] Accordingly, there is no material risk of any prejudice to the certifying creditor.

150. Deutsche's fifth objection was as follows:

> "If the Company rejects a Certification Claim, the Company should give reasons why it is doing so. Only then will the Certifying Creditor know what case it has to meet should it wish to take the Claim further and, if so, what additional evidence it should provide to the Adjudicator."

[2] See the Scheme at paragraph 27.3 [1/3/53].

151. As to this, in my view:

(1) Fairness does not require the giving of reasons in the context of an expert determination, just as it does not require an oral hearing. Indeed, at least in the context of an expert determination of value,

> "the classic rule is that silence is golden and the expert should give no explanation as to how he has come to his decision, leaving it unassailable even if apparently low or high" per Harman J in *Re a Company, ex p Holden* [1991] BCLC 594 at 603d.

(2) See also See *Morgan Sindall plc v Sawston Farms (Cambs)* Ltd [1999] 1 EGLR 90 at 92-93:

> "The whole point of instructing a valuer to act as an expert (and not as an arbitrator) is to achieve certainty by a quick and reasonably inexpensive process. Such a valuation is almost invariably a non-speaking valuation, with the expert's reasoning and calculations concealed behind the curtain. The court should give no encouragement to any attempt to infer, from ambiguous shadows and murmurs, what is happening behind the curtain."

(3) That said, and as appears from the actual result in the ex parte Holden case (whereby the applicant was permitted not to accedeto the acquisition of his shares at a value struck by an unspeaking expert), that does not conclude the point as to whether it is fair and reasonable to bind a claimant to such a process, especially in circumstances where the process is in substitution for other processes which would involve giving reasons (most obviously, in the case of a claim before the Court).

(4) In this case, the balance is between, on the one hand, expedition and certainty, without the danger of collateral attack and the complication of reasons being required, and, on the other hand, a process more nearly replicating the existing right of access to the Court.

(5) I consider the balance struck to be to be fair and reasonable, and not vitiated by any supervening or over-riding principle of fairness. The overall purpose of the Scheme, supported by the majority, is to facilitate an expeditious return of the Surplus to creditors. If the Administrators were required to give detailed reasons for their decision, that objective might be thwarted.

(6) Further and in any event, the Scheme provides for a Consultation Period during which LBIE may engage in discussions with the certifying creditor regarding their certification. Mr Downs has said he envisages that, where the Consultation Period is engaged,

> "the reasons for rejecting a certification will be discussed with a Certifying Creditor".

(7) In all the circumstances, I do not consider that the process is in this regard flawed or unfair.

152. Deutsche's sixth objection was as follows:

> "If the Company rejects a Certification Claim and the Certifying Creditor does not accept the Company's decision, the Claim should be referred to one of the Adjudicators identified (acting as an expert). If none of those named is available, a replacement should be agreed between the Certifying Creditor and the Company, without reference to the Wentworth Group. Whilst the Adjudicator should uphold a Certifying Creditor's claim unless made in bad faith or irrationally, the Adjudicator should not be obliged only to choose between, on the one hand, the amount certified and, on the other, the statutory minimum or the Company's counter-offer. If the Adjudicator does not uphold the Certifying Creditor's claim but considers that, on the evidence presented to the Adjudicator (including evidence requested by the Adjudicator), another sum would be appropriate, the Adjudicator should be free to award that other sum. The Adjudicator should also be free to hold an oral hearing if the Adjudicator considers it appropriate, and should give brief reasons for his or her decision."

153. As Counsel for the Administrators noted in their skeleton argument, this sixth objection amounted to a re-writing of the adjudication process as provided for in the Scheme, as if that was required to rehabilitate the adjudication process. I agree with the Administrators that the adjudication Scheme is not such as to cause the Scheme to fail: some would think what Deutsche proposed an overall improvement, others not; but the Court's function is to determine whether this adjudication process is a blot on the Scheme putting it beyond the pale of fairness.

154. I accept that there is nothing in the adjudication process which causes the Scheme to fall below this threshold. This seems to me to be broadly confirmed by the voting. Out of the 9 Higher Rate Creditors who have elected to certify their cost of funding (and who could therefore be subject to the adjudication process in the future), 6 voted in favour of the Scheme (2 voted against and 1 abstained). The Administrators confirmed that none of the six is a member of the Wentworth Group or the Senior Creditor Group, and two of them (Marble Ridge and CRC) previously opposed the Scheme at the Convening Hearing.

155. As to the specific points originally raised by Deutsche:

(1) I do not think a Certifying Creditor could have any reasonable objection to the system for selecting an adjudicator. If none of the named adjudicators is available, a replacement must be appointed. The replacement must be a former judge or a QC. The Subordinated Creditor has a right of consultation, but the Administrators have the final decision as to the identity of the adjudicator (and will make that decision in accordance with

their duties as officers of the Court). The system is calculated to ensure a high calibre of potential appointees, and is further buttressed by the Administrators' duties as officers of the Court. My experience is that reserving to each Certifying Creditor the choice of adjudication in default of the three named would, in that event, be likely to lead to delay, quite unnecessarily.

(2) Borrowing from the explanation given in the Administrators' skeleton argument, the key feature of an adjudication under the Scheme is that the adjudicator must either accept the creditor's certification, accept LBIE's counter-offer (if one has been made), or award the statutory minimum of 8% (if no counter-offer has been made). The purpose of this structure is twofold. On the one hand, it reduces the length and complexity of the adjudication (so as to promote the overall objective of distributing the Surplus expeditiously). On the other hand, the limited options available to the adjudicator are intended to reduce the risk of excessively high certifications. Creditors will understand that the adjudicator is unable to cure a defective certification by re-writing it, and therefore will take care to ensure that certifications are supported by proper evidence. Nevertheless, the adjudication casts the burden of proof in favour of the certifying creditor: the adjudicator must find in favour of the creditor unless LBIE proves that the certification was made in bad faith, irrationally or otherwise than in accordance with the Relevant Principles.

(3) It is acknowledged that, under the general law, it would be possible for the Court to reject both the creditor's certification and LBIE's analysis, and to conclude that the correct figure is somewhere in the middle: see WestLB AG v Nomura Bank International plc [2012] EWCA Civ 495 at [32] and Lehman Brothers Finance SA (in liquidation) v SAL Oppenheim [2014] EWHC 2627 (Ch). This practice, however, should not be elevated into a rule of public policy. There is no reason why an adjudication cannot be structured in the manner proposed in the Scheme for the purpose of furthering the objectives set out above.

(4) At the hearing I did question Counsel whether the introduction of an ability for the adjudicators to call for oral hearings into the adjudication regime might be sensible, and even perhaps requisite given especially the possibility of the adjudicators rejecting a certificate on the ground of bad faith. A finding of bad faith without affording any opportunity for personal attendance felt uncomfortable and even counter-intuitive. I asked for express confirmation that the three chosen adjudicators were happy to proceed without even having that option. The positive confirmation from each of the three has carried considerable weight with me. As further comfort, I note that there is a mechanism by which the adjudicator can request the parties to provide further information, which seems likely to be sufficient to give the adjudicator all the assistance he or she needs: and as I say, none of three primary appointees has conceived any difficulty in any of this.

156. Deutsche's seventh and final objection was as follows:

> "The Certifying Creditor should be able to take the matter to the court if the Adjudicator has made a manifest error, has made an error of law or has reached a conclusion that no reasonable Adjudicator could have reached."

157. This was a variation on the same theme as its earlier objections; but it chimes also with SRM's particular concern as to the "surrender" of "its right to the supervisory control of the Court" (see paragraph [138] above).

158. The concern is natural: and where rights of recourse to the Court are to be removed or restricted, not by private agreement but by virtue of a scheme which compels consent at the instance of a statutory majority, it is of heightened importance that it not be minimised, and that the substitute for legal recourse in the Courts should be robust, satisfactory and justified. However:

(1) It should be noted first that the Scheme provides that "insofar as the law allows there will be no right of appeal against the Adjudicator's decision (whether to a court or otherwise)". Accordingly, the Scheme does not exclude any mandatory rights of appeal which may exist under the general law.

(2) The nature of the adjudication required needs to be borne in mind. In effect it it is simply to choose between the certification and the counter-offer or (if no counter-offer is made) the statutory minimum of 8%. That is not likely to give rise to a coherent and cogent claim of manifest error or Wednesbury unreasonableness. In such circumstances, the prescription of an appellate process seems more likely to engender more bitterness and expense, over matters that may well ultimately signify more sound and fury than prejudice.

(3) The most obvious sort of dispute where instinct prompts against foreclosing recourse to Court is one involving a point of law. However, it seems unlikely that the Adjudicators will need to determine any point of law (and neither Deutsche nor SRM have suggested otherwise). The Relevant Principles provide the legal framework.

(4) In any event, there is no rule of public policy that prevents parties from agreeing to the final and conclusive decision of a third party on an issue involving construction or mixed law and fact: and see per Chadwick LJ in Brown v GIO Insurance Ltd [1998] EWCA Civ 177 at page 1, adopting as correct the conclusion of Knox J in Nikko Hotels (UK) Ltd v MEPC plc [1991] 2 EGLR 103 at 108 where Knox J stated:

> "The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he answered the right question in

> the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."

159. In the round, I have been persuaded that the certification and adjudication processes instituted by the Scheme are such as could reasonably be approved by commercial men acting in their own interest and aware of the potential for dispute in the areas designated to be subject to those processes; and that, in particular, though those processes are more "limited" (as SRM put it) than Court proceedings, they are not unfair, and they are justified by reference to the fundamental purpose of the Scheme.
160. I should also add that, in my view, the amendments introduced to the Scheme prior to the Scheme Meetings (see paragraph [39] above), which removed an earlier feature which conferred on the Subordinated Creditor the right to determine the amount of any counter-offer, were certainly appropriate and probably necessary. I had considerable reservations as to the earlier provisions, and well understood the objections to them.

161. Even the reduced role of the Subordinated Creditor now provided for has given me some concern: my instincts were against giving any particular role or platform to the Subordinated Creditor so as to enable it, without colour of office or being subject to any duties, to intervene in another person's claim simply with a view to its own interests.

162. However, the position of the Administrators is clear: they consider that involvement appropriate and would also, even apart from such provisions, have expected to consult with the Subordinated Creditor on this matter as one affecting its commercial interests, recognising that it would also have been entitled to intervene in any legal proceedings relating to a disputed certification. That view is entitled to weight; and I have taken into account also the fact that not only has Deutsche withdrawn its objection, but both CRC and Marble Ridge, who actively opposed the Scheme previously and appeared through Counsel at the Convening Hearing to object to the class composition proposed, appear also to have been satisfied by the changes so that they voted in favour of the Scheme.

163. Although, therefore, I have carefully considered SRM's continued objection on this score, and its over-arching point that "the Certification Option and the associated Adjudication process appear to be designed to discourage Higher Rate Creditors from challenging the Administrators' (and Wentworth's) view of its entitlement to Statutory Interest" so as to be "particularly unfair for Higher Rate Interest Creditors in dispute with the Administrators as to their entitlement to Statutory Interest under the Certification Option", I have concluded that I should not regard this revised feature or any remaining aspect of the certification and adjudication processes as such as to cause me to refuse sanction of the Scheme.
164. Having considered these specific objections, I have also sought to stand back and consider the matter in the round. In any scheme such as this where the assessment of the comparator is to a large degree a matter of subjective judgement, and will inevitably affect different creditors differently, in contrast to the comparator of imminent, insolvent liquidation where value destruction is objectively inevitable, the balance to be struck is less straightforward. In the

context of this Scheme, moreover, the cross-holdings and conflicting interests are obvious and substantial.

165. Nevertheless, in my judgment, the benefits overall of the Scheme are also obvious; and they are considerable. The certainty that delay will occasion substantial loss in terms of statutory interest is perhaps the most important fact in the matter.

166. In the round, I have concluded that there is no unfairness such that the Court should decline to give its sanction to the Scheme.

**Part I: international jurisdiction and cross-border recognition**

167. This is not a scheme such as that devised for and sanctioned in the case of Apcoa where there is a preliminary question as to whether there are sufficient connections between the scheme company and this jurisdiction to attract the jurisdiction of the Court and warrant its exercise. LBIE being an English company there is no need to demonstrate some other "sufficient connection".

168. Nor is there any concern in this case as to any limitation or restriction on the scheme jurisdiction of this court such as is sometimes argued there may be in the context of a body corporate with its Centre of Main Interests ("COMI") in another EU member state and no establishment here (though it is to be noted that the English court has not considered that an impediment in a number of decided cases): see, for example, *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] *Bus LR* 1245*; In re Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2014] BCC 448; and In re Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch),
[2015] Bus LR 1046.

169. However, not all LBIE's creditors are domiciled in the United Kingdom and the effect of the Scheme on them, and the international effectiveness of the Scheme generally, are plainly matters to be considered.

170. Two principal matters need to be addressed: (i) the impact of the Recast Judgments Regulation; and (ii) whether the Scheme will be given and achieve substantial cross-border effect.

**Recast Judgments Regulation**

171. Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Recast Judgments Regulation") applies in "civil and commercial matters". Chapter II deals with jurisdiction.

172. The basic rule underlying Chapter II is that any person domiciled in an EU Member State must be "sued" in the courts of that Member State: see Article 4(1). It has never been conclusively determined whether Chapter II of the Recast Judgments Regulation applies to some or all schemes of arrangement, although the matter has been considered in a number of cases (including those cited at paragraph [168] above).

173. There are two possibilities: either (a) that the jurisdictional requirements in Chapter II of the Recast Judgments Regulation are simply not applicable to English schemes of arrangement, or (b) that such schemes of arrangement do fall within Chapter II, so that the English Court must be satisfied that it can assume jurisdiction under one or more of the articles in that Chapter II.

174. As to (a) (in paragraph [173] above), there are a variety of arguments against the application of the Recast Judgments Regulation. The principal arguments are that:

(1) A scheme of arrangement between a company and some or all of its creditors falls within the exclusion in article 1(2)(b) for "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". This was the view taken by Lewison J (as he then was) in *In re DAP Holdings NV* [2005] EWHC 2092 (Ch); [2006] BCC 48;

(2) The main jurisdictional provision in Chapter II, now article 4 of the Recast Judgments Regulation, refers to a person being "sued" in the member state in which he is domiciled, and assumes a 'lis': but no one is sued, nor is there a 'lis' in the conventional sense in a creditors' scheme of arrangement: I expressed this possibility in Re Primacom;

(3) More generally, and as stated by Snowden J in *In re Van Gansewinkel* at [42], "it must be highly doubtful that the framers of [the Recast Judgment Regulation] had schemes of arrangement in mind at all."

175. Against these arguments, however, and in favour of the applicability of the Recast Judgment Regulation, the principal arguments are that:

(1) Article 1(1) provides that the Regulation applies to "civil and commercial matters, whatever the nature of the court or tribunal", which is plainly broad enough to encompass schemes of arrangement;

(2) The exclusion in article 1(2)(b) is intended simply to exclude proceedings which fall within the Insolvency Regulation, so as to dovetail the two Regulations and to avoid both any overlap and any gap between them; in *Re Rodenstock* Briggs J (as he then was) adopted this view in the case of schemes involving solvent companies, but left the matter open in the case of schemes relating to insolvent companies; and in *Re Magyar* David Richards J (as he then was) considered that

> "it logically follows that the exclusion in article 1(2)(b) does not extend to a scheme of arrangement involving an insolvent company, at least unless the company is the subject of an insolvency proceeding falling within the Insolvency Regulation. In other words, an order sanctioning a scheme between an insolvent company and creditors is subject to the Judgment Regulations, at least if the company is not subject to insolvency proceedings to which the Insolvency Regulation applies."

(3) David Richards J went on to mention the case where (as here) a scheme company is subject to an insolvency proceeding, stating that it would not necessarily follow that the exclusion would apply, since a scheme of arrangement is not an insolvency proceeding to which the Insolvency Regulations applies, so that

> "[i]t could still be that an order sanctioning a scheme of arrangement in those circumstances is entitled to recognition under the [the Recast Judgment Regulation]",

But he did not decide the point since it did not arise in the context.

176. As Snowden J noted *In re Van Gansewinkel*, the point is a difficult one. Moreover, there is an added complication in this case in that the Company's administration does not fall within the Insolvency Regulation, because that Regulation does not apply to "investment undertakings which provide services involving the holding of funds or securities for third parties": see Article 1(2). Nor does the Company's administration fall within the Recast Insolvency Regulation, because that Regulation does not apply to insolvency proceedings which commenced prior to 26 June 2017: see Article 84(1). The Company's administration also falls outside the other EU insolvency legislation, namely the Insurance Directive and the Credit Institutions Directive.

177. Rather than decide it, the approach adopted by the Court is to assume (without deciding) that the Recast Judgment Regulation applies and then determine whether jurisdiction could be found within its provisions. Especially having regard to the peculiar additional complications in this case (as above described) that indeed is the course I am invited to adopt now.

178. On that basis, the Administrators pray in aid Article 8 of the Recast Judgment Regulations as providing the necessary jurisdiction. So far as material, Article 8 provides:

> "A person domiciled in a Member State may ... be sued ... (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

179. If at least one scheme creditor is domiciled in the UK, Article 8(1) has been invoked in many recent cases to establish that the English Court has jurisdiction to sanction a scheme affecting the rights of creditors domiciled elsewhere in the EU. See *Re Nef Telecom BV* [2014] BCC 417 at [43], where Vos J stated:

> "… if the Judgments Regulation applies because some of the creditors are to be regarded as defendants to the applications for sanction [of the scheme] then, where one of those defendants is domiciled in the United Kingdom, that gives the court jurisdiction under Article 6".

180. This principle has been applied in a number of subsequent cases, including *Re Magyar Telecom BV* [2014] BCC 448 at [31] (David Richards J); *Re Zlomrex International Finance SA* [2015] 1 BCLC 369 at [15] (Mann J); *Re Metinvest BV* [2016] I.L.Pr. 19 (Ch) at [32] (Proudman J); and *Re Hibu Group Ltd* [2016] EWHC 1921 (Ch) at [67] (Warren J).

181. Further, although in some cases, the Court has suggested that it may not be enough to identify a single creditor and should consider whether the "numbers and size of the scheme creditors domiciled in [the UK]" are "sufficiently large": see Re Van Gansewinkel Groep BV [2015] Bus LR 1046 (Ch) at [51] (Snowden J) and Re Global Garden Products Italy SpA [2017] BCC 637 at [25] (Snowden J) that more restrictive view would cause no difficulty in this case. It is understood that approximately 11% by number and 5% by value of the Scheme Creditors with admitted claims are domiciled in England.[3] These figures are broadly comparable to the figures in Van Gansewinkel, and are sufficient (on any view) to bring the Scheme within Article 8.

182. Nevertheless, the Administrators have drawn to my attention that the application of Article 8 is, however, subject to two potential exceptions:

(1) Some of the Scheme Creditors (representing a very small proportion of the Scheme Creditors by value) are former employees of the Company domiciled outside the UK in other EU Member States (the "Relevant Employees"). Article 22(1) provides:

> "An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled."

This raises a question as to whether Article 22(1) of the Recast Judgments Regulation prevents the Relevant Employees from being included in the Scheme, given that the Scheme seeks to compromise the Company's liabilities under the relevant contracts of employment. It is arguable, by reference to its effect, that the Scheme should be characterised as a matter relating to employment within Article 22(1), even though the primary purpose of the Scheme is to facilitate the distribution of statutory interest under the English insolvency regime.

(2) Some of the finance documents governing the scheme liabilities contain exclusive jurisdiction provisions in favour of the courts of another Member State. This raises a question as to whether Article 25(1) of the Recast Judgments Regulation prevents such creditors (the "Relevant Jurisdiction Clause Creditors") from being included in the Scheme, given that the Scheme seeks to compromise the Company's liabilities under the relevant finance documents. Article 25(1) provides:

[3] See Downs at paragraph 119.1 [CH1/3/33-34].

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

It may be open to doubt whether the Scheme can properly be treated as falling within a contractual jurisdiction clause for the purposes of Article 25(1), given that the primary purpose of the Scheme is to facilitate the distribution of statutory interest under the English insolvency regime. But the argument is there; and it must either be adjudicated or some other solution must be identified.

183. The solution proposed by the Administrators lies in Article 26(1) of the Recast Judgments Regulation, which provides that "a court of a Member State before which a defendant enters an appearance shall have jurisdiction". In particular:

(1) Article 26(1) refers to a defendant who "enters an appearance". In determining whether an appearance has been entered, "it is for the lex fori to determine what constitutes an appearance": see Elefanten Schuh GmbH v Pierre Jacqmain [1982] 3 CMLR 1 at 11-12 (per Sir Gordon Slynn AG). This principle was approved by the Court of Appeal in Harada Ltd v Turner [2003] EWCA Civ 1695 at [30], where Simon Brown LJ commented:

> "True it is, as Sir Gordon Slynn stated in his opinion as Advocate- General in Elefanten, that 'in principle … the lex fori must determine the stage and manner in which any plea is to be raised', but, as the First Chamber of the ECJ (under the presidency of Sir Gordon Slynn) said in Kongress Agentur [1990] ECR 1-1845, whilst 'the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court', 'it should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention'."

(2) As a matter of English law, any Scheme Creditor who has lodged a proof of debt in the administration of LBIE has submitted to the jurisdiction of the English Court for all purposes relating to the administration: Rubin v Eurofinance SA [2013] 1 AC 236 at [165]-[167] (Lord Collins); *Stitching Shell Pensionfunds v Krys* [2015] AC 616 at [28]-[32] (Lord Sumption and Lord Toulson); and *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] 1 CLC 706 at [30]-[76] (Gloster LJ).

(3) Where a creditor lodges a proof of debt, the creditor's submission to the jurisdiction of the English Court is not limited to the proof itself. Rather, the creditor submits to the entire insolvency process. For example, in Rubin, a defendant to an avoidance action brought by the office-holder submitted to the jurisdiction of the Court (in relation to the avoidance action) by lodging an unconnected proof of debt in the insolvency proceedings. This reflects the policy that, if a creditor seeks to benefit from an insolvency process by lodging a proof and obtaining a rateable distribution from the estate, the creditor cannot "pick and choose": either the creditor must be subject to the entire insolvency process, or the creditor must be subject to none of it.

(4) The Administrators have an express statutory power to propose a scheme of arrangement under section 896(2)(d) of the CA 2006, and Schedule B1 to the Insolvency Act 1986 specifically contemplates that an administrator may propose a scheme of arrangement: see paragraph 49. Thus, the Scheme should be viewed as part of the administration procedure.

(5) It follows that, where a creditor (including any Relevant Employee or Relevant Jurisdiction Clause Creditor) has lodged a proof of debt in LBIE's administration, that creditor has submitted to the jurisdiction of the English Court for the purposes of the Scheme. By the same token, the creditor has "entered an appearance" within Article 26(1) of the Recast Judgments Regulation.

184. I accept this argument, and that pursuant to Article 26(1) the Court has jurisdiction, which it should exercise, to sanction the Scheme vis-à-vis any Relevant Employees or Relevant Jurisdiction Clause Creditors who have lodged a proof of debt in the Company's administration.

185. Any Relevant Employees or Relevant Jurisdiction Clause Creditors who have <u>not</u> lodged a proof of debt in the Company's administration are expressly excluded from the definition of "Scheme Creditor", and are not bound by the Scheme. The Administrators confirmed to me that they consider that it is unlikely that there are any, or any substantial, creditors falling within those categories who have failed to submit a proof of debt in the administration. That is readily understandable in the context of an administration which commenced almost a decade
ago.

186. I need not therefore decide the difficult questions otherwise raised in relation to Relevant Employees and Relevant Jurisdiction Clause Creditors.

Cross-border effect and International recognition

187. Having regard to the general principle that the English court will not act in vain or make an order which has no substantive effect or will not achieve its purpose, and echoing Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) at [18]-[20] and Rodenstock at paras. 73 to 77, in Re Magyar at [16], David Richards J said:

> "The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose."

188. However, the principle does not require either worldwide effectiveness, or certainty. Thus, it does not require that the Court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets to or because of which creditors might make claims, it is especially important that the scheme be effective. Further, and as Snowden J explained in Re Gansewinkel at [71],

> "The English court does not need certainty as to the position under foreign law – but it ought to have some credible evidence to the effect that it will not be acting in vain."

189. Thus, in Sompo, when sanctioning an insurance transfer scheme under the Financial and Market Act 2000 (which is analogous in the context), David Richards J said this:

> "[17] My principal concern, when the application was first before me on 14th December 2006, was to understand the true impact, if any, of the proposed transfer on the business … What, if any, effect will the transfer have if proceedings against Sompo were brought in those jurisdictions where it did have substantial assets? Would the transfer be recognised in those jurisdictions? If not, what purpose would be served by the transfer?
>
> [18] It was relevant, therefore, to have some evidence as to the proportion of the transferred policies which were governed by English law or other UK law and, particularly if the proportion were small, to have some evidence as to the effect of the transfer in Japan and perhaps other jurisdictions where Sompo has substantial assets.
>
> [19] If it appeared that the transfer would have little or no significant effect, it raised an issue as to whether in its discretion the Court should sanction the transfer. It is established that, on comparable applications under the Companies Act 1985, the Court will not act in vain …
>
> [26] Overall this evidence leaves me less than convinced that the scheme once sanctioned will definitely be effective as regards proceedings in foreign jurisdictions to enforce claims under policies which are governed by foreign law, although I acknowledge that it provides a proper basis for concluding that it may well be so effective in Japan and the United States. More importantly, as I have

> mentioned, the evidence establishes that over 27% of the policies in number and by reference to reserves are governed by English law, and it is reasonable to suppose that the transfer will be effective in any relevant jurisdictions as regards those policies. The proposed scheme will therefore achieve a substantial purpose. The fact that the scheme also extends to a larger class of business not governed by English law is not, in my judgment, a good ground for refusing to sanction the scheme. Whether the scheme is recognised as effective in Japan or the United States or elsewhere will, if necessary, be tested in due course in proceedings in those jurisdictions."

190. The Administrators submitted, and I agree, that the present case is stronger than Sompo: it is difficult to see how creditors could enforce their statutory interest entitlements in the English administration of an English company under English law in any jurisdiction other than England, and only a small proportion of the Surplus is situated outside of England.

191. Nevertheless, and as previously mentioned, LBIE has applied to the US Bankruptcy Court for an order recognising the Scheme as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code. The Administrators consider this to be a prudent course of action, due to the fact that there are a number of US-domiciled Scheme Creditors with claims under contracts governed by New York law, and because certain assets belonging to LBIE are situated in the US. The hearing of the application was due to take place on 19 June 2018: see Downs at paragraph 75. I do not know its result. However, in light of the matters set out above, the effectiveness of the Scheme is not conditional upon Chapter 15 recognition. Regardless of whether Chapter 15 recognition is sought or obtained, the Scheme will plainly achieve a substantial effect.

## Part J: Conclusion

192. I have considered the material sent to those interested in respect of the Scheme and the court process relating to it. I can see no 'blot' and none has been suggested (subject to the discussion of objections above).

193. As amended after the Convening Hearing, and with very minor amendments put forward to me and approved, I have been satisfied of my jurisdiction to sanction this Scheme, and that in my discretion I should do so. I made an Order accordingly.