Neutral Citation Number: [2020] EWHC 1864 (Ch)

Case Nos: **CR-2020-002833, CR-2020-002834, CR-2020-002835, CR-2020-002836, CR-2020-002837, CR-2020-002838 and CR-2020-002839**

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: Monday 13 July 2020

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTERS OF

COLOUROZ INVESTMENT 2 LLC

FLINT GROUP PACKAGING INKS NORTH AMERICA HOLDINGS LLC

FLINT CPS INKS HOLDINGS LLC

ANI PRINTING INKS B.V.

FLINT DIGITAL SOLUTIONS HOLDINGS B.V.

FLINT GROUP GMBH

FLINT GROUP SWEDEN HOLDING AB

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

Daniel Bayfield QC and Ryan Perkins (instructed by **Milbank LLP**) for the **Companies**

Hearing date: Monday 6 July 2020

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on Monday 13 July 2020.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. These are applications by ColourOz Investment 2 LLC ("ColourOz"), Flint Group Packaging Inks North America Holdings LLC, Flint CPS Inks Holdings LLC, ANI Printing Inks B.V., Flint Digital Solutions Holdings B.V., Flint Group GmbH ("Flint GmbH") and Flint Group Sweden Holding AB (together, the "Companies").

2. Each of the Companies applied for an order convening one or more meetings of certain of its creditors (the "Scheme Creditors") for the purpose of considering and, if thought fit, approving a scheme of arrangement under Part 26 of the Companies Act 2006 ("Part 26" and the "CA 2006"). There are seven schemes in total, one for each of the Companies (the "Schemes").

3. At the conclusion of a hearing on Monday 6 July 2020 I indicated that I would make the order sought by the Companies with one modification. I indicated that I would give my reasons in writing, which I now do.

<u>The Flint Group and its liabilities</u>

4. The Companies are part of the Flint group of companies (the "Group"), which is a leading global supplier of printing and packaging products. Each of the Companies is an indirect wholly-owned subsidiary of Flint Holdco S.à r.l. ("Holdco"). The Group employs approximately 6,800 people worldwide.

5. The Group's main financial liabilities arise under two secured credit facility agreements (the "First Lien Credit Agreement" and the "Second Lien Credit Agreement") (together, the "Credit Agreements"). Each of the Companies apart from ColourOz and Flint GmbH is a borrower under the First Lien Credit Agreement only. ColourOz is a borrower under the Second Lien Credit Agreement only; and Flint GmbH is a borrower under both Credit Agreements.

6. The loan facilities under the First Lien Credit Agreement include term loans which have tranches denominated in US Dollars and Euros (the "First Lien Term Facilities"). The euro equivalent of the total principal amount currently outstanding under the First Lien Term Facilities is about €1.6 billion. The First Lien Term Facilities are currently scheduled to mature on 5 September 2021.

7. The loan facilities under the Second Lien Credit Agreement comprise term loans which have tranches denominated in US Dollars and Euros (the "Second Lien Term Facilities"). The euro equivalent of the total principal amount currently outstanding under the Second Lien Term Facilities is approximately €135 million. The Second Lien Term Facilities are currently scheduled to mature on 5 September 2022, i.e. one year after the existing maturity date of the First Lien Term Facilities.

8. The Scheme Creditors under each of the Schemes are the lenders to the respective Company under the First and Second Lien Term Facilities (together "the Term Loan Facilities"). The First Lien Credit Agreement also includes a revolving credit facility (the "RCF") with total lending commitments of €103 million, of which €56 million is currently drawn down and €10 million is utilized in the form of letters of credit. The RCF is currently scheduled to mature on 5 March 2021.

9. Each of the Term Loan Facilities are guaranteed by numerous companies within the Group (including each Company, to the extent that it is not a borrower under the term facility) and benefit from a wide-ranging security package.

10. The ranking and priority of the facilities under both of the Credit Agreements is governed by an intercreditor agreement (the "ICA"). Under the ICA, the First Lien Term Facilities rank in priority to the Second Lien Term Facilities. This means that, in the event of a sale of the Group's assets, the Second Lien Term Facilities would only be repaid if any proceeds remained after the First Lien Loan Facilities had been discharged in full.

The purpose of the Schemes

11. The evidence is clear that Group is not in any immediate financial distress and has not suffered any serious financial detriment as a result of the COVID-19 pandemic. However, the Group is concerned that its current and forecasted liquidity levels will not be sufficient to repay or support a refinancing of the amounts outstanding under the Term Loan Facilities in full on their existing maturity dates. Accordingly, in the absence of an extension to the existing maturity dates, the Group would be forced to conduct an expedited sales process over the next year with a view to selling the business and assets of the Group.

12. An expedited sales process would be viewed in the market as a distressed sale, which would be likely to reduce the price that the Group could obtain. Moreover, due to the market conditions caused by the COVID-19 pandemic, it is not clear that such any such sale could be achieved in the short to medium term. Even if a sale could be achieved, the Group believes, on the basis of an independent valuation produced by EY, that the proceeds of any expedited sale in the current market conditions may well be insufficient to repay the amounts outstanding under the Credit Agreements in full. EY's valuation identifies three possible scenarios that could result from a sale: a high case, a medium case and a low case. In the medium case and the low case, the proceeds of sale would only be sufficient to discharge the First Lien Term Facilities in part (and would provide a nil return on the Second Lien Term Facilities). In the high case, the proceeds of sale would be sufficient to discharge the First Lien Term Facilities in full and to provide a small recovery (less than 10% of face value) on the Second Lien Term Facilities. EY also stated that they would strongly caution against any attempt to commence a sales process in the current market environment, due to the uncertainty caused by COVID-19.

13. For all of these reasons, the Group wishes to extend the existing maturity dates of the Term Loan Facilities by approximately two years until September 2023 for the First Lien Term Facilities and until September 2024 for the Second Lien Term Facilities. That is the main purpose of the Schemes. Such an extension will allow the Group to pursue business and asset sales without the need to adopt an accelerated timetable. This should improve the ratings given to the Group's debt which in turn should provide a better opportunity (in normal market conditions) to repay or refinance the amounts outstanding under the RCF and the Term Loan Facilities in full at their revised maturity dates.

14. The lenders under the RCF are not subject to the Schemes and have unanimously agreed, outside the Schemes but conditionally upon the Schemes becoming effective, to grant a maturity extension of the RCF.

The restructuring proposal and the Lock-up Agreement

15. The Group has engaged with its lenders under the Credit Agreements since early 2020. A number of lenders formed an "Ad Hoc Group" to negotiate the terms of a restructuring transaction, including a maturity extension and a number of other changes to the finance documents. The lenders within the Ad Hoc Group own (by value) more than 50% of the debt under the First Lien Term Facilities and approximately 90% of the debt under the Second Lien Term Facilities.

16. Following a communication the previous day to the Scheme Creditors, on 9 April 2020 the members of the Ad Hoc Group entered into a lock-up agreement with Holdco and various other Group companies (the "Lock-Up Agreement"). Under the Lock-Up Agreement, the signatories committed to supporting the restructuring transaction, the commercial terms of which were set out in therein, and agreed to take any necessary steps to implement the transaction. The Lock-Up Agreement has been substantively amended on various dates since 9 April 2020, but all lenders (whether or not they form part of the Ad Hoc Group) have been eligible to accede to the Lock-Up Agreement since 9 April 2020 and remain able to do so.

Amendment to the Credit Agreements and the ICA

17. As a preliminary to the implementation of the restructuring transaction referred to in the Lock-Up Agreement, steps were taken to amend the Credit Agreements and the ICA. Those agreements were originally governed by New York law and subject to the jurisdiction of the New York court. The Credit Agreements and the ICA include a contractual regime whereby certain amendments can be made with the consent of a bare majority of lenders (by value).

18. On 22 May 2020, the Group requested the consent of lenders under the First Lien Credit Agreement and the Second Lien Credit Agreement to change the governing law of the Credit Agreements and the ICA to English law and to replace the existing jurisdiction clause with a new clause conferring exclusive jurisdiction on the English court. The Group expressly disclosed that the purpose of these amendments was to establish a sufficient connection with England for the purposes of implementing the restructuring transaction by way of the Schemes.

19. The requisite contractual majority of lenders consented to the proposed amendments. Accordingly, the amendments were implemented on 2 June 2020 pursuant to three amendment agreements. As part of this process, the Group also obtained certain waivers and amendments for any Scheme-related breaches or defaults under the Credit Agreements.

The Schemes in outline

20. Having changed the governing law and jurisdiction provisions in the Credit Agreements and the ICA, the Schemes are now intended to implement the relevant part of the restructuring transaction set out in the Lock-Up Agreement. This will be

achieved by two amendment agreements (the "First Lien Amendment Agreement" and the "Second Lien Amendment Agreement") amending each of the Credit Agreements.

21. The amendments to be effected by the First Lien Amendment Agreement can be summarised as follows:

i) the existing maturity date of the First Lien Term Facilities will be extended to 21 September 2023;

ii) the initial margin in respect of the cash interest rate for the First Lien Term Facilities (originally 3.75%) will be increased by 0.5% and a rachet mechanism applying to the initial margin will be removed so as to result in a flat margin of 4.25%;

iii) additional "payment-in-kind" or "PIK" interest on the First Lien Term Facilities will be introduced at a rate of 0.75% per annum. Such PIK interest will be capitalised on a quarterly basis;

iv) a new exit fee of 2% will be included, payable upon the occurrence of certain exit events;

v) the mandatory prepayment regime with respect to asset disposals will be amended to oblige the Group to use certain proceeds of asset disposals to discharge its debts under the Credit Agreements;

vi) certain of the covenants applicable to the First Lien Term Facilities will be amended; and

vii) the jurisdiction clause in the First Lien Credit Agreement will be amended so that the lenders are entitled to bring proceedings against the obligors under the First Lien Term Facilities in any jurisdiction (although any proceedings brought by the obligors must be brought in England). This is often described as an "asymmetric" jurisdiction clause.

22. The amendments to be effected by the Second Lien Amendment Agreement can be summarised as follows:

i) the existing maturity date of the Second Lien Term Facilities will be extended to 21 September 2024;

ii) the margin in respect of the cash interest rate for the Second Lien Term Facilities will be reduced by 3% (such that the total cash interest rate is 3% lower than the existing interest rate);

iii) additional "payment-in-kind" or "PIK" interest on the Second Lien Term Facilities will be introduced at a rate of 5.75% per annum. Such PIK interest will be capitalised on a quarterly basis;

iv) a new exit fee of 2% will be included, payable upon the occurrence of certain exit events;

v) the mandatory prepayment regime with respect to asset disposals will be amended, to oblige the Group to use certain proceeds of asset disposals to discharge its debts under the Credit Agreements;

vi) certain of the covenants applicable to the Second Lien Term Facilities will be amended; and

vii) the jurisdiction clause in the Second Lien Credit Agreement will be amended so that the lenders are entitled to bring proceedings against the obligors under the Second Lien Term Facilities in any jurisdiction (although any proceedings brought by the obligors must be brought in England).

23. Further, both the First Lien Amendment Agreement and the Second Lien Amendment Agreement will include a consent on behalf of the lenders to an amendment to the jurisdiction clause of the ICA to introduce the same "asymmetric" jurisdiction clause as will be adopted in the Credit Agreements.

24. In mechanical terms, the Schemes will operate in the following way:

i) the Schemes are set out in two documents: one of which relates to the First Lien Term Facilities, and the other of which relates to the Second Lien Term Facilities;

ii) clause 3(a)(i) of each Scheme provides that the Scheme Creditors agree and consent to the amendments set out in the First Lien Amendment Agreement or the Second Lien Amendment Agreement (as applicable); and

iii) clause 3(a)(ii) of each Scheme appoints Holdco as an agent and attorney on behalf of the Scheme Creditors to execute the First Lien Amendment Agreement or the Second Lien Amendment Agreement (as applicable), and to perform any other action on behalf of the Scheme Creditors which Holdco may consider necessary or desirable to implement or give effect to the Schemes.

25. Various third parties – including Holdco and the Agent under the Credit Agreements – will execute undertakings in advance of the sanction hearing to carry out all actions necessary to give effect to the Schemes.

<u>Support for the Schemes</u>

26. A very large proportion of the Group's lenders have now signed or acceded to the Lock-Up Agreement. This includes,

i) all of the lenders under the RCF;

ii) approximately 430 out of 495 lenders (about 87% in number holding approximately 97.8% by value of the dollar-denominated and 97.7% by value of the euro-denominated debt) under the First Lien Term Facilities; and

iii) 54 out of 61 lenders (about 88% by number holding more than 99.99% of the US Dollar-denominated and more than 99.99% of the Euro-denominated debt) under the Second Lien Term Facilities. The remaining 7 lenders hold *de*

minimis amounts of only cents (whether euros or dollars) and probably result from rounding or inaccuracies in transfer documentation. They are referred to in the evidence as "Penny Holders'.

27. The Group is not aware of any lender who actively opposes the restructuring transaction set out in the Lock-Up Agreement. However, since a significant number of lenders holding a very small amount of debt have not acceded to the Lock-Up Agreement, it is (as matters stand) still necessary to implement the restructuring transaction by way of the Schemes. The Schemes will also provide a convenient mechanism to implement the restructuring transaction by conferring a power of attorney on Holdco to execute the necessary documents. This will reduce the administrative burden that would otherwise be likely to result from seeking to execute a suite of finance documents with some 600 lenders.

The convening hearing

28. Section 896(1) of the CA 2006 provides:

> "The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs."

Notice of the convening hearing

29. In order to communicate with the Scheme Creditors, the Companies use two websites known as the First Lien Data Site and the Second Lien Data Site (the "Data Sites"). All of the Scheme Creditors gained access to the Data Sites through the Agents under the Credit Agreements when they became lenders (as part of the transfer process). Representatives of the Scheme Creditors who have access to the Data Sites are notified automatically by email when new documents are uploaded, and the Group often receives questions from the Scheme Creditors very quickly after documents are posted.

30. The restructuring proposals agreed between the Companies and the Ad Hoc Group, together with a draft of the Lock-up Agreement were posted on the Data Sites on 8 April 2020, and the Lock-Up Agreement has been available to the Scheme Creditors through the Data Sites at all times since. As indicated above, the Ad Hoc Group executed the Lock-up Agreement on 9 April 2020.

31. On 22 May 2020, the Group announced through the Data Sites that it was seeking the consent of the lenders under the Credit Agreements to change the governing law and jurisdiction clauses in the Credit Agreements and the ICA for the purpose of the Schemes. As indicated above, that change was made on 2 June 2020.

32. On Friday 19 June 2020, the Companies issued a letter to the Scheme Creditors under the Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345 (the "Practice Statement Letter"). The Practice Statement Letter was provided to the Scheme Creditors by being uploaded to the Data Sites together with a short announcement referring to the appointment of Lucid Issuer Services Limited to act as the "Information Agent" for the Schemes. The Information Agent has a mandate to

ensure that the documents relating to the Schemes are promptly brought to the attention of the Scheme Creditors via a dedicated website relating to the Schemes (the "Scheme Website") which it established on the same day.

33. One week after the dispatch of the Practice Statement letter, and in conjunction with the coming into force of the Corporate Insolvency and Governance Act 2020, the 2002 Practice Statement was replaced by a new Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) dated 26 June 2020 (the "New Practice Statement"). The New Practice Statement builds on the jurisprudence which has been established under the former Practice Statement, but in addition to creditors' schemes, it also now applies to members' schemes under Part 26, together with the new restructuring schemes under Part 26A CA 2006.

34. Although the Practice Statement Letter was sent under the old Practice Statement, the New Practice Statement now applies to the conduct of the Schemes, and in particular applies to my approach to this convening hearing. That said, I should indicate that I would have taken the same course under the old practice as I intend to do under the new regime.

35. The New Practice Statement contains the following relevant paragraphs,

> "6. It is the responsibility of the applicant, by evidence in support of the application or otherwise, to draw to the attention of the court at the hearing for an order that meetings of creditors and/or members be held ("the convening hearing"):
>
> a. any issues which may arise as to the constitution of meetings of members or creditors or which otherwise affect the conduct of those meetings;
>
> b. any issues as to the existence of the court's jurisdiction to sanction the scheme;
>
> …
>
> d. any other issue not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme.
>
> 7. Where an application is made to convene a meeting or meetings in respect of a scheme which gives rise to any of the issues identified in paragraph 6 above, unless there are good reasons for not doing so, the applicant should, prior to the convening hearing, take all steps reasonably open to it to notify any person affected by the scheme of the following matters:
>
> a. that the scheme is being promoted,
>
> b. the purpose which the scheme is designed to achieve and its effect,

c. the meetings of creditors and/or members which the applicant considers will be required and their composition,

d. the other matters that are to be addressed at the convening hearing, including the issues identified in paragraph 6 above,

e. the date and place fixed for the convening hearing,

f. that such persons are entitled to attend the convening and sanction hearings, and

g. how such persons may make further enquiries about the scheme.

It is the responsibility of the applicant to ensure that such notification is given in a concise form and is communicated to all persons affected by the scheme in the manner which is most appropriate to the circumstances of the case.

8. Save for the circumstance in which there are good reasons for not giving the notification identified in paragraph 7 above, it should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps which have been taken to give the notification and what, if any, response the applicant has had to the notification.

9. Where an issue identified in paragraph 6 above has been drawn to the attention of the court it will consider whether to determine that issue forthwith, or whether to give directions for the resolution of that issue.

10. While members and/or creditors will still be able to appear and raise objections based on an issue identified in paragraph 6 above at the sanction hearing, the court will expect them to show good reason why they did not raise the issue at an earlier stage.

11. In considering whether or not to make an order convening meetings of members and/or creditors (a "meetings order") the court will consider whether more than one meeting of members and/or creditors is required, and if so what is the appropriate composition of those meetings.

12. A meetings order may include an order giving anyone affected a limited time in which to apply to vary or discharge

> that order with the meetings of members and/or creditors to take place in default of any such application within the time prescribed."

36. As regards paragraph 8 of the New Practice Statement, the position is that although the Ad Hoc Group have been involved since early this year, and the Scheme Creditors were notified about three months ago through the Data Sites of the intention to propose a restructuring on the commercial basis set out in the Lock-up Agreement, Scheme Creditors have only been given two working weeks' (17 days but including three weekends) notice of the convening hearing.

37. In Re Indah Kiat International Finance Co BV [2016] BCC 418 at [28]-[30], I explained the relevant principles as regards notice of a convening hearing under the old Practice Statement as follows:

> "28. The primary purpose of following the Practice Statement is to enable scheme creditors to have an effective opportunity to appear at the convening hearing at which the constitution of the classes is determined ... These purposes can self-evidently only be served if the notice of the convening hearing to creditors is adequate.
>
> 29. What is adequate notice will depend on all the circumstances. The more complex or novel the scheme, and the less consultation that has taken place with creditors as a whole before the scheme is launched, the longer the notice should generally be. That said, if the scheme is being put forward as a matter of great urgency when the company is in real financial distress, there may not be time to give very much notice to creditors if a default is to be avoided. In such a case the scheme company may well be able to persuade the court that there is good reason to shorten the period of notice or depart altogether from the Practice Statement; and in such a case, any opposing creditor would have a good reason why he had been unable to raise a class or jurisdictional question prior to the sanction hearing.
>
> 30. But in the absence of evidence of real urgency, the Practice Statement should be followed and a sufficient period of notice given of the convening hearing to enable scheme creditors to consider the matter, take advice and, if desired, participate at the hearing ... The court must be astute to detect any attempt to "bounce" creditors into a convening hearing in relation to a complex or novel scheme on inadequate notice."

38. In Re NN2 Newco Ltd [2019] EWHC 1917 (Ch) at [22]-[23] Norris J endorsed that approach. In a case involving some immediate financial difficulties, he also emphasized that other factors might be relevant when considering the adequacy of notice, e.g. the character of the scheme creditors and the nature of their claims, and held that a three-week notice period had been adequate.

39. I consider that those two authorities are still relevant and inform the approach required by the New Practice Statement.

40. In seeking to persuade me that the period of notice of just over two working weeks in the instant case was adequate, Mr. Bayfield QC emphasized the extended period of engagement with Scheme Creditors to which I have referred. He also submitted that I could infer from the requirements in the Credit Agreements that Scheme Creditors should hold a minimum €1 million face value of the debt, that all Scheme Creditors are sophisticated investors. In his skeleton argument he also relied on the fact that the vast majority of the Scheme Creditors have already signed the Lock-Up Agreement.

41. I accept, as I indicated in Indah Kiat, that the fact that Scheme Creditors were notified through the Data Sites of the intention to propose a restructuring about three months ago is a relevant factor in determining whether the period of notice of this convening hearing is adequate. I also accept that Scheme Creditors are likely to be reasonably sophisticated, and that is also a factor.

42. However, for the following reasons, I do not accept that the fact that a significant number of Scheme Creditors have signed the Lock-Up Agreement justifies a shorter period of notice of the convening hearing.

43. The origins of the provisions in the former Practice Statement and the New Practice Statement for a company to give notice of the convening hearing to scheme creditors lie in the decision of the Court of Appeal in Hawk Insurance [2001] 2 BCLC 480 ("Hawk") The Practice Statement marked a change in the practice under which the company was solely responsible for the formulation of the classes and took the risk that it would be found to have got the classes wrong only at the sanction hearing. By that time it would be too late and any error in the formulation of the classes would mean that the court had no jurisdiction to sanction the scheme. The Practice Statement was thus designed both to require the company to address class issues with the court, and to encourage any creditors who wished to do so to challenge the company's formulation of the classes at the convening hearing.

44. Whilst the court would always have to address a class question even if raised at sanction (because it goes to jurisdiction), the implicit warning now repeated in paragraph 10 of the New Practice Statement is that unless a good reason can be shown, such a late submission is unlikely to be well received and might, in an extreme case, justify disallowing an opposing creditor's costs, or even making an adverse costs award. But the *quid pro quo* is that proper notice should be given to creditors so that they have an effective opportunity to consider the matter, take advice and if so advised, appear at the convening hearing at which the constitution of the classes is determined.

45. It has become a feature of Part 26 creditor schemes in recent years that "ad hoc groups" of creditors negotiate with a company over a significant period and reach an agreement in principle for a restructuring long before any proposal is put to creditors more generally. In this way, such ad hoc groups of creditors have significant influence over the shape that a restructuring takes, become intimately familiar with its terms, and may (subject to signing confidentiality agreements) have access to unpublished financial information concerning the company. The ad hoc group then sign a lock-up agreement with the company, agreeing to support the restructuring

plan, and the company publishes the commercial terms of the proposal and advertises the level of support for it. The company then invites other creditors also to lock-up in return for a "consent" fee which acts as an incentive for other creditors to commit to the proposal at an early stage. In this way, it is increasingly the case that by the time the formal scheme process is launched and the court becomes involved, the commercial deal has been done, and achieving the statutory majorities at the scheme meetings is assured provided the court agrees with the classes proposed by the company.

46. In these circumstances, the requirement to give adequate notice to creditors of the convening hearing has in practice nothing to do with giving notice to the creditors who have already been closely involved in negotiating a scheme and/or who have already locked up to support the scheme. The requirement to give notice of the convening hearing is part of the court's essential role to ensure the fairness of the process and to provide appropriate protection to the minority from the use of majority power which a scheme of arrangement necessarily involves. Rigorous compliance with procedural fairness may also be an important factor in obtaining international recognition of the scheme in other jurisdictions.

47. As Mr. Bayfield QC accepted in argument, the question of the adequacy of notice of the convening hearing is therefore not affected by the level of support for the scheme from the creditors who have already locked up. It falls to be judged by reference to the position of those who have not locked up and who might wish to oppose the formulation of classes proposed by the company.

48. In the instant case, unlike a number of the other recent schemes to which I was referred in this regard, it is important to appreciate that Group is not in any form of immediate financial distress that might necessitate shortening the notice period for the convening hearing. Although the Schemes are extension schemes and not of the most complex type of restructuring sometimes seen, they nonetheless involve significant amounts of money, they are not without their intricacies, and they do raise a number of issues for decision at this hearing which are not routine and which were not canvassed in the earlier communications to Scheme Creditors in the way in which they were explained in the Practice Statement Letter. In my view that is the most compelling factor which leads me to the conclusion that there was no good reason not to give a longer period of notice of the convening hearing in this case, notwithstanding the other factors upon which Mr. Bayfield QC relied.

49. I did not, however, consider that this conclusion required me to adjourn the convening hearing. In addition to the factors to which Mr. Bayfield QC referred which I did accept, he rightly pointed out that the size of the financial interests of the creditors who have not locked up is relatively small and none have thus far indicated any active opposition to the Schemes. Nor have any of those creditors communicated that they would wish to appear at the convening hearing if given more time to digest the materials and prepare.

50. As a pragmatic decision, therefore, I considered that the appropriate course for me to take was that set out in paragraph 12 of the New Practice Statement. My order convening the meetings included a provision giving Scheme Creditors a further period until 17 July 2020 (making four weeks in all from the circulation of the Practice Statement Letter) within which to apply to vary or discharge the order convening the

meetings. I should add, for the avoidance of doubt, that my decision to take such a course should not be taken in any way to signify that the requirements for giving adequate notice under the New Practice Statement can generally be by-passed in that way.

The role of the court at the convening hearing

51. As indicated above, paragraph 6 of the New Practice Statement provides, so far as relevant,

> "It is the responsibility of the applicant, by evidence in support of the application or otherwise, to draw to the attention of the court at the hearing for an order that meetings of creditors and/or members be held ("the convening hearing"):
>
> a. any issues which may arise as to the constitution of meetings of members or creditors or which otherwise affect the conduct of those meetings;
>
> b. any issues as to the existence of the court's jurisdiction to sanction the scheme;
>
> …
>
> d. any other issue not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme."
>
> (my emphasis)

52. That formulation of the New Practice Statement tracks the jurisprudence which I explored in Re Noble Group Limited (convening) [2018] EWHC 2911 (Ch), [2019] 2 BCLC 505 at [60]-[76]. The authorities make clear that at the convening hearing the court will consider class questions and other issues that go to the existence of the court's jurisdiction to sanction the scheme, but that the court will "emphatically not" consider the merits or fairness of the proposed scheme, and will also generally not consider other factors which properly form part of the discretionary question of whether the court should ultimately exercise its jurisdiction to sanction the scheme.

53. In addition, paragraph 6d of the New Practice Statement requires the company to draw the attention of the court at the convening hearing any issues not going to merits or fairness, but which might lead the court to refuse to sanction the scheme. The purpose of that requirement is give the court the opportunity, if appropriate, to indicate whether or not it sees an obvious "roadblock" which would prevent the scheme from being sanctioned in due course.

54. I therefore turn to consider the issues affecting the existence of the court's jurisdiction in relation to the Schemes.

Issues concerning the existence of jurisdiction

55. Under section 895(1)(a) CA 2006, the Court has jurisdiction to summon a meeting for the purpose of considering,

> "a compromise or arrangement ... between a company and ... its creditors, or any class of them".

"company liable to be wound up"

56. Part 26 applies to a "company". For these purposes, "company" means a company liable to be wound up under the Insolvency Act 1986: see section 859(2)(b) CA 2006.

57. As I indicated in the passage from Re Noble Group (convening) to which I referred above, [2018] EWHC 2911 (Ch) at [60]-[70], in the context of a scheme, this test is intended simply to identify the types of companies and associations to which the scheme jurisdiction applies. In the case of a foreign company, the questions (i) whether there is a "sufficient connection" with England, and (ii) whether the scheme will have international effectiveness do not go to the existence of jurisdiction: they go to the exercise of the court's discretion whether or not to sanction the scheme, and should therefore not be determined at the convening hearing. See, in this regard, the decisions of Lawrence Collins J in Re Drax Holdings Limited [2004] 1 WLR 1049; Briggs J in Re Rodenstock GmbH [2011] Bus LR 1245; and David Richards J in Re Magyar Telecom BV [2015] 1 BCLC 418.

58. In the instant case, there is plainly no difficulty in this respect. Though none of the Companies are incorporated in England or Wales, all are of type which could be wound up under the Insolvency Act 1986.

The EU dimension

59. The Recast EU Insolvency Regulation (EU 2015/848) does not apply to schemes of arrangement (which are not among the insolvency proceedings listed at Annex A of the Regulation) and does not restrict the meaning of "*company*" under section 895(2)(b) of the CA 2006: see Re DAP Holding NV [2005] EWHC 2092 (Ch) at [9]-[10] per Lewison J.

60. There is, however, an issue as to whether the court must be satisfied that it has jurisdiction over the Scheme Creditors pursuant to the Recast EU Jurisdiction and Judgments Regulation (EU 2012/1215). The Recast Judgments Regulation applies in "civil and commercial matters" and Chapter II deals with jurisdiction. The general rule underlying Chapter II is that any person domiciled in an EU Member State must be "sued" in the courts of that Member State: see Article 4(1). This general rule is, however, subject to a number of exceptions set out in Chapter II.

61. It has never been determined whether Chapter II of the Recast Judgments Regulation actually applies to schemes of arrangement at all, although the matter has been debated in a number of cases: see Re Rodenstock GmbH 2011] Bus LR 1245 at [47]-[63] per Briggs J; Re Magyar Telecom BV [2015] 1 BCLC 418 at [28]-[31] per David Richards J; Re Van Gansewinkel Groep BV [2015] Bus LR 1046 at [41]-[45]; and Re Noble Group Limited (convening) [2018] EWHC 2911 (Ch) at [60] – [70].

62. In order to avoid resolving this issue, the court has usually adopted the practice of assuming that Chapter II of the Recast Judgments Regulation applies to schemes of arrangement on the basis that the scheme proposal is to be regarded as a "dispute" concerning the variation of the existing relationship between the company and its creditors under which the company "sues" the scheme creditors as "defendants" seeking an order binding them to the scheme. If, on the basis of that underlying assumption, the court has jurisdiction over the scheme creditors pursuant to Chapter II of the Recast Judgment Regulation, then there is no need for the Court to determine whether that assumption is correct.

63. In this case, the Companies are incorporated in a variety of foreign jurisdictions in the United States of America and the European Union, and their Scheme Creditors are located in a similar variety of jurisdictions. To establish jurisdiction under Chapter II, the Companies primarily rely on Article 25 of the Recast Judgments Regulation. So far as material, Article 25(1) provides as follows:

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

64. As I have indicated, the Credit Agreements and the ICA were originally governed by New York law and were subject to the exclusive jurisdiction of the New York Court. However, as a result of the amendments made on 2 June 2020 with the consent of the requisite majority of the lenders under the contractual amendment regime, the governing law and jurisdiction provisions have now been changed to English governing law and English exclusive jurisdiction.

65. In the present case, I have read expert evidence from Professor Casey, an independent expert on New York law, to the effect that the amendments made on 2 June 2020 are valid and binding as a matter of New York law. On the basis of that evidence as to the effectiveness of the change of the jurisdiction clause in the relevant agreements, and on the assumption that Recast Judgments Regulation applies, the Article 25(1) would appear to me to be satisfied and this court has jurisdiction over the Scheme Creditors.

66. There is a further question of whether it is relevant that the amendment of the Credit Agreement and the ICA to confer such jurisdiction will be short-lived if the Schemes are sanctioned and the jurisdiction clauses are then changed to asymmetric jurisdiction clauses of the type to which I have referred. However, on the basis that (if it applies) there is currently jurisdiction under the Recast Judgments Regulation to entertain the applications in relation to the Schemes, that point seems to me to go to the question of whether there is a sufficient connection with England or whether the Schemes will be recognised abroad so as to justify the exercise of the court's discretion to sanction the Schemes. For reasons that I have explained, that question is not for decision at this convening hearing, but should be considered at the sanction hearing.

"compromise or arrangement"

67. The concept of an arrangement is extremely broad. In Re Savoy Hotel Ltd [1981] Ch 351, Nourse J summarised the position as follows (at 359E-F):

> "… there can be no doubt that the word "arrangement" in section 206 has for many years been treated as being one of very wide import. Statements to that effect can be found in the judgments of Plowman J. in In re National Bank Ltd. [1966] 1 W.L.R. 819, 829, and of Megarry J. in In re Calgary and Edmonton Land Co. Ltd. (In Liquidation) [1975] 1 W.L.R. 355, 363. That is indeed a proposition for which any judge who has sat in this court in recent years would not require authority. and its validity is by no means diminished by what was said by Brightman J. in In re N.F.U. Development Trust Ltd. [1972] 1 W.L.R. 1548. All that that case shows is that there must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition of "arrangement"."

68. In Re Lehman Brothers International (Europe) [2019] BCC 115 at [64], Hildyard J stated:

> "The terms "compromise" and "arrangement" have been construed widely by the courts: all really that is required is a sequence of steps involving some element of *give and take*, rather than merely surrender or forfeiture"

69. The Schemes plainly involve an arrangement in this sense. There is "give and take" between the Companies and the Scheme Creditors. Under the Schemes, the Scheme Creditors give will give up their right to receive payment at the existing maturity date and postpone the maturity date by approximately two years. In return they receive a number of changes to the terms of the Credit Agreements, including new commercial terms relating to interest, prepayments and new covenants.

Variation of rights against third parties

70. The Schemes involve a variation of the rights that Scheme Creditors have against guarantors of the debts of the Companies. The jurisdictional question is whether that is permissible under Part 26, and if so, how it can be achieved.

71. In that regard it is well established that in certain circumstances, a scheme can, as part of the arrangement as between the scheme company and a creditor which is given effect under Part 26, require the creditor to give up or vary its rights against a third party (i.e. a person other than the scheme company). That is permissible where such a release or variation of rights against third parties is, "necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors": see Re Lehman Brothers International (Europe) (No 2) [2010] Bus LR 489 at [65] per Patten LJ.

72. Such a feature is commonly to be found in schemes proposed by a borrower where other group companies have granted guarantees to scheme creditors of the scheme company's debt. Thus, if X is the borrower and Y is the guarantor, then X may propose a scheme to compromise the creditors' claims against X (as borrower) but which also contains a term under which creditors are required to give up their claims against Y (as guarantor). Otherwise, the creditors would be entitled to sue Y under the guarantee, and Y would be entitled to claim the entire amount back from X in accordance with the guarantor's right of indemnity. This "ricochet claim" would defeat the purpose of the scheme, since X would ultimately remain liable for the very amount that was purportedly compromised by the scheme.

73. That exactly corresponds with the position in the instant case, and on that basis I have no doubt that the provisions in the Schemes for the variation of the guarantees given to Scheme Creditors by other Group companies are within the scope of Part 26.

74. The mechanism which is now frequently adopted to achieve such a result is that the scheme contains a clause which confers authority upon a nominated person to execute a deed of release or variation as attorney on behalf of scheme creditors in favour of the third parties: see e.g. Re T&N Ltd [2007] Bus LR 1411 at [55]; Re Van Gansewinkel Groep BV [2015] Bus LR 1046 at [16]; Re Noble Group Ltd (sanction) [2019] 2 BCLC 548 at [24]. The same approach has been adopted in the instant case. Clause 3(a)(ii) of each Scheme appoints Holdco as an agent and attorney on behalf of the Scheme Creditors to execute the First Lien Amendment Agreement or the Second Lien Amendment Agreement (as applicable) (and to perform any other action on behalf of the Scheme Creditors which Holdco may consider necessary or desirable to implement or give effect to the Schemes).

75. In the recent case of Re Premier Oil PLC [2020] CSOH 39 the Court of Session expressly considered the question of whether a scheme could validly confer authority upon an attorney to execute such a deed of release or variation notwithstanding the provisions of section 1 of the Powers of Attorney Act 1971 which ordinarily requires a power of attorney itself to be executed by deed. Lady Wolffe held (at [218]-[230]), referring among other cases to Kempe v Ambassador [1998] 1 BCLC 234 (PC), that a scheme could validly confer a power of attorney since a scheme is given effect by statute (Part 26) and hence does not need to comply with additional formalities under the general law. I would respectfully agree with that analysis.

Class composition

76. The essential principles of class composition are well known. The basic principle is that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 (Bowen LJ) and Re UDL Holdings Ltd [2002] 1 HKC 172 at [27] (Lord Millett NPJ).

77. It is the legal rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests can be taken into account when considering whether, as a matter of discretion, to sanction the scheme. See Lord Millett NPJ's judgment in Re UDL at 184-5:

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

78. The rights of those included in a single class can be subject to material differences, provided that they are not "so dissimilar as to make it impossible for them to consult together with a view to their common interest". In the end, that question is a matter of judgment for the court based upon an identification of the most important commercial or financial issues which creditors have to weigh up when deciding whether to vote for or against the scheme. Practical considerations, both of the extent of any differences in rights, and of attempting to define separate classes, also play a role, since, as Neuberger J remarked said in Re Anglo American Insurance Co Ltd [2001] 1 BCLC 755 at 764, "if one gets too picky about different classes, one could end up with virtually as many classes as there are members of a particular group". Importantly, it should also be borne in mind that classes should not be sub-divided more than is necessary, "lest by ordering separate meetings the court gives a veto to a minority group": see Hawk at [33] per Chadwick LJ.

79. In order to carry out this analysis of the extent and importance (or otherwise) of differences between creditors of their current rights which are to be released or varied, and the rights which are to be given in their place under the scheme, it is generally necessary to identify a comparator to the scheme – i.e. the position that would apply if the scheme were not to proceed. In many creditors' schemes, as was the case in Hawk, that comparator is a relatively immediate commencement of insolvency proceedings (an administration or liquidation). But there are other cases where that is not so: see e.g. Re British Aviation Insurance Co Ltd [2006] 1 BCLC 665. In the instant case, for the reasons that I have identified above, the comparator is not an immediate insolvency, but an expedited sale process of the business and assets of the Group, the possible outcome of which is considered in the EY report.

80. Against that background, the classes proposed by the Companies are as follows:

    i) for each of the Schemes proposed by a Company which is a borrower under the First Lien Term Facilities, the lenders to that Company under those facilities should vote in a single class meeting; and

    ii) for each of the Schemes proposed by a Company which is a borrower under the Second Lien Term Facilities, the lenders to that Company under those facilities should vote in a single class meeting (separate from any class meeting in respect of the First Lien Term Facilities).

81. It follows that for Flint GmbH, which is a borrower under both the First Lien Term Facilities and the Second Lien Term Facilities, it is proposed that there should be two class meetings in respect of the Scheme proposed by that Company: one meeting of

the lenders under the First Lien Credit Agreement, and one meeting of the lenders under the Second Lien Credit Agreement. For all the other Companies which are borrowers under the First Lien Credit Agreement only or the Second Lien Credit Agreement only, there will simply be one Scheme meeting of the lenders under the respective Credit Agreement.

82. The proposal that there should be separate meetings in respect of the two sets of lenders to Flint GmbH has been made essentially for two reasons,

   i) first, because under the ICA, the Second Lien Term Facilities are subordinated to the First Lien Term Facilities. It follows that the First Lien Term Facilities are much more likely to be repaid, and will be repaid in priority to the Second Lien Term Facilities. This difference in ranking is a significant difference between the legal rights of the lenders under the First Lien Term Facilities and the lenders under the Second Lien Term Facilities; and

   ii) secondly, there are also material differences between the ways in which the lenders under the First Lien Term Facilities and the lenders under the Second Lien Term Facilities will be treated under the Schemes. For example, the initial cash interest rate will increase by 0.5% on the First Lien Term Facilities but will decrease by 3% on the Second Lien Term Facilities, and a significantly higher rate of PIK interest will accrue on the Second Lien Term Facilities than the First Lien Term Facilities.

83. Taken together, I agree with the Company that given these differences, the lenders under the First Lien Term Facilities and the lenders under the Second Lien Term Facilities could not sensibly find enough of a common interest to discuss as to the terms on which they are being asked to grant a loan extension to Flint GmbH.

84. The further and more complex question is whether in relation to each of the Companies, the lenders under the First Lien Term Facilities should vote as a single class or be further sub-divided; and whether the lenders under the Second Lien Term Facilities should also vote as a single class or be further sub-divided.

85. In the case of each of the Credit Agreements,

   i) the lenders are all lenders under the same Credit Agreement, benefit from a common security package, and enjoy the same ranking position under the ICA;

   ii) the alternative to the Schemes would involve a distressed sales process. If such a sale could be achieved, the lenders under the each of the Credit Agreements would share in the proceeds of the sale *pro rata* to the value of their claims, and hence face the same risk that they would not be repaid; and

   iii) under the Schemes, the lenders under each separate Credit Agreement will also be treated in the same way by the amendments to the commercial terms of their respective Credit Agreement.

86. The essential question for all of the lenders under each separate Credit Agreement is whether to extend the maturity date of their loans now on the proposed amended terms or subject themselves to the uncertainties of a distressed sales process until the

current maturities. This is a question on which the lenders under each of the separate Credit Agreements are all in the same position. Prima facie, therefore, I agree with the Companies that the lenders under each of those Credit Agreements should vote in a single class.

87. In fulfilment of the Companies' duties of candour to the court on this application, Mr. Bayfield QC rightly drew attention, however, to the following points that could conceivably be thought to fracture the single class of lenders under the respective Credit Agreements.

Cross-holdings

88. Some of the Scheme Creditors are lenders to Flint GmbH under both the First Lien Credit Agreement Facilities and the Second Lien Credit Agreement. However, it is well established that such "cross-holdings" give rise to potentially different interests rather than rights and do not require any separate class meetings to be convened. Such matters are appropriately considered at sanction when it can be ascertained whether the majorities in one class have been obtained as a result of creditors with cross-holdings voting so as to promote their interests in another class rather than in the interests of the class in which they are voting.

Interest rates

89. There are slight differences between the interest rates currently applicable to different tranches in the First Lien Term Facilities.

Tranche	Base rate	Current Margin
Initial Euro Term Loans (€)	EURIBOR, with 0.75% floor	3%
Initial Term B-2 Loans ($)	LIBOR, with 1% floor	3%
Initial Term C Loans ($)	LIBOR, with 1% floor	3%
Euro Term B-3 Loans (€)	EURIBOR, with 0.75% floor	3%
Incremental Euro Term B-4 Loans (€)	EURIBOR, with 0.75% floor	3%
Euro Term B-5 Loans (€)	EURIBOR, with 0.75% floor	3%
Term B-6 Loans (€)	EURIBOR, with 0.75% floor	3%
Euro Term B-7 Loans (€)	EURIBOR, with 0.75% floor	3%
Term B-8 Loans ($)	LIBOR, with 1% floor	3%

On the basis that EURIBOR and LIBOR are currently well below the floor, the current total interest rate for the various tranches equates, or will during the next interest period equate, to either 3.75% or 4% per annum.

90. There are also slight differences between the interest rates potentially applicable to the different tranches of the Second Lien Term Facilities.

Tranche	Base rate	Margin
Initial Term B-2 Loans	LIBOR, with 1% floor	7.25%

($)		
Initial Euro Term Loans (€)	EURIBOR, with 1% floor	7.25%

However, the basis that EURIBOR and LIBOR are currently well below the 1% floor, the current total interest rate for all lenders is 8.25% per annum.

91. The effect of the Schemes will be to impose a flat rate increase to the initial margin on the First Lien Term Facilities, resulting in a margin of 4.25% per annum and a total cash interest rate of either 5% or 5.25% per annum; and to impose a flat rate reduction of 3% in the margin on the Second Lien Term Facilities, taking the total cash interest rate on those facilities down to 5.25% per annum. PIK interest will be introduced in relation to both facilities at the rate of 0.75% for the First Lien Term Facilities and 5.75% for the Second Lien Term Facilities. There is also a new exit fee of 2% for both Credit Agreements.

92. As noted above, the essential question for all Scheme Creditors is whether to extend the maturity dates of the various facilities for two years on the new interest and other terms offered, or whether to take the risk of a distressed sales process now. When compared with the overall changes in rates and terms proposed under the Schemes I do not think that the slight difference of 0.25% in the current cash interest rates on the tranches of the First Lien Term Facilities is likely to make any material difference to the approach which the lenders holding those different tranches under the Credit Agreement take to the determination of that question. There is in reality no difference in the rates applicable to the different tranches of the Second Lien Term Facilities.

Lock-Up Agreement

93. A very large proportion of the Scheme Creditors have signed or acceded to the Lock-Up Agreement and have thereby committed to vote in favour of the Schemes. It is well established that the entry into such an agreement does not, of itself, fracture a class: see Re Telewest Communications plc [2004] EWHC 924 (Ch) at [52]-[55] per David Richards J.

94. As David Richards J pointed out in Telewest, it is appropriate for a lock-up agreement to include a provision which allows a signatory to terminate the agreement and cease to support the scheme in the event of a "material adverse change" to the company's financial position. This ensures that no signatory is irrevocably bound in all circumstances (no matter how significant a change may occur) to vote for the scheme, and prevents any argument that the locked-up votes "belong" to the company. The Lock-Up Agreement in the present case includes a provision that allows for termination in the event of a material adverse change.

Consent fees

95. The Lock-Up Agreement (as amended) provides for the payment by the Companies of a so-called "consent fee" to each lender under the Term Loan Facilities that enters into or accedes to the Lock-Up Agreement, conditional upon the restructuring transaction becoming effective. For lenders who signed or acceded to the Lock-up Agreement on or before 19 May 2020 the fee was 0.5% of the principal amount of the

locked-up debt held by the relevant lender; and for those who accede to the Lock-Up Agreement after 19 May 2020, the fee is halved to 0.25% of the principal amount of the locked-up debt held by the lender.

96. The existence of the opportunity to benefit from those consent fees has been made known to all Scheme Creditors since 8 April 2020 (when the draft Lock-Up Agreement was uploaded to the Data Sites). Of the creditors who have locked up, all but one (about 430) of the lenders under the First Lien Term Facilities signed up in time to qualify for payment of the higher fee of 0.5%, one has since qualified for the lower fee of 0.25%, and the remaining approximately 65 have not locked up. All of the lenders under the Second Lien Term Facilities have locked up and qualify to receive the 0.5% consent fee apart from the Penny Holders. I was told by Mr. Bayfield QC that the intention is that the Lock-up Agreement will remain available for accession (and hence for qualification for payment of the lower 0.25% consent fee) until shortly before the Scheme meetings are held.

97. As indicated above, one purpose of a lock-up agreement is to provide the scheme company with comfort that there is sufficient support for the scheme before it embarks upon an application under Part 26. To achieve that end, the consent fee is undoubtedly designed to provide a material inducement to creditors to engage with the proposals at an early stage and provide a commitment as to their voting intentions before the company begins the court process. Indeed, as in the present case, a higher consent fee is sometimes offered to "early birds" who commit long before even a Practice Statement letter is sent.

98. The full implications of the practice of paying consent fees in this way have never been considered at an appellate level. However, a number of authorities at first instance indicate that in principle a consent fee of this nature will not fracture a class provided that it is made available to all scheme creditors, and provided also that it does not induce creditors to commit to vote in favour of a scheme which they might otherwise reject.

99. For example, in re DX Holdings Limited [2010] EWHC 1513 (Ch) Floyd J considered a consent fee and stated, at [7],

> "In the present case I was not satisfied that the existence of the benefits meant that those who had accepted them formed a separate class. Firstly, there is no doubt that the benefits were available to all creditors if they entered into the Agreement: they were all made aware of the offer in March 2010. Secondly, the evidence shows it to be most unlikely that a creditor who considered any substantive aspect of the scheme to be against its interest would be persuaded to vote in favour by the existence of the fees."

100. Likewise, in Re Seat Pagine Gialle SpA [2012] EWHC 3686 (Ch) at [16]-[22] David Richards J referred to DX Holdings and to the decision of Hildyard J to similar effect in Primacom Holding GmbH [2011] EWHC 3746 at [55]- [57] and stated, at [18]-[19],

> "18. …This is not a case in which the motivation or part of the motivation for the lock-up is to enable difficult negotiations to proceed. As I see it, on the whole the negotiations have already occurred and a proposal is to be put before creditors.
>
> 19. On the other hand, it is an offer which is to be made available to all scheme creditors and it remains the case that it is a relatively small amount of money. Looked at objectively, I doubt whether a creditor with substantial objections on commercial grounds to the proposals would be swayed in their view by a consent fee at the proposed level. There is certainly no evidence before me to suggest that this would be the case.
>
> 20. If it could be shown that the lock-up agreement did have a serious impact on the way in which creditors voted, that is a matter which plainly could be raised at the sanction hearing and the court could consider whether either it meant that the classes had been wrongly constituted or, perhaps more probably, whether the discretion should be exercised against sanctioning the scheme."

101. Reference can also be made to the short comments of Zacaroli J in Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [16]-[17] to the effect that the ability to qualify for consent fees in that case was available to all creditors and was of such amount that he "[had] no doubt that it is not such as might have an influence on voting intentions".

102. As in all those cases, the amount of a consent fee is frequently fixed by reference to a percentage of the face value of the debt held by the scheme creditor. Following remarks made by David Richards J in Re JSC Commercial Co Privatbank [2015] EWHC 3299 (Ch) at [26], in Re Noble Group Ltd [2019] BCC 349 (convening judgment) at [150]-[151], I considered how the materiality of such an amount might be assessed:

> "... I think the court will obviously have regard to the level of the fees in question, but in most cases I do not think that it is appropriate simply to look at the percentage which the fee bears to the face value of the debt held by the potential recipients. As David Richards J suggested in Privatbank, that notional figure is unlikely to be a meaningful one in a situation where the company is in financial distress, where its debt is trading at much less than its par value and where the return in a liquidation is predicted to be very low….
>
> What would seem to be far more relevant is the size of the fee when compared to the predicted returns offered to all creditors under the scheme and the returns that creditors are predicted to make in a liquidation ... The court can then make a judgment as to whether the value of the extra fees is likely to make a real difference to the decision faced by the creditors who will receive them and those who will not."

103. The point which David Richards J had made, and which I sought to develop, was that when assessing the materiality of a consent fee to the decision which creditors have to make, and hence whether it may have affected their voting intentions, a simple comparison to the face value of distressed debt is unlikely to be meaningful. The decision that creditors often face in restructuring schemes is whether to exchange debt with a real economic value much less than its face value (because of the risk of default and the predicted low return in the alternative scenario of a formal insolvency), in return for the anticipated economic value of the benefits offered under the scheme.

104. In the instant case, however, Mr. Bayfield QC correctly observed that comparison to a liquidation is not appropriate, because the alternative to the Schemes is not an immediate liquidation but an accelerated sales process leading to payment of the liabilities under the RCF and Credit Agreements at maturity. As to that, Mr. Bayfield QC drew attention to the opinion in the EY report which was that the estimated outcome of such a sales process might produce returns for the lenders under the First Lien Term Facilities of about 79% (low case), 90% (medium case) and 100% (high case), and would only produce a return of under 10% for the lenders under the Second Lien Term Facilities in the high case outcome. Although far from a precise indicator, he also suggested that those predictions corresponded broadly with the fact that at mid-June 2020 (albeit after the proposed restructuring and the degree of support for it had been announced) the First Lien Term Facilities were trading in the middle of the range of 80-90% of face value.

105. On the basis of these figures, it is true that the consent fees of 0.5% represent a small fraction of the current value of the debt under the First Lien Term Facility. Mr. Bayfield QC therefore submitted that I could safely conclude that the promise of an additional payment of such consent fees could not have affected the voting intentions of the Scheme Creditors.

106. I do not accept that submission. The question which the authorities to which I have referred require me to address is whether creditors who would otherwise have wished to vote against the Schemes are likely to have been induced to vote in favour of the Schemes because of the offer of an additional consent fee which will not be available to them if they remain opposed to the Scheme or abstain.

107. In that regard, as I have indicated, under the Schemes, the lenders under the First Lien Term Facilities will retain their existing debt and the Companies will be free to continue to operate. By extending the maturity date, the lenders do not give up any part of their holdings of debt. What they give up is the possibility of repayment of what EY estimate may be between 79% and 100% of their debt in a year's time, in return for a hope that they will be in at least the same position as regards repayment at the extended maturity date. However, because the lenders are not assured of being in the same position as regards repayment at the extended maturity date, and take an additional credit risk in that regard, the primary consideration offered to them under the Schemes is an immediate increase and the elimination of the rachet, resulting in a total increase of 1.25% in the current margin (from 3% to 4.25%), together with the introduction of PIK interest of 0.75% per annum and a possible 2% exit fee. Accordingly, the question that the lenders under the First Lien Term Facilities essentially have to decide is whether foregoing an earlier repayment of the principal

and any extra risks of extending the maturity date are properly compensated for by those increased interest rates and possible exit fee in the meantime.

108. In that context, given that the total increase in the headline cash interest rate under the First Lien Term Facilities will be 1.25% per annum for three years, on the basis of the evidence now before me I do not think that I can say with confidence that a one-off payment of an additional 0.5% of the face value of the debt might not have swayed a creditor to vote in favour who was not entirely satisfied by the offer of annual increases under the terms of the Schemes.

109. The position might be said to be even more uncertain in relation to the lenders under the Second Lien Term Facilities. Such lenders are at risk of subordination in an asset sale to repay their debt whenever it occurs, and under the Schemes they are being subjected to a reduction of 3% in the cash interest rate payable on their debt for three years, only compensated for by the introduction of PIK interest of 5.75% per annum and the possible exit fee of 2%. The lenders under the Second Lien Term Facilities might simply have been attracted by the prospect of deferring an asset sale until the market conditions might have improved. However, I cannot say that a one-off payment of 0.5% of the face value of the debt as a consent fee might not have made the reduction in the rate of cash interest under the Schemes acceptable to a lender which would otherwise have preferred to retain the 3% higher cash rate of interest for a year and been prepared to take its chance on an accelerated sale process now.

110. However, I do not think that these uncertainties should lead me to sub-divide the classes, essentially for pragmatic reasons. If were to do so, I would have to create a separate class of those creditors who have not signed or acceded to the Lock-Up Agreement (or possibly those who would not have done so prior to the Scheme Meetings). On the current figures, that would create a separate class of lenders under the First Lien Term Facilities comprising a significant number of creditors (about 65) but who together would hold only 2.2% by value of the debt due under the First Lien Term Facilities. Such a sub-division would, in effect, be creating a right of veto over the Schemes for the holders of only 2.2% in value of the relevant Scheme claims. That cannot be a sensible approach bearing in mind the warnings in the authorities such as Hawk against creating just such a right of veto, and also bearing in mind the point made both by Chadwick LJ in Hawk and by David Richards J in Seat Pagine (supra) that any concerns about the impact of the consent fee can always be raised at sanction as part of the court's exercise of discretion.

111. The position is *a fortiori* in relation to the Second Lien Term Facilities, given that, as I have indicated, the only Scheme Creditors who have not locked up to vote in favour of the Schemes are the Penny Holders whose claims are truly *de minimis*.

Professional fees

112. Holdco has agreed to pay the reasonable fees, costs and expenses incurred by certain professional advisers to the Ad Hoc Group in connection with the Schemes and the wider restructuring transaction.

113. Mr. Bayfield QC submitted, and I agree, that in principle, this is quite different from the payment of a consent fee. Holdco has simply agreed to defray (and will have the ability to satisfy itself as to the justification for) the reasonable disbursements that the

Ad Hoc Group have incurred or will incur as a result of the Group's restructuring. Such an arrangement does not provide any "bounty" or net benefit to the Ad Hoc Group. Moreover, in contrast to the consent fees, the relevant professional fees and expenses will be payable in any event and will not be dependent upon the sanction of the schemes. See in this regard Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [18] per Zacaroli J.

114. Accordingly I shall simply order one class meeting for the lenders under the First Lien Term Facilities and one for the lenders under the Second Lien Term Facilities as appropriate in the case of each of the Companies.

No "roadblocks"

115. I have already indicated that although issues going to the exercise of the court's direction are not for resolution at the convening hearing, the court can, if it sees fit, indicate whether or not it sees a "roadblock" ahead which would inevitably lead to the scheme not being sanctioned.

116. In the instant case, the one area in which such an indication was sought was in relation to the question of whether the Schemes would have a sufficient connection with England and Wales to justify the exercise of the Court's discretion to sanction the scheme. The issue arises because none of the Companies are incorporated in England or have any material operational or business connection with this jurisdiction. The only connection with this jurisdiction is that the debts which are to be restructured are, as a result of the very recent amendment of the Credit Agreements and the ICA, now governed by English law and are subject to an exclusive jurisdiction clause in favour of England.

117. There is, as I have pointed out above, also a related question which would go to the exercise of the court's discretion, namely whether, the Schemes are likely to be recognized as having modified the liabilities under the Credit Agreements in the various jurisdictions in which the Companies have assets and would thereby be effective to prevent hostile action by any Scheme Creditor based upon the existing maturity dates.

118. In this regard, Mr. Bayfield QC drew attention to a number of cases in which a scheme has been sanctioned in which an amendment was made to governing law and jurisdiction provisions in credit facilities in order to claim a sufficient connection to England for a subsequent scheme: see e.g. Re Apcoa Parking Holdings GmbH [2015] Bus LR 374; Re NN2 Newco Ltd [2019] EWHC 1917 (Ch); and Re Lecta Paper UK Ltd [2020] EWHC 382 (Ch).

119. In light of the fact there is already a very high proportion of Scheme Creditors who have committed to vote in favour of the Schemes, Mr. Bayfield QC also referred me to Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch). In that case a sufficient connection with England was created by the acquisition of an "off-the-shelf" English company, which then acceded to notes governed by New York law as a co-issuer, and a scheme was promulgated a scheme to discharge the notes. One of the factors which clearly persuaded Newey J to sanction the scheme was the very high proportion of noteholders in favour, and indeed Newey J indicated that he regarded it as an example of "good forum shopping".

120. As regards international effectiveness, I also note that I have been provided with expert evidence which is said to demonstrate that although that the Companies do not have their COMIs or any establishment in England, the Schemes are nevertheless likely to be recognised in all of the jurisdictions where the Companies are incorporated, which are also the jurisdictions in which the Group holds the bulk of its assets – namely Germany, the Netherlands, Sweden and the United States of America. I stress that I have not reviewed (and was not invited to review) that evidence in any detail at this stage. However, its existence gives me no reason to believe that the Schemes are unlikely to be effective in the relevant jurisdictions in which the Group operates and has material assets.

121. Accordingly, at this stage I will indicate that I see no obvious roadblock or reason why the court would inevitably decline to exercise its discretion to sanction the Schemes in due course.

The Explanatory Statement

122. Paragraph 15 of the New Practice Statement is as follows,

> "The court will consider the adequacy of the explanatory statement at the convening hearing. The court may refuse to make a meetings order if it considers that the explanatory statement is not in an appropriate form. However, the court will not approve the explanatory statement at the convening hearing, and it will remain open to any person affected by the scheme to raise issues as to its adequacy at the sanction hearing."

123. The reference to the court "considering the adequacy" of the explanatory statement is not intended to suggest that the court will generally do anything other than to ascertain that the essential elements which it would expect to see in an explanatory statement are present. If they are not, or if the form of the statement is for some other reason obviously unsuitable, the court may decline to make a meetings order: see e.g. Re Indah Kiat International Finance Co BV [2016] BCC 418. As the New Practice Statement goes on to makes clear, however, what the court will most assuredly not do is to approve or give its imprimatur to the contents or accuracy of the explanatory statement.

124. In the instant case, I am satisfied that the explanatory statement which has been drafted contains the necessary components and is in a comprehensible form. It describes the reasons for the promotion of the Scheme, the background to its formulation, the alternative to the Schemes by reference to the contents of the EY report, and the alterations intended to be made to the Credit Agreements and the ICA by the Schemes. It also contains the statement of directors' interests as required by Part 26.

The proposed directions as to the summoning and conduct of the Scheme Meeting

125. In summary, the proposed timetable is for the notice of the meetings to be sent as soon as practicable and for the Scheme meetings to be held on 23 July 2020, with a sanction hearing scheduled for 30 July 2020. The Explanatory Statement and its

appendices (including the Notice of Scheme Meetings, the Proxy Form, etc.) was to be uploaded to the Data Sites and the Scheme Website as soon as reasonably practicable after the convening hearing. I have also been told that the Companies promptly drew the attention of Scheme Creditors to the ability to apply until 17 July 2020 to vary or discharge the order convening the meetings.

126. Uncommitted Scheme Creditors will therefore have at least 14 days to consider the Explanatory Statement before the Scheme Meeting and 21 days before the sanction hearing. Given that (absent a material adverse change) it is a forgone conclusion that the Schemes will be approved by the necessary majorities in each class at the meetings, the question in reality is whether a dissentient creditor would have sufficient time to consider and formulate a challenge to the Schemes by the time of the sanction hearing so that argument could either then be heard or directions given for the determination of the challenge.

127. Coupled with the time that has already elapsed and the ability to apply until 17 July 2020 for a variation of the meetings order, I think that the periods of about two weeks from the date of circulation of the Explanatory Statement until the meetings and three weeks to the sanction hearing are sufficient.

128. In light of the COVID-19 pandemic, it is proposed that the Scheme meetings will be held "virtually" by webinar. The very recent decision of Re Castle Trust Direct plc [2020] EWHC 969 (Ch) contains a detailed analysis of whether the court has jurisdiction to give directions for a virtual scheme meeting. Having considered the authorities, Trower J answered that question in the affirmative. He stated at [42]-[43]:

> "42. In my view, what is important for the purposes of a meeting to be held under Part 26 is that there can be said to be something sufficient to amount to "a coming together" with the ability to consult. A coming together for consultation is something that is capable of being achieved by telephonic communication where those who are participating are able to hear and ask questions and express opinions in circumstances in which everybody else who is present at the meeting is also able to hear, ask questions and express opinions. Those seem to me to be the essential requirements of a meeting for the purposes of Part 26. Can it be said at the end of the day that what is achieved under the terms of the meeting that is proposed constitutes a collective coming together for the purpose of consultation and during the course of which consultation is both achievable and (to the extent desired by creditors) actually achieved?
>
> 43. I should add that, in a situation in which a meeting by electronic means is directed and occurs, the court will be particularly concerned to ensure at the sanction stage that what happened at the meeting directed at the convening stage did in fact constitute a coming together for the purposes of a consultation. What that means in practice is that the court is likely to require evidence at the sanction hearing as to how the technology worked and to require evidence at the sanction

> hearing as to whether or not there were, as seen either at the meeting itself or subsequently established, any difficulties in relation to participation at the meeting. The court will require to be satisfied that there were no difficulties for participating creditors in their ability to hear, ask questions or express opinions at the meeting or otherwise have their ability to contribute to the business of the meeting impaired."

129. I am entirely content to follow that course, and the Companies have indicated that they will ensure that, after the Scheme meetings are held virtually, the evidence for the sanction hearing will deal with the matters identified by Trower J.