Neutral Citation Number: **[2023] EWHC 1819 (Ch)**

Case No: **CR-2023-001437**

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

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

Date: **14 July 2023**

Before :

Mr Justice Trower

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In Re :

IN THE MATTER OF CIMOLAI S.P.A.
- and -
AND IN THE MATTER OF LUIGI CIMOLAI HOLDINGS S.P.A.
- and -
AND IN THE MATTER OF THE COMPANIES ACT 2006

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Adam Al-Attar and Lottie Pyper (instructed by **Kirkland & Ellis International LLP**) **on behalf of the Plan Companies**

Hearing dates: **14th July 2023**

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APPROVED JUDGMENT

Mr Justice Trower **Friday, 14 July 2023**
(**14:34** pm)

Judgment by **MR JUSTICE TROWER**

1. This is an application by two Italian companies, Cimolai SpA ("Cimolai") and Luigi Cimolai Holdings SpA ("LCH"; together "the Plan Companies"), for orders pursuant to section 901C of the Companies Act 2006 to convene meetings of creditors to consider, and if thought fit, approve restructuring plans.
2. The Plan Companies are the principal operating subsidiary and the holding company of the Cimolai Group. The Group's ultimate own is Mr Luigi Cimolai. It carries on business as a designer and manufacturer of complex steel structures and operates in 58 countries throughout the world. As at 31 January 2023, Cimolai had 796 employees and LCH had 14 employees. The businesses of the Group are based in and managed from Italy, with headquarters in Porcia.
3. The evidence shows that the principal cause of the financial difficulties from which the Group is currently suffering flow from claims made against the two Plan Companies under a number of foreign exchange derivative contracts entered into by Cimolai and a single derivative contract entered into by LCH with JB Drax Honore (DIFC) Ltd ("JB Drax"), in respect of which Cimolai acted as guarantor.
4. The majority of those contracts, including the contract with JB Drax, are governed by English law, and most of those are the subject of legal proceedings in England. The remaining contracts are governed by Italian law, Dutch law, Irish law and Swiss law.
5. Claims and enforcement proceedings have been commenced in respect of ten of the English law derivative contracts, including the JB Drax contract, together with the derivative contracts governed by Dutch and Swiss law. There are three other English law contracts and six other contracts governed by other laws which are not currently the subject of legal proceedings.
6. These claims have led to margin calls under those contracts and the appropriation of many millions of euros of cash collateral. For present purposes, it is not necessary to give full details of the

circumstances in which the Plan Companies came to incur liabilities under those derivative contracts; it suffices to say that the Plan Companies' position is that they and many hundreds of transactions under them were entered into without authority by two former employees. To a greater or lesser extent, those liabilities are now disputed.

7. The extent of this exposure is such that Cimolai has paid approximately €81.5 million cash collateral under the JB Drax contract in its capacity as guarantor, and approximately €16.6 million in margin calls for its own derivative contracts. If the derivative contracts are valid, Cimolai is liable for a further approximately €150 million as at 21 June 2023 in respect of its own derivative contracts, and both Plan Companies are liable for approximately a further €13.3 million in respect of the JB Drax contract.

8. In October 2022, both Plan Companies applied to the Court of Trieste to initiate restructuring proceedings by way of concordato preventivo. On 24 October 2022, the Court of Trieste commenced concordato proceedings against both Plan Companies, appointed a judicial commissioner and granted a stay preventing creditors from commencing or continuing enforcement action against their assets. The role of the judicial commissioner is to supervise the concordato proceedings, to coordinate with the Court of Trieste in relation to them and to prepare a report addressing the reasons for the Group's crisis and actions taken by the Group during the period of distress. It is also his task to provide a detailed overview and a valuation of the concordato proposals.

9. On 29 December 2022 this court (Fancourt J) made an interim order under the Cross-Border Insolvency Regulations ("CBIR") recognising the concordato proceedings in England. Final relief recognising them as a foreign main proceeding under Article 17 of schedule 1 to the CBIR was granted by Rajah J on 19 April 2023. The court's order of 19 April 2023 imposed a moratorium on creditor action in respect of all claims against the Plan Companies. It provided that the stay in

relation to JB Drax's claim would remain in force until 19 June 2023, and it follows that the stay in respect of that claim has now expired.

10. Meanwhile, the concordato proposals were being developed and were filed with the Court of Trieste on 20 February 2023 and accepted on 23 March 2023. This had the effect of moving the concordato preventivo proceedings into stage 2. The Plan Companies are then permitted to make further changes to the proposals (which is what they have done) up until the beginning of July on a date 20 days before the closing of the voting window. The date for making changes to the concordato proposals has therefore now expired.
11. The Plan Companies engaged Lazard to run a competitive sales process to run concurrently with the development of the concordato proposals. In the event, as I understand it, no non-binding offers were received by Lazard prior to the 15 April deadline, but subsequently a preliminary offer has been received for part of the Group's operation, the viability of which is currently being assessed.
12. The purpose of the restructuring plans put before this court is to implement the same proposal under English law as is proposed by the concordato proposals under Italian law. It does so in circumstances in which most if not all of the creditors with claims under the English law derivative contracts have declined to submit to the jurisdiction of the Court of Trieste or otherwise to participate in the concordato proceedings in Italy.
13. The background to and consequences of this state of affairs can be summarised shortly as follows. The vast majority of the Group's creditors have claims which are governed by Italian law or by the law of another EU Member State. It is likely that their claims will be effectively compromised by the concordato proposals. The same cannot be said for the claims governed by English law, because of the principles established by the decision of the Court of Appeal in the *Anthony Gibbs and Son v La Societe Industrielle et Commerciale de Metaux* (1890) 25 QBD 399, unless the relevant claimant submits to the jurisdiction of the Court of Trieste for this purpose.

14. It is said that this gives rise to difficulties in giving effect to a comprehensive restructuring, because the financial difficulties with which the Plan Companies are faced have been driven to a significant extent by the derivative contracts given by English law. Furthermore, although the Group does not have significant assets in England available for enforcement purposes (although it does have some), it will in the future be desirable for the Group's continuing business for it to have a presence in England, and there may be other jurisdictions which would recognise an English judgment and in which it would be desirable for members of the Group to carry on business.
15. In my view, these considerations provide a rational basis for the Plan Companies to conclude that a parallel English restructuring plan is an appropriate process to be undertaken in conjunction with the proposals being advanced by the Italian concordato preventivo. It will bring greater certainty to the finality of the restructuring as a whole, and will ensure that the restructuring for which the concordato proposals and these restructuring plans make provision binds all Plan Creditors collectively in as effective a manner as is practicable.
16. The key features of the restructuring plan are that the secured creditors will be repaid the secured portion of their claims in full, while Cimolai will be responsible for paying a portion of its cashflow to satisfy the remaining liabilities to Plan Creditors at percentage rates which vary between classes. There are also other provisions relating to the introduction of a new governance structure to oversee the implementation of the restructuring and to report to the judicial commissioner on a regular basis after sanction.
17. The Group's ultimate shareholder has committed to contribute a figure of some €5.4 million to Cimolai and some €4.6 million to LCH to assist in the implementation of Cimolai's business plan going forward. It is also proposed that each creditor will receive in respect of all or such part of its claim as is unsecured an equity instrument called the "up-side SFP" which entitles them to a further 15% of their claims by way of further distribution out of Cimolai's cashflow from the date of the approval of its 2026 financial statements in early 2027. Cimolai is to have an option to purchase

outstanding up-side SFPs at a price which varies by reference to the time at which the option is exercised.

18. All of the creditors whose claims are compromised by the concordato proposals will qualify as creditors under the restructuring plans in the same amounts. This means, therefore, that the plans have been designed having regard to the ranking of rights and the principles applicable to creditor claims in an Italian insolvency, which is one of the two possible comparators for class purposes, a point to which I will return shortly. The application of these principles therefore excludes expense creditors; critical creditors whose claims accrue prior to the assessment date, which, for present purposes, is 19 October 2022; preferred claims under Italian law (such as employees); claims against Cimolai arising after the assessment date; and any claims against Cimolai which are subordinated under Italian law and which will receive no return.

19. It is convenient at this stage to refer to one of the mandatory provisions of Italian law which deals with the ranking of different classes of creditor in an insolvency and which is relevant to the constitution of classes for the purposes of the restructuring plan meetings. The unsecured portion of a secured creditor's claim is demoted to being an unsecured claim, but ranking in a different place in the hierarchy. The same technique is used to deal with other categories of claim that would rank behind secured creditors but ahead of ordinary unsecured creditors to the extent that they are in sufficient funds to pay them in full. These creditors rank in an insolvency between secured creditors and ordinary unsecured creditors. For the purposes of the plans they have been called "demoted unsecured creditors", and the level of their ranking as such will depend on the level of insolvency ranking of the original claims.

20. The complexity of this ranking of creditors in a judicial liquidation carries through to the terms for each category of creditor, which are offered under the terms of the concordato proposals and therefore the terms of the restructuring plans. The mechanism which the restructuring plans use for giving effect to their purpose is to give effect to the concordato proposals as from the time of their

sanction by the Court of Trieste. They also provide for powers of attorney to execute the necessary documents for the release of claims and for a stay of proceedings.

21. The role of the court at this hearing is not to consider the merits or fairness of the proposed plans; that is an issue for the sanction hearing. Rather, the court is concerned to reach a determination on the proper class composition of the plan meetings, together with other jurisdictional issues or other roadblocks apart from pure fairness questions which would, if made out, cause the court to refuse to sanction the plan.

22. In order to enable the court to reach a proper determination on the issues for consideration at this hearing, the 26 June 2020 Practice Statement (Companies: Schemes of Arrangements under Part 26 and 26A of the Companies Act 2006) requires creditors to be notified of the proposals in sufficient time to enable them to consider what is proposed, to take appropriate action, and, if so advised, to attend the hearing. The extent of the notice required depends on the facts of each case. In the present case, practice statement letters were sent out on 18 April, 31 May and 5 July 2023. I have read each of them. The need for the two supplemental practice statement letters was driven by changes to the concordato proposals, which, as I have mentioned, were possible under Italian law up until the beginning of July.

23. There has been a certain amount of correspondence from Plan Creditors, but the one to which my attention has most particularly been directed is a letter from Eversheds Sutherland dated 11 July 2023. They act for JB Drax and they explained that the second supplemental PSL was only served seven working days ahead of this hearing, which they criticise as being very unsatisfactory. They assert that this provided insufficient time for their client to give proper consideration to any relevant creditor issues and address them through counsel at the convening hearing. They have reserved their position to do so at the sanction hearing.

24. Having regard to the information with which JB Drax had already been provided, and given the extent of the detailed comments which Eversheds made in their letter, I do not consider that

insufficient notice was given by the Plan Companies. While I do not rule at this stage that for that reason alone JB Drax and any another creditors in their position should not be permitted to address the court on creditor issues at the sanction hearing, I am satisfied that notice of the issues to be determined at this convening hearing was given to all Plan Creditors in respect of both restructuring plans in sufficient time to make it appropriate for this hearing to proceed.

25. Apart from questions of class constitution, there are three jurisdictional issues which arise in relation to any application for the convening of meetings of creditors for the purpose of them approving a restructuring plan under Part 26A. The first issue is whether the company concerned is a company within the meaning of section 901A(4). For that purpose, it must be a company liable to be wound up under the Insolvency Act 1986. This definition of a company is the same definition as the one to be applied for the purposes of the Part 26 scheme jurisdiction, and the same approach to its interpretation should be adopted. An entity will fall within the definition if it is a company of a type capable of being wound up, whether or not a winding-up order would in fact be made at the relevant time (see, for example, David Richards J in *Re Magyar Telecom BV* [2015] 1 BCLC 418 at [14]).

26. This aspect of the jurisdiction is satisfied in relation to the Plan Companies. However, it is well established that the court will not exercise the jurisdiction to sanction a restructuring plan merely because each of the Plan Companies qualifies as a company within the meaning of Part 26A. It is also necessary to establish that each one has a sufficient connection to England and Wales for that purpose. Strictly speaking, this is a matter of discretion not jurisdiction (see Lawrence Collins J in *Re Drax Holdings Ltd* [2004] 1 WLR 1049 at [22ff]). But it is so intimately interconnected with the point of pure jurisdiction that I should address it anyway in outline at this stage.

27. Mr Al-Attar submitted that the existence of English law debt demonstrated a sufficient connection to justify the court accepting jurisdiction to sanction these restructuring plans. He cited *Magyar Telecom* at [15], in which David Richards J referred to a number of different cases in which the court had taken that course. This line of authority has also been followed in a Part 26A context in

Re Smile Telecom [2022] BCC 808 at [61], in which Snowden LJ sitting at first instance made specific reference to *Re Rodenstock GmbH* [2011] Bus LR 1245 in support of his conclusion.

28. However, in doing so, Snowden LJ used language which raised a question mark for the present case, because he referred to the relevant fact being that an "overwhelming majority" of the debt sought to be compromised was governed by English law. This supports a proposition that the mere fact that there is some compromised debt governed by English law may not of itself be sufficient to provide a hook on which the English court can hang its decision to accept jurisdiction in every case. In this case, most of the debt subject to these restructuring plans is not governed by English law.

29. Nonetheless, it can still be seen that there may be a sufficient connection when it is properly appreciated why it is that such a requirement matters. It matters because the English court is vigilant to stop illegitimate forum-shopping, and it also matters because the court will be concerned about the effectiveness of any order that it makes. As David Richards J said in *Magyar Telecom* at [21]:

> "I am inclined to the view that the requirement to show a connection with England and the need to show that the scheme, if approved, will have a substantial effect are not wholly separate questions but, if not aspects of the same question, at least closely related."

30. In the present case, I do not consider that there is any question of illegitimate forum-shopping per se, because the English court is being asked to lend its aid to an Italian restructuring, the effectiveness of which is sought to be avoided by members of one category of creditor. Similarly, the issue of effectiveness is closely linked to the fact that these restructuring plans are intended to operate parallel to, and in conjunction with, the concordato in Italy. That is apparent amongst other things from the fact that their effectiveness is conditional on the effectiveness of the concordato. This may cause the court at sanction to focus on why it is necessary for the English plan to compromise rights which are both governed by Italian law and varied by the terms of the concordato, but it also confirms that the English court need have no concerns about its role. Quite

the contrary: it is facilitating the effectiveness of the restructuring, not granting a relief which may turn out to have been in vain.

31. The next question is whether condition A in section 901A of the 2006 Act is met in relation to the Plan Companies. This is first of the two threshold conditions, without which Part 26A does not apply at all.

32. As to that, I am satisfied that both Plan Companies have indeed encountered financial difficulties that are affecting their ability to carry on business as going concerns. The evidence is that, unless the derivative contracts are invalid, Cimolai was liable as at 13 October 2022 for in excess of €200 million, and LCH is liable for in excess of €80 million under them. Since then, the fluctuation in foreign exchange rates has improved their position, reducing their exposure significantly to a figure in excess of €150 million, together with an anticipated additional exposure of I think approximately €27 million in respect of unterminated derivative contracts.

33. But despite this reduction in liability, the evidence is clear: these exposures have already caused the Plan Companies very serious cashflow difficulties. If they were required to pay the amounts claimed in full, there is little doubt that both Plan Companies would enter formal liquidation proceedings in Italy.

34. It remains the case that condition A is met, even in circumstances in which the concordato proposals are approved and come into effect prior to the hearing of the application before this court to sanction the restructuring plans. Notwithstanding the approval of the concordato proposals, the Plan Companies' difficulties continue to subsist until such time as the English law claims are compromised in an effective manner. Until then, their size and substance is such that their enforceability in an uncompromised form will continue to cause what Zacaroli J in *Re Gategroup Guarantee Ltd (No 1)* [2022] 1 BCLC 98 at [115] called "financial difficulties which threaten the ability of the Plan Companies to continue as a going concern."

35. As to threshold condition B, I am satisfied that the terms of the proposed restructuring plan constituted a compromise or arrangement between the Plan Companies and each of their Plan Creditors within the meaning of section 901A(a)(i) of the 2006 Act. As I shall explain shortly, the evidence is that, if the restructuring plans are not approved, the return for creditors will be less in both of the Plan Companies than would be the case if they were approved. This is in short sufficient give-and-take to constitute what is proposed an arrangement between the Plan Companies and their Plan Creditors.

36. I am also satisfied that the purpose of the restructuring plans are to at least mitigate the effect of the financial difficulties with which threshold condition A is concerned. The particular context in which that is the purpose of the restructuring plans is that, if sanctioned, they will have the effect of binding the parties to the English law derivative contracts to a compromise that is itself governed by English law. Mitigating the inability of the concordato to achieve that result in a manner which will be effective in a cross-border sense is one of the principal purposes of the restructuring plans, and, in my judgment, means that threshold condition B is met.

37. The next question which arises, and the one which gives rise to the greatest level of complication in this case, is the question of class composition. The principles are very well established, and apply as much to a restructuring plan as they do to Part 26 schemes (see *Re Virgin Active Holdings* [2021] EWHC 814 (Ch) at [61]-[62]).

38. The essential principle is, of course, 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, 583). As Chadwick LJ said in *Re Hawk Insurance Company Ltd* [2002] BCC 300 at [30]:

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

39. The focus of the court is on rights, not interests, and the analysis explained by Chadwick LJ requires the court to identify the proper comparator; i.e., that against which the proposals advanced under the plans can be tested and with which they can be compared.

40. In the present case, Mr Al-Attar submits that there are two potential comparators. The first is a liquidation scenario which would occur if neither the concordato proposals nor the restructuring plans are approved; the second is what will occur if the concordato proposals are approved but the restructuring plans are not. In the second scenario, all of the Plan Companies' creditors will, as a matter of Italian law, be bound by the terms of the concordato proposals, but those whose claims are governed by English law will not have had their claims compromised as a matter of English law, a right which will leave them, anyway theoretically, able to sue and enforce those claims before the English courts. As will appear in my view, Mr Al-Attar is correct to identify the second of these possibilities as the most probable occurrence if the restructuring plans are not approved and sanctioned.

41. Against that background, in the Cimolai plan the Plan Company seeks five class meetings: one for the secured creditors, one for the demoted unsecured creditors, one for the ordinary unsecured creditors and two further classes for those creditors who have disputed claims under the derivative contracts and other disputed claims. Although the concordato proceedings sub-classify these categories of creditor differently, I do not consider that there is any difficulty with the proposal to place the secured creditors, the demoted unsecured creditors and the unsecured creditors into three separate classes. Their rights are sufficiently similar to the other members of their class to make it possible for them to consult together with a view to their common interests, but their rights both if the plan is not approved and under the plan are different from the members of the other two classes to make it impossible for them to do so. This is reflective of the fact that members of each of these three classes rank differently under the principles of Italian law which would apply in a liquidation scenario, with the knock-on consequence that they are treated differently from each other, both

under the terms of the concordato proposals and in consequence of that under the terms of the restructuring plan.

42. A rather different question arises in relation to the proposal to place creditors with disputed claims under derivative and other contracts in a different class from ordinary unsecured creditors. This point has important practical ramifications, most particularly in the LCH plan where the proposal is that JB Drax is placed in a class of its own.

43. The evidence discloses that JB Drax, with a disputed claim under a derivative contract it values in excess of €13 million, is very substantially the largest creditor of LCH, with a claim amounting to more than 75% of the totality of LCH's debts. The consequence of this is that the effect of putting it in the same class as the other unsecured creditors would be that it would have a right of veto over whether or not to approve the plan. The effect of putting JB Drax in its own class as a creditor with a disputed claim under a derivative contract means that, if the remaining unsecured creditors (sitting as they would be in a separate class) were to vote in favour of the LCH plan, the court may be empowered at the sanction hearing - and I stress "may" - to exercise the cramdown power under section 901G of the 2006 Act to override any vote by JB Drax against the plan.

44. Whether that power would in fact be exercised is not a matter for today's hearing, but the effect of the class composition for which the Plan Companies argue is to remove the right of veto which JB Drax would otherwise have. This point is spelt out very clearly in Eversheds Sutherland's letter of 11 July 2023, and is said to justify JB Drax's argument that this factor has informed LCH's decision to split the class in a manner that represents gerrymandering. They make the same point in relation to the Cimolai plan.

45. Whilst this is obviously a very important consideration for the court to have in mind, and has been considered in a number of cases as a matter of principle (see *Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch), *Re National Car Parks Ltd* [2021] EWHC 1653 (Ch) and *Re Houst Ltd* [2022] EWHC 1941 (Ch) amongst others), it remains the case that the only issue before me today is the

correct composition of the classes. If the consequence of the conclusion I reach is that plans which are said to be unfair to JB Drax or any other English law creditor with a disputed claim are approved, that is a matter to be addressed at the sanction hearing in due course.

46. The justification for taking the course proposed by the Plan Companies starts with the proposition that the correct comparator (i.e., the most probable situation with which the Plan Companies creditors would have to deal if the plan were not to be sanctioned) is one in which the concordato proposals are satisfied but the restructuring plans are not. There is powerful evidence that, in the absence of the approval of the concordato proposals, the Plan Companies will have to go into liquidation in Italy.

47. But there is also good evidence that, if those proposals are approved and sanctioned - which is likely - that will not occur. The approval and sanction is said to be likely, because, for among other reasons, the fact that JB Drax and the other creditors under derivative contracts have not submitted to the jurisdiction of the Court of Trieste and are unlikely to do so. Furthermore, as I understand it, any disputed claim will not be admitted to vote on an Italian concordato. I therefore agree that the evidence is that this is the proper comparator, because it would be a more probable outcome than a liquidation scenario. By the time of the sanction hearing, it will be clear whether that is or is not the case.

48. If this were to occur, creditors with unsecured claims governed by Italian law would have had their rights varied by the concordato proposals in a manner which would be enforceable worldwide, while creditors with unsecured claims governed by English law would not. Even having regard to the possibility that a CBIR stay of any claim by the English law creditors might be granted, the fact that English law governs their claims means that the bundle of rights to which they are entitled is significantly different to a relevant extent from the bundle of rights to which the ordinary creditors with claims governed by Italian law are entitled.

49. Importantly, the court is concerned not just with the difference in the governing laws, which in my view are plainly differences in the rights to which each creditor is entitled, but also in the different consequences of the divergence in their rights so far as concerns the practical ability of the creditors concerned to enforce them in the particular circumstances of this case. It was said by JB Drax that these are properly to be characterised as interests not rights, but even if that is the case, they are interests proceeding from rights, such as were contemplated by Lord Millett in his judgment in *Re UDL Holdings Ltd* [2002] 1 HKC 172, and as such are to be treated in the same manner as rights for this purpose.

50. In short, I agree with Mr Al-Attar's submission that the creditors with English law disputed claims will assess the restructuring plans as a process that would directly affect their English law rights. They have elected to stand on those rights outside the Italian concordato proceedings, while the other unsecured creditors are not in a position to do so. From the perspective of English law, the creditors with English law claims will not be bound by the concordato proposals as a mechanism for the compulsory variation of their rights while those creditors whose rights are governed by Italian law or that of another EU jurisdiction will be.

51. There is also another aspect of the differences between the position of ordinary unsecured creditors and those with disputed claims under English and foreign law derivative contracts. It is submitted by Mr Al-Attar that they cannot consult with ordinary unsecured creditors for a different reason, namely the very existence of the dispute. He accepts that it is not unusual in a straightforward English scheme or restructuring plan for creditors with disputed and undisputed unsecured claims all governed by English law to be put in the same class where a formal English insolvency is the appropriate comparator. In that situation, all creditors, whether their claims are disputed or undisputed, will normally have the same essential decision to make at the scheme or plan meetings. The difference between them is simply the complexity of the proving process, which will be greater for the disputed claims, but that will not normally cause an inability to consult together if the

proving mechanism under the scheme or plan replaces the formal insolvency proving mechanism in a manner which affects them in the same way.

52. However, this is a fact-sensitive aspect of class constitution, because there will be contexts in which the nature of the dispute and the way it is to be litigated makes it impossible for consultation with a view to a common interest to occur with other unsecured creditors. I am persuaded that, in the particular and relatively unusual context of this case, the impact of the approval of the restructuring plans on the conduct of the litigation by the disputed derivative contract creditors is just such a case. The factors which drive me to that conclusion are set in the context of the ability of other creditors to challenge the admission to proof of the derivative claims, and perhaps more importantly the fact that if the restructuring plan is approved, the Plan Companies themselves will continue to carry on their business in the ordinary way under the control of their existing management.
53. The essential point is that, while the ordinary unsecured creditors will be focusing on the simple question of whether the proposed restructuring plans provide them with a better return than the relevant alternative, the litigating creditors will also, and possibly exclusively, be focusing on the impact of the restructuring plan on such matters as litigation tactics. In these circumstances, it seems to me that there is more that divides them than unites them, because their interests are in that sense and to that extent adverse to each other.
54. One of the important aspects of this is that the disputes also involve counterclaims by the Plan Companies. It is also because it may well be better for the disputed derivative contract creditors to procure the plan to fail on dispute resolution grounds, without regard to an assessment of difference between the actual return they may receive once the dispute has been resolved and the face value of their claims. This may be flatly contrary to the position of the other undisputed unsecured creditors who may be motivated to support the restructuring plan because there is a greater prospect of the litigation with the disputed derivative contract creditors being resolved to the advantage of the Plan Companies, because it will increase their prospects of recovering an enhanced return on their SFPs.

55. There is one other important element which arises in relation to this part of the class analysis. It is intimately interconnected with the fact that the disputes which have arisen involve counterclaims by the Plan Companies. It is a term of the restructuring plans that the Plan Companies have offered to waive their own rights to commence or continue any proceedings against any disputed unsecured creditor which votes in favour of the concordato proposals and the restructuring plan and submits to the jurisdiction of the Court of Trieste in respect of the concordato.

56. However, this offer has not been made to JB Drax. There are commercial reasons for this of which I have not been informed, but the consequence of it is that those creditors who have been offered the waiver have an important incentive to vote for the restructuring which is not available to those who have not received the offer, and principally JB Drax.

57. I agree with Mr Al-Attar's submission that this is a further reason not just why disputed creditors who have not been offered the waiver should be placed in a different class from the unsecured creditors, but also should be placed in a different class from those who have received the offer. I should emphasise that, in reaching this conclusion on the impact that such a difference in terms of the waiver may have on class issues, I am not reaching any conclusion on the impact which that proposal may have and the absence of the making of any offer may have on fairness issues at the sanction hearing or the exercise of any cramdown jurisdiction which may be sought at that stage.

58. Those conclusions of principle mean that there will have to be some adjustment to the fourth and fifth proposed classes for the Cimolai plan meetings. I will discuss their precise formulation with counsel after I have completed delivering this judgment.

59. I can take the remaining questions more shortly. The first relates to the date which has been chosen by the Plan Companies as the assessment date at which the claims of the Plan Creditors against each Plan Company is to be assessed. This is the same as the date used for the purposes of the concordato proposals, which is the time when the Plan Companies sought relief from the Italian courts, i.e., 20 October 2022. It is some time ago, but I am satisfied that it is necessary for that

assessment date to be chosen to ensure that there is a proper correlation between the claims made under the restructuring plans with those made in respect of the concordato proposals which the restructuring plans do no more than seek to implement as a matter of English law.

60. It follows that, to the extent that the choice of this date excludes certain creditors or claims from being included as claims under the restructuring plans, there is what I consider to be a good commercial reason for the approach that has been taken (c.f. *Sea Assets Ltd v PT Garuda* [2001] EWCA Civ 1696). However, there is another aspect to the assessment date, which is whether individual claims might be smaller as a result of the chosen assessment date. In my view, the short answer to that possibility and the impact that it may have on the appropriate directions to give is that the assessment date which has been chosen is the date which would be applicable on the occurrence of either a formal liquidation or the approval of the concordato proposals, those being the two possible relevant alternatives with which an effective restructuring plan is required to be compared.
61. It follows that no class issue arises out of this point, and it is appropriate for the voting to take place by reference to the amounts which the claims would be admitted to prove under the concordato proposals. That amount will be quantified by the judicial commissioner in accordance with Italian law.
62. The second relates to the form of the explanatory statement. This must provide Plan Creditors with such information as is reasonably necessary to enable them to make an informed decision as to whether or not the plan is in their interests. The court does not approve the explanatory statement at this stage, but it is required to satisfy itself that it is in an appropriate form.
63. Complex though it is, I have reached the view that the explanatory statement in this case fulfils the purpose required and otherwise appears to comply with the other statutory requirements. In particular, it explains that the existing shareholder will be retaining his equity in the Group. Whether the form of the proposal as explained in the explanatory statement gives, in all

circumstances, a fair result is obviously a matter for consideration at the sanction hearing; t is not for today.

64. The order sought by the Plan Companies also includes detailed directions for the holding of plan meetings. I have considered all of those directions and am content to make orders on them in the terms suggested. I only add this: it seems to me that it would be appropriate to include a direction in the order that requires a chairman to value claims in accordance with the process described in the explanatory statement; provisions to this effect is not presently included.

65. Finally, and before I discuss with Mr Al-Attar the precise formulation of how the classes are to be defined in the light of the principles that I have explained in this judgment, I should say this. I have been referred to two further issues: the position of the Al Bayt joint venture and the fact that the Plan Companies are now proposing to include provision for the JB Drax claim against Cimolai to be released by the LCH plan, and also for its claim against LCH to be released by the Cimolai restructuring plan. In my view, these are both matters for the sanction hearing rather than for today, but as to the releases, I shall say this. There is at first blush no reason to think that the test so clearly expounded by Zacaroli J in *Re Gategroup Guarantee* at [163] would not be satisfied in the present case.

66. So, Mr Al-Attar, for those doubtless unnecessarily extended reasons, I will make the order that you seek.