Neutral Citation Number: **[2023] EWHC 2754 (Ch)**

Case No: **CR-2023-005640**

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: **20 October 2023**

Before :

Mr. Justice Miles

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In the matters of Atento UK Limited and Atento Luxco 1

In the matter of the Companies Act 2006

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- -

Tom Smith KC and Matthew Abraham (instructed by **Sidley Austin LLP**) for the **Claimants**

Hearing date: **20th October 2023**

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JUDGMENT APPROVED

Mr Justice Miles :

Introduction

1. This is an application by two companies, Atento UK Limited ("Atento UK") and Atento Luxco 1 (the "Issuer", together with Atento UK the "Plan Companies", and each a "Plan Company"), for an order pursuant to section 901C of the Companies Act 2006, convening meetings of creditors for the purpose of considering and, if thought fit, approving proposed restructuring plans in respect of each Plan Company.

2. The Plan Companies are part of the Atento group (the "Group"). They sit under Atento SA ("Holdco"), a public limited company. The Group operates a customer relationship management and business process outsourcing service in 17 countries. It has been facing severe financial difficulties since 2021 and is currently facing a liquidity shortfall by the week ending 1 December 2023. The plans are part of a wider restructuring. In broad terms, the restructuring and the plans are designed to avoid the immediate liquidity crisis and to stabilise the Group and place it on a more stable financial footing.

3. The restructuring will involve the injection of US $76 million (the "Exit Financing") through the injection of $58 million from Plan Creditors and a further US $18 million from an affiliate of a Plan Creditor as part of the wider restructuring.

4. The relevant liabilities covered by the plans are governed by English law. The Plan Companies propose that the plans will address the liabilities of four classes of creditors (the "Plan Creditors"): (a) the holders of a series of notes called the "existing 2025 notes" (the "Class A Creditors"); (b) the holders of a series of notes called the "new money 2025 notes" (the "Class B Creditors"); (c) the holders of a series of notes called the "new junior lien notes", (the "Class C Creditors"); and (d) parties to certain ISDA agreements (the "Swap Providers") and the holders of a series of notes called the "2026 notes" (together, with the Swap Providers the "Class D Creditors").

5. In broad terms, the plans will affect the Plan Creditors as follows:

   (a) Class A Creditors: the existing 2025 notes will be amended and restated to include, among other things, a three-month extension and amendments to the existing collateral package;

   (b) Class B Creditors: the new money 2025 notes will be amended and restated to include, among other things, a six-month maturity extension and amendments to the existing collateral package to cover all available assets. Class B Creditors will be offered the right to subscribe to $28 million of the Exit Financing by subscribing for class A redeemable preferred shares in the Issuer (the "Class A Preferred Shares");

(c) Class C Creditors: the new junior lien notes will be extinguished and Class C Creditors will be allocated ordinary shares representing 0.3% in aggregate of the fully diluted ordinary share capital of the Issuer (the "Ordinary Shares") pro rata to their claims at the restructuring effective date, which is a date in November 2023; and

(d) Class D Creditors: the swaps agreements and the 2026 notes will be extinguished and Class D Creditors will be allocated 2% of the Ordinary Shares pro rata. Class D Creditors will also be offered the right to provide US $30 million of the Exit Financing by subscribing for Class A Preferred Shares in the Issuer.

6. The boards of directors of each of the Plan Companies have concluded that the proposed restructuring and plans are in the best interests of the Plan Companies and the Group. They consider that each Plan Creditor would be better off and, in any event, no worse off under the proposed plans than in the relevant alternative, which they say would be a Group-wide liquidation.

7. On the basis of the evidence served by the Plan Companies, the Class C Creditors and Class D Creditors are all out of the money in the relevant alternative, with an estimated return of zero.

Further background

8. The background is addressed in detail in the first witness statement of Mr Nelson-Smith, a director of the Plan Companies. I shall summarise the key points which are relevant to the present hearing.

9. The Group is one of the largest providers of customer relationship management and business process outsourcing services in the world, based on revenues. It employs around 113,000 people and operates in 17 countries. Its clients are predominantly multi-national companies in the telecommunications, banking and financial services, healthcare, retail and public administration sectors. The Group's financial liabilities, subject to the plans (the "Plan Liabilities"), are as follows:

(a) a series of English-law-governed US $500 million 8% senior secured notes due 2026, issued by the Issuer and guaranteed by a number of Group companies defined in the evidence as the "subsidiary guarantors", which include Atento UK. These notes, which are the 2026 notes, were issued pursuant to an indenture dated 10 February 2021;

(b) a series of English-law-governed US $39.6 million 20% senior secured notes due 2025, issued by the Issuer and guaranteed by subsidiary guarantors pursuant to a note purchase agreement dated 15 February 2023. These are the existing 2025 notes;

(c) a series of English-law-governed US $37 million 20% senior secured notes due 2025, issued by the Issuer and guaranteed by subsidiary guarantors pursuant to a note purchase agreement dated 30 June 2023. These are the new money 2025 notes;

(d) a series of English-law-governed US $66,180,995 20% junior secured notes, due 2025, issued by the Issuer and guaranteed by subsidiary guarantors pursuant to a note purchase agreement dated 30 June 2023. These are the new junior lien notes; and

(e) certain hedging arrangements entered into by the Issuer in respect of which Atento UK has assumed liability as a primary obligor, as explained below. These are under ISDA master agreements. The Swap Providers are Goldman Sachs International, Nomura International Plc and Morgan Stanley Capital Services LLC.

10. The 2026 notes and the swap agreements are subject to an English-law-governed intercreditor agreement dated 8 August 2017 (the "Existing Intercreditor Agreement"). The existing 2025 notes, the new money 2025 notes and the new junior lien notes are subject to an English-law-governed intercreditor agreement dated 30 June 2023 (the "New Intercreditor Agreement").

11. As already mentioned, the Plan Liabilities have been guaranteed by a number of Group entities which are referred to in the evidence as the "subsidiary guarantors". The 2026 notes and swap agreements are secured by pledges over the shares of the Issuer and the shares of certain subsidiary guarantors. Subject to the terms of the Existing Intercreditor Agreement, these liabilities also benefit from security over certain bank accounts of certain Group entities.

12. The existing 2025 notes, the new money 2025 notes and the new junior lien notes are secured by security over certain bank accounts and receivables of certain of the Group's operating entities in the following priority:

(a) the existing 2025 notes have first priority liens over the existing 2025 notes priority collateral (a term defined in the evidence), with the new money 2025 notes and the new junior lien notes having second and third priority liens respectively; and

(b) the new money 2025 notes have first priority liens over what is defined as the "new money notes priority collateral", with the existing 2025 notes and the new junior lien notes having second and third priority liens respectively.

13. Each of the 2026 notes, the existing 2025 notes and the new money 2025 notes and the new junior lien notes are dematerialised securities. Each series of the relevant notes has been issued in the form of a global note and is held in either DTC, Euroclear or

Clearstream. The treatment of the Plan Creditors in respect of these notes are the ultimate beneficial owners of book entry interests in the relevant notes follows well-established principle. Certain of the Group's operating subsidiaries have incurred further debt which is outside the scope of the plans.

14. Atento UK is a private company incorporated in England and Wales. It is a direct subsidiary of the Issuer. It was incorporated on 9 August 2023. On 17 August 2023, Atento UK acceded as a guarantor to the existing 2025 notes, the new money 2025 notes and the new junior lien notes, in each case in accordance with the terms of the relevant agreement governing the notes. On 23 August 2023, Atento UK acceded as a guarantor to the 2026 notes.

15. On 25 August 2023, Atento UK executed a deed poll (the "Deed Poll") pursuant to which it assumed obligations corresponding to the obligations of the Issuer under the swap agreement and under a super senior revolving credit facility (the "SSRCF") and agreed to be liable as principle obligor in respect of all liabilities owed under the swap agreements and the SSRCF.

16. Also on 25 August 2023 Atento UK and the Issuer entered into a deed of contribution (the "Deed of Contribution") pursuant to which Atento UK has irrevocably and unconditionally agreed to pay to the Issuer, by way of contribution, an amount that is equal to Atento UK's share of the amount of any payment made by the Issuer in respect of any obligation under the various series of notes. Under these deeds, Atento UK has in substance assumed the position of a principal obligor alongside the Issuer in respect of the Plan Liabilities.

17. I turn to the trading and financial condition of the Group. The evidence shows that the Group has faced challenges arising from the sector in which it operates, including a highly competitive industry, consisting of low-cost local competitors and larger global competitors. It has also suffered from disruption from technology adoption across the sector and inflationary cost pressures. It has also experienced certain challenges which are specific to its business, including a cyber-attack in October 2021 and adverse consequences from currency movements. The Group experienced a liquidity shortfall in February 2023 due to payments required to be made in respect of the swap agreements and a coupon payment due in respect of the 2026 notes. It was projected then by the Group's management that, absent further funding, the Group was likely to have a negative cash balance.

18. In order to address this, the existing 2025 notes were issued and the proceeds were used to satisfy the liabilities I have just mentioned. After this an ad hoc Group of unaffiliated holders of existing 2025 notes merged with another ad hoc Group of unaffiliated holders of 2026 notes (the "Ad Hoc Group") and engaged with the Group to seek to agree terms for an overall restructuring of the Group. The Ad Hoc Group was represented before me by counsel and it supports the plans.

19. The cash flow forecast for the Group prepared in May 2023 showed a second liquidity crunch for the Group occurring on or after June 2023. The Group's financial adviser, FTI, prepared a preliminary draft liquidation analysis in June 2023 which indicated that the holders of the 2026 notes, the SSRCF lender and the Swap Providers were unlikely to receive any recoveries in a liquidation scenario.

20. On 23 June 2023, the Group, along with approximately 75% of the existing 2025 noteholders and approximately 40% of the 2026 noteholders (the "New Money Providers"), agreed a non-binding term sheet for the restructuring of the Group and the provision of interim finance. The interim finance was provided by the issuance of the new money 2025 notes to the New Money Providers and certain other 2026 noteholders in three tranches. To the extent that any 2026 noteholders opted to purchase new money 2025 notes, their existing claims under the 2026 notes were exchanged for new junior lien notes.

21. On 30 June 2023, Holdco, the borrowing Group entities and the New Money Providers, amongst others, executed a restructuring support agreement (the "RSA") which appended the agreed term sheet and invited the Issuer's other financial creditors to accede to its terms. As matters stand, the following groups of Plan Creditors by value have irrevocably acceded to the RSA: (a) about 76% of the existing 2025 noteholders; (b) 100% of the new money 2025 noteholders; (c) 100% of the new junior lien noteholders; and (d) about 64% of the Swap Providers and about 52% of the 2026 noteholders, representing in total about 54% of the Class D Creditors.

22. On 2 August 2023, the Issuer and the New Money Providers agreed to amend the RSA, which led to, amongst other things, a revised term sheet. In parallel with these negotiations with the financial stakeholders, the Group also considered alternative proposals, including possible disposals of assets or sales of the business. However, the directors concluded, following consultation with the Ad Hoc Group, that the only proposal capable of being implemented to address the Group's liquidity needs was that set out in the revised term sheet.

23. The interim financing raised by the existing 2025 notes and the new money 2025 notes is due to run out shortly and, on the evidence, the Group is projected to have only sufficient liquidity to continue operations until 1 December 2023.

24. I am satisfied on the evidence before the court that the Group is likely to face another imminent cash shortfall should the terms of the plans and the wider restructuring not be implemented.

25. Following the Issuer's failure to meet its payment obligations in respect of the swap agreements which I have already mentioned, each of the Swap Providers issued default notices. Further, the SSRCF lender delivered to the Issuer an acceleration notice and subsequently a guarantee payment demand.

26. The restructuring originally envisaged a plan proposed by Atento UK alone. On this basis, on 4 September 2023, Atento UK sent out a practice statement letter to all Plan Creditors affected by and entitled to vote on the proposed restructuring plan (the "Initial PSL"). However, on 14 September 2023, the lender under the SSRCF wrote to Atento UK disclaiming the Deed Poll. There were then commercial negotiations after which that lender agreed a settlement agreement with, among others, the Issuer and the subsidiary guarantors, which involved a payment of a cash sum and it was agreed that all guarantees and security guaranteeing the obligations under that facility would be terminated and discharged in full in return for that cash sum to be paid on the restructuring effective date.

27. After this, the structure of the proposed restructuring and the plans was changed so that the Issuer also became a Plan Company alongside Atento UK. As a result, on 29 September 2023, a further PSL, which replaced the Initial PSL, was issued to Plan Creditors ("the PSL").

28. I turn to the plans. By way of overview, the plans will affect the claims of Plan Creditors against the Plan Companies and provide for the following among other things: (a) the extinguishment of all the 2026 notes, the new junior lien notes and the swap liabilities in exchange for Ordinary Shares in the Issuer; (b) the amendment and restatement of the existing 2025 notes, the new money 2025 notes and the New Intercreditor Agreement; and (c) the provision to the Issuer of financing in the amount of US $58 million through the issuance of Class A Preferred Shares and the Issuer forming part of the Exit Financing. This is known in the evidence as "tranche A".

29. The plans will also have the effect of releasing claims of the Plan Creditors against relevant third parties, including claims against the subsidiary guarantors, following the occurrence of the date on which all steps, taken for the purposes of implementing the plans, will be completed, which is currently expected to be on or around 20 November 2023. This is known as the "restructuring effective date".

30. In consideration for these various compromises, the Plan Creditors will receive restructuring consideration as follows: (a) class A, the enhancement of existing collateral package to cover all available assets; (b) class B, the enhancement of the existing collateral package to cover all available assets; (c) class C, 0.3% in aggregate of Ordinary Shares to be allocated on the pro rata basis; and (d) class D, 2% in aggregate of Ordinary Shares to be allocated on a pro rata basis by the Issuer.

31. In addition to the above, the restructuring will provide for certain Plan Creditors to be able to provide additional financing as follows: (a) class B, the ability to participate in tranche A of the Exit Financing up to the value of US $28 million and the right to a pro rata share of some 70.45% of the Ordinary Shares in the Issuer for any Class B Creditor that does participate; and (b) class D, the ability to participate in tranche A of the Exit Financing up to the value of US $30 million and the right to a pro rata share of 18% of the ordinary shares in the Issuer for any Class D creditor that does participate.

32. Only Class B Creditors and Class D Creditors will have the right to participate in tranche A of the Exit Financing. This reflects the fact that the Class B Creditors were the providers of the rescue financing in June 2023 and the Class D Creditors comprise the substantial majority of the Plan Liabilities. There is also a material overlap between Class B Creditors and Class D Creditors and the Class A Creditors and Class C Creditors.

33. The Plan Companies have also obtained a commitment from an affiliate of a Class D Creditor (the "Tranche B Provider") to make an equity investment in the Group in an amount equal to US $3 million and to subscribe for the remaining amounts to be raised under the Exit Financing ("Tranche B"). The Tranche B Provider will be issued directly or indirectly with 15 million of class B preferred shares and will own Ordinary Shares representing 5% of the fully diluted issued shares in the Issuer.

34. The commitment of the Tranche B Provider to provide Tranche B is conditional on the sanction of the plans by the court, amongst other things.

35. Certain fees will be payable. These are as follows: first, tranche A backstop fees. All Class B Creditors and Class D Creditors have been offered the ability to backstop the tranche A in relation to the part in which they will be entitled to participate. The ability to do so will remain open until 14 November 2023; that is until after the proposed plan meetings.

36. Class B Creditors and Class D Creditors that provide the relevant backstop will be entitled to fees as follows: Class B Creditors will receive, as a backstop fee, up to 1.93% in aggregate of the Ordinary Shares in the Issuer and Class D Creditors who backstop the relevant tranche will receive as a backstop fee up to 2.07% in aggregate of the Ordinary Shares.

37. Second, there is a consent fee. This applies to any class D creditor that votes in favour of the plans. Such Plan Creditors will receive 0.25% in aggregate of the Ordinary Shares. This is again open until 14 November 2023, the date after the plan meetings.

38. Third, the Plan Companies have agreed to pay the Ad Hoc Group and the consenting Swap Providers' respective advisers' fees irrespective of whether the plans are sanctioned. This represents a payment or reimbursement of adviser costs actually incurred by those creditors and, as such, discharges a liability that has been incurred by them.

39. I turn to the relevant alternative. If the plans are not sanctioned, the Exit Financing will not be provided. I am satisfied on the evidence that, if that does not happen, the Plan Companies will be unable to comply with their financial obligations in respect of the Plan Liabilities and, in consequence, the Plan Companies are most likely to enter into liquidation either voluntarily due to insufficient liquidity to operate as a going concern or upon enforcement by the Plan Creditors.

40. In this regard, the directors have relied on the assistance of FTI. Their analysis shows that the Group only has limited cash to fund the implementation of a restructuring and to meet ongoing operational costs and that the Group only has sufficient liquidity to continue trading until 1 December 2023. At that point the Group will have a negative cash balance of approximately US $7.4 million.

41. I am satisfied that, absent new money, it is likely that the Plan Creditors will seek to recover the amounts as they have already threatened action against the Issuer and the subsidiary guarantors.

42. In identifying the relevant alternative, the directors of the relevant company, being advised by their professional advisers, are normally in the best position to identify what will happen if a scheme or plan fails; see *ED&F Man Holdings Limited* [2022] EWHC 687 (Ch) at paragraph 39.

43. Alvarez & Marsal Europe LLP ("A&M") have provided a report assessing the likely return to Plan Creditors in the relative alternative; that is to say liquidation of the Group companies. The estimated recoveries in the relevant alternative are, in summary, as follows: (a) existing 2025 noteholders, 42.7% to 86.2%; (b) new money 2025 noteholders, 9.5% to 19.5%; (c) new junior lien noteholders, 0%; (d) Swap Providers, 0%; and (e) 2026 noteholders, 0%. On this basis, classes C and D are out of the money as they would receive 0% in the relevant alternative.

44. A&M have also prepared a report valuing the Issuer, following the sanction of the plans, in which event A&M estimate the value of the ordinary equity in the Issuer to be between US $125 million and US $255 million, with a midpoint of US $190 million. Based on this valuation, the likely returns to each of the Plan Creditors if a plan is implemented is estimated to be: (a) existing 2025 noteholders, 100%; (b) new money 2025 noteholders, 100%; (c) new junior lien noteholders, 0.5% to 1%; (d) Swap Providers 0.4% to 0.8%; and (e) 2026 noteholders, 0.4% to 0.8%.

The issues to be determined by the court

45. The following matters fall to be considered at the convening hearing: (a) adequacy of notice of the hearing; (b) jurisdictional requirements; (c) class composition; (d) any other issues not going to merit or fairness which might cause the court to refuse to sanction the plans; and (e) practical issues regarding notice documentation and proposals for the meeting of creditors.

(a) Adequacy of notice of the convening hearing

46. Proper notice of the proposals must be given to persons affected. The appropriate period of notice is a fact-sensitive matter. I am satisfied that the content of the PSL gives a proper explanation of the Plan Companies' proposals. The PSL was given to Plan Creditors on 29 September 2023 (21 days before the convening hearing). I am satisfied

in the present case that this is reasonable notice. A substantial majority of the Plan Creditors are highly sophisticated financial institutions. The Plan Creditors were aware of the restructuring from the Initial PSL that was sent out on 4 September 2023. The only material changes between that and the PSL were the addition of the Issuer as an additional Plan Company and the removal of the SSRCF as a plan liability. I am also satisfied that there is urgency given the expected liquidity shortfall by 1 December 2023.

(b) Jurisdictional requirements

47. Section 901A of the Companies Act 2006 is available to a "company". A company is any company liable to be wound up under the Insolvency Act 1986; see section 901A(4)(b) of the Companies Act 2006. Atento UK is incorporated under the laws of England and Wales and is liable to be wound up under the Insolvency Act 1986. The Issuer is an unregistered company that is liable to be wound up under the Insolvency Act 1986 and is therefore a company for the purposes of part 26A of the Companies Act 2006. In respect of the Issuer, there is a separate question as to whether it has sufficient connection with this jurisdiction. This is closely related to the question of whether there is a reasonable prospect that the plans will be effective internationally.

48. I am satisfied for present purposes that there is at least a realistic prospect that these elements will be established at the sanction hearing, given that the Plan Liabilities are governed by English law. In any case, these are questions going to the sanction hearing rather than the convening hearing; see *Re ColourOz Investment* 2 LLC [2020] BCC 926 at paragraph 57.

49. As I have already mentioned, the existing 2025 notes, the new money 2025 notes, the new junior lien notes and the 2026 notes are all held in global form through clearing systems. Each of the relevant Plan Creditors under those notes are entitled in certain circumstances to receive definitive notes registered in their names. As such, I am satisfied that they are contingent creditors of the Plan Companies for the purposes of the Companies Act 2006.

50. Condition (a) under section 901A of the Companies Act 2006 is that the applicant company has encountered or is likely to encounter financial difficulties which are affecting or will or may affect its ability to carry on business as a going concern. I am satisfied on the evidence which I have summarised above that this condition has been met. The Issuer has been facing prolonged financial difficulties since at the latest February 2023. Atento UK is a non-trading company and is a guarantor and primary obligor in respect of the Plan Companies. It is also clear that, absent the proposed restructuring, the companies which are part of the Group will face a severe credit crunch by 1 December 2023.

51. Condition (b) has two limbs: first, the company must be proposing a compromise or arrangement with its creditors or any class of them and, second, the purpose of the

compromise or arrangement must be to eliminate, reduce or prevent or mitigate the effect of any of the companies' financial difficulties under condition (a).

52. I am satisfied as to the first of these limbs. The plan clearly involves a compromise or arrangement. It involves elements of give and take.

53. I am also satisfied as to the second limb. The purpose of the plans is to restore the Plan Companies to financial stability by enabling the injection of new money through the exit finance and by extending and amending the terms of various of the liabilities and releasing others.

(c) Class composition

54. The principles are well known and I shall not repeat them. There are four proposed classes of Plan Creditors for each Plan Company. I am satisfied that it would not be possible to reduce the number of classes. In short, each class of Plan Creditors has different existing rights arising from the difference in their security packages and different rights under the plan such that they cannot be merged into smaller classes.

55. The Plan Companies have considered a number of matters which might potentially lead to the further fracturing of the classes. The Plan Companies have concluded that none of these matters in fact lead to the fracturing of the classes. They are as follows.

56. First, the impact of the tranche A Exit Financing. As already mentioned, all Class B Creditors and Class D Creditors have been given the right to participate in the tranche A Exit Financing. I am satisfied that, since all of them have been given the same rights, this does not lead to any fracture of the class. The courts have held on numerous occasions that so long as the ability to participate in new money arrangements is provided to all relevant creditors, it will not fracture the class. Moreover, in this case, the right to participate in the financing will remain open until after the plan meetings.

57. The second possible reason for splitting the classes further is the tranche A backstop fee. The courts have held on a number of occasions that backstop fees do not fracture the class. See eg *Re PizzaExpress Financing 2 Limited* [2020] EWHC 2873 (Ch) at paragraph 42. Here all Class B Creditors and Class D Creditors have been given the opportunity to elect to backstop the relevant part of tranche A on identical terms. These rights remain open and will remain open until after the plan meetings. Accordingly, each of the relevant Plan Creditors has the same right to participate if they choose.

58. In any event, I am satisfied that these fees are payable in return for commercial services reasonably required by the Plan Companies.

59. The third potential splitting of the class arises from the consent fee. As I have explained, this applies only in respect of class D. The right to participate continues up until the time of voting and indeed beyond, but it is voting that matters for this purpose. There

are a number of authorities which have considered the question whether consent fees fracture a class. These include *Re Noble Group Limited* [2019] BCC 349 and *Re PGS ASA* [2020] EWHC 3622 (Ch).

60. One of the questions which has been considered in those cases is whether the consent fees would be likely to be a material factor when creditors come to decide whether to vote in favour of or against the proposed plan or scheme, as the case may be. In some of the cases the consent fee has been relatively small, but, in any case, as Mr Justice Snowden observed in Re Noble Group, the real question is not the absolute size of the proposed fee but the impact it might have in relation to the real alternatives open to creditors when voting at meetings. Here, the proposed fee, which consists of a right to participate in further Ordinary Shares, represents some 12.5% of the restructuring consideration that is available to the Class D Creditors under the plans.

61. Counsel for the Plan Companies points out that the Class D Creditors are wholly out of the money in the relevant alternative and the question for them is, therefore, essentially a choice between getting nothing on the basis of the evidence before the court and getting something. He submits that having an extra 12.5% of the something which creditors would obtain under the plans is unlikely to be a material influence over the decision of whether to vote.

62. Separately, counsel points out that, unlike some of the cases where the consent fee is only payable to those creditors who have irrevocably undertaken to support a scheme or plan in advance of the meeting, whereas in this case the consent fee remains available up until the time of the meeting. He submits that in those circumstances the creditors all have the same rights, but, in any event, the inclusion of the consent fee is not something which would render any difference in right fatal to them being placed in the same class.

63. Counsel for the Plan Companies also submits that if there is any question as to whether the inclusion of a consent fee for those who vote in favour of the plans may be said unfairly to skew the voting. That is a matter to be considered at the sanction hearing rather than a matter going to class composition.

64. I accept these submissions. First, I am satisfied that the inclusion of the consent fee, which would give essentially an extra 12.5% of the restructuring consideration, is not likely to be a material factor in the decision of the Class D Creditors. On the evidence they face a stark choice between getting nothing and getting something and a decision to vote in favour will, to my mind, be driven by the fact that they would rather have something rather than nothing.

65. I also agree in the particular circumstances of this case where the consent fee remains available up until the time of the meeting, the existence of the consent fee is not something that leads to the members of the class having relevantly different rights. They all have the same right, including to participate in the consent fee.

66. It seems to me that that second answer may not in all cases be a complete answer, depending on the extent to which the outcomes for those who consent differ from those who do not, but that leads to the third point, which is that it seems to me that that is a question that goes ultimately to whether the court, in the exercise of its discretion, should sanction the scheme. It may be a factor that at the sanction hearing would influence the court's view as to whether the vote that had taken place at the meeting bona fide represented the interests of the relevant class.

67. For all of these reasons, I do not consider that the class should be further divided.

68. I also add another observation. It is difficult to see how the class could be further divided on these facts, where the consent fee will remain payable to any creditors who vote in favour at the meeting. There is not an earlier cut-off date. So this is not a case where one could, in advance, divide class D into those who have consented already and those who have not. It seems to me that there is a basic conceptual problem with trying to frame a different classification of particular creditors in these particular circumstances.

69. The next question is whether the advisers' fees operate to fracture the class. The courts have held that fees of this kind paid to some members of a class but not all do not fracture the class where they are payable in any event, as here. These fees are payable in discharge of actual liabilities. Further, they are payable irrespective of whether the plans are sanctioned or the restructuring effective date occurs.

70. Finally, there is the involvement of the Tranche B Provider which is affiliated to a Class D Creditor. Again, I do not think that this operates to fracture class D. The commitment to provide Tranche B of the Exit Financing does not represent a right conferred on any Plan Creditor by the plans in exchange for and in compromise of its existing rights as a Plan Creditor.

(d) Are there any road blocks?

71. I am satisfied that there are no jurisdictional road blocks in the present case which could be said to make it pointless to convene meetings. I am satisfied that the international dimension of the plans does not create any such road block. I am also satisfied that the use of the Deed Poll and the Deed of Contribution do not give rise to a road block. Such deeds have been considered in other cases. See *Re PizzaExpress Financing 2 Plc* and *Re GateGroup Guarantee Limited* [2021] 1 BCLC 98 and [2021] 1 BCLC 141.

72. I am also satisfied that the fact that some creditors are not part of the plan does not create a road block. It is for the Plan Companies to identify and select to which of its creditors it wishes to propose a plan.

(e) Practical issues

73. I am satisfied that the explanatory statement is adequate in content and in an appropriate form. It communicates all material matters in a way that would be readily comprehensible to its intended addressees. I am also satisfied that the timetable is reasonable. The plan meetings will take place on 13 November 2023 and the sanction hearing is scheduled for 17 November 2023. The restructuring effective date is currently expected to be on or around 20 November 2023. That will give time to ensure that the Exit Financing is in place prior to the liquidity shortfall in the week ending 1 December 2023. I am also satisfied that the proposals for notification and conduct of the plan meeting are appropriate.

74. As I have already said, the Ad Hoc Group support the proposals. Counsel for the Plan Companies properly drew my attention to an email exchange with one fund manager of some of the 2026 notes. That email complained that the relevant noteholders had not had notice of this hearing until very recently. It also complained about the proposed return for 2026 noteholders and said, in brief summary, that the proposals did not involve fair consideration for those creditors.

75. As to the first point, I am satisfied that proper notice was given through the clearing systems. Issuers of notes do not generally have information about the ultimate beneficial noteholders and are dependent on notification being given by account-holders through the clearing systems. To the extent that notification was not passed on by account-holders, it seems to me that that is essentially a problem as between particular noteholders and their account-holders and that the companies in the position of the Plan Companies can only do what they can to give proper notice through the clearing systems. I am satisfied that the Plan Companies have done so here.

76. As to the complaint of fairness, that is a matter which, if it is to be raised at all, will be dealt with at the sanction hearing and on the authorities is not a matter to be dealt with at a convening hearing of this kind.

Conclusion

77. I am satisfied that I should make the convening order and will do so.