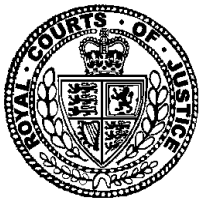

Neutral Citation Number: [2022] EWHC 1318 (Ch)

CR-2022-000612

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

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

Date: 30/05/2022

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

IN THE MATTER OF ALL SCHEME LTD

AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

- -

Barry Isaacs QC and Adam Al-Attar (instructed by **Freshfields Bruckhaus Deringer LLP**)
for the **Applicant Company**
William Day (instructed on behalf of the **Customer Advocate, Jonathan Yorke**)

Hearing date: 23rd May 2022

- -

Approved Judgment

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THE HONOURABLE MR JUSTICE TROWER

This judgment will be handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 2pm on Monday 30 May 2022

Mr Justice Trower:

Introduction

1. This judgment is concerned with an application by ALL Scheme Limited ("SchemeCo") for the sanction of two proposed and alternative schemes of arrangement (the "Schemes") under Part 26 of the Companies Act 2006 ("CA 2006"). The Schemes have been referred to as the New Business Scheme ("NBS") and the Wind Down Scheme ("WDS") and I shall use the same abbreviations. At the conclusion of the hearing on 23 May 2022, I announced that I would make the order sought by SchemeCo in relation to the NBS. These are my reasons for making that order.

2. The business with which the Schemes are concerned has been conducted by Amigo Loans Ltd ("ALL"). It is an indirect subsidiary of Amigo Holdings PLC ("Holdings"), a public company listed on the Official List of the London Stock Exchange and the holding company of the Amigo group. One of its sister companies is Amigo Management Services Limited ("AMSL"). Where is it unnecessary to distinguish between companies within the group I shall refer to them as Amigo.

3. ALL is a provider of 'guarantor loans' in the UK. Guarantor loans are mid-cost credit offered to those who, because of their credit histories, cannot borrow from mainstream lenders. The loans involve a second individual in the lending relationship, typically a family member or friend with a stronger credit profile than the borrower, who guarantees loan repayments. Since January 2005, ALL has entered into approximately 927,000 guarantor loan agreements and has had 507,144 borrowers and 536,097 guarantors. There are approximately 81,000 customers with current guarantor loans.

4. In recent years, Amigo has received a significantly increased number of customer complaints related to ALL's lending activities. These complaints relate to the affordability of loans for both borrowers and guarantors. As at 31 December 2021, Amigo's estimate of the extent of the redress liabilities arising out of those complaints (for which any one or more of ALL, AMSL and Holdings may be liable) was £347.5 million which Amigo is unable to pay in full. These liabilities include sums owed to the Financial Ombudsman Service ("FOS") in respect of case fees for handling previous complaints.

5. The consequence of these liabilities being incurred is that Amigo is insolvent on a balance sheet basis. Amigo will also be cashflow insolvent if ALL is not permitted to recommence lending. I will give a little more detail later, but I am satisfied that in those circumstances there are good and sufficient grounds for concluding that, if neither the NBS nor the WDS were to be sanctioned and come into effect, it would be proper for ALL to be placed into administration. Indeed, the directors of ALL have undertaken to the court that, if sanction of both of the Schemes is refused, they will take such action as is necessary to appoint administrators of ALL as soon as possible.

6. As part of the solution for addressing the problems caused by the extent of Amigo's redress liabilities, SchemeCo was incorporated as a wholly owned subsidiary of Holdings for the purpose of promoting a scheme of arrangement. It has assumed joint liability with ALL, Holdings and AMSL by way of deed poll in respect of the redress

liabilities in respect of loans made between 28 January 2005 and 21 December 2020. I address the legal issues which arise in relation to this structure a little later in this judgment. For present purposes it suffices to say that I am satisfied that the structure which has been adopted did not cause me to consider that the NBS ought not to be sanctioned.

The Previous Scheme

7. In January 2021, SchemeCo proposed a predecessor scheme of arrangement which was approved by the statutory majorities on 12 May 2021 (the "previous scheme"). The purpose of the previous scheme was to provide a mechanism (including the imposition of a bar date) for the determination of the claims of scheme creditors and to establish a fund to be used to pay a dividend on their claims. The scheme creditors were in turn to release their claims against members of the Amigo group. SchemeCo's best estimate was that they would receive approximately 10p in the £ plus the possibility of benefiting from further payments into the fund depending on the total amount of redress falling to be set off against outstanding borrowings and a share of Amigo's future profits.

8. However, although approved by the statutory majorities, the previous scheme was opposed by the Financial Conduct Authority ("FCA") and in a judgment dated 24 May 2021, reported as *In Re ALL Scheme Limited* [2021] EWHC 1401 (Ch), Miles J declined to sanction it. In that judgment, Miles J explained that:

    i) he was not satisfied with the directors' evidence of imminent administration;

    ii) it was not properly explained to scheme creditors that existing shareholders would retain their shares and thereby benefit from a reduction in customers' redress claims and a future return on their shares;

    iii) the directors had not adequately explored the prospect of a better alternative to the scheme he was being asked to sanction, in particular, through a market recapitalisation to raise funds to pay creditors and / or an equitization of their claims.

9. Miles J held that the legal consequences of these findings were that the approval of the majority at the scheme meeting was not representative of the class as a whole. The reason for this was that the creditors were not able to take a properly informed view, having regard to the deficiencies in the explanatory statement. He decided that the Court should therefore assess whether to sanction the predecessor scheme having regard to all the circumstances, including by having regard to what other scheme of arrangement might be proposed. Having carried out that exercise, Miles J determined that the scheme in the form then proposed ought not to be sanctioned because the existing shareholdings were to remain intact with the prospect of achieving future value from their shares, in circumstances in which customers' redress claims were to be compromised by an arrangement. Miles J was not satisfied that Amigo was unable to propose better terms.

10. It is clear from Miles J's judgment that his decision was informed by the FCA's attitude to the previous scheme, and he agreed with a number of the submissions it had made as

to its deficiencies and the processes that had been adopted for obtaining its approval and seeking its sanction. This is in marked contrast to the position of the FCA on the present application. The FCA does not oppose the sanction of the Schemes, it has not appeared by counsel and has said that it would not be in furtherance of its statutory objectives to do so. It has explained in correspondence that it has continued to engage with Amigo as its new proposals have developed and it is clear that its level of involvement has been such that it would have drawn any concerns that it may continue to have to the court's attention. It has not done so, and while it is self evident that the question of sanction is for the court and not the FCA, the FCA's attitude was a material factor in my assessment of some of the considerations I have taken into account in deciding whether I ought to grant the relief sought.

The Schemes

11. SchemeCo applied first for the sanction of the NBS. It made clear in its skeleton argument that it was only if I were to consider that the NBS should not be sanctioned that it would propose sanction of the WDS by way of alternative. As I decided that the NBS should be sanctioned, it is not necessary to conduct a detailed analysis of the respects in which the WDS was advanced as a better alternative than the appropriate comparator. However, it remains relevant as an illustration of an alternative to administration which Scheme Creditors have had an opportunity to consider, and which supports Amigo's view that, in the absence of sanction of one or other of the Schemes, a formal distributing administration is the only realistic alternative.

12. The terms of the NBS can be outlined as follows:

    i) The creditors who will be bound by the terms of the NBS are customers in respect of loans advanced by ALL, guarantors of those loans (together "Customer Creditors") and the FOS in respect of complaints handing fees (together with Customer Creditors "Scheme Creditors").

    ii) The Schemes will release ALL, AMSL and Holdings from all of Amigo's liabilities to pay any amounts to any person in relation to making or administering an Amigo loan, save for certain excluded liabilities, being intercompany debts and liabilities to customers and the FOS admitted or adjudicated prior to 21 December 2020.

    iii) The release is granted in exchange for the payment of dividends from the Scheme Fund, the amount of which will depend on which of two solutions is adopted (the "Preferred Solution" or the "Fallback Solution" as to which see below).

    iv) The amounts payable are to be calculated by a payment percentage calculated by the Scheme Supervisors by a method prescribed in the Schemes.

    v) Provision is made for a bar date or Claims Submission Deadline such that Scheme Creditors' claims will be capable of proof against SchemeCo if but only if submitted within six months after the date on which the Scheme becomes effective.

vi) Liabilities to Scheme Creditors which are not proved by the bar date will be extinguished. If they are proved in time, scheme liabilities on which dividends are to be paid will be admitted either by agreement or following an adjudication. The adjudication procedure is modelled on that which would apply in administration, but it is streamlined to provide for a quicker and cheaper dispute resolution process.

vii) Provision is made for set off, which works in relation to redress claims in the following way. Any current loan balance of the amount initially borrowed will first be reduced by the full amount of compensation a Customer Creditor is owed, calculated as at the date on which the NBS becomes effective. In the event that the Customer Creditor is owed more than the amount initially borrowed, their claim in the NBS will be for the net amount.

13. The NBS provides for two alternative solutions: the Preferred Solution and the Fallback Solution, the implementation of which will depend on whether or not two conditions (called the New Business Conditions) are satisfied. The first of the New Business Conditions is that, within 9 months of the NBS becoming effective, the FCA allows ALL to restart lending. The second is that within 12 months of the NBS becoming effective Holdings issues at least 19 ordinary shares for every 1 ordinary share in issue immediately beforehand (the "Share Issue"). The Share Issue therefore mandates the dilution of Holdings' existing shareholders by at least 95% in respect of their existing shareholdings.

14. The Scheme Fund out of which dividends are to be paid is to be held by SchemeCo on trust and will start to be constituted before it is known whether or not the New Business Conditions will be satisfied. A first funding payment of £60 million will be paid by ALL into the trust account no later than 5 business days after the date the NBS becomes effective. This is the time from which the release takes effect. A second funding payment of £37 million will be paid into that account by no later than 9 months after that date.

15. If the New Business Conditions are satisfied, the Preferred Solution will be implemented. This will mean that £15 million from the proceeds of the Share Issue (called the Top Up Amount) plus such further amount if any as the investors in the Share Issue will tolerate being paid to Scheme Creditors (called the Excess Cash Account) is paid into the trust account. Payment is to be made within 10 days of the New Business Conditions being satisfied. A further figure called the Turnover Amount will be added to the Scheme Fund if, after allowing for a liquidity reserve, ALL's net collections from its loan book before 31 October 2023 exceed £97 million. Amigo's present estimate is that this will add a further £4 million to the Scheme Fund.

16. Amigo considers that the Preferred Solution is the best outcome for Scheme Creditors because it will give an estimated return of 41p in the £, with a final anticipated dividend in November 2023. This will be achieved through the Share Issue and the consequential injection of new monies of which at least £15 million will be contributed to enhance the return to Scheme Creditors. It will also enable a recommencement of business by ALL which it anticipates will facilitate enhanced loan collections.

17. If the New Business Conditions are not satisfied, or if ALL certifies to the Scheme Supervisors that they do not expect them to be satisfied, the Fallback Solution will be

implemented. In substance this will involve ALL ceasing all further lending while continuing to collect on its existing loan book, paying the net proceeds into the trust account as part of the Scheme Fund. These recoveries will then become available for the payment of dividends to Scheme Creditors in accordance with the terms of the NBS. If the Fallback solution is implemented, Amigo estimates that Scheme Creditors will receive between 33p and 37p in the £. It is anticipated that payment of a final dividend will be made in May 2024.

18. This result is similar to the result anticipated to be achieved if the WDS were to be sanctioned. The WDS was proposed by way of alternative to the NBS and made provision to wind down ALL's business through a quicker and cheaper process than would be achieved if it were to go into administration. The estimated dividend if the WDS were to be sanctioned and implemented is 33p in the £. The estimated dividend if ALL were to go into administration is 31p in the £ with an initial dividend likely to be paid in February 2024 and a final dividend being paid in May 2024 at the earliest.

19. I have given consideration to the way in which the Scheme documents reflect what is sought to be achieved by the proposals and raised a number of points of detail with Mr Isaacs QC who appeared at the hearing for Amigo. These included matters such as the way in which the adjudication process has been formulated and the operation of the Scheme Fund on termination. I was satisfied with the answers that he gave.

The comparator or relevant alternative

20. The question for creditors at a scheme meeting is to decide whether or not to accept the proposals put forward by the proponents of the scheme. This means that they need to be in a position to compare the anticipated outcome for them if the scheme is approved and sanctioned with the anticipated outcome for them if it is not. For that purpose it is important for the scheme company to identify its current financial condition and what it considers will occur if the rearrangement of creditor rights to be achieved by the scheme does not come into effect and to give a full explanation to its scheme creditors of why its directors have reached the conclusion they have.

21. In the present case, Amigo has established to my satisfaction that the alternative to the Schemes is a distributing administration. That alternative was presented to Scheme Creditors in the explanatory statement as the proper comparator and in my judgment, the evidence justifies a conclusion that this was the right course for the directors to take. In this important respect the situation has moved on from that which appeared to be the case when Miles J refused to sanction the previous scheme (*In Re ALL Scheme Limited* [2021] EWHC 1401 (Ch) at [80] to [99]).

22. When the matter was considered by Miles J, he took the view that there were a number of reasons to suppose that the directors of Amigo would have a reasonable period of time in order to assess and promote alternative restructuring proposals if sanction of the previous scheme were to be refused. He was satisfied that there was no imminent need for administration if the scheme then before him was not sanctioned. The proposal for the sanction of one or other of the Schemes is the fruits of the process of seeking to formulate an alternative restructuring. I am satisfied that the steps taken by Amigo to promote schemes which are more advantageous to Customer Creditors can reasonably

be thought to have achieved the best terms available and that, unlike the position before Miles J, if those proposals were to be rejected by the Scheme Creditors or the court, administration would now be the only alternative. The reason for this can be stated quite shortly as follows.

23. ALL's main liabilities are (a) £50 million owed under certain secured high-yield bonds (the "Bonds") issued by another group company of which ALL is guarantor, (b) the redress claims, (c) liabilities to the FOS for complaint handing fees and (d) other trading debts such as business rates, professional advisers' fees, amounts owed to other suppliers, and a potential preferential claim from HMRC relating to VAT. ALL's total liabilities as at 31 December 2021 are estimated to be £597 million (including the estimated value of the redress claims of £347.5 million). Its assets are estimated to be £473 million.

24. The consequence is that ALL's net liabilities as at 31 December 2021 were £123 million. The reasonableness of the assumptions on which the asset and liability figures are based has been reviewed by EY who carried out an independent review of the financial position and estimated outcomes for Amigo. I am satisfied that this is not a temporary insolvency as might be caused by a sudden and foreseeable short diminution in the value of an asset. ALL and Amigo as a group are therefore balance sheet insolvent.

25. As to Amigo's cashflow position, if neither Scheme goes ahead ALL will not start relending and its business will be in run off. The evidence is that there is a reasonable degree of certainty that ALL will then run out of cash to pay its liabilities in full in the reasonably near future. Amigo is not currently progressing complaints, and the FCA and the FOS have been permitting that situation to continue while Amigo is developing the Schemes. However, this informal moratorium has no legal status and I accept the submission that Amigo cannot assume that the FCA or the FOS would allow it to continue if it becomes clear that neither Scheme will go ahead, which was not the situation at the time SchemeCo sought sanction of the previous scheme (*In Re ALL Scheme Limited* [2021] EWHC 1401 (Ch) at [86]). In any event, creditors may decide to bring proceedings against Amigo if neither Scheme is approved. It follows that, if the Schemes fail, it is reasonably certain that Amigo will satisfy the test for cash flow insolvency under section 123(1)(e) of Insolvency Act 1986.

26. In those circumstances, I am also satisfied that it would be unfair if Amigo started to pay some of its Scheme Creditors but not others on a 'pay as you go' basis. In circumstances of balance sheet insolvency and the failure of either Scheme, it will be reasonably certain that a 'pay as you go' approach would result in some creditors being paid in full and others not at all. To avoid that situation, ALL or the ALL board would need to apply for administration. As I have already mentioned, that is a course which the directors have in any event undertaken to pursue if neither of the Schemes is sanctioned, and from the evidence I have seen their decision to give that undertaking was one which it was reasonable and appropriate for them to make.

The Convening Order

27. The convening hearing took place before Snowden LJ on 8 March 2022. By the order he made on handing down his judgment on 15 March 2022, Snowden LJ permitted SchemeCo to convene single class meetings of Scheme Creditors in respect of both the NBS and WDS. He directed that the meetings were to be held on 12 May 2022 and that they were to be held virtually and concurrently. He appointed Mr Jamie Drummond-Smith, who had also been acting as independent chairperson of a creditors' committee, to be chairperson of each Scheme meeting.

28. The convening order also specified the notification requirements in respect of the explanatory statement required by section 897 of CA 2006 and the other Scheme Documents. They were to be made available for download on the Scheme website. Appropriate notifications by email and / or SMS were to be sent out and appropriate advertisements in national newspapers and social media were to be posted. Scheme Creditors were entitled to hardcopy documents on request. They were entitled to attend the Scheme meetings in person or by proxy and a portal was to be made available on the Scheme website for Scheme Creditors to appoint a proxy for voting purpose. The portal also facilitated the direct submission of Scheme Creditor votes and their pre-registration to attend the meetings in person.

29. The convening order also gave directions for voting. It required Scheme Creditors' claims to be calculated for voting purposes in the manner set out in the explanatory statement. This valuation approach was based on what would have occurred in a distributing administration and meant that the values of Customer Creditors' claims were to be calculated based on values as at 28 February 2022 in one of two ways:

    i) Guarantors were to be given the value of any amount paid by them as guarantor, plus 8% simple interest from the time of payment until 28 February 2022. If a guarantor Customer Creditor had not made any payments, their vote was to be valued at £1.

    ii) Borrowers were to be given the value of the amount by which the total payments they had made exceeded the total amount borrowed plus an additional amount of interest for each repayment made after payments equal to the total principal borrowed from the time of that repayment until 28 February 2022. The claims of borrower Customer Creditors whose redress claims do not exceed the principal amount borrowed were to have a value of £1.

Convening of the Scheme Meetings

30. SchemeCo has produced detailed evidence in relation to the manner in which the Scheme meetings were convened. The relevant documentation was uploaded on to the website in time (on 16 March) and the approved notifications were sent by email and SMS and advertised in accordance with the directions given by the convening order. I am satisfied from that evidence that the terms of the convening order were complied with.

31. Some minor amendments were made to the explanatory statement and the scheme documents after the convening hearing on 8 March 2022, but before Snowden LJ made the convening order on 15 March 2022. No changes were made to the explanatory

statement or the scheme documents after Snowden LJ made the convening order, and so the requirement that the scheme documents remain substantially in the form mentioned in that order was complied with.

32. Initially some Customer Creditors had difficulties with accessing the portal, but I am satisfied from the evidence that those were resolved reasonably expeditiously and it does not appear that any Customer Creditor was materially prejudiced by what occurred. It also became apparent that some Customer Creditors had not understood their voting options because they had not appreciated that they were able to vote for or against both Schemes. The evidence is that this problem was solved by a minor change in presentation (on which the customer advocate whose role I will deal with a little later in this judgment was consulted) which solved the problem. Once the change was made there was only a single further isolated example of apparent confusion on the point.

33. I was also shown detailed evidence on further steps that Amigo took to encourage Customer Creditor participation. Between 11 and 14 April 2022, Amigo sent follow-up SMSs to all customers who had not yet voted on the Schemes, encouraging them to do so. 749,135 SMSs were sent. Follow up emails were also sent to particular groups of Customer Creditors (approximately 48,000) who had not yet voted. On 28 April 2022 and 29 April 2022, Amigo sent postal notification to two limited groups of Customer Creditors who had made a complaint or who had voted on the previous scheme, but had not yet voted on the Schemes.

The Scheme Meetings

34. As I have explained, Snowden LJ gave directions for the Scheme meetings to be held virtually. I have considered the evidence on whether what actually happened at the Scheme meetings amounted to a coming together for consultation by remote means sufficient for them to constitute meetings and whether there were any material difficulties in Scheme Creditors' participation or in their ability to speak and consult (cf *In re Castle Trust Direct plc* [2021] 2 BCLC 523 at [43] – [44]). I am satisfied from the Chairperson's Report on how the Scheme meetings were conducted that the necessary requirements were achieved. There were no material difficulties in creditor participation at the meetings and an effective vote was held in respect of the NBS and the WDS.

35. In particular, there was very detailed evidence which explained the issues raised by Customer Creditors during the course of the meetings when there was a question and answer session which lasted just over 1 hour. Creditors raised a number of issues relating to (a) voting and claims submissions, (b) claims valuation, (c) comparison with the likely alternative to the Schemes and (d) a number of miscellaneous points in relation to their own individual positions. There was then a discussion between Customer Creditors in the presence of the customer advocate, but in the absence of members of Amigo's management. The presentation, consultation and discussion stage of the meeting lasted for approximately three hours with a further hour at the end to enable Scheme Creditors to vote.

36. Customer Creditors were given the opportunity to ask the customer advocate any questions they might have. In the event, the only issue with which he was asked to deal

was a question relating to the availability of legal advice. He confirmed that the firm in which he is a partner, McCarthy Denning, was available to respond to legal questions, although in the event no Customer Creditor took advantage of this service.

37. The result of the vote at the Scheme meetings was that the majorities required by section 899(1) of CA 2006 were achieved. Scheme Creditors approved each of the Schemes by the following majorities in number and value:

    i) 145,523 creditors voted for the NBS, being 88.8% by number and 90% by value. 18,397 creditors voted against the NBS, being 11.2% by number and 10% by value.

    ii) 134,677 creditors voted for the WDS, being 83.1% by number and 81.7% by value. 27,363 creditors voted against the WDS, being 16.9% by number and 18.3% by value.

38. The turnout at the Scheme Meeting for the NBS was approximately 15.6% of the entire population of potential Customer Creditors.

The role of the Court at Sanction

39. Section 899 of CA 2006 provides as follows:

> "(1) If a majority in number representing 75% in value of the creditors or class of creditors … present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.
>
> …
>
> (3) A compromise or arrangement sanctioned by the court is binding on – (a) all creditors or the class of creditors ..., and (b) the company …"

40. In *Re Telewest Communications (No. 2) Ltd* [2005] 1 BCLC 772 at [20]-[22], David Richards J stated the principles to be considered by the Court when deciding whether to sanction a scheme of arrangement in the following terms:

> "The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:
>
> > 'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a

> member of the class concerned and acting in respect of his interest, might reasonably approve.
>
> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.'
>
> This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'. *"*

Compliance with the terms of the statute

41. The first question is whether the requisite statutory majorities were achieved. It is clear that they were. Both the NBS and the WDS were approved by a majority in number representing more than 75% in value of Scheme Creditors' claims. They were approved by a substantial margin.

42. I am also satisfied that the Scheme Meetings were summoned and convened in accordance with the convening order. As I have already explained, on the important issue of whether there was a genuine, effective meeting held by remote means, the evidence establishes that there was.

43. I am also satisfied that no issue arises in relation to the constitution of classes for the purposes of each Scheme meeting. In accordance with para 11 of the Practice Statement (Companies: Schemes of Arrangement under Part 26 and 26A of the Companies Act 2006) [2020] 1 WLR 4493) the constitution of classes was considered by Snowden LJ at the convening hearing (*Re ALL Scheme Ltd* [2022] EWHC 549 (Ch) (the "Convening Judgment") at [52 - 58]). He ordered a single class of creditors be convened to consider each of the Schemes.

44. In light of the fact that class questions have already been considered by Snowden LJ, and there has been no suggestion by any Scheme Creditor that Snowden LJ was wrong to convene a single meeting for each Scheme, I do not think it is appropriate for me to revisit the question at this hearing. This was the approach that Snowden J himself took

in *Re Global Garden Products Italy SpA* [2017] BCC 637 at [43] and [44] and in my view reflects the policy which underpins the Practice Statement. In any event, I see no basis for thinking that I would not have reached the same conclusion as Snowden LJ did for the reasons that he gave.

45. The next question is whether the provisions of section 897 of CA 2006 have been complied with as they relate to the explanatory statement. In my view they have. While the statute is not prescriptive as to what an explanatory statement should contain, it must "explain the effect of the compromise or arrangement" (s.897(2)). This is a deceptively simple form of words, but it carries with it a requirement to ensure that the explanation is clear and suitable for both the context in which it is given and the audience to which it is addressed. In the present case, Snowden LJ said in his convening judgment, albeit without approving the document as to its content, that the explanatory statement is "appropriate to the audience at which it is aimed". I agree with that description and am satisfied that its explanation of the insolvency of Amigo, the relevant comparator and the anticipated outcomes both in that comparator and under the Schemes were all given in a readily comprehensible form.

46. The explanatory statement was also in my view clear in its description of the steps that Amigo had taken and was proposing to take in order to maximise the return for Customer Creditors. These steps include (i) the intended rights issue and dilution of existing shareholders by at least 95% (unless the existing shareholders exercise their pre-emption rights to participate in the Share Issue); (ii) the consequential intended enhanced contribution of new monies to pay compensation claims, which the directors are under a duty to maximise; (iii) the enhanced rate of collections by reason of continued business; and (iv) the repayment of the Bonds in order to save interest to further fund compensation payments.

Bona Fides of the statutory majority

47. The question of whether or not the statutory majority is acting bona fide and is not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent is an important one. The court is always concerned to ensure that what has long been regarded as "a most formidable compulsion upon dissentient or would be dissentient creditors" (per Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, 582) is not abused.

48. In the present case there is no reason to consider that any of the Customer Creditors who voted in person or by proxy voted for a collateral or special interest that conflicted with, or which was additional to or different from the other members of the class in which they were voting. There is no indication that any of them voted other than as Customer Creditors whose only interest was their rights against Amigo under their claims for redress.

49. As to the FOS, its vote was 2.4% of the majority voting for the NBS and 2.5% of the majority voting for the WDS. As such, it was not a determinative vote. I have not identified any special or different interest that might have influenced or affected the FOS vote and none has been suggested. It follows that the potential need for greater scrutiny at sanction because of any special or different interest of the FOS that might

exist does not in my judgment call for further enquiry. It also follows that the exercise contemplated by Snowden LJ in the Convening Judgment at [56] does not arise:

> "It is also unlikely to be the case that the vote of the FOS will be determinative, either as to number or value of voting, but were that to be the case, it is a matter that can be taken into account on the exercise of discretion at the sanction stage."

50. Another aspect of this part of the test is that the class must have been fairly represented by those who attended the meeting. The answer to this question can, anyway in part, be tested by turnout which was just over 15% of all Customer Creditors. I agree with the submission that this is a relatively high turnout in the context of consumer schemes. In *Re Instant Cash Loans Limited* [2019] EWHC 2795 (Ch) per Zacaroli J at [29]-[30] the turnout was 4%, in *Re Provident SPV Ltd* [2022] 1 BCLC 540 per Sir Anthony Mann at [60] the turnout was 10% and the turnout in the previous scheme, *In Re ALL Scheme Limited* [2021] EWHC 1401 (Ch) per Miles J at [66] and [115] to [117], was 8.7%. Although Miles J agreed that the turnout for the previous scheme meeting was comparatively low, he (like Zacaroli J in *Instant Cash Loans* and Sir Anthony Mann in *Provident*) did not consider that the turnout was a factor indicative of a non-representative vote. In my view the same can be said in the present case in relation to the turnout at both Scheme meetings, not least because it was materially greater than the turnout achieved for the previous scheme meeting.

Honest, intelligent and reasonable scheme creditor

51. As Mr Isaacs submitted, the third stage in the formulation of the test described in Buckley on the Companies Act (as approved by Plowman J and countless judges since) is a test of rationality. It postulates a hypothetical member of the relevant class and asks whether the scheme is one for which an honest, intelligent and reasonable member of that class could vote. If the representative class has approved the scheme, an actual majority of the class concerned has expressed their support for the scheme by their vote, and that expression of what is in their interest is an assessment from which the court will always be slow to differ. It is slow to differ because that assessment is indicative of good reason to approve the scheme by those affected by it.

52. However the proper application of this test is dependent both on the majority vote being representative of the class it purports to represent and also on the applicant being able to demonstrate that the members of the class are able properly to appreciate the alternatives open to them (the issue on which the previous scheme ultimately failed: *In Re ALL Scheme Limited* [2021] EWHC 1401 (Ch) per Miles J at [142]). The representative nature of the vote is important because, if there are concerns that the vote is unrepresentative of the class, the court cannot treat it as an expression of the interests of the class as a whole and must instead scrutinise the scheme to a greater degree than merely applying a rationality test. For the reasons I have already given, I am satisfied that the vote was representative.

53. As to the question of whether the members of the class were able properly to appreciate the alternatives open to them, the position since the sanction hearing for the previous scheme has changed very significantly. For reasons I shall summarise, I am satisfied that the processes put in place for consulting Customer Creditors, for ensuring that they

were aware in readily comprehensible language of the terms of what was proposed and for giving them support in their decision making meant that Amigo has overcome the problems which caused sanction of the previous scheme to be refused. I have already explained that I am satisfied that the explanatory statement complied with the terms of the statute. Amigo also took a number of other steps to ensure that Customer Creditors were fully informed, two of which warrant further explanation.

54. The first step was to engage an independent customer advocate, Mr Jonathan Yorke, who is a practising solicitor with many years' experience in respect of schemes of arrangement for financial services companies. His role was to consider representations made by Customer Creditors in respect of the Schemes, to engage with media and consumer bodies, to understand the concerns they may have had and then to produce reports in respect of any objections or comments to assist the court both at the convening hearing and the sanction hearing. It was also a term of his appointment that he should instruct counsel to attend the sanction hearing and to answer any questions the court may have as to the conclusions he had reached.

55. The report produced by Mr Yorke was of great assistance to me, as were the submissions and the skeleton argument from Mr William Day who was instructed to appear at the hearing on his behalf. Mr Yorke had received 217 emails from Customer Creditors prior to the convening hearing and a further 29 from Customer Creditors between the time of the convening hearing and the time of the sanction hearing. He also had communication with a consumer body, Debt Camel, in order to understand and convey the concerns that they expressed. He divided the matters in respect of which he had had such communications into a number of groups including some to which I have already alluded earlier in this judgment.

56. The first matter relevant to this aspect of the case was whether Customer Creditors understood the essence of the choice they were being asked to make when voting on the Schemes. Mr Yorke's opinion was subject to caveats that he was only able to express a generalised view, that it is likely that many customers will have chosen not to engage with the process, and that there will be customers whose understanding was incomplete. However, subject to those caveats, he considered that Amigo's extensive campaign by email, SMS, letters, newspaper advertisements, website and social media was conducted in such a manner that there was clear and accessible communication to consumers. He was fortified in that view by the fact that very few customers (approximately 1% of the total of some 700 communications reviewed) expressed confusion as to what the Schemes entailed. Such responses as he had after the convening hearing were more concerned with how to participate in the Scheme and submit claims than they were with seeking to understand what the Schemes involved.

57. From the evidence I have seen, I agree with this conclusion. It is also of note that while Mr Yorke has continued to receive communications from Customer Creditors, including from a single individual who submitted a witness statement shortly before the hearing that I have read, nobody attended the hearing to contend that they did not understand what the Schemes involved and were confused as to how to vote.

58. The second matter, which was also discussed in Mr Yorke's report for the convening hearing, related to the nature of the opposition to the Scheme, and so far as discernible, the reasons for it. Mr Yorke explained that much of the opposition from Customer Creditors who voted against the Scheme was because they considered that redress

claims should be paid in full. This is, of course, entirely understandable, but I agree that it is not a sufficient reason not to give effect to the statutory majorities. As Mr Day put it in his skeleton argument, the fact that redress claims will not be paid in full is a consequence of Amigo's insolvency which is the reason for the promulgation of the Scheme in the first place.

59. The third matter related to the content of Amigo communications in the run-up to the Scheme meetings. The first concern was the form of some email correspondence which included the phrase that Customer Creditors should "vote for your money". At least one Customer Creditor complained that this was misleading because Customer Creditors had no reassurance that their claims would actually be upheld. Mr Yorke was of the view that this correspondence was unobjectionable and I agree. The criticism takes what was said out of context. It seems to me that on any fair reading of the email, it does no more than encourage Customer Creditors to vote, which is a perfectly proper thing for a company promulgating a scheme to do. Read in its proper context, the communication did not amount to any form of improper pressure on Customer Creditors to vote one way or the other on the Scheme.

60. The other communication issue was more substantial. After the issue relating to the misapprehension by some Customer Creditors that they were not able to vote on both Schemes proposals was identified, a sample of Customer Creditors were contacted by telephone by Amigo to check their voting decision. The recordings of some of these sample telephone contacts were then reviewed by both Amigo and the FCA in light of the concerns expressed by some of the Customer Creditors who had been contacted. The FCA identified that there were a number of occasions on which Amigo's agents had made what were described as 'off-script' comments in which persuasive language was used about the NBS, the FCA's role was misdescribed and other inappropriate questions about the validity of claims were asked.

61. In light of this discovery, Amigo, at the request of the FCA, contacted all of the Customer Creditors who had subsequently changed their votes to vote in favour of the Schemes after they had been contacted in the manner I have described. That exercise required Amigo to attempt to contact each such Customer Creditor again in order to make clear that the decision as to how to vote on both Schemes was theirs and to apologise if anything said on the previous call had led them to feel they needed to vote in a particular way. The evidence is that this exercise was completed satisfactorily. Mr Yorke did not feel able to express any views of his own in relation to what occurred, apart from to note that the FCA was satisfied with the outcome.

62. The final aspect of Mr Yorke's report that I should mention is that he commented on three concerns in relation to the formulation of the Schemes that had been expressed by Debt Camel. The first was that Customer Creditors may not understand what an affordability claim is and may simply assert that the interest rates or monthly payments are too high. This may mean that their claim will be dealt with on the wrong basis. Debt Camel also expressed concern that Customer Creditors were not encouraged to make their claims early to improve their position on set off and concern about the proposal to deduct interest rebates from the loss computation where a borrower took out a further unaffordable loan to repay an originally affordable loan.

63. Like Mr Yorke I do not share Debt Camel's concerns on these points. The concept of an affordability claim is not a difficult one to grasp and the claims process is clearly

explained in the explanatory statement. The way in which Amigo has approached the set off and interest rebate points seems to me to reflect an application of normal principles of English law in a reasonable manner. While I myself am satisfied that there is nothing unfair about the approach that has been taken, I draw comfort from the fact that these concerns are not shared by Mr Yorke and have not been adopted as objectionable by the FCA.

64. The other step taken by Amigo which I should explain is that, in July 2021, Amigo asked Mr Jamie Drummond-Smith to act as chairman of a creditors' committee to be formed for the purposes of working with Amigo in the development of an alternative option to the previous scheme. He was charged with selecting the membership of the committee which he did by a random process of picking 8 names from a list of over 4,000 borrowers and guarantors who had volunteered to serve. He then convened and chaired a number of meetings to consider the developing proposals by Amigo as to the form of the Scheme and in response to which the committee sought to negotiate the most advantageous terms for Customer Creditors. There were a number of stages in the negotiation process, which culminated in Amigo's final offer made on 12 November 2021, now reflected in the terms of the Preferred Solution.

65. Mr Drummond-Smith, who is a chartered accountant and whose background includes many years' experience as chairman, finance director, non-executive director and chief restructuring officer of a number of different entities, prepared a report describing the work of the committee, which was before Snowden LJ at the convening hearing. I have considered that report and it seems to me that the existence and work of the committee addressed a number of the concerns that had been expressed by Miles J in his judgment refusing to sanction the previous scheme. In particular, it ameliorated the consequences of the fact that the Customer Creditors lacked legal or financial advice and that there was no steering committee and no negotiation of the previous scheme's terms. As Miles J put it at [142] of his judgment declining to sanction the previous scheme:

> "the Redress Creditors lacked the necessary information or experience to enable them properly to appreciate the alternative options reasonably available to them; or to understand the basis on which they were being asked by Amigo to sacrifice the great bulk of their redress claims while the Amigo shareholders were to be allowed to retain their stake."

66. One of the important aspects of the work of the committee was a decision made fairly early on in the process of developing the Scheme that the members wanted as much certainty as possible in the composition of the funds for payment of a distribution on their claims. It followed that a structure which provided for some form of equity option or profit share over a period of years was less attractive than a proposal which gave a fixed sum following a successful equity raise. It was always recognised that, if Amigo were to have any long-term chance of success, it would need to raise new money, and the certainty of receiving a fixed amount from that equity raise was one that commended itself to the committee. This is a point which is relevant to the position of a group of shareholders to which I shall revert shortly.

67. Having regard to all of these considerations, I was satisfied that the NBS is a scheme that an intelligent and honest Customer Creditor acting in respect of his interest might reasonably approve.

Discretionary factors / Blots

68. I turn finally to a number of miscellaneous discretionary considerations which may be characterised as potential blots on the Scheme as that phrase is used in the passage from Buckley cited in *Re Telewest*. In the event I have concluded that they are not.

69. The first relates to the structure adopted by Amigo to establish SchemeCo for the purpose of promulgating the Schemes. Amigo considered that this was necessary because it was feared that a proposal of the Schemes by ALL itself might trigger a default under the Bonds. In the Convening Judgment at [49] to [51], Snowden LJ addressed the legal issues that arise in relation to this structure. He concluded that there was no obvious "roadblock" which would inevitably lead the court at the sanction hearing to refuse to sanction the Schemes on the basis that the releases which are a necessary part of the structure are achieved through the interposition of a special purpose vehicle such as SchemeCo.

70. I agree with that conclusion. This form of scheme structure has been sanctioned before. In *Re AI Scheme Limited* [2015] EWHC 2038 (Ch), Norris J sanctioned a scheme in which he had considered the question of a special purpose vehicle undertaking liability in similar circumstances during the course of his convening judgment ([2015] EWHC 1233 (Ch) at [25] to [26]). I myself adopted a similar approach in *Re Swissport Fuelling Ltd (No.2)* [2020] EWHC 3413 (Ch) in which liability was undertaken by a deed of contribution. Zacaroli J considered the same point in his judgment in a Part 26A case: *Re Gategroup Guarantee Ltd* [2021] BCC 549 at [14ff]. In that case, there were a number of quite complex reasons why the interposition of a special vehicle such as SchemeCo was the only way forward, although Zacaroli J also had to consider difficult questions relating to forum shopping, which do not arise in the present case.

71. In my view the question is whether there are sufficient commercial reasons for the use of a special purpose structure to assume liabilities, such as SchemeCo in the present case, and whether there is any reason to believe that overcoming the restrictions contained in the Bonds in this manner might have a material adverse impact on the position of the bondholders on which they would be entitled to express a view. In my judgment there are sufficient commercial reasons in the present case for taking this course because it facilitates what would otherwise be unachievable without significant risks to the integrity of the restructuring process. No suggestion has been advanced by the bondholders that they might be prejudiced in any way and it is difficult to conceive that they might have any arguments as to why that might be the case. The evidence is that a very significant proportion of the outstanding Bonds have recently been repaid to stop interest running and, as they are fully secured, whatever happens going forward, they stand to be repaid in full in any event.

72. The second question raised by Mr Isaacs relates to issues of conditionality. In *Re Smile Telecoms Holdings Limited* [2021] EWHC 685 (Ch) at [52ff], having reviewed a number of the authorities, I explained that sufficient certainty is required so that the court will not act in vain. But this principle is normally applicable where failure to satisfy a condition means that the Scheme has no effect at all. It has less relevance where the scheme is effective, but the actual outcome may differ depending on the occurrence of a future event. In that type of case the issue has more to do with whether

the scheme creditors have been properly informed as to what may or may not occur than it does with whether the court may have acted in vain.

73. In any event, the court does not require certainty that any conditions will be satisfied and it is clear that the degree of assurance that the court requires will depend on the circumstances of the case. It seems to me that the point which normally matters is what I expressed as the third principle in *Smile Telecoms* at [57]:

> "The third important principle of more general application is one of clarity and certainty. Provided that clarity and certainty are present on the face of the scheme or plan and no further decision-making process is required, in other words it is self-executing without the further intervention of an interested third party, there is much less likely to be a problem."

74. In my judgment that is an important principle for determining the answer in the present case. There is no conditionality as to the effectiveness of the Scheme. The only question is whether or not the circumstances in which the Preferred Solution, and the other possibilities which depend on extraneous circumstances such as any increase in the Top Up amount and a maximisation of the Turnover Amount will or might occur. These were fully explained to Scheme Creditors, and I am satisfied that from an objective point of view there was sufficient clarity as to what was proposed and the uncertainties that might arise to ensure that Scheme Creditors had a fair description of the various possibilities and the prospects that they might occur.

75. In any event, so far as the first of the New Business Conditions is concerned, the FCA expressed itself in a way which indicated to me that there was a real and substantial prospect that, within 9 months of the NBS becoming effective, ALL would be permitted to restart lending. This is far from certain, but in my judgment a sound basis for thinking that it will be satisfied has been established.

76. So far as the Share Issue is concerned, the evidence is that investors will be concerned about any continuing FCA investigation and the possibility of a fine. Amigo's board considers that there is a realistic prospect not just that a return to lending will have been permitted but also that the investigation will have been completed and the position as to a possible fine will have been clarified. The FCA have confirmed that the amount of any fine will take account of the priority of Scheme Creditors. It should not therefore have an adverse impact on Amigo's ability to implement the NBS. In short the board considers that there is a realistic prospect that the Share Issue will succeed as a method of raising sufficient capital to restructure in accordance with the proposals described in the scheme documentation. In my view that conclusion is one to which the court should give weight in deciding whether or not to sanction the NBS.

77. I am satisfied that there is a sufficient prospect of the New Business Conditions being fulfilled for the Schemes to be sufficiently certain in their operation to justify sanction. If those conditions are fulfilled (with or without an increase in the Top Up Amount or the Turnover Amount) the Scheme Creditors will achieve a reorganisation of their rights against SchemeCo and Amigo in one form. If they do not, they will achieve a reorganisation of those rights in another form.

The Holdings Shareholders

78. Finally, I should explain the position of Holdings' shareholders. The Preferred Solution is dependent on the contemplated Share Issue being approved by the existing shareholders of Holdings voting in general meeting. This is a simple majority threshold. An organisation called the Amigo Shareholders Action Group ("ASAG"), which says that it has 66 members holding 42.4 million shares equal to approximately 8.92% of Holdings' total issued shares, has written to SchemeCo complaining about the exclusion of existing shareholders from the Schemes and the structure of the Share Issue. Their chairman, Mr Mohammed Majid, also wrote to the court and attended the hearing. Even though he was not a creditor, and did not represent any creditor, I permitted him to make some short submissions to supplement what he had said in writing.

79. Mr Majid said that, although the members of the ASAG have every desire for the NBS to be sanctioned and to be a success, they think that the equity raise on which the Preferred Solution is conditional should be limited to the amount necessary to make payment to the Scheme Creditors. They consider that an equity raise for other purposes (i.e. recapitalisation) should not be part of the NBS and as he put it in his letter to the court "Amigo should not be permitted to use the threat of liquidation, as built into the scheme, to leverage shareholder agreement to that broader raise".

80. It is clear that part of ASAG's concern was that its members opposed the 95% equity dilution that is contemplated by the Share Issue. Mr Majid also said that Amigo was wrong to say, as it did through the witness statement of its chief restructuring officer, that the significant level of dilution was required in order to maximise returns to Customer Creditors under the Preferred Solution. He said that the amount of capital to be raised was pitched at the wrong level and that it was wrong in principle for the funds to be raised by the Share Issue to be used overwhelmingly for the purpose Amigo's business activities going forward, which he said was extraneous to the proper purpose of a creditor scheme.

81. With respect to Mr Majid, the submissions he made were misconceived. I agree with Mr Isaacs' submission that the payment of creditors is inseparable from funding new lending under the NBS Preferred Solution. As Amigo's skeleton argument explained, both practically and commercially, new money to pay creditors can only be raised as part of a recapitalisation which is then able to pay a return on those new monies. There is no evidence that existing shareholders (who ASAG note are principally retail investors) have either the means or the willingness to participate in a £15 million rights issue for the purpose of raising funds for creditors and I agree with Amigo that it is fanciful for ASAG to suggest that any external investors would participate in such a share issue when it would leave the new business without adequate capital to continue.

82. In any event, I also agree with Amigo's submission that ASAG's complaints, even if meritorious from the perspective of out-of-the money shareholders, have no legal relevance. The previous scheme failed because, in part, it was considered that the interests of Customer Creditors were not sufficiently prioritised, relative to those of existing shareholders. The position is now even more acute because it is clear that the appropriate comparator is administration, which was not established at the time of the sanction hearing for the previous scheme before Miles J. If ALL were to go into administration, as will happen if one of the Schemes is not sanctioned, there will be no

return to shareholders at all. It was not said by Mr Majid that I should not proceed on the basis that ALL would not go into administration if the NBS was not sanctioned, and even if that had been said, on the evidence the argument would have been hopeless.

83. ASAG appears to be seeking to restructure the Share Issue to the advantage of out-of-the-money existing shareholders and to the corresponding disadvantage of the interests of Customers Creditors who have a prior ranking in the circumstances of Amigo's insolvency. The only reason that Amigo shareholders have been able to maintain any interest at all as a result of the restructuring is that Amigo's board have decided that a dilution to 5%, which eliminates the value of the existing equity save for the required incentive for existing shareholders to vote for the rights issue, is in the greater interests of Amigo and its creditors than would be a greater dilution or even extinction that would occur if the restructuring were to be implemented through a part 26A restructuring plan with the effect of extinguishing existing shareholder rights altogether.

84. Mr Majid suggested that this approach by the board misunderstands the psychology of the retail shareholders who may prefer to accept nothing than feel themselves forced to vote positively for a 95% reduction in their shareholding. He also told me that an ASAG survey confirmed that more than 90% of respondents would prefer two separate capital raising events. Unfortunately, and partly because ASAG only speaks for just under 9% of shareholders, I am unable to give any material weight to what Mr Majid said about shareholder psychology. I can only proceed on the basis that shareholders are likely to vote in due course in their own economic interest. On the evidence, it is clear that this will be to vote for a small diluted shareholding rather than the complete extinction of their economic interest which will occur if they vote against.

85. For these reasons I am satisfied that, while it is possible that some shareholders might vote in a manner that is motivated by the psychology described by Mr Majid, that possibility has no material impact on the likelihood of the Preferred Solution being achieved. It is not only that the views of the ASAG have no legal relevance, I am not satisfied that they reflect the reality of what will occur at the time of the Share Issue in due course and there is certainly no proper evidential basis for thinking that they will. It follows that, while the court is grateful to Mr Majid for articulating the concerns of the ASAG, they had no effect on what I conceive to be the proper outcome of the sanction application.