Neutral Citation Number: [2024] EWHC 2908 (Ch)

Case No: CR-2024-005965

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
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: 14/11/2024

Before :

MR JUSTICE MILES

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IN THE MATTER OF CHAPTRE FINANCE PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

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Ryan Perkins (instructed by **A&O Shearman**) for the **Plan Company**
Charlotte Cooke (instructed by **DLA Piper UK LLP**) for **Opposing Creditors**

Hearing date: 11 November 2024

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APPROVED JUDGMENT

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This judgment was handed down by email to the parties and release to the National Archives at 14:00 on 14 November 2024

Mr Justice Miles :

Introduction

1. Chaptre Finance plc (the "Plan Company") seeks an order sanctioning a restructuring plan (the "Plan") between the Plan Company and four classes of its creditors (the "Plan Creditors") under Part 26A of the Companies Act 2006.

2. The Plan Company was incorporated for the purpose of financing the construction of a biomass power plant in Teesside (the "Power Plant"), which is designed to produce electricity by burning wood pellets and chips. The Power Plant is the largest of its kind in the world.

3. The Power Plant is owned by a special purpose vehicle called MGT Teesside Limited ("MGT"). MGT and the Plan Company are subsidiaries of Chaptre Holdings Limited ("HoldCo"). These three companies comprise the "Group". Wood pellets and chips are supplied to MGT by Enviva Wilmington Holdings LLC (the "Pellet Supplier"), which is a joint venture between two companies in the United States.

4. The construction of the Power Plant was contracted to two other companies (the "EPC Contractors"), which agreed to ensure that the Power Plant became operational by January 2020. This did not occur, and MGT terminated its contract with the EPC Contractors in May 2021. Arbitration proceedings between MGT and the EPC Contractors are continuing.

5. The Power Plant became operational in 2023, but it has suffered from several technical problems. By the summer of 2023, the Power Plant had ceased to operate and the Plan Company was facing an urgent liquidity crisis. In those circumstances, the Plan Company proposed a restructuring plan (the "2023 Plan"). This was sanctioned on 13 July 2023 (see [2023] EWHC 2276 (Ch)).

6. The Power Plant returned to power generation in September 2023. There were, however, further serious technical problems which have led to expensive outages.

7. The Group has incurred significant liabilities to the Pellet Supplier and its joint venture partners.

8. The evidence in support of the application shows that the Group requires a significant injection of new money to continue operating as a going concern.

9. The Plan Company is therefore proposing the Plan as a second restructuring. Its main purpose is to make certain amendments to the Group's finance documents that will allow the Group to raise up to £85 million of new super senior financing. The amendments will bind four classes of financial creditors, i.e. the Plan Creditors. The Plan Creditors within the existing most senior-ranking class will be entitled, but not obliged, to participate in the New Super Senior Funding on a pro rata basis.

10. The Plan Company contends that, absent the Plan (and the provision of the new super senior funding), it is highly likely that the Plan Company and the other members of the Group would enter into formal insolvency proceedings.

11. The convening hearing took place on 14 October 2024 before Edwin Johnson J, who made an order (the "Convening Order") giving the Plan Company liberty to convene four meetings of the Plan Creditors (the "Plan Meetings") to consider and, if thought fit, approve the Plan. The four classes of Plan Creditors are known as the "Priority Creditors", the "Elevated Creditors", the "Hedging Banks" and the "Senior Creditors", which rank in that order. The last class is therefore the most junior class of those affected by the proposed Plan. The reference to that class as "Senior" is a legacy from the original capital structure.

12. In accordance with the Convening Order, the Plan Meetings took place on 5 November 2024. The Plan was approved by over 75% in value of those voting at the meetings of the Priority Creditors, the Elevated Creditors and the Hedging Banks (with majorities in value of 95.1%, 88.9% and 100% respectively). But at the meeting of the Senior Creditors, the Plan was approved by 23.9% in value of those voting. The Senior Creditors therefore constitute a dissenting class for the purposes of Part 26A.

13. The Plan Company seeks an order under section 901F of the CA 2006. Section 901G empowers the Court to sanction a Plan notwithstanding the dissent of one or more classes, provided that certain conditions are satisfied (a "cross-class cram down"). These include the "no worse off" test under section 901G(3). The Plan Company invites the Court to exercise its discretion under that section to sanction the Plan.

14. The lenders under one of the Senior Facilities, the "Floating Rate Term Loan Facility", have the benefit of a credit insurance policy written by Korea Trade Insurance Corporation ("K-Sure"). The relevant creditors are required to act in accordance with the directions of K-Sure. Under the K-Sure policy, the relevant lenders can seek repayment from K-Sure in the event of a default by the Group. If that happened, K-Sure would be subrogated to the rights of the relevant lenders against the Group. For this reason, K-Sure is a contingent creditor of the Plan Company and is treated as a Senior Creditor for the purposes of the Plan.

Further background

15. The factual background is set out in Plan Company's evidence, including the first statement of Mr Jeff Holder. I draw on the helpful summary in the Plan Company's skeleton argument.

The Plan Company and the Group

16. The Group consists of HoldCo, the Plan Company and MGT, all of which are incorporated in England. The Power Plant is owned by MGT. Half of the share capital of HoldCo is owned by an Australian infrastructure investor called Macquarie, and half by a Danish pension fund called PKA (together, the "Shareholders").

The finance structure

17. The Group's finance structure involves four key classes of financial debt: (i) the Priority Facilities; (ii) the Elevated Facilities; (iii) the Hedging Debt; and (iv) the Senior Facilities. The external debt (forecast as at 31 May 2025, and amounting to over £964 million in total) is as follows:

i) Priority Facilities: £165,193,000;

ii) Elevated Debt: £122,872,000;

iii) Hedging banks (based on fair value measurements at 1 October 2024): £41,956,000; and

iv) Senior Debt: £634,293,000.

18. The Plan Creditors are the creditors in respect of these four classes of debt (the "Plan Liabilities"), all of which are governed by English law. The contractual terms of the Plan Liabilities are set out in various finance documents – including a common terms agreement (the "CTA") which sets out a common package of covenants, events of default, and other provisions.

19. The Plan Liabilities are secured by a common security package over the assets of the Group. Prior to enforcement of security, the Plan Liabilities are required to be repaid over time through a "cash sweep" process (whereby the Group's available cash is applied in discharge of the Plan Liabilities in a defined order). All interest is capitalised rather than being paid in cash.

20. Upon the enforcement of the security, the Plan Liabilities rank (so far as matters) in the following order: (i) the Priority Facility; (ii) the Elevated Facilities; (iii) certain parts of the Hedging Debt; and (iv) the Senior Facilities (and certain parts of the Hedging Debt). This security enforcement waterfall is set out in an intercreditor agreement (the "ICA") which is binding on all of the Plan Creditors.

21. The Group has also borrowed over £400 million from the Shareholders (the "Shareholder Debt"). The Shareholders are not Plan Creditors and have given all necessary consents by signing a Lock-Up Agreement. The Shareholders are also creditors under a large proportion of the Priority Facility.

22. The key features of the Plan Liabilities are as follows.

23. First, the Priority Facilities:

i) This is split into two parts, with principal amounts of £80 million ("Tranche A") and £40 million ("Tranche B") respectively.

ii) MGT is the borrower of the Priority Facility, and the Plan Company is a guarantor. The Priority Facility was provided to MGT in connection with the 2023 Plan.

iii) The Priority Facility is the highest-ranking tranche of the Plan Liabilities, and the Priority Creditors have the primary economic interest in the relevant alternative.

24. Second, the Elevated Facilities:

i) The Elevated Creditors comprise the lenders under seven facilities. The Plan Company is the borrower of two of the Elevated Facilities and a guarantor of the other five (for which MGT is the borrower).

ii) The Elevated Facilities were created by 2023 Plan. They were allocated to creditors who agreed to participate in the Priority Facility. The seven Elevated Facilities mirror the seven Senior Facilities (see below), but they have a superior ranking.

25. Third, the Senior Facilities

i) The Senior Creditors comprise the lenders under seven facilities and K-Sure (as a contingent creditor). The Plan Company is the borrower of two of the Senior Facilities and a guarantor of the other five (for which MGT is the borrower).

ii) These represent the most junior tranche of the Plan Liabilities, ranking behind the other three classes of debt in the security enforcement waterfall.

26. Fourth, the Hedging Debt:

i) The creditors within this class comprise two banks which have entered into various swaps with the Group. The swaps are designed to hedge the Group's exposure to inflation, interest rates and foreign exchange rates. They remain open and have not yet been closed out.

ii) All of the swaps are documented by 2002 ISDA Master Agreements, which are governed by English law.

iii) MGT is the counterparty to the relevant Master Agreements, and MGT's obligations to the Hedging Banks are guaranteed by the Plan Company.

iv) The Hedging Banks are contingent creditors of MGT and the Plan Company. This is because, depending on the price of the underlying asset or index for each swap, the Hedging Banks may be entitled to receive a payment under the terms of the Master Agreements, whether before or after the swaps are closed out.

v) The Hedging Debt has a complex ranking. Depending on certain factors, the Hedging Debt occupies either the third rank (below the Elevated Debt) or the fourth rank (alongside the Senior Debt).

The Deed of Contribution

27. The Plan Company is a guarantor of most of the Plan Liabilities (rather than a borrower). It has also assumed the position of a principal debtor by executing a deed of contribution. Under this deed, the Plan Company has conferred a right of contribution on MGT (as if the Plan Company and MGT were joint principal debtors). This ensures that MGT has a "ricochet claim" against the Plan Company – which, in turn, creates a legal justification for using the Plan to release the claims of the Plan Creditors against MGT as well as the Plan Company. The same technique has been used in many cases and, indeed, was used and approved in the 2023 Plan.

Financial difficulties

28. The 2023 Plan was sanctioned in July 2023. Its purpose was to address the financial difficulties that the Group had encountered as a result of significant delays to the construction of the Power Plant (following the termination of the contract with the EPC

Contractor in May 2021). These delays and technical defects meant that the final commissioning of the Power Plant was delayed until late 2023 and into 2024, causing severe liquidity issues.

29. The 2023 Plan was essentially designed to facilitate an injection of new money. In accordance with the 2023 Plan, new money of £80 million was advanced through the creation of Tranche A. Tranche B was advanced under the Priority Facility in March 2024.

30. The Priority Facility was intended to support the final works to the Power Plant. However, there have been further setbacks since the 2023 Plan was sanctioned.

31. The Power Plant was partially restarted in July 2023, shortly after the 2023 Plan was sanctioned. Various additional technical issues arose, and a full recommencement of operations did not take place until September 2023. The late start pushed the Group into the downside scenario under its business plan. In November and December 2023, "sintering events" (where sand in the boiler solidifies and requires removal) led to further unplanned outages.

32. MGT has also been engaged in arbitration proceedings against the EPC Contractors (involving substantial claims and cross-claims between the parties). In November and December 2023, MGT was ordered to place £30 million in escrow as security for the EPC Contractors' claims, plus £3 million as cost cover. This has exerted a considerable strain on the Group's liquidity position. The provision of the security was funded (for the most part) by Tranche B of the Priority Facility.

33. A decision in the arbitration is expected in the first half of 2025.

34. In May 2024 a further technical problem arose at the Power Plant, resulting in a 22 day long unplanned outage whilst repairs were carried out. There was another unplanned outage of 28 days in June 2024.

35. The Power Plant restarted on 12 July 2024. Operations have become increasingly stable, but there is a non-trivial risk of further operational issues or outages (given the Power Plant's performance in recent years, and noting that such issues are not unusual for a Power Plant of this kind).

36. Indeed, there was in fact a further unplanned outage on 12 October 2024 (immediately before the convening hearing), which was caused by additional technical issues. As a result, the Power Plant was offline for 25 days. A long-term solution to fix the issues that caused these outages is due to be implemented in the next planned annual maintenance outage in March 2025.

Position of the Pellet Supplier

37. The Group has also fallen into difficulties with the Pellet Supplier, which is the critical supplier of wood pellets that are used as fuel to generate electricity. As to this:

    i) MGT has entered into a long-term fuel supply agreement with the Pellet Supplier (the "Pellet Supply Agreement"). Under this agreement, MGT is obliged to accept a minimum quantity of wood pellets per year at fixed delivery

schedules. If there is a failure to accept delivery of a shipment under the Pellet Supply Agreement, then MGT is liable for a "take or pay" shortfall (the difference between the contract price under the Pellet Supply Agreement and the market price realised on resale of the rejected pellets).

ii) As a result of the recent outages, the Power Plant's pellet consumption has been much less than the contracted volumes, and MGT has cancelled a number of pellet shipments (and expects to reject additional shipments in the remaining months of the year). This has coincided with a low market price for pellets, with the result that MGT has incurred a large quantum of unexpected "take or pay" liabilities to the Pellet Supplier. Absent the Plan, it is expected that MGT will owe the Pellet Supplier c. £23.5 million by December 2024 (subject to the FX rate).

38. The Pellet Supplier is a joint venture between two US companies (namely, Enviva Partners L.P. and John Hancock Life Insurance Company ("John Hancock")). The consent of both joint venture partners is required in order to amend the Pellet Supply Agreement and any related documents. Enviva Partners L.P. is part of the "Enviva Group" which also includes Enviva Holdings, LP and Enviva Inc.

39. John Hancock and Enviva Holdings, LP are guarantors of the Pellet Supplier's obligations under the Pellet Supply Agreement.

40. In January 2024 Enviva Inc. and other entities in the Enviva Group entered into Chapter 11 (debtor-in-possession) bankruptcy proceedings in the US.

41. In addition to the amounts owing under the Pellet Supplier Agreement, by the end of December 2024, MGT will owe c. US$24 million to Enviva Inc. under a working capital facility, which has been used to pay for pellets supplied by the Pellet Supplier.

42. The Pellet Supplier itself is not subject to the Chapter 11 bankruptcy proceedings.

43. I am satisfied on the evidence that the combined effect of the matters set out above is that the Group is now experiencing another acute liquidity crisis. The Group's cashflow position became negative by the end of October 2024 (by which point the Group's liquid assets were significantly less than the Group's due and payable liabilities), and the Group has only been able to continue operating by failing to pay various creditors (including the Pellet Supplier and Enviva Inc.).

44. I am also satisfied on the evidence that the Group is close to collapse. It is unable to pay its debts as they fall due. Moreover, the Power Plant cannot properly be operated without a reserve of liquidity to deal with unexpected events. Indeed, the Group's finance documents include a minimum liquidity requirement of £15 million.

45. The Group has reached an agreement in principle with the Pellet Supplier and its joint venture partners (the "Enviva Deal"), following extensive negotiations between the parties. Under the Enviva Deal:

i) The Pellet Supply Agreement will be amended in order to provide MGT with additional flexibility (and thereby to avoid incurring excessive "take or pay" liabilities in the future).

ii) MGT will be permitted to cancel nine pellet shipments in the 2024 calendar year (with retroactive effect) without incurring any liabilities for doing so. This should eliminate the debt of £23-25 million that would otherwise be payable to the Pellet Supplier.

iii) MGT will pay US$10 million of the debt owing by MGT to Enviva Inc. US$10 million of the debt owing by MGT to Enviva Inc. will be written off.

iv) John Hancock will pay US$13.75 million to MGT. In consideration for that payment, John Hancock will be released from its guarantee of the Pellet Supplier's obligations to MGT. John Hancock will also transfer its interest in the joint venture to Enviva Inc. in return for a cash payment by Enviva Inc.

46. The Enviva Deal is subject to two important conditions precedent (the "Enviva Deal Conditions"):

i) The Group is required to obtain access to £35 million of new money; and

ii) The Pellet Supplier is required to be given a limited security package (including security over any pellet inventory held by the Group).

47. The evidence shows that the Enviva Deal was the result of complex commercial negotiations. I am satisfied by the evidence that the Enviva Deal Conditions are non-negotiable, non-waivable conditions which the Pellet Supplier has insisted on.

48. It should also be noted that the Enviva Deal requires an up-front prepayment of US$10 million to be made to the Pellet Supplier, which will be applied towards the cost of pellets delivered over time. There is presently no funding available to make that prepayment, which is an additional reason why new money is required.

49. I am satisfied that the Enviva Deal cannot be implemented unless the Plan is sanctioned.

Viability of the Power Plant

50. Despite the Group's cashflow problems, the directors of the Group consider that the Power Plant is fundamentally viable. When the Power Plant operates properly, it produces very significant cashflows through the sale of electricity under a long-term contract for differences, backed by the UK government. The directors of the Group consider that its creditors will benefit from a restructuring rather than a collapse into formal insolvency proceedings and it is for this reason that they have proposed the Plan.

The Plan

51. The principal purpose of the Plan is to introduce the New Super Senior Funding into the finance structure. This will involve the introduction of two new tranches of the Priority Facility (known as "Tranche C" and "Tranche D", which together constitute the New Super Senior Funding).

52. Tranche C will have lending commitments of £35 million, satisfying one of the Enviva Deal Conditions.

53. Tranche D will be an uncommitted facility with a principal amount of up to £50 million. Tranche D is designed to ensure that the Group has sufficient headroom to borrow additional sums in the future, e.g. in the event of further unplanned outages or other unforeseen difficulties. Tranche D can only be utilised with the consent of the majority lenders under the Priority Facility.

54. Tranches C and D of the Priority Facility will have the same ranking under the ICA as Tranches A and B. This means that the new funding will rank ahead of the Elevated Debt, the Hedging Debt and the Senior Debt (but *pari passu* with the existing Priority Debt).

55. The Priority Creditors will be entitled, but not obliged, to participate, pro rata, in the funding. No other Plan Creditors will participate in the new funding. The right to participate will remain open to all Priority Creditors until one business day after the Plan Meetings.

56. The interest rate for the new Priority funding is 20% p.a. This matches the interest rate of Tranche A of the Priority Facility. The interest rate of the Tranche B Facility is 25% p.a. Subject to one point discussed below, the new funding does not involve elevation incentives. The evidence of the Plan Company is that the directors have concluded that the economic terms of the new funding are reasonable and appropriate in the circumstances.

57. In order to introduce the new Priority funding into the finance structure (ranking *pari passu* with the existing tranches of the Priority Facility), various amendments need to be made to the ICA, the CTA and other finance documents. These amendments can only be made with the unanimous consent of the Plan Creditors. Likewise, in order to give effect to the Enviva Deal (including the release of John Hancock's guarantee obligations and the creation of security over pellet inventory), the unanimous consent of the Plan Creditors is required.

58. If the Plan is approved it will confer a power of attorney on the Plan Company to execute a Restructuring Implementation Deed on behalf of the Plan Creditors, together with a suite of contractual documents (including amended and restated versions of the ICA, the CTA and the other finance documents). A deed of release in customary form will also be executed.

59. There will also be some other changes:

   i) The Priority Facility will be amended so as to extend the maturity date to 2029.

   ii) The CTA will be amended so as to remove certain restrictions on the transfer of Priority Debt by the Shareholders.

   iii) The ICA will be amended so as to insert certain provisions relating to the enforcement of security and the release of debt.

   iv) The Pellet Supplier will be granted a limited package of first-ranking security in respect of pellet inventory and over a blocked account, thereby satisfying the second of the Enviva Deal Conditions.

v) The security enforcement waterfall will be simplified so that any excess proceeds after the payment of the Priority Debt and the Elevated Debt shall be applied as follows: one-third to repay the Shareholder Debt; and two-thirds to repay the Senior Debt and certain liabilities to the Hedging Banks.

vi) The Company will pay an amendment fee of £250,000 which shall be shared between all of the Plan Creditors on a pro rata basis.

vii) Consent fees are also payable. At the convening hearing, Edwin Johnson J held that the consent fees did not fracture any of the proposed classes and I see no reason to revisit that decision.

60. There was debate about the fairness of points (iii) and (v) in this list. I shall return to these below.

The Plan Meetings

61. The Plan Meetings were held on 5 November 2024. The Plan was approved by the following majorities:

i) The meeting of the Priority Creditors was attended by 9 of the creditors within that class (in person or by proxy), representing a turnout of 98.8% in value. In total, 8 of the Priority Creditors voted in favour of the Plan, representing a majority of 95.1% in value.

ii) The meeting of the Elevated Creditors was attended by 7 of the creditors within that class (in person or by proxy), representing a turnout of 93.4% in value. In total, 6 of the Elevated Creditors voted in favour of the Plan, representing a majority of 88.9% in value.

iii) The meeting of the Hedging Banks was attended by one of the two creditors within that class (in person or by proxy), representing a turnout of 60.3% in value. That Hedging Bank voted in favour of the Plan, representing a majority in value of 100%.

iv) The meeting of the Senior Creditors was attended by 15 of the creditors within that class (in person or by proxy), representing a turnout of 94.7% in value. In total, 6 of the Senior Creditors voted in favour of the Plan, representing a vote in favour of 23.94% in value; and 9 voted against, representing 76.06% in value.

The procedural history and the evidence

62. The sanction application was opposed by K-Sure and Banco Santander, SA and Institutio de Credit Oficial EPE, the corresponding creditors under the Floating Rate Term Loan Facility ("the Opposing Creditors"). As at 9 October 2024 the amount outstanding under that facility was over £122 million.

63. Something should be said about the state of the evidence.

64. Opposing Creditors' raised some possible objections about the Plan with the Plan Company ("AOS") from September 2024 onwards. The Opposing Creditors' solicitors

("DLA") requested further information in correspondence from the solicitors for the Plan Company ("AOS") in October. That information was provided by AOS.

65. The Opposing Creditors did not appear at the convening hearing.

66. At the convening hearing the Plan Company relied on the first witness statement of Mr Holder. He in turn referred to the opinions expressed in two reports produced by an advisory firm, Interpath Ltd:

i) The first was a "Going Concern Valuation in the Relevant Alternative" dated 9 October 2024 ("the Interpath Valuation Report"). The author was not identified, although it gave the name of Noah Ojetola as the contact. There was no statement of his independence, qualifications or experience. The report was not compliant with Part 35 of the CPR. Indeed it contained a disclaimer which stated that Interpath owned no duties to any stakeholder of the Company or the Court.

ii) The second was a "Relevant Alternative Report" ("the Interpath Outcomes Report"), also dated 9 October 2024, designed to show a comparison between the outcomes for creditors in an administration and the outcomes if the Plan was sanctioned. Again the author was not identified, but David Pike and Isabel Green were named as contacts. The report did not comply with Part 35 and there was nothing about their independence, qualifications or experience. The report contained the same disclaimer as the Interpath valuation report.

67. On 31 October 2024 AOS asked DLA whether their clients intended to oppose the sanctioning of the Plan. DLA did not respond.

68. The Opposing Creditors attended the relevant Plan Meeting on 5 November and voted against.

69. On 7 November 2024 the Plan Company filed the bundle for the hearing and a skeleton argument in support.

70. Later that morning counsel for the Opposing Creditors filed a skeleton argument. It contended that the Plan Company had failed to satisfy the no worse off condition and that the Plan was unfair to the Opposing Creditors. It relied on the letters referred to below.

71. On the same day DLA also wrote a letter to the Court, explaining that Santander and ICO were acting under the instructions of K-Sure pursuant to the terms of the K-Sure Insurance Policy. DLA stated that,

> "Although KSURE had been aware of a potential second restructuring of the Group for some time, it is a Korean state-owned entity that is subject to the budgetary oversight of the Korean government's Ministry of Trade, Industry and Energy. This has necessarily shaped the scope and timing of KSURE's response to the Plan. In particular, KSURE currently has a relatively limited budget to challenge the Plan which is not expected to increase."

72. DLA enclosed a letter dated 7 November 2024 from FRP Advisory, addressed to the Opposing Creditors, which commented on the Interpath Valuation Report and the Interpath Outcomes Report prepared by Interpath ("the FRP Letter"). The letter explained that it had been prepared by Mr Philip Reynolds (a restructuring partner) and Mr Jim Davies (a valuations partner). Their CVs were attached. The letter stated that they had been asked to conduct a limited scope review of the two Interpath reports and management's long term model. The FRP Letter concluded at para 42,

> "In view of the above, we consider that there is a reasonable likelihood that the Senior Debt holders could be considered 'in the money' and that under certain reasonable conditions they could be better off under the RA [sc. relevant alternative] than under the RP [sc. restructuring plan]."

73. The DLA Letter acknowledged that the FRP Letter was not an expert report and that it was subject to a number of caveats but said that it had nonetheless been prepared by experts in the fields of insolvency and restructuring, and valuation.

74. The Plan Company responded on 8 November 2024 with four documents:

    i) A supplemental skeleton argument.

    ii) The third witness statement of Mr Holder.

    iii) An expert report by Mr Ojetola. This contained a confirmation of compliance with CPR Part 35. It confirmed an overriding duty to the court. It also explained that Mr Ojetola had been the author of the Interpath Valuation Report. He confirmed that the Interpath Valuation Report was accurate to the best of his knowledge and belief. It gave his curriculum vitae, which showed that he had experience in valuation work. It addressed the FRP letter.

    iv) An expert report by Mr Pike. This again contained confirmation that Part 35 had been complied with. It confirmed an overriding duty to the court. It also explained that Mr Pike had been the author of the Interpath Outcomes Report. It gave his curriculum vitae, which showed that he had experience as an insolvency practitioner. It addressed the FRP letter.

75. The Opposing Creditors did not seek an adjournment of the hearing to address this evidence. Nor did they seek to cross-examine Mr Ojetola, Mr Pike or Mr Holder. They appeared by counsel at the hearing to oppose the Plan.

76. Some comments should be made about the procedural history and the state of the evidence.

77. First, proper case management of proceedings for restructuring plans (like other proceedings) requires the parties to identify points of dispute as early as possible. It also requires them to serve properly prepared evidence complying with the rules. In this case the Opposing Creditors have been raising objections in correspondence since September 2024. Their objections were only properly articulated for the first time in the documents sent on 7 November. This has added to the burden on the parties and the court of preparing for the hearing on 11 November.

78. Second, the Plan Company's original opinion evidence was flawed. The Interpath Valuation Report and the Interpath Outcomes Report did not comply with CPR Part 35. They did not identify the authors or their expertise. Worse still they disclaimed any duty to the court: on its face this was a disavowal of the overriding duty under CPR 35.3. It was clear from the first statement of Mr Holder that the Plan Company wished to rely on the opinions expressed in these two reports. I can see no reason why valuation and outcomes reports of this kind should not be required to comply with Part 35. The requirements of those provisions are not to be regarded as a formality. They place experts under stringent obligations and require them to ensure that their reports are a genuine product of their independent expertise. My provisional view is that, in the absence of the expert reports served on 8 November, the Plan Company would have struggled to satisfy the no worse off condition. I do not consider that the court could properly have accepted evidence from experts who had expressly disavowed any duty to the court. I would also have been sympathetic, in light of the service of the expert reports on 8 November, to an application by the Opposing Creditors for more time to prepare to cross-examine. They did not however seek that.

79. Third, the FRP Letter is of very limited (if any) evidential value. It is, of course, for the Plan Company to satisfy the statutory conditions including the no worse off test. Dissenting creditors are doubtless entitled to argue (without serving their own evidence) that a plan company's expert evidence is flawed, by reason of manifest errors (of calculation or logic), obvious internal inconsistencies, or a lack of any supporting reasoning. These are essentially points of submission. But the Opposing Creditors sought to do more than that by sending the FRP Letter: while acknowledging that it did not comply with Part 35, DLA stressed the credentials of Messrs Reynolds and Davies. In other words, they were bolstering FRP's expressions of opinion as if they were indeed expert evidence.

80. Counsel for the Opposing Creditors argued that the court should adopt a flexible approach to restructuring plan proceedings, which are often urgent. I accept that the court must apply the overriding objective and have regard to timing constraints. But, in general, where either the Plan Company or objecting creditors wish to rely on the opinions of experts, their reports should comply with the requirements of CPR Part 35. In this regard I agree with the comments of Snowden LJ (sitting at first instance) in *Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) at [76]. Though he was referring there to evidence of foreign law, the same logic applies to other expert opinion.

81. Fourth, as already explained, the Opposing Creditors chose not to cross-examine Mr Ojetola or Mr Pike on their expert evidence (or indeed Mr Holder on the facts). As the Supreme Court reiterated in *TUI UK Ltd v Griffiths* [2023] UKSC 48, the general rule is that the party is required to cross-examine the evidence of an opposing expert witness which he or she wishes to submit should not be accepted; this is partly a matter of fairness; but it also enables the judge to make a proper assessment of all the evidence; it gives the witness the opportunity to explain or clarify the evidence. This is not an inflexible rule and there may be grounds to relax it. There are also cases where it may not apply, including where the expert's views contain a bare assertion of opinion with no supporting reasoning (rather than reasoning which is open to criticism); where there is an obvious mistake on the face of the report, or it is obviously illogical or inconsistent; where it is contrary to the facts on which it is based; or where it fails to comply with CPR 35.

82. The reasons for the general rule apply with real force in restructuring cases, where the expert evidence is often complex and technical. As Snowden LJ said in *Smile Telecoms* at [52]:

> " Nor is it realistic, appropriate or fair to judges hearing complex scheme or plan cases, who already carry a heavy burden, to expect the court itself to descend into the fray. Whilst judges are of course entitled to ask questions to ensure that they understand what is proposed, and to probe into any areas of law or evidence which give them concern, they cannot be expected to conduct a detailed factual investigation into the merits or demerits of the company's valuation evidence in a highly specialist area without any assistance. Still less can they be expected to engage in some sort of vicarious challenge to that evidence on behalf of creditors or members, based upon a rival report, without help from the expert responsible for it or the benefit of cross-examination."

83. The Opposing Creditors contended that the Plan Companies had the burden of satisfying the statutory tests and that they were simply pointing out errors or gaps in reasoning or logical flaws in the Plan Company's evidence. As explained in more detail below, I reject this. The Opposing Creditors were in reality inviting me to prefer FRP's Letter to the expert evidence.

84. Counsel for the Opposing Creditors emphasised their budgetary constraints and said that this justified their non-compliance with Part 35 and the decision not to cross-examine. As to this, it appears that the Opposing Creditors have spent more than £300,000 on costs to date, so their involvement has been more than negligible. Moreover, the claims of the Opposing Creditors amount to more than £120 million, so the sums at stake are large. The Court also has jurisdiction to make orders for the costs of opposing creditors (including pre-emptively).

85. In any case, the Opposing Creditors' own decision to constrain their budget cannot justify a departure from the usual requirements concerning the early identification of contentious issues, the service of properly compliant evidence or the cross-examination of witnesses.

86. With these observations about the evidence in mind, I turn to the statutory requirements.

Legal principles

87. Section 901G provides (materially) as follows:

> "(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.

> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

88. In *Re AGPS Bondco plc* [2024] EWCA Civ 24, Snowden LJ identified the relevant legal principles to be applied by the Court at a sanction hearing under Part 26A. I summarised these in *UK Commercial Property Finance Holdings Limited v Cine-UK Ltd* [2024] EWHC 2475 (Ch) at [66]-[69]:

> "66. I turn to the third limb, discretion. The Court has a general discretion to decide whether or not to sanction a restructuring plan. As noted by the Court of Appeal in *Re AGPS BondCo Plc* [2024] EWCA Civ 24 ("*AGPS*") at [105], the statute itself gives little guidance on the factors that are relevant when the Court is exercising this discretion.
>
> 67. In respect of the assenting classes, it is well-established that the court will apply the principles that are applied in schemes of arrangements. However, the established approach requires radical modification where a dissenting class has voted against a restructuring plan or has failed to vote in favour by the required 75% majority, and the plan company seeks to rely upon section 901G to persuade the court to impose the plan upon the dissenting class: *AGPS* at [118].
>
> 68. In deciding whether to sanction a restructuring plan as against a dissenting class, it is relevant to consider whether the dissenting class is "out of the money". When the dissenting creditor is "in the money" in the relevant alternative, the focus will be on the "horizontal comparison" between the members of the dissenting class and members of other classes of creditors to ensure that: (i) those with similar rights in the relevant alternative are treated equally; and (ii) where there is a departure from equal treatment, that departure is justified. As part of this analysis, the court will consider whether an alternative (or "fairer") plan is available: *AGPS* at [118]-[186].

> 69. However, when the dissenting creditor is "out of the money" in the relevant alternative, its view about the fairness of the plan or complaints about the distribution of the benefits of the restructuring "should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down": *Re Virgin Active* at [249] cited with approval in *AGPS* at [251]-[252]."

The Assenting Classes

89. In the present case I am satisfied that the Plan should be sanctioned in relation to the assenting classes, applying the approach in *Re Telewest Communications plc (No 2)* [2005] 1 BCLC 772 at [20]-[22] per David Richards J. The Plan is one that an intelligent and honest creditor, a member of the class concerned and acting in respect of its interests, might reasonably approve. Creditors are better judges of their own interests than the courts. There is no reason to think that the members of the classes were acting other than *bona fide*.

90. There is one technical point that arises in relation to the Hedging Banks. As explained in section B above, there are two Hedging Banks. One of them did not cast a vote at the Plan Meeting; the other Hedging Bank cast a vote in favour (via the chairperson as proxy). Thus, the Plan was unanimously approved by those voting within the class of Hedging Banks, but the relevant Plan Meeting was attended by only one creditor.

91. In a traditional scheme of arrangement under Part 26 of the CA 2006, such a meeting would be regarded as defective (since a valid meeting ordinarily requires the attendance of at least two creditors). That would be fatal to the scheme.

92. Under Part 26A, the position is different. Even if a meeting is technically defective (by reason of being attended by only one creditor), the Court can cram down the relevant class under section 901G. This does not require a valid meeting, and a cramdown can take place even if no one attends the meeting: see *Re Listrac Midco Ltd* [2023] EWHC 460 (Ch) at [33]-[40] per Adam Johnson J. In fact, it is often the case that a "dissenting" class consists of a group of creditors who did not vote. This was the approach taken by Michael Green J in sanctioning the 2023 Plan. Thus, to the extent necessary, the Hedging Banks can be treated as a "dissenting class" (although no dissenting votes were actually cast), and this addresses any defect in the meeting.

93. Moreover, the expert evidence filed by the Plan Company shows that the Hedging Banks will be paid in full under the Plan (as compared to a return of 0% to 50% in the relevant alternative). Condition A under section 901G is therefore satisfied. Condition B is also satisfied, since the Plan was approved by two assenting classes (the Priority Tranche and the Elevated Creditors) that would receive a payment in the relevant alternative. No Hedging Bank has voted against the Plan. There has been no suggestion that the Hedging Banks are subject to any unfair differential treatment as compared to other Plan Creditors (or that a better or fairer plan could be available).

The Dissenting Creditors

94. The remaining issue is whether the Plan should be sanctioned against the dissent of the Senior Creditors.

95. Condition B has been satisfied.

96. There is a dispute between the parties about Condition A: if the restructuring plan is sanctioned, would any members of the dissenting class be any worse off than they would be in the event of the relevant alternative? This is the "no worse off" test.

97. There is then the question of discretion. As already explained, the exercise of discretion will be materially influenced by the court's conclusions about Condition A.

98. In *AGPS* at [159] Snowden LJ said:

> "… a key issue for the court in exercising its discretion to impose a plan upon a dissenting class is to identify whether the plan provides for differences in treatment of the different classes of creditors inter se and, if so, whether those differences can be justified … an obvious reference point for this exercise must be the position of the creditors in the relevant alternative."

99. This enables the court to determine whether the plan involves a fair distribution of the benefits of the restructuring: see *AGPS* at [161]. Where the dissenters would be in the money in the relevant alternative, the court will ask whether a better or fairer plan is available: see *AGPS* at [180]-[182]. However, as explained above, no or very little weight will be given to the views of creditors who are "out of the money" (because they would receive nothing in the relevant alternative). Such creditors are not entitled to receive any of the benefits of the restructuring.

100. The "relevant alternative" is defined as "whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned".

101. I am satisfied by the evidence that if the Plan fails, it is most likely that the Plan Company and MGT will enter formal insolvency proceedings.

102. I have already summarised the cashflow position set out above. The Group is currently unable to pay its debts as they fall due and the position is projected to deteriorate. Though most of the debt is owned by MGT, the Plan Company is a guarantor and principal obligor under the deed of contribution. It depends on MGT for its cashflows.

103. The Opposing Creditors indeed accepted that, absent the Plan, the Group would most likely go into administration.

104. Mr Pike, who is an experienced insolvency practitioner, says that it is most likely that MGT and the Plan Company would seek to carry out a sale of the business and assets, which would take about six months, and that the Power Plant would be mothballed in the meantime. The Opposing Creditors accepted that there would probably be a sales process and that it would take about that long. They suggested however that the administrators would look into the option of operating the Power Plant pending the process. I shall return to this below.

105. In his report Mr Ojetola has carried out calculations of the enterprise value ("EV") of the business, using a discounted cashflow ("DCF") model. The DCF calculations are

based on a number of sets of management projections with varying assumptions about future events. Two of these are known as a "low case" and a "high case". He then deducts sums for the estimated costs that would be incurred by a buyer in restarting the Power Plant. He then applies a discount to reflect the distressed nature of the sale.

106. Mr Ojetola's evidence is that the total realisations in the administration would be £240 million (low case) to £324 million (high case). Either amount would produce the following returns to creditors: (a) Priority Debt: 100%; (b) Elevated Debt: 52% to 100%; (c) Hedging Debt: 0% to 50%; (d) Senior Debt: 0%.

107. The Plan Company contends that, since the Plan will enable the survival of the Plan Company and the Group as a going concern, it will produce a better outcome for the Plan Creditors than they would receive in the relevant alternative.

108. In this regard Mr Pike's view is that, if the Plan is sanctioned, the Priority Creditors, Elevated Creditors and Hedging Creditors will be paid in full over time and the Senior Creditors are expected to recover 17% to 45% (depending on the appropriate assumptions applied to management's projections). In his view, the returns will depend on the Group's performance. The lower figure of 17% represents a "downside" case (which assumes significant operational problems in the future), whereas the figure of 45% represents the base case forecasted by management.

109. The Plan Company therefore contends that the Senior Creditors would be better off if the Plan is sanctioned than they would be in the relevant alternative, where they would get nothing.

110. The Opposing Creditors contend that there are obvious and basic flaws in the expert evidence of Mr Ojetola and Mr Pike. Their principal submissions related to (a) the distressed sale discount applied by Mr Ojetola and (b) Mr Pike's failure to discount the returns to the Senior Creditors to take account of the time value of money.

111. The Opposing Creditors contended that (a) applying a more realistic distressed discount and (b) properly discounting the Senior Creditors' expected receipts there were a number of realistic potential outcomes in which they would be better off in the relevant alternative than under the Plan. They submitted that the Court could not properly be satisfied that the not worse off condition was satisfied.

112. Starting with the level of the distressed sale discount, the Opposing Creditors submitted as follows.

113. First, the Interpath Valuation Report applied a distressed discount to EV of between 50-60% and took the mid-point of 55% That is not supported by other cases, including *AGPS* where the discount was 25% and there was evidence of a range of 20-40%. Interpath had referred to an FTI report which supported a range of about 20-40%. Interpath's range of 50-60% is beyond the outer limit of that range.

114. Second, FRP have observed in their Letter (in Appendix 2) that two of the cases referenced by FTI had an upper-end adjustment of 50%, one of 60%, with six cases between 20-40% and one as low as 10%. The result of this is that, looking at the 10 cases, the lower quartile range of distressed discount is 25% to 30% and the upper quartile is 30% to 47.5%. FRP say that this would suggest that a range between 25% to

47.5% would be in line with what is more commonly applied by valuers estimating distress discounts.

115. Third, in Mr Ojetola's Low Case, if the distressed discount were reduced from 55% to 33%, Senior Creditors would be in the money. In the high case, if the distressed discount were reduced from 55% to 51% Senior Debt holders would be in the money. At a Distressed Discount rate of 30%, Senior Creditors would receive £116 million in the High Case and £16 million in the low case.

116. As already explained, after the provision of the FRP Letter, Mr Ojetola served his expert report. In the report he gave further justifications for the distressed sale discount. He says that the appropriate discount is fact sensitive. There are reasons for the higher range of discounts in this case than in some others:

i) The Power Plant does not have a sustained track record of reliable operation. In fact, it has suffered from numerous outages.

ii) There is a significant risk that a purchaser would need to provide further funding to resolve the tube leak issues that have created problems in recent months (and to deal with any potential unknown defects and operational issues).

iii) The Power Plant faces a heavy funding requirement. In the relevant alternative, the New Super Senior Funding would not be available. A purchaser would need £40 million to £50 million of new money on "day one", and further funds would likely be required in due course.

iv) The business faces significant commercial and political risks, including risks relating to the regulation of biomass energy. Moreover, in the event of the Plan failing, there would be a risk that the Power Plant could become completely unviable. As matters stand, the Power Plant produces very significant cashflows through the sale of electricity under a long-term contract backed by the UK government. That contract could be terminated in an insolvency scenario.

v) The most directly comparable recent transaction is the sale of a biomass power plant by the administrators of Cramlington Renewable Energy Developments in June 2021. The distressed sale discount in that case was up to 80% (measured against the enterprise value calculated as a multiple of revenues).

vi) Mr Ojetola considers that a discount range of 50% to 60% is conservative.

117. Counsel for the Opposing Creditors said that Mr Ojetola's reasoning about the discount was flawed in various respects. She contended that there was an element of double counting in that the Power Plant's operational problems were reflected in the discount rate used in the DCF calculation. She said that was impermissible. She contended that the range given by Mr Ojetola was narrow and that this undermined his evidence. She said that the factors he had relied on appeared to overlap and that there was no clear explanation even now of how he had reached the 50-60% range.

118. It my judgment the court cannot reject the evidence of Mr Ojetola without cross-examination. As Lord Hodge explained in the *TUI* case, the court is assisted by cross-examination, which enables the expert to explain his or her reasoning and, where there

are alleged flaws, for these to be analysed and identified. I do not consider that this is a case where there are obvious errors of calculation or logic on the face of the report or that there is an absence of reasoning. In reality, the Opposing Creditors are seeking to persuade the court that the discount is too high and that the views of FRP should be preferred. I have already cited the comments of Snowden LJ in *Smile Telecoms*. He explained that an objecting party should produce its own expert witness, and that the experts should be cross-examined. There have now been numerous restructuring plan cases where that has happened. I would endorse his approach. While I accept that the distressed sale discount advanced by Mr Ojetola is considerably higher than in a number of other cases, I do not consider that it would be right to reject it without cross-examination.

119. I turn to the second principal point about which the Opposing Creditors have complained. They point out that the returns to Creditors in the event that the Group carries on as a going concern do not take account of the time value of money. Repayments on the Senior Debt do not commence until 2032 in Interpath's base case and 2035 in the (more pessimistic) funding case. FRP's view is that a 15% discount for the time value of money is "supportable". This would result in returns to Senior Creditors under the Plan in the funding case of £25,850,000 (as opposed to the £109 million advanced by Interpath) and £81 million in the base case (as opposed to £285 million).

120. Applying a lower distressed discount and a 15% discount rate on returns (for the time value of money) the FRP Letter concludes that there is "a reasonable likelihood" that the Senior Creditors are in the money and that, under certain reasonable conditions, they could be better off in the relevant alternative than in the Plan. FRP do not say that this is more probable than not.

121. As already explained, the Plan Company served Mr Pike's expert report in relation to this (among other points). The discount rate proposed by FRP is 15%. That is too high. The FRP Letter does not provide any justification for the proposed 15% discount rate. It says it is "supportable". A more appropriate discount rate to calculate the time value of money is 6.53% (which is the Group's post-tax cost of debt). On that basis, the present value of the returns to the Senior Creditors under the Plan are £163.2 million (in the base case) and £57.7 million (in the funding case).

122. Moreover the FRP Letter involves a series of tables that do not compare like with like. For instance the FRP Letter compares the funding case (under the Plan) with the high case recovery (in the relevant alternative). The high case recovery in the relevant alternative is founded on an enterprise valuation which is derived from the base case, not the funding case.

123. Counsel for the Opposing Creditors maintained that the appropriate discount rate should be higher than that proposed by Mr Pike. She noted that the interest rate for the new tranches of Priority Debt was 20% and that was with super-priority security.

124. The selection of the appropriate discount rate to reflect the time value of money is a matter of expert evidence. The court cannot be expected to reach its own conclusions without a proper process, which includes rival expert evidence and cross-examination. It would not be fair to reject the evidence of Mr Pike without cross-examination, for the reasons given in the *Tui* case and *Smile Telecoms.* This is not a case where there is an

obvious logical flaw or inconsistency; in reality the Opposing Creditors are asking the court to prefer the opinions expressed in a letter by FRP to the expert evidence served by the Plan Company.

125. Taking into account all of the evidence I have concluded that the Plan Company has satisfied the not worse off condition. I am also satisfied that in the relevant alternative the Senior Creditors would be wholly out of the money.

126. As already explained, this conclusion is highly material to the issue of discretion. The cases establish that the views of out of the money creditors are to be given no or little weight. It is for the in-the-money creditors to determine the shares of the economic benefits of the restructuring.

127. In light of this conclusion, the Opposing Creditors' objections have no or little weight. Indeed the Opposing Creditors accepted this much in para 26 of their skeleton argument. The Plan would enable the introduction of new money, which would allow the Enviva Deal to proceed. This would enable the Group to survive as a going concern. That would result in a better outcome for the assenting, in-the-money, classes of creditors than an insolvent administration. These are positive reasons for the court to exercise its discretion to approve the Plan.

128. However, for completeness, I turn to the Senior Creditors' complaints about fairness.

129. The first complaint concerns the removal of the "Waterfall Debt Cap" from the waterfall in the event of an enforcement event.

130. Under the existing ICA the debt ranks (materially) as follows:

i) Priority Tranche;

ii) Elevated Debt;

iii) Hedging Banks;

iv) Senior Debt up to the Waterfall Debt Cap;

v) Shareholder Debt up to 50% of the Waterfall Debt Cap;

vi) In respect of excess returns: one third to Shareholder Debt and two thirds to Non-Elevated Debt.

131. The Waterfall Debt Cap is calculated as follows:

£250m x (Total Senior Debt / (Total Senior Debt + Elevated Debt))

132. The Plan proposes to remove the Waterfall Debt Cap in the ICA such that on enforcement, after proceeds have been applied in repayment of the Elevated Senior Debt, the balance will be split and applied in repayment of the Senior Debt, Springing Hedging Liabilities (if applicable) and amounts owing to the Shareholders.

133. More specifically, any excess proceeds (after the payment of the Priority Debt and the Elevated Debt) shall be applied as to one-third to repay the Shareholder Debt; and as to two-thirds to repay the Senior Debt and some liabilities to the Hedging Banks.

134. The Opposing Creditors contend that this effectively elevates the Shareholders in relation to Shareholder Loans. There is therefore an improvement to the position of the Shareholder Debt (to the detriment of Senior Creditors) and the Shareholders are therefore being given an enhanced position in the security enforcement waterfall.

135. It is to be noted that the Shareholders are also substantial holders of the existing Priority Debt.

136. The Plan Companies submit that there is nothing unfair about these changes.

i) The changes simplify the waterfall. But the Shareholder Debt will continue to occupy a low position within the security enforcement waterfall. Moreover the Shareholder Debt will only receive one-third of any available proceeds.

ii) The third statement of Mr Holder explains that these changes were a condition of the new Priority Financing. Without making those changes, no new money would be available.

iii) The Shareholders could have driven a harder bargain. The Shareholders are the majority lenders under the Priority Facilities (as explained in Holder 3), and they have also committed to participate in the new funding. The Plan would therefore be impossible without the support of the Shareholders.

iv) The Senior Creditors have not offered to provide any new money. There is no realistic probability of a third party offering better terms.

v) There are many cases in which shareholders have been given benefits as a result of lending new money: see e.g. *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) at [278] per Snowden J. It cannot be said that there is anything unfair in the new security enforcement waterfall that will be imposed by the Plan.

137. The Opposing Creditors note that there has been no evidence from the Priority Creditors to support the evidence of Mr Holder that the amendments to the ICA were a condition of the new money. They submitted that it is inherently unlikely that those creditors would allow the Plan to fail over this issue. They also said that there is little in the evidence to show whether the Plan Company sought to negotiate about this issue or what would have happened had it sought to do so.

138. I have already concluded that the approach of the court to an issue of alleged unfairness of this kind is intimately bound up with the likely position of the dissentient creditors in the relevant alternative. I have concluded that the Opposing Creditors are wholly out of the money in the relevant alternative. In these circumstances it appears to me that it is for the in-the-money creditors to share the benefits of the restructuring, including by making the amendments to the ICA. Mr Holder's evidence that this was a condition of the new money has not been controverted. Moreover, the point of objection has been raised late in the day by the Opposing Creditors and they cannot fairly complain about

the lack of evidence from the Priority Creditors. In any event, for the reasons given by the Plan Company, I see nothing inherently unfair about the changes to the ICA.

139. The second complaint of the Opposing Creditors about the fairness of the Plan concerns amendments of the ICA to include provisions:

i) Authorising the Security Trustee to release certain liabilities or security, or dispose of certain liabilities, or transfer certain liabilities upon the occurrence of a distressed disposal provided that: (i) the Priority Tranche Debt has not been repaid in full by its maturity date and (ii) the release has been approved by Priority Tranche Creditors holding 85% of the total Priority Tranche Commitments (across the Super Senior Tranche A Facility, Super Senior Tranche B Facility, Super Senior Tranche C Facility and, if applicable, the Super Senior Tranche D Facility);

ii) Requiring the Security Trustee to take reasonable care to obtain fair market price having regard to the prevailing market conditions upon a distressed disposal which shall be deemed satisfied if the disposal is made pursuant to a court process, by an insolvency office holder, pursuant to a competitive sales process or accompanied by a fairness opinion.

140. The Opposing Creditors submitted that the distressed disposal provisions are, at best, ancillary to the purpose of the Plan (and not directly relevant to alleviating the Group's financial difficulties). They raise a particular concern that the ability of the Security Trustee to act basis of a fairness opinion, rather than (at worst) another restructuring plan, in the context of which a dissenting creditor would have the opportunity to adduce competing valuation evidence. They say that such a mechanism should not be imposed via the Plan as a matter of fairness.

141. The Plan Creditors again relied on the third statement of Mr Holder. They submitted (in summary) as follows:

i) In high-value finance structures, it is very common for the creditors and debtors to enter into an intercreditor agreement, often based on a form promulgated by the Loan Markets Association (the "LMA").

ii) LMA intercreditor agreements commonly include a detailed contractual regime whereby the security agent is empowered to release and transfer certain types of debt in the event of a security enforcement (known as a "distressed disposal").

iii) Under the Plan, the ICA will be amended by the Plan to include a set of standard distressed disposal provisions.

iv) The inclusion of the distressed disposal provisions is a condition of the New Super Senior Funding.

v) As to the concerns about the use of a fairness opinion, under the amended ICA, the Security Trustee will be required to take reasonable care to obtain fair market price having regard to the prevailing market conditions upon a distressed disposal. That obligation is deemed to be satisfied if the disposal is made pursuant to a court process, by an insolvency officeholder, pursuant to a

competitive sales process, or in accordance with a fairness opinion (meeting certain conditions) prepared by a financial adviser.

vi) The use of a fairness opinion in this context is market-standard. It is designed to avoid expensive litigation on valuation issues. It is fair for the ICA to be amended to include a market-standard provision of this kind.

142. I repeat the point made above, that the approach of the court to an issue of alleged unfairness of this kind depends on the likely position of the dissentient creditors in the relevant alternative. Here I am satisfied that the Senior Creditors would be wholly out of the money in the relevant alternative. In these circumstances it appears to me that it is for the in-the-money creditors to share the benefits of the restructuring, including by making the amendments to the ICA. Mr Holder's evidence that this was a condition of the new money has not been controverted. Again, the point of objection has been raised late in the day by the Opposing Creditors and they cannot fairly complain about the lack of evidence from the Priority Creditors. In any event, for the reasons given by the Plan Company, I see nothing inherently unfair about these changes to the ICA.

Conclusion

143. For these reasons, I shall sanction the Plan.