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Case No: **CR-2020-004538**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **21 December 2020**

Before :

Mr Justice Miles

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IN THE MATTER OF PGS ASA

AND IN THE MATTER OF THE COMPANIES ACT 2006

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Tom Smith QC and Georgina Peters (instructed by **Ashurst LLP**) for the **Claimant**

Hearing dates: **21st December 2020**

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JUDGMENT

Mr Justice Miles:

1. This is the hearing of an application by PGS ASA ("PGS") for an order pursuant to section 896 of the Companies Act 2006 (the "2006 Act") convening a meeting of certain of its creditors for the purposes of considering, and, if thought fit, approving a proposed scheme of arrangement. The application was made by a Part 8 claim form dated 16 December 2020.

2. PGS is a Norwegian incorporated company originally incorporated on 19 June 1962. It is a public limited company listed on the Oslo Stock Exchange. It is the parent of the PGS Group and has 41 subsidiaries worldwide. The group provides marine seismic survey and data processing services which, in short, involve imaging and processing data for the oil and gas industry which it sells on to companies operating in that sector. The group has approximately 900 full-time employees.

3. The factual background to the application is comprehensively set out in the first witness statements of Mr Gottfred Langseth, executive vice-president and CFO of PGS, and Mr Walter Qvam, the chairperson of PGS. The facts summarised below are taken from those statements and the exhibited documents.

4. The group completed a refinancing of its capital and debt obligations in February 2020 and was, at that time, in a sound financial position to discharge its scheduled debt repayments, including those in 2020. However, oil prices fell dramatically as a result of the COVID-19 pandemic in the spring of 2020. This resulted in a sharp decline in the demand for seismic survey services provided by the group, which had a material adverse impact on its revenues, margins and cash flow. As a result, the group is unable to service, and is in default under, its principal debt obligations. Against this backdrop, the scheme is proposed as part of a restructuring of certain of the group's liabilities.

5. The scheme creditors are the group's lenders under a Credit Agreement originally dated 29 June 2007, as subsequently amended and restated on a number of occasions, comprising both term loans and revolving credit facilities. The scheme relates to some $872 million of indebtedness under the Credit Agreement.

6. It is proposed that the scheme creditors should vote in a single class. I shall return to this issue below.

7. In addition, the group has a number of export credit facilities in an aggregate principal amount of some $298 million, which will also be restructured under a wider financial restructuring but not directly by the scheme.

8. I am satisfied by the evidence that the alternative to the scheme is that PGS would probably enter into bankruptcy proceedings in Norway. PGS and other companies in the group are already in default under the Credit Agreement and export credit facilities. There have, however, been forbearance agreements entered into by a majority of the lenders during the course of negotiations.

9. The purpose of the scheme is to amend and extend PGS's liabilities under the Credit Agreement, in particular by extending the maturity of certain of the facilities and introducing a common amortisation payment schedule. Scheme creditors will receive certain fees in consideration for the amendments, payable partly in cash and partly in kind.

10. I am satisfied by the evidence that the scheme (if approved and sanctioned) is likely to lead to a materially better return to scheme creditors than would be likely in an insolvency of PGS and other group members. PGS has taken advice from independent advisers, Alvarez & Marsal, whose analysis shows that, absent the scheme, scheme creditors are likely to receive a return representing between 34.0% and 69.3% of the current par value of their loans. The difference between the low case and the high case mainly turns on the realisable value of certain valuable proprietary intellectual property owned by the group. Alvarez & Marsal have agreed that PGS may rely on their advice in relation to these matters.

11. The scheme has the support of a large majority of its lenders under the Credit Agreement. By 20 November 2020, all except one of the 195 scheme creditors had acceded to a Lock-Up Agreement under which they have agreed that they will vote in favour of the scheme. They represent some 95.35% of the scheme creditors by value.

12. As I have said, the group's financial indebtedness arises under the Credit Agreement and the export credit facilities. The Credit Agreement is between PGS and PGS Finance Inc ("PGS Finance") as borrowers, and various group subsidiaries are guarantors. To date only PGS has drawn funds under the Credit Agreement.

13. As for the export credit facilities, there are four such facilities under which PGS Titans AS ("PGS Titans"), a wholly-owned subsidiary of PGS, is a borrower, and in connection with which PGS has provided guarantees. PGS is also party to other financial arrangements but these are on a much smaller scale and will not be subject to changes under the financial restructuring of which the scheme is part.

14. I will say a little more about the Credit Agreement. As I have said, the total present indebtedness under that agreement is approximately $872 million. This comprises two term loans and two revolving credit facilities. The term loan facilities have an aggregate principal amount outstanding of some $522 million, of which $2 million has a final maturity date of 19 March 2021 and $520 million has a final maturity date of 19 March 2024.

15. The revolving credit facilities have an aggregate principal amount of US$350 million, of which $135 million was originally scheduled for repayment on 25 September 2020 and $215 million has a maturity date of 18 September 2023. A very small part of that latter facility is undrawn.

16. There are different interest rates on the four facilities. For the 2020 term loan facility the interest rate is 600 to 750 basis points plus LIBOR. For the existing term loan facility, the interest rate is 250 basis points plus LIBOR. For the existing revolving facility the interest rate is 375 to 675 basis points plus LIBOR. For the 2020 revolving credit facility the interest rate is 450 to 650 basis points plus LIBOR. In addition, there is a utilisation fee payable in respect of both revolving credit facilities.

17. The four facilities rank *pari passu* against PGS as regards payment of principal and interest. The four facilities benefit from the same security package on a *pari passu* basis. The security arrangements will remain in place and/or will be reinstated under the financial restructuring. Each of the facilities is guaranteed by a number of group subsidiaries.

18. The governing law of the Credit Agreement was amended on 25 September 2020, by consent of the lenders, to be English law, and the parties, by the same amendment, submitted to the

non-exclusive jurisdiction of the courts of England and Wales. Before the amendment, the Credit Agreement was governed by the law of the State of New York and contained a non-exclusive jurisdiction clause in favour of the courts of that state. The amendment was undertaken to strengthen the ties with this jurisdiction for the purposes of potentially promoting a scheme in this jurisdiction.

19. PGS has received an expert report from a former judge of the State of New York opining that each of these changes will be legally valid and effective as a matter of New York law, and are therefore likely to be recognised by the US courts.

20. Before the pandemic PGS had already commenced a process to address its 2020 debt maturities. In February 2020 it completed the refinancing of its debts, and the group at that stage expected to be in a position to service the refinanced debts. However, since that time, as a result of the pandemic, the group's financial performance has sharply deteriorated. Its revenues declined markedly during 2020 and its cash flow has declined steeply. This has materially affected the group's business, rendering its current financial position unsustainable. The group has adopted a number of operational measures and reductions in expenditure in an attempt to mitigate its falling revenues. However, its current levels of financial indebtedness remain unsustainable.

21. The proposed financial restructuring of which the scheme is part is a product of negotiations with scheme creditors as well as lenders under the export credit facilities. In March 2020 PGS initiated discussions with creditors on a one-to-one basis. At the same time the board of PGS considered whether there was any alternative financial transaction available to discharge its 2020 debt obligations. In April 2020 it engaged Morgan Stanley as its financial adviser for this purpose. The board concluded, having considered the options, that there was no viable financial transaction other than a restructuring of its existing indebtedness.

22. By June 2020 it became clear that PGS would be unable to pay the amounts payable under the Credit Agreement in September 2020 when due. Morgan Stanley advised that payment of the debt would cause PGS's available liquidity to fall below the minimum liquidity covenant ($75 million) under the Credit Agreement.

23. In June 2020 PGS invited certain of its largest term lenders to form an ad hoc committee to engage advisers for the purpose of obtaining access to confidential information and negotiating the proposed terms and amendments to the Credit Agreement. The ad hoc committee members engaged legal advisers and took part in intensive negotiations. Separate groups of revolving lenders were formed to negotiate with the group and they engaged their own legal advisers.

24. As part of this process, on 24 September 2020 PGS entered into a forbearance agreement with the requisite majorities of lenders to prevent enforcement action being taken under the Credit Agreement. PGS agreed also to pay a work fee in the aggregate sum of $1.2 million to certain members of the ad hoc committee, payable in cash, to compensate them for the work done and time spent in negotiating and agreeing the terms of proposed amendments to the Credit Agreement. That fee has already been paid. It compensated designated lenders for their role in co-ordinating the restructuring, including time spent by them, and for the opportunity cost of allocating resources away from other investments. Those lenders did not engage their own separate financial advisers.

25. PGS also agreed, by separate agreement, to pay the fees incurred by financial advisers to certain of the revolving facility lenders, as well as the legal advisers to those lenders, and to the ad hoc group. The adviser fees are to be paid directly to the relevant advisers. The obligation to pay pre-dates the scheme and is not dependent on the scheme taking effect.

26. On 21 October 2020 PGS, PGS Finance and certain group subsidiaries entered into a Lock-Up Agreement with certain consenting lenders which documented their agreement as to the terms of a proposed financial restructuring, including the scheme.

27. By November 2020 all but one of the 195 lenders under the Credit Agreement had acceded to the Lock-Up Agreement, representing 95.35% by value of those lenders. The only lender not to consent is one of the three lenders under the existing revolving facility, representing about 30% by value of that facility.

28. To encourage support for the restructuring, the Lock-Up Agreement requires PGS to pay a fee to lenders who have acceded prior to a date called "the Early Bird Deadline". That was originally 6 November 2020 but has been extended to 5.00 pm on 20 January 2021. That fee, which amounts to 25 basis points, will therefore be paid to all lenders except the non-consenting lender, unless that lender also accedes to the Lock-Up Agreement by 20 January 2021. The lock-up fee is payable in cash on the effective date of the restructuring. The Lock-Up Agreement will automatically terminate on 16 April 2021 if the financial restructuring has not been completed by that date, unless extended by consent.

29. Parallel with the negotiations concerning the Credit Agreement, PGS and PGS Titans AS have negotiated continued forbearance in respect of the export credit facilities.

30. I turn to say something more about the scheme. Its primary objective is to reschedule the debt obligations of PGS and the group by amending and extending the facilities, which will be restated into new term loans. The key amendments involve, first, the reinstated loans being given an extended common maturity date of 19 March 2024, and, secondly, upcoming amortisation payments in respect of the facilities being amended and replaced by a new payment schedule to apply to all the new term loans which will resume from September 2022 onwards. There will also be a common interest rate. The extension of the amortisation payment schedule until 2022 is to seek to give the group breathing space between the implementation of the scheme and that date.

31. The amendments include the conversion of the existing principal amounts outstanding under the revolving credit facilities and existing term loan facilities into a single new term loan constituting one tranche. There will also be changes to the cash sweep provisions and amendments to the financial covenants and other terms of the facilities.

32. The scheme consideration involves a payment of certain fees to all scheme creditors: (i) an amendment fee equal to 40 basis points of the principal amount of the loans advanced by creditors under the Credit Agreement; and (ii) an additional fee which is expressed either as a payment in kind option equal to 1% of the principal amount of the outstanding loans, or, at creditors' election, a mix of payment in kind and certain convertible notes, which are to be issued as a new issue.

33. A lender with cross-holdings under both the existing revolving facilities and the term loan facilities, called Sculptor Investments IV S.à.r.l. ("Sculptor"), has entered underwriting or

backstop arrangements concerning the convertible notes, but no additional fees are payable to Sculptor for its services.

34. In addition to the financial restructuring, a corporate reorganisation of the group is proposed to take place from the effective date of the restructuring. If completed, PGS would at that point become a guarantor rather than a borrower under the Credit Agreement.

35. I have read the explanatory statement and I am satisfied that it provides adequate and proper details of the proposed scheme.

36. The scheme also includes a customary release of certain parties, as well as PGS, which include group guarantors under the Credit Agreement. It is well established that the court has jurisdiction to release claims by scheme creditors against third parties where the release is necessary in order to give effect to the arrangement and is ancillary to the arrangement between the company and its own creditors.

37. Against this background I turn to consider the various issues arising on this convening hearing. The Practice Statement dated 26 June 2020 sets out the procedure to be followed on an application to convene meetings of creditors for the purpose of considering proposals for a scheme of arrangement. The function of the court at the convening stage is not to consider the merits or fairness of the proposed scheme, which will arise for consideration at the future sanction hearing if the scheme is approved by the statutory majority of creditors. However, the court is entitled to consider whether there are any jurisdictional roadblocks that would unquestionably lead the court to refuse to sanction the scheme. The court should also carefully consider the composition of the proposed class of creditors and give at least a provisional ruling on that question.

38. There are no opposing creditors appearing at this hearing.

39. I start with by considering the notification has been given to creditors for the purposes of this hearing. As recognised by the Practice Statement, the appropriate notice period for a convening hearing is fact-sensitive. There is no minimum required period. There are three relevant factors in deciding whether the period of notification is adequate: (i) the complexity of the scheme; (ii) the degree of consultation with creditors prior to the launch of the scheme; and (iii) the urgency of the scheme, having regard to the financial position of the company.

40. The Practice Statement letter of 26 November 2020 was distributed on that date, which is more than three weeks before this hearing. I am satisfied that this is sufficient notice for the following reasons.

41. First, the scheme is urgent. The company is already in default in respect of its principal debt obligations under the Credit Agreement, and several events of default have already occurred. The forbearance granted by existing creditors to date is conditional on the scheme being implemented by 15 April 2021.

42. Second, groups representing the majority of scheme creditors have been aware of and closely negotiated the proposed structuring over a number of months.

43. Third, as early as November 2020 all but one of the scheme creditors had acceded to the Lock-Up Agreement. The non-consenting lender has been negotiating directly with the

company since August 2020 and is therefore aware of the terms of the scheme, and has been for a significant period.

44. Fourth, the scheme is relatively straightforward.

45. I am satisfied that what is proposed by the scheme is a compromise or arrangement within the meaning of Part 26 of the Companies Act. The scheme plainly involves elements of give and take. The principal compromise is the maturity extension and changes to the repayment schedule. The *quid pro quo* is the payment of the additional fee and the amendment fee.

46. I turn next to the composition of the class meeting or meetings. The authorities establish that separate meetings are only required if there are separate classes of creditors. Whether there are separate classes of creditors depends on whether or not the rights of different creditors, or different groups of creditors, against the company are sufficiently similar that they can consult together with a view to their common interest. The assessment of creditors' existing rights against the company requires identification of the substance of those rights, absent the scheme. Where that is an insolvency procedure, the correct approach is to consider the rights which are to be released or varied under the scheme as those the scheme creditors would have in such an insolvency.

47. PGS considers and proposes that scheme creditors ought to vote in a single class at the scheme meeting. It considers that, absent the scheme, scheme creditors would all have materially the same rights against PGS in an insolvency. Further, all creditors will receive the same rights under the scheme.

48. As to the existing rights of the scheme creditors against PGS, I am satisfied that all lenders under the Credit Agreement have materially the same legal rights against PGS, given that the likely alternative to the scheme is a bankruptcy of PGS. On PGS entering a formal bankruptcy, all lenders would have the same rights against PGS, being accelerated liquidated claims for principal and accrued interest under the Credit Agreement. The claims of all such creditors would rank *pari passu*, including as to recourse to the security. Indeed, absent a scheme, because the facilities are already in default there is likely to be an acceleration of the facilities, even prior to any bankruptcy of PGS.

49. The facilities currently have different maturity dates and rates of interest, as I have already outlined, but these differences do not give rise to a material difference in existing rights, and none that would make it impossible for scheme creditors to consult together in their common interests. As far as interest rates are concerned, it is well established that differences in rates will not fracture a single class, particularly where the comparator is insolvency. It is also well established that different maturity dates will not fracture a class: in an insolvency all claims will be accelerated. In short, the creditors under the facilities would receive identical treatment in an insolvency and hence have the same rights going into the scheme.

50. They will also have the same rights coming out of a scheme. Scheme creditors will receive identical rights in relation to the newly designated term loan facilities, including as to interest rates and maturity, and to the amendment fee and the additional fee.

51. For these reasons, *prima facie* there is a single class of creditors able to meet together to consider and vote on the scheme.

52. PGS has properly raises the issue whether the various fee arrangements I have referred to above affect this provisional conclusion.

53. The first is the lock-up fee of 25 basis points. I am satisfied that this does not fracture the class. First, it is available to all scheme creditors, provided they accede to the Lock-Up Agreement by 20 January 2021. There is, therefore, no relevant difference in rights. I also consider that there have been long-running negotiations and that the non-consenting lender has had adequate time to decide whether to accede to the Lock-Up Agreement. Second, the fee is equal to 25 basis points of the aggregate principal amount of each scheme creditor's locked up debt. This is low in absolute terms. More pertinently, creditors will be making their voting decisions in the light of the insolvency comparator where returns are estimated at between 34.0% and 69.3%, as against projected returns of over 100% if the scheme is passed. I consider that the value of the lock-up fee to scheme creditors is likely to be immaterial to the voting decisions of scheme creditors.

54. Next there are the work fees. The total work fee was $1.2 million. It was paid for creditors' work on the negotiations and for tying up their debt. I do not consider that the fee here fractures the class. First, the fee was payable and has in fact been paid under a separate agreement. It was not dependent on the scheme being passed. Second, I am satisfied on the evidence that it was paid to the relevant lenders in respect of the work actually done. It was calculated by reference to work done and not to the outstanding amount of the creditors' debt. Third, I am satisfied that fees of this level will not have any material influence on the voting decisions of creditors. The amount of the work fee is very low in the context of the overall liabilities to the scheme creditors. It is still less material when measured against the likely returns in a bankruptcy of PGS as against the probable outcome if the scheme is passed.

55. The third category of fees are those payable to various financial and legal advisers. PGS considered that the advice provided to these creditor groups was necessary for them to participate in the restructuring discussions. I do not consider that these fees fracture the class for the following reasons. First, the adviser fees are being paid directly to the relevant advisers, in each case pursuant to the engagement letters which pre-dated the scheme and are not dependent on it being sanctioned. Second, in any event, payment of the adviser fees cannot reasonably be said to be material to the decision which the scheme creditors need to make when voting on the scheme. It would be unrealistic to think that the scheme creditors might be motivated to vote for the scheme in order to obtain payment for professional fees arising in connection with the scheme.

56. PGS has also considered the potential impact on class composition of the right to payment of the amendment fee and additional fee. So far as the amendment fee is concerned, all scheme creditors have the same right to receive this and therefore it has no bearing on class composition. So far as the additional fee is concerned, all scheme creditors have the same right to receive it and the same option to receive payment of its fee in one of two ways: either what is called the PIK option or, in part, through convertible notes. Accordingly, all scheme creditors have the same opportunity to acquire convertible notes in partial satisfaction of their entitlement to the additional fee.

57. Finally, as noted above, Sculptor has agreed to provide backstop services in relation to the issue of the convertible notes. This is a commercial arrangement. It is not to be paid any additional fees for doing so. The arrangement does not, in my judgment, affect the ability of

the creditors to confer together in deciding how to vote in relation to the scheme, and therefore does not fracture the class.

58. For these various reasons, I am satisfied that there should be one class of creditors.

59. I turn to questions of international jurisdiction. The question at this stage is to consider whether there are any obvious roadblocks to jurisdiction. The first jurisdictional question relates to the status of the company. The scheme jurisdiction is only available if the scheme is a compromise or arrangement between a company and its creditors or any class of them: see section 895(1)(a) of the 2006 Act. For these purposes, a "company" is any company liable to be wound up under the Insolvency Act 1986 (the "Insolvency Act"): see section 895(2)(b) of the 2006 Act. A foreign company is liable to be wound up as an unregistered company under Part 5 of the Insolvency Act and is therefore within the meaning of section 895 of the 2006 Act. PGS, being a Norwegian company, is a foreign company liable to be wound up as an unregistered company under Part 5 of the Insolvency Act.

60. There is then the potential issue whether PGS has a sufficient connection to England and Wales for the purposes of this jurisdiction. Questions of sufficient connection are properly a matter of the court's discretion and therefore arise mainly at the sanction hearing. But, in any event, there is no reason to think that this requirement is not satisfied in the present case for two reasons: first, the Credit Agreement is governed by English law and, second, the Credit Agreement has an English jurisdiction clause. In a number of cases the English courts have held that one or other of these features is enough to create the sufficient connection required for jurisdictional purposes.

61. The second possible issue on jurisdiction concerns the potential application of the Recast Judgments Regulation, under which the basic rule is that any person domiciled in an EU member state must be sued in the courts of that member state: see Article 4(1). To the extent that scheme creditors are domiciled in an EU member state, this might potentially raise a jurisdictional question.

62. There is an unresolved issue whether the relevant part of the Recast Judgments Regulation applies to schemes of arrangement. The court has traditionally approached this question by assuming, without deciding, that the Regulation does apply and then asking whether there would, in any case, be a relevant exception to the domicile rule. I shall follow this approach.

63. Making that assumption, there appear to be two relevant exceptions. The first ground is contained in Article 25 of the Recast Judgments Regulation which covers jurisdiction clauses. There is a jurisdiction clause in favour of the courts of England and Wales in the Credit Agreement. The fact that the contract was recently amended to include this clause, and that it was done in order to strengthen the ties with this jurisdiction for the purposes of a possible scheme, does not bar reliance on Article 25. The clause is asymmetric, in the sense that scheme creditors retain rights to litigate against PGS and the group guarantors in any competent jurisdiction, whereas PGS and the guarantors are subject to the jurisdiction of the English courts exclusively. It has been held in several cases that asymmetric English jurisdiction clauses drafted in materially identical terms to the present one fall within Article 25: see, for example *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) per Snowden J.

64. The second alternative ground is Article 8 of the Recast Judgments Regulation, which provides that a person domiciled in a member state is to be sued where he is one of a number

of defendants in the courts for the place where any of the defendants 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.

65. Here, at least two scheme creditors are domiciled in England and Wales, being Barclays Bank PLC and Goldman Sachs International Bank. Those scheme creditors hold collectively over 6.5% by value of the outstanding amounts under the facilities.

66. In the light of these considerations, I am satisfied that there is no jurisdictional roadblock.

67. I agree with the views of Snowden J in *Re ColourOz* at [57] that the question whether a scheme will have international effectiveness is a matter going to discretion rather than jurisdiction, and should be addressed and determined at the sanction hearing. PGS intends to provide evidence on this issue at the sanction hearing, including evidence about international effectiveness in Norway.

68. I shall therefore convene a scheme meeting as sought. In the normal way, PGS seeks directions as to summoning and conduct of the scheme meeting. The draft order contains standard provisions regarding adjournment, voting and proxies. The court has made orders in a number of recent cases that it is appropriate, in the light of current conditions, to have a virtual scheme meeting and I am satisfied that such a course is appropriate in the present case.