Neutral Citation Number: [2020] EWHC 2441 (Ch)

Case No: CR-2020-003544

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

7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 13/09/2020

Before :

MRS JUSTICE FALK

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IN THE MATTER OF CODERE FINANCE 2 (UK) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

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David Allison QC and Ryan Perkins (instructed by **Clifford Chance LLP**) for the Company
Felicity Toube QC (instructed by **Milbank LLP**) for an ad hoc group of Scheme creditors
Tom Smith QC (instructed by **Jenner & Block London LLP**) for Kyma Capital Limited

Hearing dates: 3, 4 and 7 September 2020

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Judgment Approved by the court for handing down

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 14 September 2020

Mrs Justice Falk:

Introduction

1. These are my written reasons for my decision on an application by Codere Finance 2 (UK) Limited (the "Company") for an order convening a single meeting of certain of its creditors ("Scheme creditors") for the purpose of considering, and if thought fit approving, a scheme of arrangement under Part 26 of the Companies Act 2006 (the "Scheme"). In view of the urgency I made a convening order following the issue of this judgment in draft, on 11 September 2020.

2. The Company is part of the Codere group of companies (the "Group"), the parent of which, Codere S.A. (the "Parent"), is listed on the Madrid stock exchange. The Group is an international gaming operator with operations in Latin America, Spain and Italy. It also has some online gaming operations, although in 2019 these only represented around 4.3% of sales. It employs over 12,000 people worldwide.

3. The Group's financial position has worsened significantly during the Covid-19 pandemic, as a result of venues being closed and major sporting events being cancelled. This has resulted in the Group facing a liquidity crisis. The Company's position is that, absent the Scheme, it will enter into liquidation.

4. The convening hearing was fixed for one day, which the Company's advisers had considered to be sufficient. However, the proposed class composition was opposed by Kyma Capital Limited ("Kyma") on behalf of a fund managed by it. Kyma sought an adjournment of the convening hearing on the basis that one day was insufficient. This was opposed by the Company based on its understanding that any adjournment would (at least absent an order for expedition) be to a date well into October, which would leave insufficient time to implement the Scheme before the Group ran out of funds. The Company suggested that, if I was satisfied that there was a reasonably arguable basis for Scheme creditors to vote as a single class, then I should make a convening order on that basis, without prejudice to the ability of creditors to raise class issues again at the sanction hearing (currently fixed for 6 and 7 October).

5. I concluded that it would be preferable to resolve the class issues that had been raised at the convening hearing if at all possible, by allowing the hearing to run over into what became a total of two days, comprising one full day and two half days.

6. I heard submissions from David Allison QC for the Company and Tom Smith QC for Kyma. Felicity Toube QC also appeared and made submissions on behalf of an ad hoc committee of Scheme creditors (the "AHC"). I am grateful to all Counsel for their assistance.

The Group's financial liabilities and the proposed Scheme: overview

7. At present, the key financial liabilities of the Group are as follows:

   i) The Company and Codere Finance 2 (Luxembourg) S.A. ("Codere Finance") are co-issuers of two series of notes with face values of €500 million and US $300 million respectively, currently scheduled to mature on 1 November 2021 (the "Existing Notes"). The Existing Notes are issued in registered global form

and traded through Euroclear and Clearstream. It is the ultimate holders of the beneficial interests in the Existing Notes who are the proposed Scheme creditors. (This is on the basis that they are contingent creditors for Part 26 purposes, given their entitlement to call for the issue of definitive notes.)

ii) Another group company, Codere Newco S.A.U., is the borrower under a €95 million super senior revolving credit facilities agreement (the "RCF"), due to mature on 15 November 2020.

iii) Codere Newco S.A.U. and the Parent are primary obligors under a €50 million super senior surety bond facility agreement (the "SBF").

iv) Codere Finance is the issuer of €85 million super senior notes due on 30 September 2023 (the "Interim Notes"). The Interim Notes were issued on 29 July 2020 in circumstances discussed further below.

8. All of these liabilities benefit from substantially the same guarantee and security package granted by a number of Group companies (although the SBF also benefits from some cash collateral). Pursuant to an English law governed intercreditor agreement, the RCF, SBF and Interim Notes rank senior to the Existing Notes with respect to the proceeds of enforcing security, and *pari passu* amongst themselves. The two series of Existing Notes similarly rank *pari passu* amongst themselves. Furthermore, pursuant to a separate agreement, enforcement proceeds in respect of the Interim Notes are required to be turned over to the RCF lenders until the RCF is discharged, therefore effectively subordinating them to the RCF.

9. If the Scheme is implemented:

i) The maturity of the Existing Notes will be extended from 1 November 2021 to 1 November 2023.

ii) The interest rate on the Existing Notes will be increased. The rate on the euro denominated notes will be increased from 6.75% to 4.5% in cash plus either a further 5% in cash or 6.25% payment-in-kind ("PIK") at Codere Finance's option. The rate on the dollar denominated notes will increase from 7.625% to 4.5% in cash plus either a further 5.875% in cash or 7.125% PIK.

iii) The covenants in the Existing Notes indenture will be amended, in particular to allow the issue of the New Notes referred to below and to impose a new minimum liquidity requirement.

iv) Codere Finance will raise new money by issuing a further €165 million of notes (the "New Notes"). These will be offered pro rata to holders of Existing Notes. Once these are issued, the Interim Notes and the New Notes will have the same terms, as a single class of "New Super Senior Notes" (or "NSSNs"). The NSSNs will have a maturity date of 30 September 2023.

v) Part of the proceeds of the New Notes will be used to repay the RCF.

10. The AHC comprises five institutions who between them own or manage approximately 55% by value of the Existing Notes. The fund managed by Kyma holds around 0.74% by face value of the Existing Notes.

Evidence

11. The evidence for the hearing included witness statements from Manuel Martínez-Fidalgo, a director of the Company and a non-executive director of the Parent, who is also a managing director of the restructuring specialist Houlihan Lokey, and Angel Corzo Uceda, the CFO of the Group. Kyma produced evidence in the form of a witness statement from its Chief Investment Officer, Akshay Shah.

12. There had been a suggestion that time for cross-examination of the Company's witnesses would be required. The Company was particularly concerned at what it took to be allegations that its witnesses had provided misleading evidence in respect of some issues. In the event cross-examination was not needed. It was made clear that Kyma was not suggesting that the witness evidence failed in any way to reflect the honest beliefs of Mr Martínez-Fidalgo and Mr Corzo. This was a helpful, and appropriate, clarification.

13. As noted further below, I required some additional evidence during the hearing. This was provided in the form of a second witness statement by Mr Martínez-Fidalgo, to which Kyma responded with a second witness statement from Mr Shah.

The liquidity crisis and the effect of the Scheme

14. The existence of a liquidity crisis was very clear from the Company's evidence. That indicated that the Group's requirement for fresh funds increased, and became more urgent, as the pandemic continued and its impact worsened. It became apparent that without immediate new cash the Group was projected to run out of funds in mid-August. The Interim Notes have provided a breathing space, but this is projected to last only to the end of October. By November a cash shortfall of €119 million is projected. Although the shortfall could potentially be addressed initially by seeking deferrals of the repayment date for the RCF (15 November) and a €27 million coupon due on the Existing Notes on 31 October, that would still leave liquidity at what the Group regards as an impossibly low level.

15. The Company's evidence indicates that, if the Scheme is implemented, the Group's cashflow issues are projected to be resolved and the Group is expected to be placed on a sustainable footing. In particular, the extension to the maturity date of the Existing Notes will mean that they will not need to be categorised as current liabilities for accounting purposes, which would have led to a qualified audit opinion in respect of the Group's ability to continue as a going concern. The increase in coupon on the Existing Notes obviously reflects this extension, along with the fact that the Existing Notes holders' consent is required for the issue of the New Notes in priority to the Existing Notes.[1]

16. A report produced by Deloitte concludes that if the Scheme is successful the Group will have an enterprise value in excess of its total debt. The Group's view is that it would then have every prospect of being able to continue to trade and pay its debts, including paying the Existing Notes in full as they fall due.

[1] The Group was able to issue the Interim Notes in the amount that it did without the consent of holders of Existing Notes, because the terms of the indenture permitted that. Consent is however required to issue the New Notes.

17. Mr Shah's assessment in his second witness statement was different. He said that he thought it was "extremely unlikely" that the Group would be able to repay the Existing Notes in full, and that by far the most likely outcome was a further, more substantial, restructuring. This was, he said, reflected in the current market price of the Existing Notes, being 61% of par value.

18. I prefer the evidence provided by the Company, based on the Group's detailed knowledge of its own position and supported by the Deloitte report. I therefore proceed on the basis that, if the Scheme is implemented, holders of Existing Notes are more likely than not to be repaid in full by what will inevitably be a full refinancing of the Group's main financial liabilities in 2023.

The comparator transaction

19. I also accept the Company's evidence that, if the Scheme is not implemented, the most likely alternative transaction would be some form of formal insolvency procedure. Both Mr Martínez-Fidalgo and Mr Corzo's evidence was that a Group-wide insolvency process would be the most likely scenario. Mr Corzo's evidence was that the directors of the Group's operating companies would be unlikely to feel comfortable that they could continue to trade, and he also pointed to the fact that the gambling industry is heavily regulated: continued support from regulatory and licensing authorities could not be assured.

20. The Deloitte report estimates that, if the key operating companies entered into liquidation, Scheme creditors would achieve a return of between 0% and 4.1% (with the RCF holders recovering between 77.3% and 100% and the Interim Note holders between 0% and 100%). A second possibility is that the key operating companies are able to continue trading for long enough to allow the completion of a distressed sale process. In that event, Deloitte estimate that Scheme creditors would achieve a return of between 30% and 72.2%.

21. Clearly there is a significant difference between these scenarios and it is obvious that office holders would make every effort to pursue the distressed sale option. However, I accept the Company's evidence that the absence of cash from November, and the absence of any clear source of cash, make this option, in current circumstances, the less likely option. (It is worth noting in this context that the RCF maturity date of 15 November 2020 is itself a foreshortening, having been brought forward under the terms of a standstill agreement entered into on 23 July.)

22. Kyma challenged the Company's conclusion as to the most likely alternative to the Scheme by reference to comments in the Deloitte report to the effect that it expected insolvency office holders to explore the possibility of an accelerated (or "pre-pack") sale of the business given the significantly better returns expected to be available, and that Deloitte expected RCF lenders to support this. However, my reading of the report is that Deloitte did accept the Group's view that a liquidation of operating entities, followed by piecemeal realisations of businesses or assets, was the most likely alternative, rather than the distressed sale option.

The AHC and the lock-up agreements

23. As already indicated the AHC comprises five institutions which between them hold around 55% of the Existing Notes, or around €424 million by face value. All but one have been creditors for a number of years, the other having been a creditor for just under a year. The weighted average purchase price paid by them for the Existing Notes is 83.6% of face value.

24. The AHC approached the Group shortly after it announced that it was not paying the April coupon on the Existing Notes, raising the possibility of new money being provided and the terms of the Existing Notes being amended. Negotiations ensued, as indicated by versions of term sheets included in the evidence. Agreement was reached, and an initial lock-up agreement (the "Lock-up Agreement") was entered into on 13 July by various Group companies, members of the AHC and certain other creditors holding around 2.5% of the Existing Notes. An announcement was made on the same day, which attached a copy of the Lock-up Agreement, including the agreed term sheets appended to it. (For reasons that are not entirely clear a revised lock-up agreement was entered into and distributed to creditors on 21 July, but my attention was not drawn to any material differences.)

25. The two term sheets appended to the Lock-up Agreement deal respectively with new money and the amendments to the Existing Notes. The former covers both the Interim Notes and New Notes. The Lock-up Agreement defines the "Transaction" as the restructuring contemplated by both term sheets.

26. The Lock-up Agreement and term sheets also provided for the following:

    i) an initial issue discount of 3% on the Interim Notes;

    ii) a coupon on the Interim Notes which is 2% higher than the coupon on the New Notes, for the period from issue to the point that the New Notes are issued (12.75% as opposed to 10.75%);

    iii) a "backstop" fee of 2.5% of the entire €250 million of NSSNs;

    iv) a "work fee" payable to AHC members of 1% of the principal amount of the Existing Notes (totalling around €7.6 million), to be paid on issue of the Interim Notes;

    v) the payment by the Group of the AHC's financial and legal advisers' fees (anticipated to amount to approximately €6.75 million); and

    vi) consent fees, comprising a pro rata share of 0.5% of the principal amount of the Existing Notes to be paid to noteholders who acceded to the lock-up by 20 July (an "early bird" fee)[2] and a further 0.5% of the principal amount of the Existing Notes to be paid to noteholders who acceded by a later date (that later date subsequently being altered to the business day prior to the sanction hearing). Noteholders who qualify for the early bird fee also receive the second consent fee.

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[2] 23 July under the revised Lock-up Agreement.

27. The Lock-up Agreement contemplated that the Transaction would proceed either by a consent solicitation process (which could only proceed with the support of at least 90% of Existing Note holders) or alternatively by a scheme. However, a scheme would only be put forward if certain conditions were met. One of these was that more than 75% by value of the holders of the Existing Notes were "locked up" by acceding to the Lock-up Agreement. Existing Noteholders who acceded to the Lock-up Agreement committed, among other things, to vote in favour of the Scheme.

28. In addition, under the term sheets one of the conditions precedent to the provision of the Interim Notes was that the holders of 75% by value of the Existing Notes (or such lower percentage as AHC members agreed) had acceded to the Lock-up Agreement. It was also one of the conditions to the AHC's support for amendments to the Existing Notes that the new money was provided by the AHC on the agreed terms.

29. On 24 July the Group announced that by 23 July 79.8% by value of the holders of Existing Notes had acceded to the lock-up. This led to the entry into of an Interim Note purchase agreement on 24 July, and the Interim Notes being issued on 29 July. At that stage the backstop fee in respect of the Interim Notes and the work fee were paid (by deduction from the issue price, in addition to the 3% discount referred to above). Those elements, together with the undertaking to pay the AHC's advisers' fees, are accordingly not conditional on the Scheme being sanctioned and implemented. The same obviously applies to the Interim Notes themselves. In contrast, the backstop fee in respect of the New Notes and the consent fees are dependent on the Scheme being implemented.

30. By the start of the convening hearing, 80.4% by value of the Existing Notes were locked up.

Accession by the Company

31. The original issuer of the Existing Notes was Codere Finance. The Company was incorporated in England only on 16 July 2020. On 17 July 2020 a consent solicitation was launched, in accordance with the terms of the Lock-up Agreement, seeking consent to the accession of the Company to the indenture as a co-issuer. This was done with the express purpose of allowing the Scheme alternative to be pursued. By 23 July over 90% of holders of Existing Notes by value had consented to the accession, and it was brought into effect on the same date. (A similar technique was used by the Group in 2015, in respect of another scheme: *Re Codere Finance (UK) Ltd* [2015] EWHC 3206 (Ch); [2015] EWHC 3778 (Ch).)

32. The evidence included an expert report on New York law which confirmed that the Company's accession was effective.

Class composition: the principles

33. The basic principle of class composition is that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest" (*Sovereign Life Assurance v Dodd* [1892] 2 QB 573 at 583, Bowen LJ).

34. Further authoritative guidance was given by Chadwick LJ in *Re Hawk Insurance Ltd* [2002] BCC 300. At paragraph [23] he posed the question:

> "Are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements?"

35. At [26] he explained that the answer to that question is provided by Bowen LJ's formulation. If the rights of those creditors whom the scheme is intended to bind are such as to make it "impossible" for them to consult together with a view to their common interest, then the scheme must be regarded as a number of linked arrangements and separate meetings are required. But it is not the case that different treatments under a scheme (in that case of vested or contingent rights, or rights under matured or current policies) necessarily mean that the rights are so dissimilar that persons must be put in different classes:

> "In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied." ([30] and [34])

36. Chadwick LJ went on to caution against the risk of giving a veto to a minority group. Where rights are "sufficiently similar" to the rights of others that they can properly consult together, then they should be required to do so: paragraphs [32] and [33]. It is worth noting the passage he cited at [32] from the judgment of Lush J in *Nordic Bank plc v International Harvester Australia Ltd* [1982] 2 VR 298, which refers to the risk of breaking creditors up into classes and giving each class an opportunity to veto the scheme, undermining the "basic approach of decision by a large majority", and pointing out that the fact that one group of creditors may for "extraneous reasons" prefer a different course from another is not a reason for calling separate meetings.

37. Chadwick LJ also made it clear at [42] that, where a scheme is proposed as an alternative to winding up (as it was in that case), the right approach is to consider the position on the basis that the relevant rights are those which creditors would have in a winding up.

38. Further guidance was provided by Lord Millett (sitting in the Hong Kong Court of Final Appeal) in *Re UDL Holdings Ltd* [2002] 1 HKC 172. He emphasised that it is the legal rights of creditors, and not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests are matters that may properly be taken into account at the sanction stage, but do not go to class composition. He helpfully summarised the authorities as follows at pp 184-185:

> "(1) It is the responsibility of the company putting forward the scheme to decide whether to summon a single meeting or more than one meeting…
>
> (2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest

> must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.
>
> (3) 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 private interests not derived from their legal rights against the company is not a ground for calling separate meetings.
>
> (4) 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.
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> (5) The court has no jurisdiction to sanction a scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a scheme, however, the court is not bound to do so.
>
> (6) 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."

39. Is also worth referring to the following summary by Hildyard J in *Re Primacom Holding GmbH* [2013] BCC 201 at [44]-[45]:

> "[44]… The golden thread of these authorities, as I see it, is to emphasise time and again the long established principle [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 the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.
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> [45] I emphasise this point because it does very seriously affect the composition of classes and 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."

Kyma's objections to class composition

40. Kyma's position is that Scheme creditors should vote in two classes, with AHC members voting as one class and other Scheme creditors voting in a separate class. It says that the AHC has negotiated a special package of benefits for itself which is not available to other Scheme creditors. A central focus of Kyma's arguments is the Lock-up Agreement and its appended term sheets. That, it says, is the commercial deal which the AHC agreed in exchange for its agreement to support the Scheme, and that deal contains material elements that are not available to non-AHC members, and which cannot be left out of consideration in considering rights for scheme composition purposes.

41. Kyma points in particular to:

    i) the right to subscribe for the Interim Notes on attractive terms, namely a 3% discount and an enhanced coupon of 12.75%, together with a backstop fee of 2.5% of the Interim Notes (which effectively operated as an additional discount, resulting in an issue price of 94.5% of par);

    ii) a backstop fee of 2.5% of the New Notes;

    iii) the work fee; and

    iv) the payment of advisers' fees.

42. Excluding the coupon on the Interim Notes and ignoring the fact that they are currently standing at a premium on a mark-to-market basis (both of which Kyma says should also be taken into account), its calculation of cumulative value is as follows:

3% Discount on €85m Interim Notes	€2,550,000
2.5% backstop fee on €85m Interim Notes	€2,125,000
1% Work Fee on €764,795,000 Existing Notes	€7,647,950
2.5% backstop fee on €165m Further Notes	€4,125,000
Fees to advisers	€6,750,000
Total	€23,197,950

43. Kyma also says that regard should be had to the early bird and other consent fee. Although these are available to other Existing Noteholders who choose to accede to the Lock-up Agreement, as far as AHC members are concerned they are simply another part of the package. On Kyma's calculation that represents over another €5 million of benefits.

44. Of the five members of the AHC, only four took up Interim Notes and are participating in the backstop. One, holding around 11% by value of the Existing Notes (or around one fifth of the combined holding of AHC members), has chosen not to participate. Kyma says that nonetheless that member should vote as part of the AHC class, because what is important is its ability to participate.

45. Kyma's view is that the difference in rights is material, and that AHC members are benefitting at the expense of other Scheme creditors. It points to the history of the negotiations, as evidenced by various draft term sheets, in support of this. For example, these demonstrate that it was originally contemplated that all Existing Noteholders would be offered the opportunity to provide new money, there would be no distinction in terms of issue discount, and the interest rates on both the new money and the Existing Notes would have been more favourable. The work fee was also not originally included.

The Interim Notes and associated benefits: mere cross-holdings?

46. The Company's primary submission (supported by the AHC) is that the Interim Notes and the backstop fee associated with them do not fall within the "mix" of rights to be considered for class composition purposes. The Interim Notes are no more than cross-holdings, and it is well established that cross-holdings do not fracture a class, although they may be a relevant consideration at the sanction hearing (see for example *Re UDL Holdings* at pp 180-181, approving the analysis of Bowen LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213, and for a recent authority see *Re ColourOz Investment 2 LLC* [2020) EWHC 1864 (Ch) at [88]). Whilst it is accepted that it is not right to look at a scheme document in isolation from other documents, that applies to arrangements entered into pursuant to a scheme or dependent on it taking effect (see for example *Re Stemcor Trade Finance Ltd* [2016] BCC 194 at [18], referring to *Re Uniq plc* [2011] EWHC 749 (Ch) at [24]), rather than encompassing the Interim Notes, which were not conditional on the Scheme and which will remain in place even if the Scheme is not implemented.

47. Mr Allison submitted that, because the question of class composition is one of jurisdiction, precision is vital. Rights can be taken into account where they are dependent on a scheme proceeding or are conferred by the terms of a scheme or by documents entered into pursuant to it. But a commercial link with a wider transaction is insufficient. It is too vague and contrary to the clear guidance in the cases, to the effect that the class test is determined by reference to the legal rights affected and conferred by the scheme. In this case there is no certainty that the Scheme will come into effect. The Interim Notes are legally independent, and are collateral interests relevant to fairness at the sanction hearing but not to class composition.

48. Applying the formulation set out by Chadwick LJ in *Re Hawk* at [30] and [34], a comparison of the rights to be released or varied under the Scheme and the new rights would not obviously include the Interim Notes. In a liquidation (being the relevant comparator) Scheme creditors would have the same right to lodge a proof of debt in respect of the Existing Notes, and under the Scheme they will be treated in the same way in respect of the Existing Notes. The Interim Notes are already in place and are not dependent on the Scheme being implemented. Rather than being rights granted in exchange for rights released or varied under the Scheme (or being dependent on their release or variation), they exist irrespective of any such release or variation. This is

different to the rights conferred by the wider restructuring documents that were taken into account in *Re Stemcor* and *Re Uniq*.

49. However, the fundamental question is whether the Scheme should be regarded, on a true analysis, as a number of linked arrangements rather than a single arrangement (per Chadwick LJ in *Re Hawk*). So I need to ask myself what is the “arrangement”, and whether there is more than one. The focus of Bowen LJ’s test is on the ability of persons to “consult together” with a view to their “common interest”. The focus is on the nature of the arrangement and the decision-making process in respect of it. As a matter of commercial reality, AHC members will have taken the decision to support the Scheme by reference to the whole package of rights to which they were entitled pursuant to the Lock-up Agreement, including the level of conditionality (if any) attached to each element of that package. If the “package” of rights offered and agreed to by some creditors for releasing or varying their existing rights is different to the package available to others, then that might in principle be thought properly relevant to class composition, and not only to the question of the court’s exercise of discretion at the sanction stage.

50. My concerns on this point are reinforced by the fact that, pursuant to the terms of the Lock-up Agreement, the provision of the Interim Notes was specifically conditional on achieving a 75% lock-up (a threshold that must have been chosen with a single class scheme in mind), and by the overall terms of the agreement and attached term sheets, including (for example) describing the “Transaction” as the whole arrangement, encompassing the entire €250 million of new money (i.e. including the Interim Notes).

51. When *Sovereign Life Assurance v Dodd* and *Re Hawk* were decided, voting or lock-up agreements of the kind now regularly seen in respect of schemes were not in common use. They now are. I have real doubt that the court should, in determining class composition, leave out of account rights conferred by lock-up agreements simply because they are not conditional on the scheme being implemented. This is particularly so where the parties to the agreement have framed the terms of the agreement in such a way as to confer those rights only in circumstances where it can reasonably be inferred that the parties considered that there is a strong likelihood of the scheme being implemented. Mr Smith was right to say that, in substance, there is a significant degree of conditionality on the Scheme in this case.

52. If any such rights could always be ignored, then it would be open to a body of creditors to negotiate clearly preferential rights in their favour but ensure that they are excluded from class composition considerations by making them technically not conditional on the scheme being implemented, even though as a commercial matter they are part of the same transaction and, in reality, are highly unlikely to be conferred unless the scheme proceeds. Although the court would not be precluded from taking account of those rights in determining whether to sanction the scheme, an opposing creditor could still face a material hurdle in challenging whether the class was fairly represented at the meeting and the statutory majority was acting bone fide (rather than coercing the minority to promote interests adverse to those of the class), or whether the preferential rights conferred affected whether an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve the scheme (applying the well known tests set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012). This is particularly the case where, as here, the anticipated difference in returns between the scheme proceeding and the likely alternative

liquidation scenario are significant. It might also be the case that creditors see little point in engaging in opposition to a scheme where they can see that the statutory majority will be achieved. In that case the votes at the meeting might not be as representative of creditors as it might appear.

53. My concerns on this issue are not without authority. The point was raised by David Richards J in *Re Telewest Communications plc* [2004] BCC 342, and was considered again by Snowden J in *Re Noble Group Limited* [2019] BCC 349 at [131] and [132] (convening judgment):

> "131. As regards the class question, subject to an important caveat, I accept in general terms the proposition that payments made by a company to some creditors independently of a proposed scheme and its associated restructuring agreements, which are not dependent upon the scheme taking effect, ought not to come into the equation for class purposes. The simple reason is that they would not be part of the scheme proposal which all scheme creditors have to consider at the relevant meetings. This was, I think, what David Richards J was alluding to when considering the effect of payments in connection with voting (lock up) agreements in *Telewest Communications Plc* [2004] B.C.C. 342 at [54],
>
> > "54. A serious issue would arise if in consideration of its agreement to vote in favour of the scheme, or collaterally to it, the bondholder received benefits not available to the other bondholders. In effect, the result would be unequal treatment under the scheme and the bondholder could not, I think, be included in the class. As I was informed, that is not the case with the voting agreement in this case. *The voting obligations are conditional on prior payment of fees and costs incurred by the bondholder committee in the course of the past two years but Telewest had already, independently of the voting agreements, undertaken to pay these costs and fees*. Telewest will also pay their costs of entering into the voting agreements but I consider that to be immaterial." (My emphasis.)
>
> 132. The important caveat is that any such prior payment which is made to some, but not all, creditors must have been made for legitimate reasons and be genuinely independent of the scheme and restructuring. In other words, it should not amount to a disguised part of the consideration offered under the scheme and restructuring. I alluded to such a requirement when questioning the legitimacy of the "work fees" paid in *Global Garden Products*[3] at [15] and [53]. On the facts of that case I was able to take the view that the payments had been made available to all creditors, and that they were of a relatively low amount (an order

[3] *Re Global Garden Products Italy SPA* [2017] BCC 637

> of magnitude different to the fees in this case), so that they did not give rise to a class issue."

54. As can be seen from this, David Richards J left out of account the prior payment of fees and costs incurred by the bondholder committee because, "independently of the voting arrangements", Telewest had already agreed to pay them. In contrast, the agreement to pay the costs of entering into the voting agreement was taken into account, but it was determined to be immaterial. I agree with Snowden J's concern about amounts which are in reality disguised consideration under the scheme. Although not dependent (in the sense of conditional) on the scheme going ahead, they cannot be described as independent in any realistic commercial sense.

55. Mr Smith drew my attention to *Re Stripes US Holdings Inc* [2018] EWHC 2912 (Ch), where Zacaroli J considered the right to participate in a new "exit" facility which was only available if the lock-up agreement was signed. He concluded that it did not fracture the class. Mr Smith relied on the fact that the basis for Zacaroli J's conclusion was that participation in the exit facility was available to any scheme creditor, rather than because there was no connection to the scheme: paragraphs [22] and [23]. However, my understanding from what Zacaroli J said at [7] is that (absent a fall back plan) the scheme was essential to enable the exit facility to be implemented. That is different to the position here in respect of the Interim Notes, which are in place irrespective of the Scheme.

56. Mr Allison relied on my decision in *Re Syncreon Group BV* [2019] EWHC 2068 (Ch), where I concluded that there was no class issue in respect of a benefit conferred in respect of a secured liquidity facility that had been provided a few months earlier because it was separate to the scheme (see [29]). However, that facility had been provided two months before the lock-up agreement in that case (a Restructuring Support Agreement) was entered into, and was designed to provide liquidity during both negotiation and implementation of the restructuring: see [9] and [10].

57. Ms Toube rightly made a number of points about the role of ad hoc committees, the significance of bridge funding and the importance of groups being able to raise that funding from existing creditors. She also made the point that it was reasonable for an ad hoc committee to want comfort that there was sufficiently broad support for a restructuring transaction before providing any new money. It would also often be sensible for a lock-up or other restructuring agreement to deal with matters going beyond the scope of the scheme, and just because it did does not mean that those other matters affect class composition. Both Ms Toube and Mr Allison emphasised that the clear distinction between rights and interests needed to be borne in mind: the latter was only relevant to the court's decision whether to exercise its discretion to sanction the scheme.

58. There is no doubt that ad hoc committees of creditors can perform a very helpful function. In this case it allowed a transaction to be negotiated which is expected, if implemented, to avoid the Group's collapse. Bridge funding can obviously be of significant importance, and it was essential in this case to avoid insolvency before a transaction could be implemented. Nonetheless, it was accepted by all parties that members of ad hoc creditor committees act in their own interests, rather than in the interests of the wider creditor group.

59. I agree that groups should not be constrained from raising bridge financing from existing creditors, who are most familiar with the group, already invested in it and may be able to offer the best terms, simply because if the funding were offered by a lender who is not a scheme creditor there would be no need for the court to take it into account in determining class composition.

60. I also bear in mind that, given the Group's very precarious financial position and the possibility of the effects of the pandemic worsening further, its ability to continue trading for long enough to allow the Scheme to be put forward, sanctioned and implemented is not certain (even if AHC members considered that the Scheme would be sanctioned if put to the court).

61. Ultimately, I have concluded that in this particular case the Interim Notes should not be treated as "new rights … which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied" (using Chadwick LJ's formulation in *Re Hawk*). I have concluded that, on a proper analysis, the Interim Notes were issued in exchange for the funds advanced for them by the relevant AHC members, rather than constituting any form of disguised consideration for the release or variation of rights under the Scheme. They were obviously issued in an amount which the Group had power to issue without any release or waiver of the terms of the Existing Notes. The Group could in principle have borrowed that amount from a third party without reference to Existing Note holders. And as discussed in detail below I have concluded that they were issued on commercial terms, without any element of "bounty". They were not simply a benefit handed to AHC members as part of the price for agreeing an overall deal.

62. The difference between rights and interests is key. The focus has to be on the legal rights that holders of Existing Notes have (absent the Scheme) and what they are being compromised in exchange for. Although Mr Shah's evidence was that AHC members were taking fundamentally different investment decisions to other Existing Note holders, the position in relation to the Interim Notes is that they obtained them in exchange for the money they advanced, and not in respect of their holdings of Existing Notes: they were not obtained in their capacity as holders of Existing Notes. The difference between (participating) AHC members and other Existing Note holders is in their respective interests, not rights.

63. A further point is whether, if the Interim Notes did fracture the class, the correct class composition would comprise all five members of the AHC, as Kyma maintains. By the date that the Lock-up Agreement was signed and the commitment to provide the Interim Notes became unconditional, it was clear that one member would not participate, and the documents were written on that basis. There is much to be said for the argument that the linked "arrangement" to which Chadwick LJ referred would, as far as the Interim Notes are concerned, be with the four participating members of the AHC, and not all five. The fifth member never obtained a legal right to acquire Interim Notes. If the Interim Notes fractured the class at all I would have concluded that the division should be between the four participating members of the AHC on the one hand, and all other holders of Existing Notes on the other.

Is the work fee relevant to class composition?

64. The work fee was also paid on issue of the Interim Notes. The Company and AHC make similar points in relation to it as they do in respect of the Interim Notes, namely that it is not relevant to class composition.

65. I am not persuaded that this fee is in the same category as the Interim Notes. Clearly, it cannot realistically be described as independent of the Scheme. But the link to the Existing Notes is much more than that. The work fee was calculated as a percentage of the principal amount of the Existing Notes (1%) and it was paid to all AHC members pro rata to their holdings of Existing Notes. Because its payment was linked to the issue of the Interim Notes it was also similarly conditional on 75% lock-up being achieved (see [28] above).

66. The basis on which the work fee was calculated and the method of its allocation among AHC members makes the link to AHC members' holdings of Existing Notes very clear. To my mind it is substantially closer to the kind of disguised consideration to which Snowden J was referring in *Re Noble* at [132]. Furthermore, although it is said to have been paid for good consideration, it is also harder to conclude that that is the case than it is in respect of the Interim Notes (see further below).

67. I accept that it is not straightforward to conclude that rights that are already in place, and the conferral of which are not dependent on the Scheme actually going ahead, should be taken into account in determining class composition. However, for the reasons already given (see in particular paragraphs [49] to [54] above) I am not persuaded that it would be correct to ignore them simply on the basis that they are not legally dependent on the Scheme being sanctioned and implemented.

Are advisers' fees relevant?

68. The link between the commitment to pay advisers' fees and the Scheme is far less clear. Although the commitment is reflected in the Lock-up Agreement, Mr Martínez-Fidalgo's second witness statement confirmed that the Parent and other Group companies had in fact already agreed to meet the fees pursuant to letters entered into on 10 and 15 June 2020, well in advance of the Lock-up Agreement being entered into.

69. On that basis I consider that the advisers' fees should be regarded as independent of the Scheme, and therefore that they do not fall to be taken into account.

Are the rights so dissimilar that it is impossible to consult together?

70. For the reasons discussed I think the correct approach is to consider class composition in a way that takes account of the work fee as a right that should be treated as conferred by the Scheme (and which would not exist in the comparator transaction of a liquidation), but not the Interim Notes or advisers' fees. In case I am wrong about this and the Interim Notes or advisers' fees should also be taken into account, I have considered what impact that would have.

71. It is certainly not the case that any difference in rights between creditors will fracture a class. The hurdle is a relatively high one: are the rights "so dissimilar" that it is

"impossible" to consult together? In *Re Telewest* David Richards J said at [37] that this was a matter of judgment on the facts of each case, but:

> "… a broad approach is taken and … differences may be material, certainly more than de minimis , without leading to separate classes."

72. A similar point was made by Hildyard J in *Re Lehman Brothers International (Europe)* [2019] Bus LR 1012 at [70], where he said that even a material difference in legal rights does not necessarily preclude the respective holders from being included in a single class. (In the same paragraph he reiterated concerns about giving a veto to a minority group, and (referring to the passage in *Re Primacom* at [44]-[45] set out above) the need to focus on rights rather than interests.)

73. In *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) Trower J referred at [16] to the need to consider the rights of creditors in the absence of the scheme and any new rights to which they become entitled under the scheme. If, having performed that exercise, there is a material difference between the rights of different groups of creditors then:

> "…they may, but not necessarily will, constitute different classes. Whether they do depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest."

74. Despite the apparent scale of the benefits to the AHC (as calculated by Kyma) there are some powerful points in favour of the Company's contention that there should only be a single class. However, the position, particularly on a cumulative basis, is not straightforward. I will consider the individual elements separately first, before considering the cumulative effect.

The Interim Notes and associated benefits

75. Dealing first with the Interim Notes (including the associated benefits complained of by Kyma, namely the discount on issue, the backstop fee on the Interim Notes and the enhanced coupon), Mr Corzo's evidence, which I accept, was that if the Interim Notes had not been issued he did not believe that the Group would have been able to continue to trade to the present date. The Group required the funds urgently, and before a restructuring transaction could be implemented (whether through a consensual or scheme process). This was not simply a benefit handed to AHC members as part of the price for agreeing an overall deal.

76. Further, the opportunity to provide new funds was not only offered to AHC members. At the end of April 2020 the Group engaged financial advisers to assist in raising new liquidity. 35 investors were approached, but only four carried out detailed diligence, only two provided a term sheet and only one provided a commitment letter. The total amount offered by that alternative funder, at €200 million in the absence of any extension to the Existing Notes, was less than the amount that the Group required. It would have had to be repaid three months prior to the maturity of the Existing Notes. The pricing was higher than the Existing Notes and New Notes combined, including a 3% commitment fee. The alternative funder would not have been providing financing subordinated to the RCF (because that would be refinanced), and to that extent its risk

would be lower. Only €60 million, or possibly up to €100 million, would be available to be offered to Existing Note holders, and the ability of some Existing Note holders to participate would have been restricted because the financing would have been provided in the form of a facility (which Mr Corzo understood that some Existing Note holders are unable to hold) rather than notes, and also because the alternative funder would need to pre-approve their participation.

77. Although the Group gave serious consideration to the alternative offer, it concluded that raising new funds in the form of the Interim Notes and New Notes was commercially preferable.

78. The fact that the Group undertook market testing to determine whether it could raise new funds on better terms from elsewhere is not determinative, but I disagree with Mr Smith that it is irrelevant. The courts have recognised that rewards for commercial services, which do not involve any element of "bounty", are less likely to lead to class composition issues, for the simple reason that such rewards are less likely to be material to a decision whether to support the scheme, and thus to creditors' ability to consult together. This does not mean that they can be ignored if they represent part of the package of rights obtained by the relevant scheme creditor(s) in exchange for the compromise, but the likelihood of them preventing consultation with other creditors with a view to their common interest is reduced.

79. However, the position is rendered less straightforward by the fact that this is not a simple comparison between the Interim Notes and funding offered by a third party. The Group was comparing what the third party offered with the Interim Notes and New Notes together. It does not fully answer the question whether there has been an allocation of value in favour of the Interim Notes as compared to the New Notes available to other Scheme creditors, which if material (and assuming for present purposes that the Interim Notes were relevant to class composition) would be likely to lead to the class being fractured. In assessing this it must also be borne in mind that the relative amounts of the Interim Notes and New Notes are not immaterial. The Interim Notes represent 34% of the total new money.

80. Nevertheless, I do find it to be of real assistance that one of the members of the AHC has not in fact participated in the Interim Notes, but clearly had a meaningful "seat at the table" while the terms were negotiated and agreed, and also has a significant holding of Existing Notes. It seems to me unlikely that it would be willing to agree to terms which allowed material value to pass to other AHC members without either choosing to participate in that additional value, or refusing to agree to the terms. (The same point may apply to an extent to other creditors who are not members of the AHC but have still agreed to lock up, but it strikes me as a particularly powerful point in relation to a member of the AHC, who was directly participating in the negotiations and would be very familiar with the detail.)

81. I also accept the Company's evidence that there was significant negotiation of the terms on which the Interim Notes and New Notes would be provided. Kyma point to the fact that there is no initial issue discount on the New Notes but there was a 3% discount on the Interim Notes, as compared to the initial term sheet which contemplated a 3% discount for all NSSNs. There is also a higher coupon on the Interim Notes as compared to the New Notes. However, as Mr Corzo and Mr Martínez-Fidalgo point out in their evidence, by providing the Interim Notes in advance of the transaction completing, and

agreeing to subscribe for debt that would be subordinated to the RCF, Interim Note purchasers were taking on a different level of risk in respect of the Interim Notes than those who purchase New Notes pursuant to the Scheme. This is the case even though the provision of interim financing was dependent on 75% lock up. The Scheme might not proceed even with 75% support, either because the Group could not continue trading for long enough to implement it or because the court does not sanction it.

82. Mr Shah's first witness statement makes the point that the opportunity for creditors to provide new money will invariably represent one of the most valuable parts of the consideration on offer in a restructuring. In principle, if this opportunity is offered to some existing creditors and not others (and it does properly form part of the rights to be taken into account for class composition purposes) that may be a powerful pointer towards a conclusion that the class is fractured.

83. In this case Mr Shah's point appears to carry additional weight by reference to the fact that the Interim Notes currently stand at a premium on a mark-to-market basis. However, the mere fact that they do does not itself determine that they were not issued on commercial terms, or that they could otherwise have the effect of fracturing the class.

84. I take account of Mr Martínez-Fidalgo's evidence in his second witness statement that not only has the value of the Interim Notes fluctuated significantly, but in fact none of them have been sold. He noted that the Interim Notes are rated CCC- by Standard & Poor's. He also points out that Deloitte's projection is that the Interim Notes would receive between 0% and 100% in a liquidation, such that the Interim Notes are genuinely at risk if the Scheme does not proceed.

85. Mr Martínez-Fidalgo's evidence was that, in fact, the pricing of the Interim Notes was at or below the market rate. Taking account of the different elements, including the 3% initial discount and the 2.5% backstop fee in respect of the Interim Notes, the annualised return on the Interim Notes to maturity is 12.6%. This compares to an annualised cost of funds from the alternative third party investor of 12.67%, and a yield to maturity for debt forming part of a market index for CCC and lower rated Euro denominated high yield notes, as at 24 July, of 12.37% (or 12.67% at 30 June). Mr Martínez-Fidalgo's view was that the Interim Notes would be expected to be significantly more expensive than the index average, not only because of their lower rating but as a result of other factors, including the nature of the group's business and the fact that its operations are concentrated in Latin America. I found this evidence persuasive.

86. Kyma suggests that, even if there was insufficient time to offer the Interim Notes to all holders of Existing Notes initially, the opportunity should have been offered once time allowed. Ms Toube rightly commented that that would seem to involve a one-way option: Interim Note holders would take the downside risk and other creditors could access the upside. Commercially, there would need to be a price. However, this does not fully deal with Kyma's point. That point might have been addressed if (for example) the Interim Notes had been issued on terms that they would be refinanced on completion of the transaction by an enlarged issue of New Notes, made available to all Existing Note holders. But that would be a different commercial transaction, and it is not the role of the court to seek to insist on a possible alternative restructuring transaction that might have been put forward. The focus must be on the Scheme as presented, as compared to the likely alternative if it does not proceed.

87. In his second witness statement, Mr Shah also suggested that I should take account of a further benefit of the Interim Notes, namely that if the Scheme is implemented the holders of the Interim Notes are likely to have voting control of the NSSNs. That would put the holders in a strong position for a future restructuring, which Mr Shah considers is quite likely to occur in 2023. But this assumes (among other things) that holders of the Interim Notes act, and continue to act, effectively as a concert party, and that they maintain their holdings. There is no evidence of that.

88. Ultimately, and as already indicated, I find the role of the non-participating AHC member, being an entity which is itself a significant Existing Note holder, to be particularly persuasive, together with Mr Martínez-Fidalgo's evidence, and taking account of his dual role as a director of the Group and his experience as a managing director of Houlihan Lokey. The role of the non-participating member supports the conclusion that the Interim Notes were issued on commercial terms, but it also supports the conclusion that it is not impossible for all holders of Existing Notes to consult together, despite the existence of the Interim Notes. The non-participating member certainly did not find it impossible to consult together with other AHC members, and indeed its use of common advisers with other members of the AHC is worthy of note.

The backstop fee on the New Notes

89. Turning to the backstop fee in respect of the New Notes, this is a fee that will only be paid if the New Notes are issued, and so it is clearly conditional on the Scheme proceeding. It is effectively an underwriting fee, payable in exchange for a commitment to take up New Notes not subscribed by holders of Existing Notes. The Group's position is that the fee is the outcome of a commercial negotiation, it being in the Group's interest to ensure that it did not exceed the market rate. Mr Corzo's evidence was that the Group needed to ensure, before launching the Scheme, that the full amount of New Notes could be raised. The backstop was negotiated with large, creditworthy institutions capable of standing behind the backstop. The rate was negotiated down from 3% to 2.5%. Mr Martínez-Fidalgo's evidence was that at 2.5% the fee was below market, and his belief was that a similar or higher fee would have been payable to a third party. The Group would also have needed to entered into a separate negotiation process, which it could not afford to do.

90. I accept this evidence. The backstop fee is payable in exchange for a commercial service, namely underwriting the New Notes. That is not a service that is provided for nothing, and I do not accept Kyma's suggestion that AHC members should not receive a fee in respect of their pro rata entitlement to New Notes, because they will in any event wish to take them up. I accept Mr Martínez-Fidalgo's evidence that underwriting or backstop arrangements are simply not priced on that basis. If a fee was not paid to AHC members it would need to be paid to a third party. The fact that one AHC member is not participating in the backstop provides further support for the fee being at a commercial rate.

91. Whether a service is provided at a commercial rate is not a complete answer (see [78] above), but it is relevant. By itself, I would not expect the fee to be sufficiently material to fracture the class, particularly having regard to the alternative of a liquidation.

92. The point made at paragraph [63] above about whether, if the class was fractured, the relevant class should contain five AHC members or only the four participating members applies equally in relation to the backstop fee on the New Notes.

The work fee

93. The work fee is in my view less straightforward than the backstop fee for the New Notes.

94. For the reasons already discussed in relation to the Interim Notes, I am not persuaded that it can be ignored simply because the work fee has already been paid and is not dependent on the Scheme being sanctioned. The rate at which it has been charged, being 1% of the Existing Notes (split pro rata between AHC members), also does not obviously relate to any level of "work" done by individual members of the AHC. Furthermore, all members of the AHC received it, unlike the backstop fee and participation in the Interim Notes.

95. I do accept that a considerable amount of work was done in negotiating the proposed transaction, and that (unlike lawyers) financial institutions do not tend to charge fees by reference to time spent. I also accept that the fee in part reflects the fact that the AHC members were not able to trade their interests in the Group for a period of around a month up to the announcement on 13 July, during which there was in fact material fluctuation in the value of the Existing Notes, because they held insider information. Nonetheless, I also accept Mr Shah's evidence that there can be substantial benefits in obtaining detailed information about the Group. Furthermore, by the time the fee was legally committed to and became payable the risk of being unable to trade had already been assumed, and any work being paid for had already been done.

96. Against this, if the fee is regarded as a success fee for the work and risk (in terms of restricted trading) involved in negotiating a transaction which in fact achieves a significant level of creditor support, in the form of a 75% lock up, then it is perhaps more understandable. The Group's view is that it was unlikely to have been able to put together a deal commanding such a high degree of support in a short period of time in the absence of the AHC's work. However, the work fee was not clearly presented with this justification.

97. Work fees have been considered in a number of cases and not, so far, considered to fracture the class. But the position is far from straightforward. In *Re Noble* Snowden J expressed concern in his judgment following the convening hearing about the level of the fee (which in that case was calculated at 2% of the ad hoc group's scheme claims, subject to a cap and an adjustment for a further group member: see [119] and [120] of the convening judgment) but ultimately concluded that it did not fracture the class. In reaching that conclusion, however, he relied in part on the fact that the work fee was not offered in exchange for the execution of the agreement under which the ad hoc group promised to support the scheme, and was paid for genuine reasons "independently" of the scheme: paragraph [141]. The same cannot be said here.

98. In contrast, in *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch) at [46], Norris J considered a work fee which was conditional on the scheme being sanctioned. He concluded that it did not fracture the class, on the basis that it was a commercial reward for the time and effort expended in assisting to formulate the scheme, and also because recipients

had disabled themselves from dealing with their holdings, notwithstanding the precarious position of the group, for the duration of the negotiations. He noted that there had been full disclosure and no objections had been taken. On that basis he concluded that the level of reward, which in that case was 1.5% of the notes or bonds held by the recipient, was not disproportionate.

99. At 1% of the Existing Notes (rather than simply the notes held by the AHC) the work fee is higher than that charged in *Re NN2 Newco* and not dissimilar to the level charged in *Re Noble*. Unlike those cases, however, there has also been a specific creditor objection to the fee, focusing in particular on its contribution to the cumulative total of benefits available to AHC members. I consider this further below.

100. I also note that, because the work fee was paid to all five members of the AHC, any fracturing of the class in respect of it would be different to fracturing caused by the Interim Notes or the backstop in respect of the New Notes. No AHC member would be in the same class as the other Existing Note holders.

Advisers' fees

101. I have already concluded that the obligation to pay advisers' fees was independent of the Scheme and does not fall to be taken into account on that basis.

102. If this was wrong, I am not persuaded that the Group's undertaking to reimburse fees charged by the AHC's professional advisers conferred no benefit at all on AHC members, because the undertaking relieved AHC members of any liability they would otherwise have to pay the fees. In addition, and as with the work fee, the advisers' fees also cannot necessarily be ignored simply because they are payable whether or not the Scheme is sanctioned. I am aware that, in making these comments, I may to an extent be taking a different approach to that taken in some other cases which did not involve creditor opposition (including *Re Lecta Paper UK Ltd* [2019] EWHC 3615 (Ch) at [18] and *Re ColourOz* at [113]).

103. However, it is undoubtedly the case that significant work was done and that, although other creditors such as Kyma will also have incurred expense, the costs of reviewing agreed documents and assessing whether to consent to a scheme will be of an entirely different order to the work involved in negotiating them. Furthermore, particularly with fees of financial advisers but also to an extent with lawyers, it cannot simply be assumed that the AHC would have to pay the fees, at least at anything like the same level, in any event. The "benefit" to AHC members is not obvious, and is unlikely to be perceived as such commercially. Rather, the reimbursement would be likely to be regarded as not conferring a "net" benefit in return for being a member of the AHC, and instead being a payment of costs necessarily incurred in undertaking that role. The value to the Group of the work, in terms of achieving agreed terms that command significant creditor support, is also quite different from the costs incurred by creditors in reviewing an agreed transaction.

104. In the circumstances I am satisfied that the advisers' fees do not fracture the class.

Consent fees

105. In relation to the consent fees, whilst I recognise that their availability to AHC members is not necessarily irrelevant in determining the cumulative benefit, they do not in themselves present a clear basis for fracturing the class, and certainly not in the manner put forward by Kyma (that is, two classes split between AHC members and all others). Unlike the other elements already discussed they were, in fact, available to all Existing Note holders. On that basis it can be argued that Scheme creditors are all treated in the same way. If this is not correct, then in the alternative, and in the context of the likely return in a liquidation as compared to the anticipated returns if the Scheme is implemented, I do not consider that consent fees at the level proposed are likely to exert a material influence on voting decisions (see in particular *Re DX Holdings Ltd* [2005] EWHC 1513 (Ch) at [7], Snowden J's recent discussion of the issue in *Re ColourOz* from [95] onwards, and a comment that I made about that discussion in *Re HEMA UK I Ltd* [2020] EWHC 2219 (Ch) at [38] and [39]).

106. One feature worth mentioning is that the second consent fee will now be available for those who agree to lock up right up to the business day prior to the sanction hearing (previously the opportunity expired on 27 July). That is unusual, and it is worth noting that payment to anyone acceding after the creditors' meeting would not obviously be a payment that influences the way in which they vote, as opposed to possibly influencing the court's assessment of the Scheme.

Cumulative effect

107. The court has indicated on a number of occasions that it is important to assess fees or benefits available to a creditor or a group of creditors on a cumulative basis: see for example *Re Codere Finance UK Ltd* [2015] EWHC 3206 (Ch) at [4]. Although there was some information about this in the Company's initial evidence, in my view it was not sufficient. I therefore required further evidence from the Company during an adjournment over a weekend, and in particular evidence that responded to Kyma's evidence about the cumulative benefit.

108. I do accept that reaching a conclusion based on a straightforward aggregation of "benefits" received by a group of creditors is far too simplistic. It is essential also to take into account what those creditors provide in exchange for the benefit asserted, for example an underwriting service. But with that caveat it is still critical that the cumulative position is considered. This is for the obvious reason that, commercially, the decision to agree to the arrangement will be influenced by the terms of the total "package" of rights, rather than by individual items taken in isolation from each other.

109. Mr Shah's evidence was that, overall, the "deal being offered to the AHC is very different from that being offered to other Scheme creditors", and that the various fees and benefits (whether viewed individually or cumulatively) "would plainly be material to a decision made by a Scheme creditor". In contrast, Mr Martínez-Fidalgo's view is that the differences in returns available to AHC members would not be sufficient to cause a Scheme creditor to vote in favour of the Scheme where they would not otherwise have done so.

110. My overall assessment is that, taking into account (a) the cumulative benefits, (b) what AHC members have provided in exchange for them, and (c) the likely alternative of a

liquidation, the differences in rights between AHC members and other Existing Note holders are not so material as to fracture the class.

111. In reaching that conclusion I take particular account of the non-participation in the Interim Notes and backstop of an AHC member who has a substantial holding of Existing Notes. I have also considered the witness evidence, including differing analyses of benefits produced by Mr Shah and Mr Martínez-Fidalgo.

112. Mr Shah presented the benefits in the form of a percentage return on the AHC members' Existing Notes, in a way that disregarded the new funds represented by the principal amount of both the Interim Notes and the New Notes. The effect of this was to attribute all the benefits to the Existing Notes. On that approach he calculated a benefit of up to 14.6% of current market value, 10.6% of cost or 8.9% of face value for AHC members participating in the Interim Notes and backstop, including mark-to-market gain and accrued coupon to 30 September 2020. Further calculations exhibited to his second witness statement, taking account of returns to maturity, suggested that there could be over a 20% difference in recovery between participating AHC members and other Existing Note holders who take up New Notes.

113. Alternative calculations appended to Mr Martínez-Fidalgo's second witness statements showed a quite different picture, taking account of the principal amount of the Interim Notes and New Notes. Mr Smith objected to this on behalf of Kyma, particularly on the basis that the figures did not also reflect the expected returns on those notes to maturity, and the Company had also not shown a comparison with the position of a non-AHC Scheme creditor.

114. In the light of these submissions I asked the Company to provide some revised figures following the hearing. What it provided started with Mr Shah's calculations and made adjustments, the most significant ones being to include both the principal amount of the Interim Notes and New Notes and the anticipated returns on them to maturity. The figures also showed comparisons with other Scheme creditors. It was made clear that the Company did not agree with all of Kyma's assumptions or with the basis of preparation more generally.[4]

115. Kyma objected to this additional analysis in a letter sent to me by their solicitors Jenner & Block, and said that I should disregard it. Having considered the objections, I have decided that is not appropriate to disregard a document which was produced in response to a request that I made, which uses as a starting point Kyma's own calculations, and which does seek to address points raised by Mr Smith. Instead, I have taken into account those points raised in the letter which appear to me to have substance. I have not, however, placed weight on Kyma's assertion that all the benefits should be expressed as a percentage of the Existing Notes, with only an allowance for cost of capital in respect of the funds required to purchase the Interim Notes and New Notes. To my mind that simply ignores the fact that the new money is genuinely put at risk. It must be reasonable to assume that the funds would be likely otherwise to be invested elsewhere

[4] By way of example, the calculations assume that interest on the Existing Notes will be paid in cash and not at the higher PIK rate. They also assume that 80% of the New Notes are subscribed by backstop parties, which is far from assured. However, some assumptions need to be made: some of the objections by both parties simply underline the difficulty of making comparisons that have a high degree of accuracy. But that does not mean that a broad indication cannot be produced.

in instruments that carry a comparable level of risk, and therefore with a level of return that reflects that risk.

116. The Company's revised figures, taking account of both the principal amount of the Interim Notes and New Notes, and the expected return on them to maturity, show an enhancement of 5.1% of total par value for participating AHC members, as compared to non-AHC members who take up New Notes, if all elements of the benefits relied on by Kyma are included. If advisers' fees and a mark-to-market gain on the Interim Notes are excluded, the enhancement for the participating AHC members is 3.5% (again as compared to non-AHC members who take up New Notes). If the consent fees are excluded as well then the percentage enhancement for participating AHC members is about 2.8%. The differences are about 0.3% larger if the comparison is with a non-AHC member who does not take up New Notes.

117. In my view it is correct to exclude advisers' fees for the reasons already discussed. I understand the Company's point that reflecting any mark-to-market gain would involve double counting for an instrument assumed to be held to maturity, but Kyma objected to this on the basis that their calculations had in fact made an adjustment to avoid double counting. My own calculation is that, if this element was added back in, then the enhancement excluding advisers' fees would be about 4.2% (rather than 3.5%), or about 3.4% (as opposed to 2.8%) excluding advisers' fees and consent fees, in each case as compared to a non-AHC member who takes up New Notes.

118. I also take account of the very significant expected difference in outcome between the most likely alternative of a liquidation (which represents the rights to be released or varied under the Scheme) and the Scheme being implemented (which represents the new rights conferred by the arrangement) (*Re Hawk* at [30]). It is in that context that materiality should be judged. The comparison in this case is very stark.

119. I have however borne in mind that the risk of insolvency cannot, as Hildyard J said in *Re APCOA Parking Holdings GmbH* [2015] Bus LR 374 at [117], "be used as a solvent for all class differences". Otherwise, creditors who might be assumed to be clearly in separate classes, for example with different priority rights on a liquidation, could still be treated as a single class if they will all be materially better off if a scheme proceeds, even if the levels of return available under the scheme (and therefore the degree of compromise) differ significantly. But in this case, when combined with my assessment of the evidence of the differences between the benefits available to AHC members and others, the alternative liquidation scenario does enable me to conclude that those differences are not so great that it is impossible for all holders of Existing Notes to consult together with a view to their common interest.

120. I should add one other observation in relation to Kyma's objections. Their key objection is that they were not given the same opportunity as AHC members to participate in part of the new financing (the Interim Notes) and the backstop. Whilst there is no indication that they approached the Group directly to offer new money, Mr Shah's evidence was that he did make approaches to the AHC's advisers during and after the negotiation process, indicating Kyma's willingness to participate in any new money, including by providing money in July and being prepared to accept a dealing restriction.

121. The Company's view is that, given the limited funds Kyma have under management, it would not have been able to assist materially with the Group's needs, and that Kyma's

real objective is to apply pressure so that its debt is bought out in a way that achieves a better return than it would otherwise obtain. Kyma has not accepted this characterisation, and I do not make any finding about it. But I do note that Kyma appears to accept that the Group must be restructured, and Mr Smith made it clear that it was not seeking to derail the entire Scheme process or timetable. My impression is that what Kyma really wanted, at least initially, was to be part of the AHC.

122. For class composition purposes, it is important to remember that the focus is on whether creditors' rights are so dissimilar that they are not able to consult together with a view to their common interest. Differences of opportunity – in this case the opportunity of AHC members to participate in the Interim Notes and backstop in particular – which do not arise from the legal rights compromised by a scheme, and which are not conferred as disguised consideration for the compromise, may well be regarded as highly material as a commercial matter. But that does not mean that they are relevant for class composition purposes or make it impossible for the creditors to consult together for the purpose of determining whether to approve the scheme.

123. In making this point, I bear in mind again the fact that one member of the AHC has chosen not to participate in the considerable benefits which Kyma has maintained are provided by the Interim Notes and the backstop, that a significant proportion of Existing Noteholders who are not members of the AHC have locked up, and that no other creditor apart from Kyma has objected to the class composition.

Conclusions on class composition

124. In conclusion on the question of class composition:

i) the Interim Notes (including the associated discount and backstop) and the advisers' fees are not relevant to class composition, but the work fee is relevant;

ii) if this was wrong and the Interim Notes were relevant, then any fracturing of the class would be between the four participating members of the AHC and other Scheme creditors; the same applies to the backstop fee in respect of the New Notes;

iii) even if the Interim Notes and advisers' fees should be taken into account, then by reference to the likely alternative of a liquidation, the differences between the rights of AHC members and other Scheme creditors are not so great that all Existing Note holders cannot consult together with a view to their common interest.

Accordingly, it is appropriate to convene a single meeting of Scheme creditors.

The Practice Statement letter

125. Paragraph 7 of the Practice Statement in respect of schemes of arrangement (reissued on 26 June 2020) requires a notification in a "concise form" to persons affected by the scheme of, among other things, the meetings of creditors that the applicant considers will be required and their composition, the fact that such persons are entitled to attend the convening and sanction hearings, and how they may make further enquiries. Under paragraph 8, notice should generally be given in sufficient time to enable them to

consider what is proposed, take appropriate advice and, if so advised, attend the convening hearing. If matters relating to class composition (or other matters not going to merits or fairness) are not raised at that stage and instead are raised at the sanction hearing, the court will expect good reason to be shown why the issue was not raised at an earlier stage: paragraph 10.

126. The Practice Statement letter was issued on 6 August, around four weeks in advance of the convening hearing. I am satisfied that sufficient notice was given in the circumstances.

127. Kyma objects to what it says are deficiencies in the letter. In particular, it says that there was a failure to make full and frank disclosure in respect of class issues, because that involves identifying possible rival arguments. It points in particular to a failure to characterise the issue of the Interim Notes as being part of the restructuring, instead describing them in a way that did not reflect the treatment of them in the Lock-up Agreement as part of a single overall transaction. It also points to a failure to mention the backstop fee in respect the Interim Notes, a failure to disclose the amount of the advisers' fees, a failure to provide any "proper explanation" of the work done to justify the work fee, and a failure to indicate cumulative benefits by providing a clear statement summarising all the benefits available to AHC members.

128. I accept Mr Allison's submission that the Practice Statement letter is intended to be a concise document, without the level of detail that would be included in an Explanatory Statement. It is also the case that Scheme creditors had previously all received the Lock-up Agreement and associated term sheets (and the revised version of that agreement) which, among other things, did include the existence and amount of the backstop fee in respect of the Interim Notes. That is relevant context. Taking account of that fact, I do not agree that there were material deficiencies. The Interim Notes were properly, and extensively, referred to in the letter, and creditors could ascertain their full terms (including the associated backstop fee) either by looking at the term sheets they should already have received or by contacting the Company for more information. Creditors could also seek more information in respect of the work fee and advisers' fees, and indeed could request the Company's evidence and submissions in advance of the convening hearing.

129. The letter did maintain that the Interim Notes were issued outside the context of the Scheme and "independent" of it, without in terms stating that there could be a contrary argument. It would have been better if the terminology had been different, but I do not accept that it is necessary for a Practice Statement letter exhaustively to state all possible rival arguments. It would certainly not be concise if it did. The issue is identified and the Company's view is stated. Creditors are provided with sufficient information to recognise that there might be an issue with the Interim Notes, which had not been made available to Existing Note holders generally. The potential relevance of that to the decision-making process was sufficiently clear.

Other issues

130. I will deal with other issues briefly, having heard no oral submissions on them.

Jurisdiction

131. At the convening hearing, the court may indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are other factors which would clearly lead it to refuse to exercise its discretion to sanction the scheme: *Re Noble* at [76] (convening judgment).

132. The Company is incorporated in England and therefore clearly within the definition of "company" for the purposes of Part 26. On that basis, the court has jurisdiction.

133. As already explained, the Company became a co-obligor under the Existing Notes under a consent solicitation process with the express purpose of being in a position to propose the Scheme. As Newey J commented in his decision sanctioning the last scheme implemented by the Group (*Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch)), this can be described as forum shopping, albeit that he categorised it in that case as good forum shopping ([18]).

134. At this stage, and taking account of the expert evidence that the Company has validly acceded to the indenture as a matter of New York law, the fact that the Group has again engaged in forum shopping is not the type of obvious roadblock which should prevent me making a convening order.

135. I also note that (a) the New York law advice confirms that the Scheme is likely to be recognised under Chapter 15 of the US Bankruptcy Code (in fact Chapter 15 recognition is a condition of the restructuring completing); and (b) the Company intends to file independent expert evidence in advance of the sanction hearing that the Scheme will be recognised in all of the jurisdictions where the Group holds assets of material value.

136. As regards the Recast Judgments Regulation, and on the assumption that it applies, I note that the Company relies on Article 8, on the grounds that 13 of the Scheme creditors, holding in aggregate around 12% the Existing Notes, have confirmed that they are domiciled in England.

The two series of Existing Notes

137. The two series of Existing Notes have slightly different interest rates. The proposed revised rates under the Scheme reflect this difference. I am satisfied that, particularly in the context of the likely alternative transaction of a liquidation, the difference in rates does not present a class issue.

Compromise of claims against other entities

138. The object of the Scheme is to compromise the claims of Scheme creditors against all obligors in respect of the Existing Notes, including Codere Finance as co-issuer as well as guarantors within the Group. It is well established that this is possible. The point has arisen most commonly in respect of guarantees, the point being that if creditors continued to be able to claim against a guarantor without that right being affected by the scheme, the guarantor could make a claim on the same basis against the scheme company under its subrogation right, defeating the purpose of the scheme. The same approach has been applied, with the same rationale (having regard to the right to a

contribution), in respect of two companies jointly and severally liable as primary obligors. For a recent example see *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) at [21] (referring to *Re Codere (UK) Ltd*).

Scheme meeting

139. As with other recent Scheme meetings, it is proposed that the Scheme meeting will be held "virtually" by webinar. It will be a matter for the court at the sanction hearing to determine whether there were any difficulties in full participation by creditors who wish to attend: see *Re Castle Trust Direct plc* at [42]-[43].

Chapter 15

140. At the Company's request, the convening order will confirm that, by reference to a resolution passed by the Company's board, two of its directors have been validly appointed as its agent to seek relief available as a foreign representative for the purpose of seeking recognition of the Scheme under Chapter 15 of the US Bankruptcy Code.

Conclusion

141. In conclusion, it is appropriate to make a convening order on the basis sought by the Company.