CR-2023-000936

Neutral Citation Number: [2023] EWHC 916 (Ch)

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

21 April 2023

Before:

MR JUSTICE LEECH

- -

IN THE MATTER OF AGPS BONDCO PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

MR DANIEL BAYFIELD KC, MR RYAN PERKINS and **MS ANNABELLE WANG** (instructed by **White & Case LLP**) appeared on behalf of the Applicant Company
MR TOM SMITH KC and **MR ADAM AL-ATTAR** (instructed by **Akin Gump LLP**) for an ad hoc group of opposing creditors
Ms FELICITY TOUBE KC and **MR HENRY PHILLIPS** (instructed by **Milbank LLP**) for a steering committee of creditors

Hearing dates: 3 to 5 April 2023, 12 April 2023

- -

APPROVED JUDGMENT

- -

This judgment was handed down remotely at 3.30 pm on 21 April by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Leech:

I. The Application

1. By Claim Form dated 20 February 2023 the Claimant, AGPS BondCo PLC (the "**Plan Company**"), applied for an order to convene and conduct meetings for the purpose of considering and, if thought fit, approving a restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006 and to give directions for the hearing of the Plan Company's application to seek the sanction of the Court to the Plan.

2. The Plan will implement certain amendments to the Plan Company's indebtedness arising under a series of senior unsecured notes or "**SUNs**". These notes comprise six series of senior unsecured notes governed by German law and they were divided into six classes (corresponding to the six series of SUNs) for the purposes of voting on the Plan. I will call the holders of the SUNs collectively the "**Plan Creditors**".

3. On 24 February 2023 the convening hearing took place before Sir Anthony Mann (the "**Convening Hearing**") and he made an order (the "**Convening Order**") giving the Plan Company liberty to convene six meetings of the Plan Creditors (the "**Plan Meetings**") to consider and, if thought fit, approve the Plan. Sir Anthony Mann also gave a judgment in which he explained his reasons for making the Convening Order and giving the directions in the Convening Order (the "**Convening Judgment**"): see [2023] EWHC 415 (Ch).

4. On 21 March 2023 the Plan Meetings took place and the Plan was approved by over 75% in value of those voting at each Plan Meeting apart from one class of Plan Creditors (the "**2029 Plan Creditors**") which approved the Plan by a majority in value of 62.28% of those voting at the relevant meeting. In the other five classes the Plan was approved by majorities ranging from 80% to 98%.

5. The Plan Company, therefore, applied to the Court to sanction the Plan and to order a "cross-class cram down" in relation to the 2029 Plan Creditors. On 3 to 5 April 2023 I heard the Plan Company's application and Mr Daniel Bayfield KC, Mr Ryan Perkins and Ms Annabelle Wang appeared for the Plan Company.

6. Two groups of creditors appeared by counsel at the hearing. Ms Felicity Toube KC and Mr Henry Phillips appeared on behalf of the first group which consisted of a steering committee of Plan Creditors with holdings across all six series of the SUNs ("**SteerCo**") who supported the sanction of the Plan. Mr Tom Smith KC and Mr Adam Al-Attar appeared on behalf of the second group which consists of an ad hoc group of Plan Creditors who hold notes due in 2029 and I will refer to them collectively as the "**AHG**". They opposed the sanction of the Plan.

7. There were a number of issues of fact between the parties and they agreed that the Court should hear oral evidence at the hearing. This imposed a heavy burden both on the parties and the Court and I sat from 9.30 am to 5 pm each day. I also dispensed with oral opening submissions and heard the witnesses give evidence before the parties made their oral submissions. Following the hearing I indicated that I would announce the Court's decision on 12 April 2023 with reasons to follow.

8. On 12 April 2023 I announced that I would sanction the Plan and I made an Order in those terms. I also adjourned the hearing until the hand down of this judgment so as to extend time for any application for permission to appeal. I made it clear to counsel that I would hear their applications for permission to appeal and to abridge the time for any appeal (or application for permission to appeal) when I handed down judgment. In this judgment I set out the detailed reasons why I made the order sanctioning the Plan.

II. Background

9. The Plan Company is incorporated in England and Wales. It is a subsidiary of Adler Group SA (the "**Parent Company**"), a company incorporated in Luxembourg. The Parent Company and its subsidiaries (including Adler Real Estate AG ("**Adler RE**") and Consus Real Estate AG ("**Consus**")) form the "**Group**". The Group's business consists of the purchase, management and development of income-producing, multi-family residential real estate in Germany. The current domestic and global economic downturns, and decreased business confidence have caused a sharp downturn in the demand for residential

and commercial real estate in Germany. This has had a significant adverse impact on the Group's business.

10. The Group's financial difficulties had recently become acute. Certain notes issued by Adler RE were to become payable on 27 April 2023 and the Group did not have sufficient funds to repay these notes when they fell due. It appeared to be common ground that if the Court did not sanction the Plan, the key members of the Group would have no choice but to file for formal insolvency proceedings. It is also common ground that this is the "**Relevant Alternative**" to the Plan for the purposes of section 901G(4) (below).

(1) The Debt Structure

11. The external debt of the Group amounts to approximately €6,100,000,000. This debt has been borrowed by various entities within the Group. The SUNs consist of the following series of notes, all of which are governed by German law:

    (1) the €400,000,000 1.5% notes due in 2024 (the "**2024 Notes**");

    (2) the €400,000,000 3.25% notes due in 2025 (the "**2025 Notes**");

    (3) the €700,000,000 1.875% notes due in January 2026 (the "**January 2026 Notes**");

    (4) the €400,000,000 2.75% notes due in November 2026 (the "**November 2026 Notes**");

    (5) the €500,000,000 2.25% notes due in 2027 (the "**2027 Notes**"); and

    (6) the €800,000,000 2.25% notes due in 2029 (the "**2029 Notes**").

12. There are certain differences between the maturity dates and interest rates applicable to each series of SUNs. The key differences are set out in the table below:

SUNs	**Principal Amount**	**Coupon (% p.a.)**	**Maturity**
2024 Notes	€400,000,000	1.500	26 July 2024

SUNs	Principal Amount	Coupon (% p.a.)	Maturity
2025 Notes	€400,000,000	3.250	5 August 2025
January 2026 Notes	€700,000,000	1.875	14 January 2026
November 2026 Notes	€400,000,000	2.750	13 November 2026
2027 Notes	€500,000,000	2.250	27 April 2027
2029 Notes	€800,000,000	2.250	14 January 2029

13. The terms and conditions of each series of SUNs had the effect of restricting the Group from refinancing its existing debt (apart from the 2024 Notes) or incurring additional indebtedness. The Parent Company is the guarantor of the SUNs. It is also the issuer of convertible notes with a face value of €165,000,000 which will fall due on 23 November 2023 (the "**Convertible Notes**") and a guarantor of four unsecured promissory notes issued by ADO Lux Finance S.à r.l (a vehicle for finance owned by the Parent Company) ("**ADO Lux**") with an aggregate face value of €24,500,000. These notes are known as *Schuldscheindarlehensvertrag* or "**SSDs**". It appears to be common ground that the SSDs also fall due for payment in 2023.

14. Adler RE and Consus have a number of other financial liabilities. The principal external debt obligations of Adler RE are certain senior unsecured notes with an aggregate face value of €1,100,000,000 (the "**Adler RE Notes**") which comprise the following:

    (1) €500,000,000 of 1.875% senior unsecured notes due on 27 April 2023 (the "**Adler RE 2023 Notes**");

    (2) €300,000,000 of 2.125% senior unsecured notes due on 6 February 2024 (the "**Adler RE 2024 Notes**"); and

    (3) €300,000,000 of 3% senior unsecured notes due on 27 April 2026 (the "**Adler RE 2026 Notes**").

15. The Adler RE Notes are senior unsecured liabilities of Adler RE. They do not benefit from any guarantees from the Parent Company or from any other member of the Group. However, since they are liabilities of a subsidiary of the Parent

Company, it follows that they are structurally senior to the SUNs and must be repaid before Adler RE can distribute dividends to the Parent Company to enable it to repay its own debt. The terms and conditions of the Adler RE 2023 Notes and the Adler RE 2026 Notes are governed by German law. The Adler RE 2024 Notes are governed by New York law.

(2) The Issuer Substitution

16. The SUNs were originally issued by the Parent Company. On 11 January 2023 the Plan Company was substituted in place of the Parent Company as the issuer of the SUNs in accordance with the substitution procedure under the terms and conditions of the SUNs (the "**Issuer Substitution**"). One of the issues which I have to consider is whether the Issuer Substitution is valid as a matter of German law. I set out the Issuer Substitution clause in section VII (below).

17. The Plan Creditors were notified of the completion of the Issuer Substitution on the same day by a notice published on the Luxembourg Stock Exchange. On 12 January 2023 the announcement was also posted on various clearing systems and on the Group's website. The Group also shared the same release through the media platform "EQS" (the equivalent in Germany to the regulatory news service or "RNS" in the UK) to share on other media outlets.

18. The Parent Company then issued irrevocable and unconditional guarantees to the Plan Creditors as holders of the SUNs in relation to the Plan Company's obligations and liabilities under the SUNs and, in particular, payment of the principal and interest due under the SUNs. The Plan Company and the Parent Company also entered into a series of agreements in connection with the Issuer Substitution under which the Plan Company became substituted as the principal debtor for all obligations arising from or in connection with the SUNs together with a reimbursement deed and a consideration agreement. Finally, on 11 January 2023 the Parent Company issued back-to-back loan notes on the same terms as the SUNs to the Plan Company.

(3) The Group's Financial Difficulties

19. The Group's business has been significantly and adversely affected by current domestic and global economic downturns which include a substantial increase in the inflation rate in Germany, supply chain disruptions, rising energy and building prices caused by the war in Ukraine and the ongoing impacts of the COVID-19 pandemic. These factors have resulted in a sharp downturn in the demand for residential and commercial real estate, causing a significant adverse impact on the core businesses of the Group. As I have stated, the Group would have faced a critical liquidity shortage as a result of the impending maturity of the Adler RE 2023 Notes on 27 April 2023 if I had not sanctioned the Plan.

20. The Group's business was also negatively affected by a report published on 6 October 2021 by Viceroy Research LLC which contained allegations that the Group had inflated real estate asset values artificially in its financial statements and failed to disclose related party transactions. The Group rejected those allegations from the outset and the Parent Company engaged KPMG Forensic to conduct a forensic investigation. In April 2022 they reported that they had found no evidence to support the allegations. Nevertheless, the Group's auditor, KPMG Luxembourg SA, resigned and despite various actions the Group still does not have an auditor.

(4) The Lock-Up Agreement

21. In the second half of 2022 the Group entered into discussions with a steering committee of the Plan Creditors to consider a restructuring proposal. These note holders are the SteerCo (as I have defined them above). On 25 November 2022 and following those negotiations the Parent Company, Adler RE, Consus and the SteerCo entered into a lock-up agreement (the "**Lock-Up Agreement**") and it was announced on the same day.

22. Since the date of its announcement and publication Plan Creditors have been entitled to accede to the Lock-Up Agreement at any time. Initially, any Plan Creditor acceding to the Lock-Up Agreement by no later than 13 December 2022 was entitled to a lock-up fee equal to 0.25% of the value of that Plan Creditor's locked-up SUNs (the "**Lock-Up Fee**"). But on 19 February 2023 the Group extended the Lock-Up Fee eligibility deadline to noon London time on the date

of the Plan Meetings. In the event, 68.85% of the holders of the SUNs by value became parties to the Lock-Up Agreement prior to the extended Lock-Up Fee eligibility deadline.

23. The Lock-Up Agreement provided that the parties would seek to pursue the implementation of certain amendments to the terms and conditions of the SUNs (the "**Proposed Amendments**") by a voting procedure known as a consent solicitation (the "**Consent Solicitation**") in accordance with the terms and conditions of the SUNs and the Schuldverschreibungsgesetz (the "**SchVG**"), the German Bond Act.

24. In particular, the participating noteholders undertook as follows: (a) to vote in favour of the Proposed Amendments to the SUNs; (b) to vote in favour of the Adler RE consent solicitations to effect the proposed changes to the Adler RE 2024 Notes and the Adler RE 2026 Notes; (c) not to transfer, assign or sell any of their locked-up SUNs to a person who was not a participating noteholder, unless that person acceded to the Lock-Up Agreement; (d) to waive certain events of default in connection with the SUNs; (e) not to take certain actions that are or might be inconsistent with the restructuring plan (as it was then formulated); and (f) not to take certain enforcement actions for the term of the Lock-Up Agreement.

25. The Consent Solicitation required the approval of 75% by value of those voting (with a quorum of 50%) in the contractual voting procedure under each series of the SUNs. Moreover, the voting procedures within each series of the SUNs were structured to be "inter-conditional" in the sense that the Consent Solicitation would only succeed if the contractual majority of 75% was achieved in every series.

26. The Lock-Up Agreement also provided that in the event of the failure of the Consent Solicitation, the Proposed Amendments would be implemented by an alternative implementation method which included both a restructuring plan under Part 26A and a restructuring under Unternehmensrestrukturierungsund-Stabilisierungsgesetz (the "**StaRUG**"), the German Corporate Stabilisation and Restructuring Act. It appears to be common ground that there is no equivalent

restructuring procedure in Luxembourg that would be available to the Parent Company.

27. Finally, the Lock-Up Agreement provided that participating noteholders could terminate it if a material adverse change has occurred. The majority could also terminate the agreement where changes, events or circumstances occurred which individually or taken together as a whole, were likely to have a material adverse effect on the business, operations or financial condition of the Group or its ability to perform its obligations or the ability of the Proposed Amendments to be implemented by a longstop date of 12 April 2023. This made it imperative for the Court to announce its decision by that date at the latest.

(5) The Commitment Letters

28. On 25 November 2022 the Parent Company also concluded "**Commitment Letters**" with the members of the SteerCo, under which they made commitments to the Parent Company to provide cash funding of up to €880,000,000 (the "**New Money**"). Those commitments were subsequently reduced to the extent that other Plan Creditors elected to provide New Money and I will call all of those Plan Creditors who made such an election the "**New Money Providers**". The New Money was itself dependent upon the implementation of the Proposed Amendments and the wider restructuring plan. The time to put the New Money Funding in place and to use it to repay the Adler RE 2023 Notes was another reason why the Court had to announce its decision by 12 April 2023.

29. There was no obligation for Plan Creditors to become parties to the Lock-Up Agreement if they wanted to participate in funding the New Money. Equally, there was no requirement for Plan Creditors to execute a Commitment Letter if they wished to accede to the Lock-Up Agreement or vote in favour of the wider restructuring plan. However, under their Commitment Letters the Group agreed to pay a "**Backstop Fee**" to the members of SteerCo equal to 3% of the amount of their initial commitment to fund the New Money as of 25 November 2022. This fee was agreed because the members of SteerCo had committed to "backstop" the full amount of the New Money if other Plan Creditors did not elect to participate and become New Money Providers.

(6) The New Money

30. The Commitment Letters provided that a new special purpose vehicle would be used to provide the New Money and to grant facilities to the Parent Company and Consus (or subsidiaries of Consus) under the terms of a "**New Money Facilities Agreement**". This will provide for the issue of up to €937,500,000 senior secured loans maturing on 30 June 2025. In particular, it will provide for the grant of the following facilities:

    (1) A term loan facility of €322,500,000 will be used by the Parent Company to fund a €265,000,000 repayment of an intra-Group loan the proceeds of which will then be applied by Adler RE to fund the repayment of the Adler RE 2023 Notes. €57,500,000 will also be used to pay fees incurred in relation to the New Money Funding, namely, the Backstop Fee (above) and the Ticking Fee, Early Bird Fees and the OID Fee (below).

    (2) A €235,000,000 term loan facility will be made available to the Parent Company to be used to fund a shareholder loan to Adler RE which will also be used to fund the repayment of the Adler RE 2023 Notes. The inter-company loan will not carry interest.

    (3) A €80,000,000 term loan facility will be made available to Consus or certain property-owning subsidiaries of Consus to fund capital expenditure.

    (4) A €300,000,000 term loan facility will be made available to the Parent Company and will be used to fund another shareholder loan to Adler RE to fund the repurchase or redemption of the Adler RE 2024 Notes.

31. Participation in the New Money is allocated to Plan Creditors on a pro rata and *pari passu* basis and it will carry "**payment-in-kind**" or "**PIK**" interest at a rate of 12.5% per annum. In addition to the Backstop Fee the Group has also agreed to pay a number of additional fees to New Money Providers. In particular:

    (1) The Group will pay an "**Early Bird Fee**" of 1% of the amount which each Plan Creditor committed to provide on or before the "**Early Bird Fee**

Deadline". This was initially 2 December 2022 but the Plan Company extended the deadline for other Plan Creditors until 31 March 2023. The extension allowed all Plan Creditors to be eligible to receive the Early Bird Fee if they contributed to the New Money.

(2) The Group will also pay a "**Ticking Fee**" of 5% on committed but undrawn New Money lending commitments. This is intended to reflect the opportunity cost to the New Money Providers who will need to ensure that they have sufficient funds available to satisfy their lending commitments.

(3) Plan Creditors who executed Commitment Letters before 14 December 2022 are entitled to the Ticking Fee calculated on their initial commitments for the period 9 January 2023 to 31 March 2023. From 1 April 2023 their Ticking Fee is calculated on the basis of their final commitments because other Plan Creditors could participate in the New Money until 31 March 2023.

(4) Finally, the Group will pay an "**Original Issue Discount Fee**" or "**OID Fee**" of 1% calculated on the nominal amount of the New Money notes issued by the new SPV to the New Money Providers. It is said that this is part of the pricing of the notes (comparable to the interest rate) and is available to anyone who participates in the New Money.

(5) The Ticking Fee and the Early Bird Fee were to be payable whether or not the wider restructuring plan was implemented and, if not, those fees were to rank as unsecured claims against the Parent Company in any insolvency proceedings. The OID Fee will be financed via an increase in the nominal amount of the notes to be issued by the SPV in relation to the New Money and will only accrue if those notes are actually issued.

(6) Finally, each New Money Provider will be allocated a pro rata entitlement to new shares in the Parent Company in a total amount equal to 22.5% of the Parent Company's share capital (on an as-converted basis). It is the Plan Company's evidence that the total value of the new shares would be approximately €32.6 million on the basis of the Parent Company's market capitalisation at the commencement of these proceedings.

(7) The Consent Solicitation

32. On 2 December 2022, the Parent Company launched the Consent Solicitation by publishing the relevant documentation on the Group's website and making a notification through the relevant clearing systems. On 9 December 2022, the Parent Company issued a press release announcing that more than 60% of the Plan Creditors had acceded to the Lock-Up Agreement and that the Group would look to implement the Proposed Amendments via an alternative route if the Consent Solicitation did not succeed.

33. Between 17 December 2022 and 19 December 2022 the vote on the Consent Solicitation took place. The Plan Company's evidence is that the requisite majority was achieved in five out of the six series of SUNs with over 75% of Plan Creditors in each series other than the 2029 Notes consenting to the Proposed Amendments.

34. It was also the Plan Company's evidence that Plan Creditors representing more than 78% of the total nominal amount outstanding under the SUNs and more than 82% of the voting creditors, in each case, voted in favour of the Consent Solicitation. However, only 54.9% of the total nominal amount of 2029 Notes remaining outstanding voted in favour of the Consent Solicitation and the requisite majority was not reached in respect of those notes. The outcome of the Consent Solicitation was announced on 20 December 2022.

(8) The AHG

35. By early December 2022 the AHG had emerged and formed a cohesive group of Plan Creditors represented by the same advisers. On 8 December 2022, they published an announcement stating that they intended to vote against the Consent Solicitation and by a letter dated 10 January 2023 the AHG's lawyers, Akin Gump LLP ("**Akin Gump**"), put forward an alternative proposal. I consider the terms of this proposal in a number of contexts below.

36. After correspondence with the Parent Company's solicitors, White & Case LLP ("**White & Case**"), it became clear that it would not be possible to reach an immediate compromise and on 26 January 2023 White & Case provided Akin

Gump with the letter distributed under the Practice Statement a few days earlier (the "**Practice Statement Letter**"). On 15 February 2023, White & Case confirmed that the Plan Company intended to proceed with the Convening Hearing (which then took place on 24 February 2023).

(9) The Acceleration

37. The SUNs in their existing form provide that an Event of Default occurs if the issuer applies for or institutes insolvency proceedings and that individual noteholders may serve notice declaring that all sums payable under the relevant notes are immediately due and owing. I set out the terms of the relevant clauses below (in their amended form). But for present purposes it is enough to record that the practical effect of such a notice is to accelerate the maturity date of the relevant SUNs. It also follows that if all of the Plan Creditors served a notice, all of the sums payable under the SUNs would become due and payable immediately and all of the debts due to Plan Creditors would rank equally for distribution.

38. The AHG filed a witness statement dated 16 March 2023 made by Dr Christian Halasz, a partner of Gleiss Lutz Hootz Hirsch ("**Gleiss Lutz**"), their German lawyers. It was his evidence that on 10 March 2023 a number of members of the AHG had served notice under Clause 10(2) by email on the Paying Agent appointed under the SUNs and on 13 March 2023 they had served notice by hard copy delivery. Those notices related to SUNs with a face value of €145 million. In a witness statement dated 29 March 2023 Mr Friedrich Schlott, who is counsel at Gleiss Lutz, updated the position and gave evidence that notices had also been served in relation to a further €40.3 million. Neither witness was called to give evidence and their evidence was not challenged by the Plan Company or SteerCo. I therefore accept it.

39. The basis on which these members of the AHG claimed to be entitled to accelerate their SUNs and to immediate payment was that if the Issuer Substitution was valid, then the issue of the Claim Form in these proceedings on 20 February 2023 amounted to an Event of Default because they are insolvency proceedings. The Plan Company disputes this construction of the SUNs. On 24

February 2023 a member of the AHG also commenced proceedings in the Regional Court of Frankfurt am Main for a declaration that the Issuer Substitution is invalid and ineffective and on 27 March 2023 the Court informed Gleiss Lutz, who are acting for that member, that White & Case were acting for the Parent Company and intended to defend the proceedings.

III. The Plan

40. The principal purpose of the Plan is to give effect to the Proposed Amendments to the SUNs in the context of the wider restructuring plan for the Group. It will involve six groups of amendments to the SUNs which I summarise as follows.

(1) The 2024 Notes: Maturity Extension

41. The maturity of the 2024 Notes will be extended from 26 July 2024 to 31 July 2025. Mr Bayfield stressed in his Skeleton Argument that this was the only maturity extension to any of the SUNs under the Plan and that the longer-dated maturities of the other series of SUNs would not be extended. He also stated that the maturity extension in respect of the 2024 Notes was designed to alleviate the Group's immediate liquidity pressures and in return for their maturity extension the 2024 Notes will be given priority over the other series of the SUNs.

(2) New Covenants

42. The Plan will insert various new covenants into the terms and conditions of the SUNs. The most important covenant for present purposes is a covenant to maintain the loan to value ratio of the Group's assets (the "**LTV Covenant**") which will be tested quarterly from 31 December 2024 and pursuant to which the Group must maintain an LTV of 87.5% until the end of 2025 (and 85% thereafter). If the Group commits a breach of the LTV Covenant, all of the SUNs can be accelerated and they are immediately due and payable. It is the Plan Company's case (which the AHG disputes) that this ensures parity among the six series of the SUNs even though they have different maturity dates. The Plan Company submits that they are likely to become payable at the same time if it emerges that the Group has insufficient assets to repay them. The Plan will also introduce certain additional

restrictions on debt incurrence and an obligation not to declare or pay any dividend or make any other payment or distribution to any of the Group's shareholders.

(3) Interest Payment Holiday and Uplift

43. The Plan provides for the suspension of cash interest payments for a period of approximately two years on all series of the SUNs with interest payable on the SUNs capitalised until 31 July 2025. In return, the SUNs will benefit from a coupon uplift of 2.75% until 31 July 2025 and after that date the coupons will revert to their current levels.

(4) The New Money

44. The Plan will make various amendments to permit certain members of the Group to incur additional indebtedness. For present purposes, the most important provisions are those which permit the Group to borrow the New Money and to refinance the existing indebtedness (which I have described above). It will also permit the modification of negative pledge covenants to allow for the creation of new security over the Group's assets and guarantees to be given by certain subsidiaries. The primary purpose of these amendments is to enable the Group to grant security to the New Money Providers and to the 2024 Plan Creditors.

(5) Reporting Covenants

45. The Plan will make various amendments to the terms and conditions of the SUNs temporarily to alleviate the reporting obligations placed on the Group. In particular, this group of amendments will prevent a default as a result of the Group's failure to appoint an auditor to carry out an audit of its financial statements for the year ended 31 December 2022 by the end of April 2023.

(6) The Notes Representative

46. The terms and conditions of the SUNs will be amended to enable the appointment of a "**Notes Representative**" for each series under the SchVG. Mr Bayfield submitted that the function of a Notes Representative was similar to that of a note trustee under English law or New York law. Mr Smith submitted that the appointment was unfair to the 2029 Plan Creditors because it conferred very wide

powers and discretions which the Notes Representative would exercise to their disadvantage and against their interests.

(7) The Intercreditor Agreement

47. When the Plan is implemented, the Parent Company and the Plan Company intend to enter into two intercreditor agreements. For present purposes the relevant agreement (which I will call the "**Intercreditor Agreement**") is described in the Explanatory Statement as the "New Parent Company Intercreditor Agreement" and the Explanatory Statement explains its purpose as follows:

> "The New Parent Company Intercreditor Agreement will be executed if the Restructuring Plan becomes effective and will be made, inter alios, between the Parent Company, the Plan Company, certain subsidiaries of the Parent Company, the LendingCo, certain intra-group lenders, the Notes Representative and the Security Agent and govern, inter alia, the administration and enforcement of the guarantees and the transaction security (as described in section 6.1 (Summary of the post-restructuring security structure and hive-down) in this Part) and the distribution of the proceeds from such enforcement and the relationship between the LendingCo, the SUN Holders and the Convertible Notes holders, the SSD lenders and the holders of and claims under any instrument by which the Loan Notes and/or the Convertible Notes may be refinanced. The Notes Representative will act as such in respect of each series of the SUNs."

(8) Power of Attorney

48. Mr Bayfield also drew my attention to the fact that the Plan Company will be given a power of attorney to execute the Amendment Agreement on behalf of the Plan Creditors. He submitted (and I accept) that this is a commonplace structure which has been approved by the Court: see *Re ColourOz Investment 2 LLC* [2020] BCC 926 at [75] (Snowden J).

IV. Procedural History

49. On 24 February 2023 Sir Anthony Mann made the Convening Order and on 27 February 2023 he handed down the Convening Judgment. He was satisfied in relation to the following points:

(1) The jurisdictional or threshold requirements of section 901A had been fulfilled: see [14](i).

(2) Sufficient notice had been given to the Plan Creditors and the Practice Statement Letter was in an appropriate form: see [14](ii).

(3) The classes of Plan Creditors had been correctly identified and constituted. As he pointed out, the Plan Company had adopted a conservative approach to class constitution and had treated each set of SUNs as a separate class: see [14](iii).

50. The AHG did not submit that Sir Anthony Mann had been wrong to reach any of these conclusions. Moreover, Mr Bayfield submitted (and I accept) that the Court should follow the conclusions reached in the Convening Judgment on issues of class composition particularly in circumstances where the AHG accepts that the classes have been properly constituted. He cited the decision of Snowden J in *Re Global Garden Products Italy SpA* [2017] BCC 637 (Ch) at [43]:

> "As regards the correct constitution of classes, I accept the point made by Mr Dicker that if a judge has heard full argument at the Convening Hearing and has decided on the appropriate constitution of classes, it is not ordinarily appropriate for a different judge at the sanction hearing to take a different view of his own motion in the absence of any creditor appearing to contend that the classes were not correctly constituted."

51. On 27 February 2023 the Plan Company circulated the following documents to the Plan Creditors: notice of the Plan Meetings (which formally convened them), the Explanatory Statement, a holder letter (which contained a voting form enabling creditors to register to vote or appoint a proxy) and the Plan itself.

52. Paragraph 1 of the Convening Order provided for the Plan Meetings to take place on 16 March 2023. On 14 March 2023, the Plan Company notified the Plan Creditors by posting a notice on the Plan portal that the Plan Meetings would be moved to 21 March 2023. The stated purpose of this step was to allow Plan Creditors more time to review an updated version of the Explanatory Statement which was made available on 15 March 2023.

53. The updated Explanatory Statement involved a number of changes. But the principal one was to draw attention to the BCG Report (below) on the Relevant Alternative which had been updated and resulted in an increase in the expected returns from 57% to 63%. The Plan Company announced that the Plan Creditors could register to vote at the Plan Meetings by lodging a holder letter before 17 March 2023 but any Plan Creditor who wished to change their vote could do so by attending the Plan Meeting to revoke any prior voting instructions. In the event, no Plan Creditor changed its vote.

54. There was an issue between the parties as to whether the Plan Company was empowered to change the date of the Plan Meetings. On 16 March 2023 Mr Andrea Trozzi, a director of the Plan Company and the Chair of the Plan Meetings, opened the meetings and adjourned them to 21 March 2023. Akin Gump attended the relevant meeting on behalf of the AHG and put certain questions to him. On 21 March 2023 the Plan Meetings (or adjourned Plan Meetings) were held by webinar and the outcome of those meetings was as follows:

(1) At the meeting of the holders of the 2024 Notes (the "**2024 Plan Creditors**"), the Plan was approved by 98.50% in value of those voting (with a turnout of 96.60% in value).

(2) At the meeting of the holders of the 2025 Notes (the "**2025 Plan Creditors**"), the Plan was approved by 92.93% in value of those voting (with a turnout of 96.93% in value).

(3) At the meeting of the holders of the January 2026 Notes (the "**January 2026 Plan Creditors**"), the Plan was approved by 95.00% in value of those voting (with a turnout of 94.87% in value).

(4) At the meeting of the holders of the November 2026 Notes (the "**November 2026 Plan Creditors**"), the Plan was approved by 91.97% in value of those voting (with a turnout of 94.35% in value).

(5) At the meeting of the holders of the 2027 Notes (the "**2027 Plan Creditors**"), the Plan was approved by 80.68% in value of those voting (with a turnout of 90.48% in value).

(6) At the meeting of the 2029 Plan Creditors, the Plan was approved by 62.28% in value of those voting (with a turnout of 95.46% in value) (as stated above).

55. The Plan was therefore approved by the requisite majority of Plan Creditors voting at each Plan Meeting apart from the 2029 Plan Creditors. Mr Bayfield submitted (and I accept) that there was a high turnout in each class and that this demonstrates that the Plan Creditors were properly notified of the Plan Meetings. He also submitted that the 2029 Plan Creditors approved the Plan by a substantial majority although not by the required 75% to approve the Plan. In the event, there was no dispute between the parties that the Plan Meetings were validly held and Mr Smith did not challenge the adjournment of the meeting from 16 March 2023 to 21 March 2023.

56. There was a dispute between the parties in relation to the weight to be attached to the votes cast by the Plan Creditors for reasons which I will explain. Mr Smith and Mr Al-Attar also relied on the fact that the Explanatory Statement was deficient. They did not submit in terms in their Skeleton Argument that I should refuse to sanction the Plan for that reason and that reason alone. Moreover, there is no evidence that the relevant deficiencies made any difference to the vote. In particular, it was not suggested that any other creditors had informed any of the parties that they wished to change their votes because they had been misled (and none appeared before the Court to say so either).

V. The Law

57. In this section I set out the general legal principles which I must apply in deciding whether to sanction the Plan and where I refer to statutory sections, I intend to refer to sections in the Companies Act 2006 (unless otherwise stated). Section 901F(1) provides that if a number representing 75% in value of the creditors or class of creditors present and voting either in person or by proxy at the plan meeting agree a compromise or arrangement, the Court may sanction the compromise or arrangement. Section 901F(2) provides that subsection (1) is subject to section 901G, which is headed "sanction for compromise or arrangement where one or more classes dissent". The section provides as follows:

> "(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

58. Section 901G empowers the Court, therefore, to sanction a plan under section 901F notwithstanding that the arrangement has not been approved by the requisite majority in every meeting of creditors provided that conditions A and B are met. In *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) Snowden J identified the following three questions which the Court must consider on an application under the section at [104]:

> "[W]here a company applies for the sanction of a restructuring plan in reliance on section 901G, three questions must be considered by the Court:
>
> <u>Condition A</u>: If the restructuring plan is sanctioned, would any members of the dissenting class be any worse off than they would be in the event of the relevant alternative? This is often described as the "no worse off" test.
>
> <u>Condition B</u>: Has the restructuring plan been approved by 75% of those voting in any class that would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative?
>
> <u>General Discretion</u>: In all the circumstances, should the Court exercise its discretion to sanction the restructuring plan?"

(1) Condition A: The NWO Test

59. The principal issue between the parties was whether Condition A was satisfied and in *Virgin Active* (above) Snowden J articulated the following test at [106] to [108] which both parties invited me to apply:

> "[106] The "no worse off" test can be approached, first, by identifying what would be most likely to occur in relation to the Plan Companies if the Plans were not sanctioned; second, determining what would be the outcome or consequences of that for the members of the dissenting classes (primarily, but not exclusively in terms of their anticipated returns on their claims); and third, comparing that outcome and those consequences with the outcome and consequences for the members of the dissenting classes if the Plans are sanctioned.
>
> [107] It is important to appreciate that under the first stage of this approach, the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than not that a particular alternative outcome would occur. The critical words in the section are what is "most likely" to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two.
>
> [107] Having identified the relevant alternative scenario, the Court is also required to identify its consequences for the members of the dissenting classes. This exercise is inherently uncertain because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain."

60. I will also refer to Condition A as the "**No Worse Off Test**" or the "**NWO Test**". Mr Smith and Mr Al-Attar also cited *Re Hurricane Energy plc* [2021] BCC 989 where Zacaroli J adopted the same test. After setting out the three-stage test he provided the following additional guidance:

> "37. As to the first step, the court is not required to be satisfied that a particular alternative would definitely occur, merely (where there are possible alternatives) which one is most likely to occur: *Virgin Active* at [107].
>
> 38. As to the second step, the outcome or consequences for the shareholders is to be assessed primarily, but not exclusively, in terms of the anticipated returns on their claims: *Virgin Active*, at [106]. In *Re Deep Ocean 1 UK Ltd* [2021] EWHC 38 (Ch), Trower J said of the phrase "any worse off" that it is "…a broad concept and appears to contemplate the need to take into account the impact of the

> restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay." I consider a similarly broad approach is required in determining whether shareholders are "any worse off" as a result of the Plan: it is necessary to take into account all incidents of their rights as shareholders.
>
> 39. As Snowden J pointed out in *Virgin Active* the exercise at the second stage is inherently uncertain, "because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain". *Virgin Active* was a case where the relevant alternative involved an immediate insolvency process. In such a case (which is more typical in restructurings generally) disputes between stakeholders will often focus on the appropriate value to ascribe to assets and liabilities in that insolvency process. That is not the case here where (as I will develop below) the relevant alternative is the continuation of trading for at least a further year.
>
> 40. Where the threshold conditions are satisfied, although the starting point is the approach to the exercise of discretion adopted in relation to schemes under Part 26, the fact that the case involves the application of the cross-class cram-down power in section 901G requires important modifications to that approach: see *Deep Ocean* (above), per Trower J at [44] to [46]. In particular, the reluctance of a court to depart from the outcome of a properly convened meeting of a class of creditors cannot have the same place in the court's approach to sanctioning a restructuring plan to which section 901G applies."

61. This is a case in which the Relevant Alternative involves an immediate insolvency process but the comparators are both complex and uncertain. I take comfort from the fact that in both *Re Deep Ocean 1 UK Ltd* [2021] EWHC 38 (Ch) and *Hurricane Energy* Trower J and Zacaroli J respectively took a broad approach recognising the uncertainties in the exercise. Moreover, in *Re ED&F Man Holdings Ltd* [2022] EWHC 687 (Ch) Trower J accepted that the directors of the plan company are normally in the best position to identify what will happen if a scheme or restructuring plan fails. He stated this at [39]:

> "In my view, the court should recognise that the directors are normally in the best position to identify what will happen if a scheme or restructuring plan fails. Where the evidence appears on its face to reflect a rational and considered view of the company's board, the court will require sufficient reason for doubting that evidence. As no creditor or member appears today to challenge the director's conclusion on this aspect of the test and as the evidence appears to

> reflect a rational and considered view by the board, there is no basis on which I can or should doubt it."

62. I can see no reason why the Court should not adopt the same approach to the consequences of the Plan itself where there are a range of possible outcomes and complaint is made either that they are uncertain or that the Court should dig deeper and further. That said, in the present case Mr Trozzi was the only director of the Plan Company or the Parent Company to give evidence and he only had limited knowledge because he had been appointed as recently as 23 December 2022. I bear this in mind when considering the gaps (if any) in the Plan Company's evidence.

63. In *Deep Ocean* (above) Trower J also stated that the Court must take into account all of the legal consequences which the restructuring plan will have on the relevant class of creditors in deciding whether they will be worse off if it is implemented. In the present case this is particularly important and he said this at [35]:

> "[T]he phrase used is 'any worse off', which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay."

(2) Condition B

64. For what it is worth, there was no dispute that Condition B is satisfied in this case. The Plan Company's expert evidence was that the Plan Creditors were likely to recover 63% of their claims in insolvency proceedings under the Relevant Alternative. The AHG's expert evidence was that they were likely to recover 56% in insolvency proceedings. The way in which the experts each arrived at those conclusions was, however, completely different and their reasoning was relevant to the other issues which I had to decide.

(3) Discretion

65. The Explanatory Notes to the Corporate Insolvency and Governance Act 2020 (which inserted Part 26A into the Companies Act 2006) indicate that the Court has an absolute discretion whether or not to sanction a restructuring plan and may

refuse to do so on the grounds that it would not be "just and equitable". However, the Court should be mindful that those words do not appear in the section and the Court does not have carte blanche to impose its own views of what is fair or just and equitable as between the parties. Furthermore, there is no presumption in favour of sanction even if the Plan Company satisfies both Conditions A and B (which are jurisdictional requirements): see *Virgin Active* (above) at [217] to [224].

(i) Overall Support

66. Mr Bayfield submitted that the creditors are normally the best judges of their own interests and that the overall support for the restructuring plan is a relevant factor. In answer, Mr Smith submitted that the normal principle that overall support is a relevant factor is weaker in the case of a cross-class cram down where, by definition, the restructuring plan has not been approved by the requisite majority in each class of creditors. I accept both submissions. In particular, I approach the question of discretion on the basis that overall support is a relevant but not important or decisive factor.

67. In *ED&F Man Holdings* Trower J placed reliance on the fact that the plan enjoyed strong support across all classes of creditors: see [50]. In that case the vote in favour of the plan across all of the classes was 84% and the present case involves similar support. In relation to the dissenting class itself, Trower J considered that it remained relevant that a significant majority by value – in that case 69% – had voted in favour of the plan (although it fell short of the statutory majority): see [55]. In the present case, the majority was 62.28%. The fact that a majority of the 2029 Plan Creditors voted in favour of the Plan is also a relevant factor which I may take into account in the exercise of the Court's discretion.

(ii) Fair Distribution of Benefits

68. Mr Smith and Mr Al-Attar submitted that it was important for the Court to adhere to the principle of *pari passu* distribution given that the Plan was not an attempt to rescue the business as a going concern but an orderly wind down and sale of the Group's assets which they described as a "**Liquidation Plan**". They submitted that in no case had the Court sanctioned a Liquidation Plan in which this principle

was not respected. In *Deep Ocean* (above) Trower J gave the following general guidance about the approach which the Court should adopt (at [62] and [63]):

> "62. The next discretionary factor that may apply in s.901G cases relates to the relative treatment of creditors under the proposals and has much in common with what has come to be called the "horizontal comparison" that the court will often carry out when considering an unfair challenge to a company voluntary arrangement. It is the second of the two heuristics referred to by Norris J in the *Debenhams* case at [12] (in a passage immediately following the citation I set out earlier in this judgment). It compares the treatment of creditors under the CVA inter se. As Norris J said: "whilst there is no prohibition on differential treatment, any differential treatment must be justified".
>
> "63. In my view, because a 'class' right of veto is removed by the operation of s.901G, justice may require the court to look at questions of horizontal comparability in the context of a cross-class cram down to see whether a restructuring plan provides for differences in treatment of creditors inter se, and if so whether those differences are justified. In particular the court will be concerned to ascertain whether there has been a fair distribution of the benefits of the restructuring (what some commentators have called the "restructuring surplus") between those classes who have agreed the restructuring plan and those who have not."

69. The parties debated three points before me in the context of a Liquidation Plan under which the maturity dates of the Notes were to remain unchanged although there was an overlap between all three. First, there was the importance to be attached to the *pari passu* principle itself. Secondly, there was the question whether the Court should sanction a restructuring plan which could have been improved or could have eradicated differential treatment. Thirdly, there was the question whether it was open to the Court to sanction a restructuring plan which involved changing or even reversing the existing priorities between the parties.

70. Mr Smith and Mr Al-Attar cited a number of authorities for the proposition that the principle of *pari passu* distribution is a fundamental principle of corporate insolvency law: see *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437, *Re Golden Key Ltd (in receivership)* [2009] EWCA Civ 636, *Lehman Brothers International (Europe) v CRC Credit Fund Ltd* [2011] 2 BCLC 184, *Re Lehman Bros (International) Europe Ltd (in administration) (No 4)* [2018] AC 465 and Goode on the Principles of Corporate Insolvency Law. They also cited

British Eagle International Airlines Ltd v Compagnie Nationale Air France [1975] 1 WLR 758 and *Belmont Park Investments v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 for the proposition that it is contrary to public policy and void to contract out of the *pari passu* principle.

71. Given this weight of authority I accept, of course, that the *pari passu* principle is a fundamental principle of corporate insolvency law. I also accept that it is important to take account of the horizontal comparator in the exercise of the Court's discretion. Mr Smith and Mr Al-Attar emphasised the importance which the Court attaches to the horizontal comparator in claims for unfair prejudice arising out of a CVA: see, e.g., *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2020] BCC 9 at [12] (Sir Alastair Norris) referred to by Trower J in *Deep Ocean* (above).

72. In *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2022] 1 BCLC 557 Zacaroli J explained the relationship between the vertical and horizontal comparators in the context of section 6 of the Insolvency Act 1986. In particular, he stated this at [106] to [110]:

> "106. Prejudice to a creditor, in the context of a CVA, is likely to be readily identifiable and readily established, for example if the amount owing to it is reduced (without receiving payment) or if it loses a benefit relating to the debt, for example if its security is impaired. More difficult to pin down are the circumstances that render the prejudice "unfair".
>
> 107. In considering whether an arrangement is unfairly prejudicial, while recognising that it is necessary to have regard to all the circumstances of the case, the courts have developed two helpful tests, labelled the "vertical" and "horizontal" comparators: see *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch) ("*Powerhouse*"), at [75].
>
> 108. The vertical comparator, described by Henderson J in *Mourant & Co Trustees Ltd v Sixty UK Ltd* [2010] EWHC 1890 (Ch) ("*Sixty*") at [67] as the "irreducible minimum" below which the return in a CVA cannot go, is a comparison with what the creditors' position would have been in the event that the CVA was not approved, typically therefore their position in a winding up or bankruptcy: see the Cork Report (at [378]) and *Re T&N Limited* [2004] EWHC 2361 (Ch) , per David Richards J at [82], where he considered it difficult to envisage a court not interfering with a CVA which was "…likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a

> winding up would in reality be achieved and within an acceptable time-scale".
>
> 109. It is emphatically not enough, to preclude a finding of unfair prejudice, that the vertical comparator test is satisfied in respect of objecting creditors. It is also necessary to consider the position as between creditors – the horizontal comparator. Indeed, it was established relatively early on that unfairness in the context of section 6(1)(a) stems from differential treatment as between creditors: see, for example, *Re a Debtor (No.222 of 1990), ex p the Bank of Ireland* [1992] BCLC 137, per Harman J at p.145d-e. In *Doorbar v Alltime Securities Limited (No.2)* [1995] BCC 728, Knox J, put it this way: "Unfair prejudice, therefore, is a reference to a degree of prejudice to one creditor or class of creditors as compared with other creditors or class of creditors. It involves an assessment of any imbalance between possible prejudices to one or the other…"
>
> 110. Knox J's conclusion on the question of unfair prejudice was upheld on appeal: [1996] 1 WLR 456, per Peter Gibson LJ at pp.467-468."

73. He also stated, however, that the fact that the CVA gave rise to differential treatment between creditors did not establish unfair prejudice. It gives rise to a cause for inquiry but that treatment might turn out to be justified and this required a comparison between the range of alternatives available to the various creditors. He also pointed out that in certain circumstances the *pari passu* principle might itself result in differential treatment. See [111] to [114]:

> "111. The mere fact that there is differential treatment does not, however, establish unfair prejudice: see *Re a Debtor (No.10 of 1999)* [2001] 1 BCLC 54. At p.63c, Ferris J held that it gave cause for inquiry, but might turn out to be justified.
>
> 112. Lightman J in *IRC v Wimbledon Football Club Ltd* [2004] EWHC 1020 (Ch), at [18] summarised the effect of the authorities to that date as follows: (1) the unfairness must be caused by the terms of the arrangement; (2) unequal or differential treatment of creditors of the same class will not of itself constitute unfairness, but may give cause for inquiry and require an explanation; (3) it is necessary to consider all the circumstances including, as alternatives to the arrangement proposed, not only liquidation but the possibility of a different fairer scheme; (4) differential treatment might, in some circumstances, be required to ensure fairness (citing, as an example, *Sea Voyager Maritime Inc v. Bielecki* [1999] 1 All ER 628). Further, he noted that differential treatment may be justified where necessary to ensure the continuation of the business that underlies the arrangement: see also, *Powerhouse*, at [90], *Sixty* at [67], and *Debenhams*, at [110].

> 113. Differential treatment is also justified where it is required by section 4 IA 1986 (relating to secured and preferential creditors, see [52] above). There is no inconsistency, however, between such differential treatment and the basic principles of good faith and equality, because "equality" in this context does not mean equal treatment in the abstract, but equal treatment in the context of the established insolvency principle of pari passu. The pari passu principle is not an absolute rule, but is subject to important exceptions. For example, secured creditors are entitled to rely on their security outside of bankruptcy or liquidation (and the assets of the debtor subject to security have been treated as excluded from the bankruptcy estate) and for policy reasons preferential creditors have for a long time ranked ahead of other unsecured creditors upon insolvency (although the precise definition of a preferential debt has changed over time).
>
> 114. The pari passu principle also recognises that some creditors may have additional rights which they are entitled to retain in an insolvency, for example a right in some circumstances to pursue third parties for the debt owed to them by the insolvent debtor. There is no inconsistency with the principles of good faith and equality if a voluntary arrangement affords different treatment to a creditor in order to preserve those rights."

74. In my judgment, there is no real difference between the approach taken by the Court on a claim to set aside a CVA for unfair prejudice on the grounds of differential treatment and the approach set out by Trower J in *Deep Ocean* (above). The Court should take into account the horizontal comparator and will normally approve a plan if there is equal treatment between all creditors. Moreover, equal treatment will normally mean adherence to the *pari passu* principle. However, even if there are differences in the treatment of individual creditors or classes of creditors, the Court may still approve or sanction the scheme provided that there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment.

75. In relation to the question whether the Court should refuse to sanction the Plan because a better plan is available, Mr Bayfield, Mr Perkins and Miss Wang submitted that there was an important difference between claims to set aside a CVA for unfair prejudice and an application to sanction a restructuring plan under Part 26A and that it was not the Court's role to consider whether the Plan was the best plan or the only fair scheme which is available. In support of this proposition they relied on *Re Amicus Finance plc* [2022] Bus LR 86 in which Sir Alastair

Norris stated this at [45] in the context of a submission that it was unfair for the shareholders to retain their equity (and I return to this passage in that context):

> "There is one submission of Counsel for Crowdstacker that I must specifically address. Counsel submitted that the scheme failed the "fairness" test purely and simply because none of the benefits (if any) from future trading accrued to the compromised creditors; the benefits accrued solely to the Amicus shareholders. I have previously expressed some sympathy with this view when considering schemes for the compromise of compensation claims against a company, where it is those who have been wronged by the company who sacrifice their redress to enable the wrongdoing company to be rescued for the benefit of its shareholders: *Re Provident SPV* [2021] EWHC 1341 (Ch) at [44]-[46]. But the situation here is very different. Crowdstacker enabled investors using its platform to risk commercial advances to Amicus for reward, advances of which Crowdstacker is now (on its own case) the sole beneficial owner. The context is an entirely straightforward commercial one in which it is very well established that it is not the role of the Court to consider whether the scheme submitted for sanction is the best scheme or the only fair scheme or could be improved in some respect, but rather to assure itself that it is one approved by the requisite majority of properly informed and consulted creditors acting in accordance with their ordinary class interests and not oppressively in pursuit of some special interest: *Re Telewest Communications* [2004] EWHC 1466 (Ch) at [21]-[22]. For the purpose of this part of the analysis I do not accept the submission of Counsel for Crowdstacker."

76. Mr Smith and Mr Al-Attar accepted that this approach was correct for schemes of arrangement under Part 26 but submitted that it was not the correct approach for restructuring plans under Part 26A where there is a dissenting class. In particular, they submitted that Zacaroli J had set out the test both for unfair prejudice claims and Part 26A restructuring plans in *New Look* (above) at [191] to [196]:

> "191. Whether unfair prejudice exists depends on all the circumstances, including those that would be taken into account in exercising the discretion to sanction a Scheme, per Hildyard in *Lehman* (above), and in exercising the discretion to cram-down a class in a part 26A plan".

> "192. Without attempting to define what all the circumstances in any case might be, I make the following four points which are of particular relevance on the facts of this case".

> "193. First, an important consideration is whether there is a fair allocation of the assets available within the CVA between the compromised creditors and other sub-groups of creditors. That will include considering the source of the assets from which the treatment of the different sub-groups derives, and whether they would or could have been made available to all creditors in the relevant alternative".
>
> "194. For example, if secured creditors receive favourable treatment solely by reference to the existence of their security so that, insofar as they are unsecured creditors and thus vote at the creditors meeting they are treated no better than other creditors, then the fact that their vote was decisive in approving the CVA is unlikely to be unfair".
>
> "195. In contrast, if assets that would, in the relevant alternative, have been available for all unsecured creditors are allocated in a greater proportion to other creditors (e.g. where critical creditors are paid in full), then the fact that the requisite majority was reached by reason of the votes of those creditors may point towards the CVA being unfairly prejudicial, even if there was an objective justification for their payment in full".
>
> "196. For the reasons I have expressed at [147] above, in considering whether the allocation of assets is fair, the court is necessarily required to consider whether a different allocation would have been possible, so the principle adopted in scheme cases, against considering whether an alternative arrangement would have been fairer, needs to be modified."

77. I accept Mr Bayfield's submission and I reject Mr Smith's submission on this issue. *Amicus Finance* was an application to sanction a plan under section 901G. It, therefore, provides guidance which the Court is entitled to follow in the present case although it must be read in context (below). Further, in *New Look* Zacaroli J qualified the passage which I have set out immediately (above) by expressing the view that there was a clear difference between a claim for unfair prejudice and a restructuring plan under Part 26A. He stated this at [199]:

> "Fourth, a finding of unfair prejudice ought not to be precluded merely because the same result might have been achieved in a part 26A plan. As Mr Arden QC pointed out, the process under part 26A contains important safeguards for creditors that are absent from the CVA process. Most importantly, there is significant court oversight before the scheme becomes effective. In particular, the court is closely involved with identifying whether the class meetings are properly constituted before they are convened. Creditors know at the outset, therefore, with whom they are to consult and are able to

> negotiate with the company and other groups of creditors with clarity as to the strength of their position. In addition, creditors are likely to have significantly more time to consider the plan, and to consult with other creditors, before the plan meeting: all creditors are required to be sent a "practice statement letter" sufficiently in advance of the convening hearing so as to enable creditors to have an effective opportunity to appear at and take part in the hearing; and the court will direct that the period of notice for the class meetings is sufficient in all the circumstances, including the complexity of the plan. In contrast, in a CVA creditors are entitled to receive only one notice within a much tighter timetable: not less than 14 days before the decision date, but not more than 28 days from the date the nominee's report was filed at court: IR 2016, Rule 2.27."

78. Finally, I note that in *New Look* Zacaroli J dismissed the claims for unfair prejudice although the CVA involved differential treatment of various groups of creditors. He gave detailed reasons for doing so which it is unnecessary for me to rehearse here. But I note that he rejected an argument based on the judgment of Norris J in *Debenhams* that the modifications to the terms of the leases imposed by the CVA must interfere with the landlords' rights only to the minimum extent necessary to achieve the objectives of the CVA: see [217]. This suggests to me that Zacaroli J regarded the test for unfairness in the context of unfair prejudice to be rather wider than Mr Smith and Mr Al-Attar submitted to me.

79. Thirdly, and finally, it was common ground that the Court had the power to reverse or change the priorities of the creditors under the Plan although the parties were not agreed about what I should take from the cases in which a restructuring plan had been sanctioned on such terms. In *ED&F Man Holdings* Trower J considered that the distribution of the restructuring surplus respected the existing ranking of creditor claims because the dissenting class were "very nearly out of the money" even on a high case return. He stated this at [58]:

> "Thirdly, there is no reason to consider that the benefits of the restructuring plan, what is sometimes called the restructuring surplus, is being shared in an inequitable manner which does not reflect plan creditors existing rights. The plan itself respects the current ranking of creditor claims. In my view it is also relevant that the members of the dissenting class are very nearly out of the money even on a high case return. It follows that to the extent they have an interest in the restructuring surplus, it can fairly be described as one that is minimal. The closer the members of the dissenting class are

> to being out of the money, the less clearly it can be seen that they might have an entitlement to an enhanced share."

80. Trower J also dealt with the introduction of "new money" which had the effect of enabling creditors to improve their priority in exchange for their existing debt. He asked himself whether this might have an adverse effect on the dissenting class and concluded that it did not for the following reasons (at [61] to [64]):

> "61. I do not think though on further reflection that it is possible for me to conclude that this is or even might be the case. From a legal perspective, all members of the dissenting class are permitted to obtain an elevation of their existing ranking through the advance of new money. Even if they do not do so, the undisputed evidence is that they will be in a much better position than they would be in the relevant alternative, i.e. if the plan were not to be approved.
>
> 62. Furthermore, there is a helpful analysis of the reason why a structure of this sort is not intrinsically unfair in Meade J's judgment sanctioning the 2020 scheme, reported at [2020] EWHC 2505 (Comm), at paragraph 27 , which is worth reciting in full: "I asked Mr Allison forensically what disadvantage could be suffered by any of the creditors in either class, and his answer, which I accept, was that the only conceivable disadvantage would be to creditors in the consolidated creditors' class who did not want to participate in the provision of new money and therefore who could not achieve elevation of any of their existing debt. Clearly this is a theoretical possibility and may turn out in due course to be a real possibility, but to my mind the key answer is that all creditors in that class are able to subscribe for the new money instruments pro rata the debt which they hold, so there is no unfairness in that respect, and it is no doubt for this reason again that the scheme achieved the level of support that it did."
>
> 63. Michael Green J also addressed this point in his convening judgment at paragraph 75: "Even though it is more relevant to the sanction stage, I can see that there are very good commercial reasons why such an elevation structure is used in this plan, providing certainty that the new money will be raised and potentially reducing the pricing of the new facility. It also avoids a backstop or underwriting fee."
>
> 64. At the end of day, and having regard to the approach that was taken by both Michael Green J and Meade J, I think there is nothing unfair in a structure which enables the B noteholders, who are either out of the money or very nearly so, to lend new money and obtain the prospect of a 100% return but have only the prospect of a reduced 40% return if they do not. It seems to me that there are, as Michael Green J anticipated in his convening judgment, very good commercial reasons for introducing a structure of this sort and the

> precise nature of the terms which are included within the structure seem to me to be entirely reasonable."

81. In *Re Houst Ltd* [2022] BCC 1143 Zacaroli J was prepared to sanction a restructuring plan even though it involved a clear departure from the order of priority between creditors. He described the question of whether the plan provides a fair distribution of the benefits generated by the restructuring as an important factor: see [29]. He also observed that although a relevant reference point is the treatment of creditors in the relevant alternative, a departure from the existing priorities of the classes of creditors is not fatal to the success of the plan (unlike Chapter 11 under US federal bankruptcy law): see [30].

82. But it is also instructive to consider how Zacaroli J exercised his discretion in *Houst*. He found that the positive reasons given for depriving HMRC of the priority which they would have had in the relevant alternative were weak. However, he was prepared to sanction the plan for the following reasons:

> "40. First, the new value generated as a result of the plan comes principally from the capital injection from members. This does two things. First, it provides a fund from which a substantial part of the restructured debt due to the Bank can be paid down. Second, it provides essential liquidity to enable the Company to continue trading so as to generate funds to pay dividends to HMRC and to the ordinary unsecured creditors. This is not, therefore, a case where assets that would have been available in the administration of the Company are being applied in a manner inconsistent with the order of priorities applicable in that administration.
>
> 41. To some extent, the relinquishment of the greater part of their debt by all creditors also contributes to the value created by the plan. That is because it is only by relieving the Company of all but approximately 25% of the debt due to the Bank, 20% of the debt due to HMRC and 5% of the debt due to ordinary unsecured creditors that the Company is able to continue trading so as to generate funds to pay a higher dividend to the Bank and HMRC, to pay anything at all to ordinary unsecured creditors, and ultimately to generate value for shareholders. This point is of limited strength, however, where there are no circumstances in which the Company could realistically pay any part of the relinquished debt.
>
> 42. Second, the only creditor who is disadvantaged – in the sense only that they will receive a smaller share of the distributions in the plan than they would have been entitled to if the order of priorities in administration had been respected – is HMRC. HMRC are a sophisticated creditor able to look after their own interests. They

> have had full notice of the plan and, although they voted against it, they have not attended the hearing to oppose the plan, or presented any arguments against sanctioning the plan.
>
> 43. Third, even HMRC stand to receive a better outcome if the plan is sanctioned than in the relevant alternative. As I have noted above, the only explanation I have for their vote against the plan is that contained in their email of 22 June 2022, i.e. they would not agree to relinquish their preferential status. It appears, from that email, that this was a decision reflecting a general policy, or at least not a decision taken with specific regard to the circumstances of this particular case. HMRC have not otherwise engaged with the Company or with the members who have agreed to inject new capital. They have not sought, for example, to negotiate an alternative deal.
>
> 44. Accordingly, the issue facing me is a binary one; to sanction the plan, or not. While it would in theory be possible to require the Company to start again and seek to negotiate with HMRC, that is highly undesirable, where the costs and delay in requiring it do so would impose a disproportionate burden on the Company, a small to medium enterprise. In any event, without knowing what HMRC's position would be, it may be that nothing at all would be gained by requiring the Company to start again.
>
> 45. If I refuse to sanction the plan, then the evidence indicates that all creditors, including HMRC, will be worse off. As HMRC have not opposed the sanction of the plan, I do not know that they would wish – of the two options open to me – to choose that one. In some cases, a creditor (particularly one with an interest in many company insolvencies such as HMRC) might be concerned to ensure that the debtor is placed into a formal insolvency process such as liquidation or administration to enable investigations to be carried out in relation to the directors' management of the business or potential claims against third parties. As I have already noted, the Company's financial difficulties appear to be a consequence of the pandemic, rather than anything which might justify such investigations. HMRC have certainly not suggested that this is a case where they would prefer a formal insolvency process for that reason. Aside from that, I would expect HMRC's interest to be in recovering more, rather than less, tax and, as such, in relation to the binary choice that faces me, their interests lie in sanctioning the plan.
>
> 46. In these circumstances, I am prepared to exercise my discretion so as to sanction the plan."

83. Both parties relied on *Houst.* Mr Bayfield, Mr Perkins and Miss Wang relied on it as showing that the Court's discretion was a wide one and it could approve a restructuring plan even if it reversed or advanced the priority of the creditors. Mr Smith and Mr Al-Attar relied on the statement of principle at [29]. They also relied

on the fact that Zacaroli J considered it was a weak justification for differential treatment that the plan represented the best deal which could be negotiated between the various creditors. They also submitted that if this was enough, the largest group of creditors could always impose the terms which they wanted (however unfair) by saying that these were the only terms which they were prepared to accept.

(iii) Holdings

84. Many of the Plan Creditors who voted in support of the Plan are members of SteerCo. Others hold interests across all classes of the SUNs and so it is possible that they may have voted all of their rights under the SUNs in favour of an outcome which was more favourable to holders with earlier dated notes rather than later dated notes. Mr Bayfield submitted (and I accept) that it was relevant, therefore, to consider the extent to which the Plan is supported by "pure" 2029 Plan Creditors, who do not have "cross-holdings" in other classes of SUNs. In support of this proposition he cited *Re PizzaExpress Financing 2 PLC* [2020] EWHC 3933 (Ch) at [14] (Sir Alastair Norris).

85. Mr Smith and Mr Al-Attar submitted that I should treat the votes of the majority with caution because SteerCo had a special interest in preferring the 2024 Notes and the Adler RE Notes in favour of the later dated SUNs. They also submitted that SteerCo had a special interest in elevating their existing debt by providing the New Money and in earning the additional fees which were available. Ms Toube relied on *Re Lehman Brothers International (Europe) Ltd* [2019] BCC 115 in which Hildyard J put forward the following test when there is a challenge to the representative nature of a vote by creditors:

> "The questions at the heart of the matter at this stage are (a) whether the majority creditors had some "special interest(s)" different from and adverse to the other members of the Higher Rate Creditor class by which it is shown (b) they were predominantly motivated in voting as they did; if so (c) whether their votes are to be (i) disregarded or (ii) discounted and (d) what effect that should have in terms of whether or not the court should decline to sanction the scheme."

86. Mr Smith and Mr Al-Attar did not challenge this test and I apply it. I also accept Ms Toube's submission that for a special interest to undermine the representative

nature of a vote the Court must be satisfied not only that the special interest was adverse to the interests of the class as a whole but also that it was the predominant motivation for the creditor to vote as it did. Finally, I accept Ms Toube's submission that there must be a "strong and direct causative link" between the creditor's special interest and its decision to support the restructuring. In *Lehman Brothers International (Europe)* (above) Hildyard J applied the following test at [103] to [105]:

> "103. In summary, and whilst wary of any exclusive or binary test and not intending to suggest any mechanistic restriction on the discretion of the court at each stage, I continue to think that with suitable caution or nuance in its application, the "but for" test may be helpful in conveying the extent to which the special interest must be demonstrated to be an adverse one before the vote of a member of a class at a duly constituted class meeting is to be discounted or even disregarded. As it was out in the Administrators' skeleton argument, 'the "but for" test is a useful heuristic for determining whether a causal link exists'.
>
> 104. In the application of such a test, or a nuanced version of it, two important and inter-linked considerations are and, as it seems to me, usually will be, (a) whether other creditors without the special interest have, apparently reasonably, approved the scheme proposed as being in their interests as members of the class concerned and (b) whether having regard to what would be the position if there were no scheme there is more to unite the members of the class than divide them.
>
> 105. The first speaks for itself: if creditors in the class without the special interest have, on an informed basis, voted in favour of the proposed scheme that further supports the conclusion that the majority had the interests of the class in mind, and not merely their own."

(4) "Blot" or "Roadblock"

87. The Court will not sanction a scheme or restructuring plan where there is a "blot" or "roadblock" which prevents it from taking effect. Put another way, the Court will not sanction a scheme or plan which will not have the effect which the plan company and creditors intend it to have: see *Re Van Gansewinkel Groep BV* [2016] 2 BCLC 138 at [61] (Snowden J). This may be because of a technical or legal defect which means that it cannot take effect according to its own terms or it may be because it would infringe some mandatory provision of law: see *Re The Co-operative Bank plc* [2017] EWHC 2269 (Ch) at [22] (Snowden J). It may also be

because there is some other flaw which makes the plan or scheme inoperable: see *Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch).

88. *Instant Cash Loans* (above) provides a useful example. In that case the terms of the proposed scheme stated that it was not intended to affect the proprietary remedies of the landlords of the company. However, it also provided for the surrender of the leases. Zacaroli J held that this provision was outside the jurisdictional scope of Part 26. However, he sanctioned the scheme because the removal of this provision had been contemplated in the Explanatory Statement and canvassed at the convening hearing:

> "Accordingly, despite the skilful arguments presented on this application, my conclusion is that the provisions of clause 2.4.1 of the scheme relating to the surrender of the leases are outside the jurisdictional scope of Part 26. As I have already indicated, the draft scheme was modified at the convening hearing so as to allow for the excision of the relevant parts of clause 2.4. That possibility was publicised to scheme creditors in the explanatory statement in accordance with the directions imposed at the convening hearing. There is no prejudice to the landlords or to any other creditor. So far as the landlords are concerned, the company remains willing to give up possession, so it lies in each landlord's hands to agree to a surrender if it so desires."

VI. The Witnesses

(1) Mr Trozzi

89. Mr Bayfield called Mr Andrea Trozzi to give evidence of fact. He was appointed as a director of the Plan Company on 23 December 2022 after acting as an adviser in his capacity as a partner in THM Partners LLP. He made three witness statements dated 20 February 2023, 23 March 2023 and 24 March 2023 which I will refer to as "**Trozzi 1**", "**Trozzi 2**" and "**Trozzi 3**" respectively. He was a good witness and did his best to assist the Court although his evidence was of limited value because of the short period of time during which he had been a director of the Plan Company. Nevertheless, when he was asked questions which did not appear to assist the Plan Company's case, he answered them in a frank and straightforward manner. I accepted his evidence and relied upon it where it was relevant.

(2) Mr Wolf

90. Mr Rüdiger Wolf gave expert evidence on behalf of the Plan Company. He is a Managing Director and Partner at Boston Consulting Group GmbH ("**BCG**") and has over 20 years of advising on restructuring and turnaround management and is head of the Restructuring Taskforce in Hamburg. His principal purpose was to speak to the "Comparator Report" which BCG issued to the board of directors of the Plan Company on 20 February 2023 and updated on 15 March 2023. I will refer to the updated Comparator Report in this judgment as the "**BCG Report**". Mr Wolf also made two expert reports dated 24 March 2023 and 4 April 2023. I will refer to them as "**Wolf 1**" and "**Wolf 2**" respectively.

91. I found Mr Wolf to be an honest witness. But his evidence was not entirely satisfactory in some respects. He seemed to lack familiarity with sections of the BCG Report and I suspect that he had not performed much of the analysis. He also lacked familiarity with some of the underlying information on which it was based. When Mr Smith cross-examined him about the table of "deep dive interest rates" on slide 85 he was unable to explain what information BCG had used to prepare the table even though BCG's methodology depended on an assessment of future interest rates. The Plan Company was sufficiently concerned to correct his evidence that it served Wolf 2 and Mr Bayfield applied for permission to recall him (which I permitted).

92. Mr Smith submitted in his closing submissions that Mr Wolf's evidence and the BCG Report were "shambolic". Although I had reservations about Mr Wolf's evidence, I do not accept that characterisation either of his evidence or the report itself. As Mr Wolf explained in evidence, it took months to prepare the market model and to put the report together and I am satisfied that it was a solid piece of work upon which I was able to rely. I bear in mind that the issues were not framed in statements of case and that CPR Part 35 and the usual ground rules for expert evidence at trial did not apply. Mr Wolf did not have an opportunity to refine the issues with Mr Gerlinger and Ms Rickelton and then to produce a joint statement. Finally, the breadth of the BCG Report meant that Mr Smith had a lot of material to choose from when he cross-examined Mr Wolf and I bear in mind that he chose to focus on some important but fairly narrow issues.

(3) Mr Gunther

93. Mr Frank Gunther is one of the shareholders, founders and managing director of One Square Advisors GmbH. He has had over 25 years of restructuring experience and specialises in insolvency and financial restructuring. He gave expert evidence on behalf of the Plan Company in a report dated 24 March 2023 (the "**Gunther Report**") and Mr Smith cross-examined him briefly. He was a good witness and answered the few questions put to him clearly and thoughtfully. I accepted his evidence and relied upon it.

(4) Mr Gerlinger

94. Mr Smith called Mr Christoph Gerlinger to give evidence on behalf of the AHG. He is a partner in Knight Frank Valuation & Advisory GmbH ("**Knight Frank**") and since 2021 he has been the managing director of the Frankfurt office. He is undoubtedly a very experienced commercial valuer and had the necessary expertise. He was also open and straightforward and plainly trying to assist the Court. He gave his written evidence in a report dated 18 March 2023 (the "**Knight Frank Report**") and he and his team had assembled as much information as they could in the time available and the report itself was impressive in the circumstances.

95. My principal difficulty with Mr Gerlinger's evidence, however, was that on key issues he had to exercise his professional judgment with very little to go on. He was asked in substance to value all of the Group's assets within a matter of days or weeks. The real differences between his valuations and the valuations produced by the Group related to yields and the inputs into development appraisals. For the first, he accepted that he used a broad brush and for the second he accepted that slight variations could lead to "brutal" differences. For the yields which he adopted for his future valuations, he also accepted that they were based on instinct. He also accepted that it was not possible to produce future Red Book valuations based on Market Value.

96. Further, Mr Gerlinger did not produce the historic valuations which Knight Frank had carried out on eight of the relevant properties and it was therefore impossible for me to assess how his assumptions differed from the Group's valuations and

why they were so different. In the end, I had to decide between the Group's valuations and Mr Gerlinger's figures and I chose to accept the former for the reasons which I set out (below).

(5) Ms Rickelton

97. Mr Smith also called Ms Lisa Rickelton to give expert evidence. She is a chartered accountant, licensed insolvency practitioner and managing director of the London office of FTI Consulting LLP ("**FTI**"). She made an expert report dated 18 March 2023 (the "**Rickelton Report**") and she was also a good witness and answered the questions put to her carefully and thoughtfully. Her evidence on the Insolvency Discount (as I define it below) in *ED&F Man Holdings* was inconsistent with her evidence in this case. But in this case, she accepted that she had not expressed her own view but relied on the views of others. She also had limited evidence to give on the other key factual issues which I had to decide although I found her report and supplementary material very useful in understanding the consequences of the various views expressed by the other experts.

(6) Professor Thole

98. Professor Christoph Thole, who is a professor of law at the University of Cologne, gave expert evidence on German law on behalf of the Plan Company. He made three reports dated 20 February 2023, 23 March 2023 and also 23 March 2023 and I will refer to them as "**Thole 1**", "**Thole 2**" and **"Thole 3**" respectively. He was a good witness and answered the questions put to him carefully and patiently. I accepted his evidence.

(7) Professor Pfeiffer

99. Professor Thomas Pfeiffer, who is a full professor at the Faculty of Law at Heidelberg University, gave expert evidence on German law on behalf of the AHG. He was an engaging witness who gave evidence with something of a flourish. He had no answers to some questions which Mr Bayfield put to him and became rather evasive. Although the credentials of both German law experts were exemplary, if not stellar, I preferred the evidence of Professor Thole for the reasons which I set out in detail in section VII (below).

VII. Jurisdiction: The Issuer Substitution

100. Mr Bayfield accepted that the Plan Company was substituted as the issuer of the SUNs in place of the Parent Company solely for the purpose of making the application under Part 26A and promoting the Plan. He submitted that there was no need to establish any further "sufficient connection" with England in relation to the Plan (in contrast to a scheme or plan promulgated by a foreign company): see *Re Dundee Pikco Ltd* [2020] EWHC 89 (Ch) at [24] (Zacaroli J). He also submitted that it was unnecessary, therefore, to change the governing law of the SUNs to English law or to move the centre of main interests of the Parent Company to England or to take any other steps to create a sufficient connection with England.

101. Mr Bayfield also submitted that this was an established technique for ensuring that the English Court has jurisdiction (and will exercise its jurisdiction) in relation to a scheme or plan. He cited *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) as an example. In that case, a Luxembourg company had issued notes governed by New York law. It then acquired an "off-the-shelf" English company, which acceded to the notes as a co-issuer. The English company then promulgated a scheme to discharge the notes. Newey J sanctioned the scheme. He stated at [18]:

> "In a sense, of course ... what is sought to be achieved in the present case is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping."

102. Mr Smith and Mr Al-Attar did not challenge the Court's jurisdiction to sanction the Plan on the basis of "forum shopping". They did, however, challenge the Court's jurisdiction on the basis that the Issuer Substitution was ineffective or

invalid as a matter of German law. I, therefore, accept Mr Bayfield's submissions (above) in relation to the Court's jurisdiction to sanction the Plan more generally and turn to consider the validity of the Issuer Substitution as a matter of German law.

(1) The Terms and Conditions

103. It was common ground that each series of SUNs incorporated the same terms and conditions (or the same terms and conditions *mutatis mutandis*) and where I refer to an individual "**Clause**" or "**Clauses**" below, I intend to refer to the terms and conditions of each series of the SUNs (whether in original or amended form) unless I state otherwise. Because of their central importance to the dispute, I take the relevant Clauses from the 2029 Notes.

104. Clause 1(1) provided that the SUNs were issued in Euros by the Parent Company and registered with the Luxembourg Trade and Companies Register. Clause 5(1) provided that payment should be made to the Paying Agent through the Clearing System (as defined) and Clause 7(1) identified the "**Paying Agent**" as the Luxembourg branch of BNP Paribas Securities Services. Clause 10 contained the Events of Default and I set out the relevant parts of it (containing the minor amendments to be made under the Plan) when dealing with the Plan Company's alternative case on Condition A. Clause 12 provides for Issuer Substitution and Mr Smith and Mr Al-Attar accepted in their Skeleton Argument that it appeared in identical form in each series of the SUNs. That clause provided as follows (original emphasis):

> "(1) *Substitution*. The Issuer may, without the consent of the Holders, if no payment of principal of or interest on any of the Notes is in default, at any time substitute for the Issuer any affiliate of the Issuer as principal debtor in respect of all obligations arising from or in connection with these Notes (the "**Substitute Debtor**") *provided that*:
>
> (a) the Substitute Debtor, in a manner legally effective, assumes all obligations of the Issuer in respect of the Notes;
>
> (b) the Substitute Debtor and the Issuer have obtained all necessary governmental and regulatory approvals and consents for such substitution, that the Substitute Debtor has obtained all necessary governmental and regulatory approvals and consents for the performance by the Substitute Debtor of its obligations under the

> Notes and that all such approvals and consents are in full force and effect and that the obligations assumed by the Substitute Debtor in respect of the Notes are valid and binding in accordance with their respective terms and enforceable by each Holder;
>
> (c) the Substitute Debtor can transfer to the Paying Agent in the currency required and without being obligated to withhold or deduct any taxes or other duties of whatever nature levied by the country in which the Substitute Debtor or the Issuer has its domicile or tax residence, all amounts required for the fulfilment of the payment obligations arising under the Notes;
>
> (d) the Substitute Debtor has agreed to indemnify and hold harmless each Holder against any tax, duty, assessment or governmental charge imposed on such Holder in respect of such substitution;
>
> (e) the Issuer (in such capacity, the "Guarantor") irrevocably and unconditionally guarantees (the "Guarantee") in favour of each Holder the payment of all sums payable by the Substitute Debtor in respect of the Notes on terms which ensure that each Holder will be put in an economic position that is at least as favourable as that which would have existed if the substitution had not taken place; and
>
> (f) the Issuer shall have delivered to an agent appointed for that purpose one legal opinion for each jurisdiction affected of lawyers of recognized standing to the effect that subparagraphs (a) to (d) above have been satisfied."

105. Clause 17 provided that German Law was the governing law, that the place of performance was Frankfurt am Main in the Federal Republic of Germany and that Frankfurt am Main was the place of jurisdiction subject to any mandatory jurisdiction under the SchVG. Clause 17(1) specifically provided as follows:

> "*Governing Law*. The Notes, as to form and content, and all rights and obligations of the Holders and the Issuer, shall be governed by German law without giving effect to the principles of conflict of laws. For the avoidance of doubt, Articles 470-1 to 470-19 of the Luxembourg law of 10 August 1915 on commercial companies, as amended shall not apply to the Notes."

106. Finally, Clause 18 provided that the terms and conditions were written in the German language and provided with an English language translation. But it also provided that the German version was the only legally binding version and that the English translation was for convenience only. In the event, there was no dispute between the parties about the accuracy of the English translation and I, therefore, rely upon it.

(2) BGB §307

107. The German Civil Code (the "**BGB**"), §307 imposes transparency requirements upon standard business terms and forms part of the German law on standard terms and conditions (sometimes called the "**GTC**"). BGB, §305 defines standard business terms as "all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract". BGB, §307 then provides as follows:

> "(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible. (2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision 1. is not compatible with essential principles of the statutory provision from which it deviates, or 2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised. (3) Subsections (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above."

108. The German law of contract generally permits the assignment or transfer of rights and obligations. BGB, §414 provides that a debt may be assumed by a third party by contract with the obligee in such a way that "the third party steps into the shoes of the previous obligor". BGB, §415 then provides as follows:

> "(1) If the assumption of the debt is agreed between the third party and the obligor, its effectiveness is subject to ratification by the obligee. Ratification may only occur when the obligor or the third party has informed the obligee of the assumption of the debt. Until ratification, the parties may alter or cancel the contract.
>
> (2) If ratification is refused, assumption of the debt is deemed not to have occurred. If the obligor or the third party requests the obligee, specifying a period of time, to make a declaration relating to the ratification, the ratification may only be declared before the end of the period of time; if it is not declared it is deemed to be refused.
>
> (3) As long as the obligee has not granted ratification, then in case of doubt the transferee is obliged to the obligor to satisfy the obligee in good time. The same applies if the obligee refuses ratification."

(3) SchVG §3

109. The SchVG replaced the German Bond Act 1899 following the financial crisis of 2008. Section 3 introduced a specific transparency provision and it provides as follows:

> "According to the bond terms and conditions, it must be possible for the performance promised by the debtor to be determined by an investor who is knowledgeable with regard to the respective type of bonds."

110. The SchVG generally permits the substitution of a debt like the general law of contract. SchVG, §5 provides that the majority of creditors under a bond regulated by the legislation may agree to amend the bond terms and conditions to substitute a debtor and also to appoint a joint representative. I set out the provision in full in the English translation supplied by Professor Thole (because it is also relevant to other issues):

> "(1) The bond terms and conditions may provide that the creditors of the same bond may agree to amendments to the bond terms and conditions by majority resolution in accordance with this section and appoint a joint representative for all creditors for the purpose of exercising their rights. The bond terms and conditions may thereby deviate from sections 5 to 21 to the detriment of the creditors only to the extent expressly provided for in this Act. An obligation to perform cannot be established for the creditors by majority resolution.
>
> (2) Majority resolutions of the creditors shall be equally binding on all creditors of the same bond. A majority resolution of the creditors which does not provide for equal terms and conditions for all creditors shall be ineffective unless the disadvantaged creditors expressly consent to their disadvantage.
>
> (3) The creditors may, by majority resolution, agree in particular to the following measures: 1. a change in maturity, reduction or exclusion of interest; 2. a change in maturity of the principal amount; 3. a reduction of the principal amount; 4. a subordination of the claims arising from the bonds in the debtor's insolvency proceedings; 5. a conversion or exchange of the bonds into shares, other securities or other performance commitments; 6. an exchange and release of collateral; 7. a change in the currency of the bonds; 8. a waiver of the creditors' right of termination or its restriction; 9. a debtor's substitution; 10. an amendment or cancellation of ancillary provisions of the bonds. The bond terms and conditions may limit the possibility of creditors' resolutions to individually designated

> measures or exclude individually designated measures from this possibility.
>
> (4) The creditors shall decide by a simple majority of the voting rights participating in the vote. Resolutions by which the material content of the bond terms and conditions is amended, in particular in the cases of paragraph 3 numbers 1 to 9, require a majority of at least 75 per cent of the participating voting rights in order to be effective (qualified majority). The bond terms and conditions may require a higher majority for individual or all measures.
>
> (5) If it is stipulated in the bond terms and conditions that the termination of outstanding bonds can only be declared by multiple creditors and uniformly, the minimum share of the outstanding bonds required for the termination may not exceed 25 per cent. The effect of such termination shall lapse if the creditors so resolve by majority vote within three months. A simple majority of the voting rights is sufficient for the resolution on the ineffectiveness of the termination, but in any case more creditors must agree than have terminated.
>
> (6) The creditors shall decide either in a meeting of creditors or by way of a vote without a meeting. The bond terms and conditions may provide for only one of the two options."

111. The Bundestag produced an Explanatory Memorandum for the SchVG which was in evidence before me. The English language translation begins by pointing out that the Bond Act 1899 had remained essentially unchanged since it came into force but gave three reasons why it had achieved no practical importance. The memorandum then continued:

> "The present draft aims to eliminate these weaknesses of the current law. In doing so, it does not disregard the fact that Anglo-American contract law is clearly predominant worldwide in the field of international bonds, which are subject to the free choice of law. Obviously, this cannot be countered merely by referring to the freedom of contract applicable under German law. In particular, the possibility of judicial review of the content of bond terms under the provisions on general terms and conditions in § 305 et seq. of the German Civil Code (BGB) is cited as an obstacle to the international competitiveness of German law in this area.
>
> The question of whether bond terms and conditions are to be regarded as general terms and conditions (GTC) and are subject to judicial content review is controversial. The Federal Court of Justice (Bundesgerichtshof, BGH) has ruled that bond terms and conditions of bearer bonds do not fall within the scope of § 2 paragraph 1 of the Act on General Terms and Conditions (now: § 305 paragraph 2 BGB), with the consequence that a review of inclusion does not take place in this respect (BGH, judgement of 28 June 2005, XI ZR

> 363/04, BGHZ 163, 311). In its decision, the BGH did not comment on the question whether bond conditions are also subject to a review of their content under the law on general terms and conditions and whether such a review is required by Directive 93/13/EEC. Since it has not yet been bindingly clarified whether Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (ABl. L 95, p. 29) is applicable to the terms and conditions of bonds, a specific ruling is forgone on the question of whether bond terms and conditions are subject to a general terms and conditions review pursuant to § 305 et seq. BGB takes place. The Federal Government will try to work towards a more precise definition of the scope of application of the Directive, in particular also with regard to bond terms, in the course of the consultations on the proposal for a Directive on Consumer Rights submitted by the European Commission on 8 October 2008 (Council document no. 14183/08), which essentially combines and further develops the subject matter of four previous Directives, including Directive 93/13/EEC.
>
> Independent of this question of principle, however, the draft provides for a special statutory transparency requirement for bond terms and conditions with regard to the issuer's performance promise, especially with regard to the sometimes highly complex terms and conditions of so-called structured bonds. It became apparent during the financial market crisis that many investors did not sufficiently understand the risks arising from these products because they could not understand from the bond terms and conditions under which conditions and to what extent the issuer's performance promise would be reduced."

112. Professor Pfeiffer challenged the accuracy of this translation in one respect. He suggested that the word "Independent" at the beginning of the third paragraph (above) was not quite correct and that a more accurate translation of the memorandum would have used the word "Irrespective". I return to this point below.

(4) Professor Thole's Evidence

113. It was Professor Thole's evidence that it was widely accepted as a matter of German law that a substitution clause was not dependent upon any statutory criteria and that the use of such a clause was considered standard market practice and generally permissible. He also gave evidence that as a matter of German law all of the requirements of Clause 12 had been satisfied by the Issuer Substitution documents. In particular, he gave evidence that the Plan Company had assumed

all of the obligations of the Parent Company and had issued guarantees as required by Clause 12(1)(e).

114. Professor Thole accepted in Thole 1 that the terms and conditions of bonds fell within the GTC as a matter of principle but he also said that some legal scholars had argued that SchVG, §3 took precedence (references removed):

> "The jurisprudence of the German Federal Court of Justice (Bundesgerichtshof) ("BGH") (as well as the predominant view in the relevant literature) supports the view that the terms and conditions of bonds and notes fall within the scope of the general rules of §§ 305 ff. BGB. In particular, the validity of terms and conditions must be assessed against the background of the general rule of § 307 BGB, which prohibits the use of unfair terms. Some scholars argue that the §§ 305 ff. BGB do not apply but rather that the specific provision of § 3 SchVG 2009 as lex specialis takes precedence over the general law. SchVG 2009, at § 3, declares that the terms and conditions of notes need to be transparent. However, in a recent judgment of the BGH, dated 16 January 2020, the Court confirmed the applicability of the §§ 305 ff. BGB. The exception of § 310 para. 4 BGB which concerns matters of "company law" does not apply to notes."

115. Although the view which he expressed in this passage appeared to be no more than tentative, Professor Thole expressed a much firmer view later in Thole 1 that §307 did not apply to Clause 12(1) because it was displaced by SchVG, §3. In that passage he stated (references removed):

> "Furthermore, it should be taken into account that a contract for the purposes of §307 para. 2 BGB includes the legal relationship between a noteholder and an issuer. This relationship is widely governed by the specific provisions of SchVG 2009 which describe the issuer's substitution as one of the standard methods of restructuring a note (§5, para. 3, no. 9 of SchVG 2009. Thus, issuer substitution clauses do not deviate from statutory provisions. Where there is no such deviation, an unfairness and disadvantage within the meaning of §307, para. 2 BGB is excluded by law, § 307, para. 3 BGB. According to §4 SchVG and based on the premise of contractual freedom, parties are free to amend the terms and conditions and to effect such a restructuring by way of a contractual amendment agreement between the issuer and the noteholders. A fortiori, it must be permissible to validly agree on an issuer substitution at the time of issuance of the notes: If a majority of noteholders can validly impose an issuer substitution on all of the noteholders even absent a substitution clause pursuant to 5, para. 3, no. 9 of SchVG 2009, then a fortiori a mutual agreement between

> each subscriber of a note and the issuer must be permissible. There is no deviation from statutory provisions."

116. Finally, in his summary Professor Thole expressed the unqualified opinion that the substitution clauses in the SUNs were valid as a matter of German law and that the Issuer Substitution was in full accordance with both the German law applicable to notes and general contract law. He also expressed the unqualified opinion that the substitution complied with Clause 12(1).

117. Mr Al-Attar asked Professor Thole to clarify his position in cross-examination. He accepted that BGB, §307(1) applied to the SUNs because it was of general application under the GTC but it was his view that the second sentence of §307(1) did not apply because no unreasonable disadvantage could arise unless it failed to comply with SchVG, §3. Mr Al-Attar then asked him to clarify whether there might be circumstances in which a substitution clause ought to contain a non-exhaustive list of the reasons why a substitution could be permitted:

> "Q. I'd like to get a sense -- because it may shorten what the judge has to decide -- about how much the debate between you and Professor Pfeiffer as to the application of Bond Act section 3 versus 307(1) sentence 2 matters. As I understand it, just to have your words, it is a debate between the lex specialis versus the lex generalis. That's the debate you are having. I just want to ask you some questions to see whether and how much that matters. If we can look first at how Professor Pfeiffer puts his position. If we go to. If you read in the middle of the paragraph -- just a little bit bigger -- Professor Pfeiffer's position is that: "An unconstrained discretion for the user to decide whether to apply the clause [the substitution clause] because of the absence of specification or the circumstances of its permitted exercise is unacceptable." That's, I think, the shortest expression of Professor Pfeiffer's view. Before I ask you a question, I just want to compare that to one part of your opinion at**.** In paragraph 5.41, you say "Some scholars argue that, in general, substitution clauses are valid as long as the relevant clauses are sufficiently transparent. This does not necessarily require that the specific reasons for initiating a substitution are outlined in detail in the substitution clause." I have already picked up on it because a few times in the transcript you tend to express yourself "not necessarily". And when you say "not necessarily" here, it obviously implies that there are circumstances in which it may be appropriate to specify the reasons. Can I just get a sense of whether you accept that or not? That's what is written and that's the implication. A. No, what I was trying to say here is that there is no requirement for that list of scenarios and circumstances in which you want to conduct the issuer

> substitution. But of course, the issuer may introduce and integrate such a list in the terms and conditions, of course subject to the transparency requirement. So that is what I was trying to say. Q. When I read that second sentence, I should read it as: this does not necessarily require that all the specific reasons should be stated? Is that what you are saying? When you say "a list", do you mean a complete list? A. Well, it might have been a problem with my English here. What I was trying to say is that you don't have to have that exhaustive list, this list of circumstances -- Q. Yes, exhaustive, complete. A. Right, right. That is what I was trying to say, yes."

118. Mr Al-Attar then took Professor Thole to one of his own works, "**Hopt/Seibt**" which he had cited in support of his argument. He took him first to the 2017 edition and then compared this with the 2023 edition in which he had modified his view. Professor Thole gave evidence that he had changed the text in October or November 2022 and he also accepted that his view had changed over time. The view which he had expressed in the earlier edition was as follows (references removed):

> "The law does not impose substantive requirements on a resolution. On the other hand, in the run-up to the reform of SchVG in 2009, there was discussion about the conditions under which the debtor should be able to make reservations in the bond conditions regarding the possibility of changing debtors without the decision of the creditors. This question is still topical today, but it does not affect the case of § 5 (3) sentence 1 no. 9 SchVG. The legally regulated situation only concerns the granting of consent by resolution at the creditors' meeting. In this respect, no additional creditor protection is required, as the majority requirement already sufficiently safeguards the overall interests of the creditors. The case of the issuer, in the bond conditions, reserving the right to replace the debtor without further consent from the creditors is more difficult. This entails, in particular, the risk that, for example, a SPV will become a debtor without sufficient resources of capital and assets. However, it is generally considered permissible in principle that the debtor reserves this right or vice versa that creditors do not receive a co-determination right134. This is not called into question, as far as can be seen, with regard to § 5 (3) sentence 1 no. 9 SchVG, although it could certainly be argued that § 5 SchVG with the opt-in solution contains a priority of the creditor resolution. In fact, however, § 4 SchVG continues to allow unilateral rights to determine performance (§ 4 SchVG marginal no. 16). This then, consequently, also applies to the replacement of debtors. The legal problem arising here is ultimately one of § 3 SchVG and the material scope of the bond conditions, not the majority principle. The preliminary drafts of the SchVG anticipated particular provisions, which were intended to

> achieve the result that after the replacement the creditor has available a debtor of equal value with regard to their liability expectation (§ 23 SchVG Draft Bill). In the literature it has been required that "the economic fundamentals" should not change, in particular in relation to the question of whether the risk to creditors significantly increases. The problem with this criterion is that it is barely workable because the risk changes with every debtor change. Whether it has increased or decreased usually only becomes apparent afterwards. Nevertheless, it will be possible to assume that a unilateral debtor replacement, which is made possible in the bond conditions without further prerequisites, is to be assessed as rather non-transparent (see, however, § 3 SchVG marginal no. 51)."

119. When he had considered Professor Pfeiffer's report, Professor Thole disagreed strongly with Professor Pfeiffer about the requirement for transparency and set out his criticisms in Thole 3. I have considered them carefully but given that Mr Al-Attar did not have time to cross-examine him on Thole 3, I attribute limited weight to them. I do note, however, that Professor Thole gave the following evidence in relation to the Explanatory Memorandum (again references removed):

> "The German legislator expressly stated in the explanatory notes to the SchVG, that the transparency of contractual terms and the conditions of notes requires the terms to be "clear and unambiguous" (eindeutig und klar). However, nowhere did the German legislator provide for a need to enumerate any relevant and potential scenarios in which the clause may be relied upon. Under German law on moveable and immoveable property, a similar transparency test applies. In respect of this test, the BGH has previously held that a reference to "all" goods in a pledge agreement is sufficiently transparent (which I referred to at Thole 1, at para. 5.43 contrary to what the Pfeiffer Report suggests at para. 91). The BGH case provides guidance here, too. The basic assumption of the BGH was that, where the agreement refers to "all" goods, no doubts remain. The same holds true if a clause like § 12 of the SUN Notes Terms and Conditions refers to an issuer substitution "at any time". This term is equally all encompassing."

(5) Professor Pfeiffer's Evidence

120. Professor Pfeiffer accepted that SchVG, §3 imposed a similar transparency requirement to BGB, §307. He also accepted that Clause 12 fell within SchVG, §3. However, his evidence was that BGB, §307 continued to apply and that the "requirement of definiteness" (as he described it) made it necessary to set out a

statement or restriction of the potential cases in which it applied. He also maintained that the failure to incorporate a list made Clause 12 invalid:

> "34. In the case at hand, the Substitution Clause does not include any statement or restriction of potential cases and reasons for a substitution. It purports to allow a substitution whenever the obligor chooses to make use of the Substitution Clause and for whatever reason. 35 Therefore, the Substitution Clause does not comply with the applicable transparency requirements under §307 para 1 sentence 2 and para 3 sentence 2 BGB and §3 SchVG. Hence, the clause is invalid as a matter of German law."

121. Professor Pfeiffer also relied upon a decision of the Higher Regional Court in Frankfurt am Main in which the Court held that the substitution of a creditor was invalid (the "**Frankfurt Decision**"). He set out the Court's reasoning as follows although he accepted that it was obiter dicta:

> "The substitution of the debtor is likely to deviate from essential basic ideas of contract law (§ 307(2) no. 1 BGB), which is not sufficiently mitigated by the continued existence of the guarantee."
>
> "The fact that it may be economically desirable to reduce existing claims against companies, in this case the guarantor, in order to safeguard them, cannot lead to an encroachment on the contractual rights of individuals, even if objective criteria of interpretation are applied. … The purpose of facilitating restructuring measures does not require interference with the contractual principle ("pacta sunt servanda"), which is one of the pillars of German law of obligations, for the transitional period until the old bonds expire."

122. Professor Pfeiffer accepted that views had been expressed in the legal literature that substitution clauses were permissible where the obligations of the new bond-holder were guaranteed by the original debtor. He also accepted that BGB, §307 would permit a substitution if the guarantee was of at least equal value to the bondholders compared with the original obligations of the debtor (and I omit the footnotes):

> "Such a compensation has to be, as compared to the disadvantage caused, of an equivalent value. This means that a guarantee by the original debtor could constitute a compensation sufficient under §307 BGB, but only if it is of at least equal value to the bondholders compared to the original obligation of the debtor. In this respect, the main criterion is that the risk of non-performance of the original obligation may not be increased. This criterion is not only

> recognized in relation to substitution clauses but also in relation to other types of contracts under § 309 no. 10 BGB, including a loan contract which must allow the other party to free himself from the contract if the user wishes to substitute a third parties to perform the rights and duties of the user. It also reflects the prevailing interpretation of EU Directive 93/13 on Unfair terms in consumer contracts (Annex no. 1 letter p to Art. 3 para 3 of this Directive. A substitution clause will be, e.g., unacceptable if the bondholder would have to bear a higher risk of non-performance, e.g. in relation to an insolvency, because of the substitution. Moreover, the BGH ruled that compensation may even be insufficient if it brings about "unreasonable consequential costs … or similar obstacles".

123. However, he expressed the view that the substitution of the issuer could bring about "a significant change of the contractual equilibrium". He also expressed the opinion that the guarantee to be given by the Parent Company under the Plan did not provide full compensation for the substitution of the Plan Company as the principal debtor because the effect was to permit a restructuring which would not be permitted under German law (again footnotes omitted):

> "51 The guarantee does not provide for full compensation as required for the validity of a substitution clause by §307 BGB. As already explained, a sufficient compensation would require that full payment by the substitute debtor or under the guarantee is not less probable or likely than payment by the original debtor under the Bonds. 52 However, the effect of the Substitution Clause is to permit the guarantee of the primary debt (or the primary debt itself) to be restructured or amended pursuant to an English law procedure more easily than this would otherwise have been the case for the original primary debt owed under German law by the original Luxembourg issuer. Accordingly, the probability of full repayment of the original pre-substitution debt has therefore decreased to a certain degree because of the increased ability to discharge the debt or its guarantee under English law – specifically by a restructuring plan – as applied to the new English substitute issuer, as compared to the original legal position in respect of the original Luxembourg issuer. Therefore, the Substitution Clause does not provide for sufficient reasonable compensation for substituting the original obligor without the Bondholders' consent. Consequently, the Substitution Clause is invalid under § 307 BGB."

124. Mr Bayfield took Professor Pfeiffer to Clause 12 and pointed out the conditions for the substitution. He suggested that it was common to have a substitution clause of this kind in German bonds. Professor Pfeiffer did not accept this to begin with but Mr Bayfield took him to a prospectus dated 29 April 2022 which set out the

terms on which medium term bonds totalling €2 billion were to be issued by Mahle GmbH. Those terms had been drafted or approved by Gleiss Lutz and were in materially the same form as Clause 12. Professor Pfeiffer had to accept that if his evidence was correct, then a large number of German bonds were going to contain invalid substitution clauses. After some prevarication, he also accepted that there have been a large number of issuer substitutions under clauses which were materially the same as Clause 12.

125. Mr Bayfield then cross-examined Professor Pfeiffer about the relationship between SchVG, §3 and BGB, §307. He pointed out that the first provision introduced a different test for transparency which would make no sense if the second – and broader – test continued to apply. Professor Pfeiffer maintained that both would apply. He placed a lot of reliance upon the fact that the Bundestag recognised that there was a controversy over the application of BGB, §307 but chose not to resolve it. He also said that the effect of failure to comply with SchVG, §3 could be to give rise to a claim for damages whereas the effect of the failure to comply with BGB, §307 was to render the clause invalid:

> "Q. If that's the test that section 3 requires, section 3 being expressly addressed to bonds, the point is that it would make absolutely no sense to then apply section 307(1) second sentence, which focuses on a lesser understanding being required? A. I disagree to that for the following grounds. The first is if we could go back to the legislative explanation of that provision, because the legislative explanation confirms what I say. It firstly states that there is -- or that there was in 2009 or 2008 -- a controversy whether 307 would apply. It also says there is an uncertainty whether the application is required by the EU Unfair Terms Directive. And then it continues and say "irrespective of that ..." And the term "irrespective", in my understanding, expresses that regardless of whether 307 applies or not, the legislator put as a precaution, if you will, article 3 into the Bond Act. And I conclude it is the express purpose of the Bond Act not to take any stand on the application of 307. And if the provision does not take a stand, it does not replace it. This is what -- and this is only the first reason. The second reason is -- and that is also not only in my writing, but it is also confirmed in the legislative material."
>
> "Q. But the conclusion that you reach is that both transparency requirements apply, which means that the second transparency requirement, the new one in the Bond Act, is completely pointless? A. Not necessarily. As you see, from what we have on screen, the legal consequences of both provisions are different. It says here that

> under certain conditions a lack of transparency may result in payment obligations, damages, whereas 307 always results in the invalidity of the clause. So there is a reason -- and a good cause -- for applying both parallel. Q. Professor, we are going to come back to that point later on. It's an important point. But that makes no sense. If it was the Bond Act that resulted in invalidity and section 307(1) only resulted in damages, then section 3 would serve an important purpose. But actually it's section 3 that doesn't necessarily result in invalidity and section 307 that does, which again renders section 3 of no application. A. As I said several times this afternoon, the provision was enacted irrespective of the dispute whether 307 applies. Because at that time in 2009 there was uncertainty in this respect. We don't have this uncertainty anymore. So when the legislature passed that, there was a good reason and the only thing that happened is that the provision was never amended, because there was no practical need for doing so. Q. German law recognises the concept of lex specialis, doesn't it? A. To the extent it applies, it does."

126. Mr Bayfield took Professor Pfeiffer next to some of the materials upon which he had relied. Mr Bayfield pointed out that none of these cases or textbooks upon which he relied provided authority for his opinion. In particular, he took Professor Pfeiffer to two extracts from the textbook Friedl and Hartwig-Jakob on the German Bond Act 2nd edition (2022) ("**Hartwig-Jacob**") which he had cited. He then handed Professor Pfeiffer further extracts from Hartwig-Jacob and asked him whether he agreed with them:

> "MR BAYFIELD: We are moving on to a slightly new topic. It is something that we touched upon earlier, which is the consequence of a breach of a transparency requirement. The third piece of paper I gave you is another Hartwig Jacob extract. I want see what you make of this. If you could turn, please, firstly to paragraph 157. The first sentence says: "There is agreement in the literature that the invalidity of the bond terms as a consequence of a violation of the transparency requirement of section 3 can be assumed only in exceptional cases." Do you see that? A. Yes, I see it. Q. Can you turn to paragraph 160, the next piece of paper. They continue: "Furthermore invalidity as a legal consequence of a violation of the transparency requirement would have a considerable impact on the function of the bond market. Such a violation does not only have an effect vis-a-vis the bond holder who claims invalidity but vis-a-vis all bond holders. This follows from the purpose of the principle of collective bonding set out in section 4." A. I have the German. Q. The English is behind A. The English is behind it. I didn't recognise that. Q. Now, can you read paragraph 161 and 162 to yourself, as well, please? A. Yes. Q. Professor, what they are saying is if you were right that the issuer

> substitution clause in this case breached section 3 of the German Bonds Act and the transparency requirement, then it wouldn't follow that the clause was a nullity, would it? It's more likely that that claim in damages would apply. Do you agree with that? A. As a consequence of section 3, that seems to be the position of Hartwig Jacob, but it is in no way settled law. Q. Do you agree with them? A. I have not stated any position on that, because I did not need to in my report. Because my report is based on the reasoning that 307 BGB applies, which results in the nullity of the substitution clause. And by the way, how should I say, the parade of horror in paragraph 160 of Hartwig Jacob does not relate to substitution clauses specifically, it relates to bond terms as a whole which might result in destroying the complete bond. That would indeed have these consequences, whereas that is not necessarily the case if only the substitution clause is invalid."

127. Mr Bayfield then moved on to the second part of Professor Pfeiffer's argument that Clause 12 gave rise to a presumption of disadvantage under BGB, §307(2), sentence 2. He pointed out the conditions for the validity of the Issuer Substitution and then asked Professor Pfeiffer to explain why a significant change in the contractual equilibrium would be brought about. He repeated the views which he had expressed in his report and Mr Bayfield suggested to him that if he was right all substitution clauses would be invalid:

> "Q. If that were right, surely all substitution clauses would fall within the scope of section 307(2) and be invalid, wouldn't they? A. The first part of your question, yes. The second part no. All substitution clauses -- and that is not doubtful under German law -- fall under the scope of 307(2), 1. But this provision only sets forth a presumption of invalidity. Not more and not less. Therefore the question is has there been sufficient compensation? That might in spite of the presumption render the clause valid. Maybe. Under circumstances."

128. Mr Bayfield then dealt with the Frankfurt Decision. Professor Pfeiffer accepted that the comments which I have set out (above) were obiter dicta. But Mr Bayfield also suggested to him that he had failed to point out that the textbooks have treated this decision with "derision". Professor Pfeiffer said that the content of the decision had been overstated. Mr Bayfield then took him to one of the textbooks which he had cited in his opinion (which I will call "**Bliesener/Schneider**"):

> "**Cited in footnote 23, 40 and 121: Bliesener/Schneider in Langenbucher/Bliesener/Spindler, Banking Law Legal**

Commentary (Bankrechts-Kommentar), 3. Ed. 2020, Section 5 SchVG, para 30

The discussion draft of April 2003 contained – as already the working group's draft of 1996 (in Section 7), a provision (Section 795a BGB) that the bond conditions may, under certain conditions, provide for the debtor to be replaced by an affiliated company. The subsequent discussion drafts of September and November 2004 described the preconditions for the admissibility of a change of debtor in more detail (in Section 3). The 2008 draft bill took the plan even further (in Section 23). The government draft and finally the Act abandoned the plan of all previous drafts. The legislator did not consider it necessary to provide statutory requirements for such terms, which could be regulated by cautel in such a way as to meet the legal requirements and the expectations of investors. In order to take these requirements into account and to exclude an unreasonable disadvantage of the creditors, debtor substitution clauses must regulate the prerequisites and consequences of the change of debtor in such a way that the economic basis of the risks borne by the creditors remains essentially unchanged and the legal position of the 0014 creditors does not deteriorate, requirements which these clauses in the issuance programmes of the issuers of corporate bonds meet almost without exception. All the more astonishing is the opinion expressed by the Higher Regional Court of Frankfurt a. M. in an obiter dictum, according to which a (classic) debtor substitution clause deviates from essential basic ideas of contract law and is therefore ineffective according to Section 307 (1), (2) no. 1 BGB on the grounds of unreasonable disadvantage to the bondholder, which is rightly described by critics as "untenable" and as likely to "drive [...] capital seekers into the 'safe harbour' of foreign legal systems"."

129. Mr Bayfield took Professor Pfeiffer to this passage and suggested that it was extremely helpful to his own case. Professor Pfeiffer said that he had been thinking of this passage earlier in his evidence and the following exchange then took place:

> "A. Yes. Indeed this is the Bliesener Schneider quotation that I asked to have in a break for to retrieve. There you have it. Q. Okay. Which is extremely helpful to me, isn't it? A. I note that Mr Bliesener and Mr Schneider find the decision astonishing -- Q. No, no, the bit we just read was very helpful to me, before we get on to what they say about Frankfurt. If we go back to it, go back a page. In order to take these requirements into account and to exclude an unreasonable disadvantage, debtor substitution clauses must regulate the prerequisite and consequences of the change of debtor in such a way that the economic basis of the risks formed by the creditors remains essentially unchanged and the legal position of the creditors does not deteriorate, requirements which these clauses in the issuance programmes of the issuers of corporate bonds meet almost without exception. What they are getting at there is the guarantee

> requirement, aren't they, which is standard? A. It seems so. But I note that Mr Bliesener and Mr Schneider don't refer to any case law in support of their position. They don't consider it necessary to -- Q. Because no one has taken this point before, before you, Professor Pfeiffer? A. There is always the Columbus."

130. Finally, Mr Bayfield took Professor Pfeiffer to the passage in his report (above) in which he addressed the effect of the substitution above and, in particular, to his statement that the probability of full repayment by the debtor had decreased as a consequence of the substitution:

> "Q. Now do you appreciate that the original issuer is not able to make repayment in full and your clients are not suggesting otherwise? A. I have no exact details of this part of the economic background of the case so I can't comment on that. Q. You said that repayment in full has been decreased by the issuer substitution, so presumably that's based on something? A. Yes. That is placed on the legal mechanism that I understand applies in restructuring procedures in the UK, which permit a cramdown, which is a legal disadvantage that would not be applicable, so I have been instructed -- not based on my own knowledge -- in Luxembourg proceedings. Q. Okay. Do you appreciate that a restructuring plan will not be sanctioned by the English court if any of the creditors would be worse off if the plan were to be sanctioned? A. In my report, I made the distinction between the economic position in the moment of substitution and the economic outlook. What I say is if the clause permits a substitution that is fine in the moment of the substitution but is connected with an increase of risk as relates insolvency, as relates to legal mechanism, that is not essentially the same position, which would be necessary. Q. Do you realise that the original issuer could itself have proposed this restructuring plan had it moved its COMI to this jurisdiction? A. I have been instructed, as I wrote in my report, that its COMI is in Luxembourg. I have no idea whether the issuer could move its COMI to Luxembourg. In any event, I understand it hasn't. Q. Do you accept also that the restructuring which has been carried out through the restructuring plan could in fact have been carried out through a StaRUG proceeding in Germany initiated by the original issuer, assuming that it has its COMI in Germany or moved its COMI to Germany? A. That may be possible. Let me add one aspect. Germany introduced the umbrella proceedings in 2012 as an option for restructuring of debts. And since 2012, never, ever has anyone argued that the contract law legal standards in relation to substitution clauses have been somehow influenced by the option of restructuring of debts under the umbrella proceedings. So I think for the contract law analysis, that is not relevant."

(6) The Parties' Submissions

(i) The Plan Company

131. Mr Bayfield, Mr Perkins and Miss Wang submitted that there was no dispute that the Plan Company had complied with Clause 12(1)(a) and assumed all of the obligations of the Parent Company or that the Parent Company granted irrevocable and unconditional guarantees of the Plan Company's obligations as substitute debtor. The issue between the parties, so they submitted, was whether Clause 12(1) is valid and enforceable at all. Finally, they submitted that the Court should accept Professor Thole's evidence for the following reasons:

(1) The starting point is that substitution clauses are generally permissible and effective as a matter of German law. Consent can be given by a resolution of noteholders under SchVG, §5 or by including a substitution clause in the notes when issued. Moreover, no substitution clause in the same or similar terms has been found to be invalid by the German Courts.

(2) Professor Pfeiffer was wrong to focus on BGB, §307(1). He accepted that there is a general principle of lex specialis in German law and SchVG, §3 is the lex specialis in the present case. Moreover, it is very hard to see how both provisions could apply at the same time and the Explanatory Memorandum does not suggest that they do.

(3) But in any event there is no requirement under German law that the issuer must specify a non-exhaustive list of the circumstances in which a substitution may take place. The academic textbooks upon which Professor Pfeiffer relied were either equivocal or did not support this proposition.

(4) Professor Pfeiffer was wrong to suggest that BGB, §307(2) applied because there is no reason to conclude that the holders of the Notes are unreasonably disadvantaged as a result of the substitution. Clause 12(1)(e) expressly imposed a condition requiring the issuer to ensure that each holder was put in an economic condition that was at least as favourable as before the substitution and the Parent Company had guaranteed the Plan Company's obligations.

(5) Professor Pfeiffer's reliance upon the pacta sunt servanda principle and the decision of the Higher Regional Court of Frankfurt am Main was misplaced. The facts of that case were very different, the decision on the point was obiter, it had not been followed and it had been heavily criticised.

(6) Professor Pfeiffer's reliance upon the fact that the rights of the Plan Creditors may now be restructured under English law goes nowhere. No prejudice can be caused to the holders of the SUNs because the Court has no jurisdiction under Part 26A unless the NWO Test is satisfied.

<u>(ii) The AHG</u>

132. Mr Al-Attar submitted that a fair reading of Thole 1 was that Professor Thole accepted that the GTC applied to the Notes. He also submitted that Professor Thole had changed tack after seeing Professor Pfeiffer's evidence and that his own view had developed between editions of his textbook (the last edition being published very recently). Finally, he submitted that Professor Thole's developing view was unconvincing for a number of reasons:

(1) He had persistently caricatured the views expressed by Professor Pfeiffer and other commentators.

(2) His views on transparency had developed between editions by reference to two analogies a sale or pledge of goods and a landlord analogy which did not support his new conclusions.

(3) He was wrong to equate the inclusion of a substitution clause in a note as an "ex ante consent to the Issuer Substitution" and, therefore, equivalent to SchVG, §5.

(4) Professor Thole's view that the substitution clause was "market standard" was no more than an assertion which he repeated many times.

133. Mr Al-Attar also submitted that Professor Pfeiffer's opinion was supported by leading textbook authors. In his written closing note he cited two of the relevant academic authorities. First, he cited Hartwig-Jacob at paragraph 103 (my emphasis):

> "Furthermore, the substitution authority must be sufficiently detailed in the corresponding clause and be limited to the extent reasonable for the creditors. In practice, the specification refers exclusively to the requirements usually described in detail in the bond and certificate conditions, which must be met by the old and new debtor before and after the replacement (see above margin no. 100f.). The conditions of bonds and certificates usually do not contain a list of reasons that entitle them to exercise the replacement authorisation. Therefore, when and for what reason the debtor decides on its own replacement is left to it. However, the requirement to determine the grounds for replacement in the issue conditions can be found in the transparency requirement of §3. In this respect, the list of reasons should be as detailed as possible. However, a definitive list of reasons is not necessary, as there will be grounds for replacing the debtor arising from events beyond the issuer's control and not to be anticipated."

134. This was a passage which Professor Thole exhibited to Thole 3 rather than one which Professor Pfeiffer had cited himself. However, Mr Al-Attar also relied upon the commentary of Professor Birke in Reinhard and Schall (ed) *SchVG - Gesetz über Schuldverschreibungen aus Gesamtemissionen* which Professor Pfeiffer had referred to in his footnotes (again my emphasis):

> "In case of substitution of the debtor, a person other than the issuer becomes debtor of the bond claim. The previous issuer ceases to be the primary debtor. This does not refer to the case of universal succession in accordance with the Transformation Act (Umwandlungsgesetz, "UmwG"). A debtor substitution also occurs in the context of the debt equity swap in the variant of the debt push-up. After a debtor substitution, the debtor change must be implemented under securities law. This is to be distinguished from debtor substitution on the basis of a corresponding power in the bond terms. With this provision, the issuer reserves the right to replace the debtor without further consent of the creditors. Such a debtor substitution clause is usually found in bonds issued through foreign financing subsidiaries, where the parent company guarantees the liabilities under the bond. Reasons for such a debtor substitution may be tax law changes at the issuer's domicile or its restructuring. This right is usually conditional on the parent company remaining obligated under the guarantee and the successor debtor assuming all obligations. Such a debtor substitution clause, which specifies the cause, procedure, consequences and preconditions of the change of debtor and does not place the bondholder in a significantly worse economic position after the change of debtor has taken place, is permissible."

135. Mr Al-Attar submitted that a substitution clause which permitted a change of one debtor for another was a deviation from the contractual principle "pacta sunt servanda" and that BGB, §307(2), sentence 1 was engaged. He accepted that the presumption could be rebutted if it was met by an equivalent compensating advantage provided for in the clause in question. But he relied on the Frankfurt Decision and, in particular, the second passage which Professor Pfeiffer quoted (above) in support of the proposition that the Parent Company's guarantee did not provide the necessary compensation. He also submitted that the fact that the Plan would be recognised in Germany increased the risks for the Plan Creditors.

(7) Decision

(i) The Background

136. I agree with Mr Bayfield, Mr Perkins and Miss Wang that the starting point is that substitution clauses are generally permitted and effective as a matter of German law. Both BGB, §415 and SchVG, §5 expressly permit the substitution of a debtor or obligor under a contract. I also agree with Mr Al-Attar that SchVG, §5 is a majority resolution provision (as Professor Thole accepted). But the effect of this provision is to limit the circumstances in which the issuer may amend notes or their terms and conditions after they have been issued. It does not detract from the general principle.

137. There was no issue between the parties that the terms and conditions of a note or bond must be transparent and comply with SchVG, §3. It must be possible, therefore, for an investor with expertise in the Notes to determine the circumstances in which a substitution would be permitted. Professor Pfeiffer did not suggest that Clause 12(1) was invalid or ineffective because it failed to comply with SchVG, §3. Nor was he able to point to any authority in which the German Courts had held that a substitution clause was invalid for that reason or because it failed to contain a list of the reasons for the substitution.

138. Contrary to Mr Al-Attar's submission, I also accept Professor Thole's evidence that Clause 12(1) was a typical or standard substitution clause. Mr Bayfield found a number of public examples drafted by Gleiss Lutz to put to Professor Pfeiffer. Moreover, when the Mahle terms and conditions were put to him, Professor

Pfeiffer had to agree that if his view was correct then a large number of German bonds were likely to contain invalid substitution clauses. Moreover, the AHG and other Plan Creditors are experienced investors and I consider it unlikely that they would have invested in the Notes if they had been advised that the terms and conditions of the Notes were untypical or likely to be invalid.

(ii) Assessment of the Evidence

139. I must therefore consider Professor Pfeiffer's evidence that Clause 12(1) is invalid under BGB, §307 against this background and, as a consequence, I would have needed considerable persuasion that a provision contemplated by the general law and permitted by the SchVG was invalid especially when it is a standard clause used by lawyers acting for bond issuers (including Gleiss Lutz) and apparently accepted without concern by both the original holders of the Notes and purchasers from them in the open market. Despite his best efforts, Professor Pfeiffer did not persuade me on this issue and I preferred the evidence of Professor Thole for a number of reasons:

(1) As I have stated (above), I found Professor Thole to be a good witness and I reject Mr Al-Attar's submission that he changed his evidence. Although the first passage which I have set out from Thole 1 (above) appears to express a tentative view, Professor Thole was very clear in the remainder of that report that he considered Clause 12(1) to be valid and he stated this conclusion without qualification. In my judgment, he did not change his evidence between Thole 1 and Thole 3.

(2) I also reject Mr Al-Attar's submission that Professor Thole's view was "developing" in the sense that he had changed the view of the law because he had been instructed in these proceedings. I accept Professor Thole's evidence that he made the amendment to the text of Hopt/Seibt in November or December 2022 although he did not submit it until earlier this year. Moreover, Mr Al-Attar did not put it to Professor Thole that he was guilty of sharp practice by changing the text of Hopt/Seibt and then relying on it in Thole 1 without making it clear that it was his own work.

(3) But in any event, I am not satisfied that there was any material change between the two versions of Hopt/Seibt or that this had any material bearing on the issue which I had to decide. Apart from the Frankfurt Decision (which they debated), neither expert was able to point to any decision in which a German Court had held that a substitution clause under BGB, §307 was invalid.

(4) I found Professor Pfeiffer to be an intelligent and articulate witness and he gave his evidence with both humour and a flourish. But I also found him to be evasive in some of his evidence and that he had no real answer to a number of Mr Bayfield's points. He refused to accept that Clause 12(1) was a standard clause until the terms and conditions from the Mahle bond issue were put to him and he also refused to accept that there was nothing inherently objectionable about a substitution clause.

(5) He also gave evidence that the apparent overlap between BGB, §307 and SchVG, §3 could be explained on the basis that the first rendered a clause invalid but the second gave rise to a claim for damages. But, as Mr Bayfield put to him, this might have been a sensible explanation if the effect of the first was to give rise to damages and the second made a clause invalid. But it made no sense the other way round.

(6) He also claimed that Bliesener/Schneider supported his case but when Mr Bayfield put it to him, it provided no support for his opinion at all. It was highly critical of the Frankfurt Decision and also supported the case which Mr Bayfield had been putting to him instead.

(iii) Analysis

140. Professor Thole accepted that BGB, §307 applied in principle to notes or bonds. But it was his opinion that BGB, §307(1), sentence 2 was displaced by SchVG, §3. I accept that evidence. Professor Pfeiffer accepted that there was a general principle of "**lex specialis**" under German law. Whilst it might seem odd to an English lawyer that one statutory provision could displace another without an express proviso to that effect, I understood Professor Pfeiffer to accept that this is how the principle of lex specialis operates.

141. BGB, §307(1), sentence 1 provides that a provision in a set of standard business terms is ineffective if it unreasonably disadvantages the party who is required to accept them. But Professor Pfeiffer did not suggest that Clause 12(1) unreasonably disadvantaged the holders of the SUNs as a matter of fact. Indeed, he struggled to point to any disadvantage at all (beyond the fact that it gave this Court jurisdiction under Part 26A).

142. Sentence 2 provides that such a disadvantage may (and I stress the word may) arise if the provision is not clear and comprehensible. This is the requirement of transparency or "definiteness" (as Professor Pfeiffer described it). But Professor Pfeiffer could not explain why a substitution clause which complies with SchVG, §3 and sets out detailed and unambiguous conditions which must be satisfied before the substitution can take effect is not clear and comprehensible. Nor did he explain what other kind of reasons it had to contain before the clause would be valid.

143. BGB, §307(2) creates a presumption. A standard term is also presumed to be disadvantageous if either of the conditions or set of circumstances in sentence 1 or sentence 2 is met. Professor Pfeiffer relied on the presumption in BGB, §307(2), sentence 1 and it was his evidence that the presumption applies in the present case because Clause 12 deviated from the basic principles of contract law. But he also accepted that the presumption could be rebutted on the evidence.

144. The short answer to Professor Pfeiffer's analysis is that the presumption does not arise in the present case because a substitution clause which complies with SchVG, §3 does not "deviate" from the general principles of contract law set out in BGB, §414 or the specific statutory provisions in SchVG, §5. The alternative answer is that the presumption arises but that in a case where the relevant contract is governed by the SchVG, the issuer is able to rebut the presumption by complying with SchVG, §3. Either way, Clause 12(1) is not invalid under BGB, §307 because, as a matter of principle, it permits the substitution of one debtor for another.

145. Moreover, this analysis seems to me to be consistent with the extract from the Explanatory Memorandum (above). The legislature recognised that there was a

legal controversy over the application of BGB, §307 but intended to legislate in relation to bonds either "independently" or "irrespectively" – Professor Pfeiffer's translation – of the question of principle to which it gave rise as a matter of general law. It is clear, however, that the legislature intended to remove the obstacle for bonds created by the GTC for the commercial reasons given in the first paragraph of the extract which I have set out (above) by creating a special transparency requirement. Finally, it seems to me to be possible to apply BGB, §307 and SchVG, §3 consistently with each other so as to give effect to that legislative purpose by either of the alternative statutory constructions which I have set out (above).

146. But whether or not a German Court would give effect to SchVG, §3 by adopting the precise reasoning which I have put forward, I accept Professor Thole's evidence that Clause 12(1) is valid because it complies with SchVG, §3 and the Parent Company complied with all of the relevant conditions which it imposed. Professor Pfeiffer's contrary view was not supported by any authority apart from the Frankfurt Decision which is of very doubtful authority and criticised in the textbooks.

147. The issue for the Court in the Frankfurt Decision was whether the creditors of a bond issued in another jurisdiction could amend the terms and conditions by majority decision under the SchVG on the basis that the German parent had guaranteed its obligations. The Regional Court held that they could not and the appeal against that decision was dismissed. In the course of argument, the Appellant relied on the substitution clause to argue that the Dutch issuer could have been substituted with a German debtor and in that context the Court expressed the view that in that context the "debtor substitution is likely to deviate from essential basic principles of contract law (section 307(2) no. 1 BGB)".

148. This is hardly compelling authority for declaring invalid a standard substitution clause and from the translation exhibited by Professor Pfeiffer, the Court does not appear to have been taken to SchVG, §3 at all. What the Court may have had in mind was that it was contrary to basic contractual principles for one party to use the amendment powers in the SchVG to re-write a foreign contract where it contained no express power to do so. But in any event, the decision has been

heavily criticised in the textbooks and, in particular, in the passage from Bliesener/ Schneider (above) which Professor Pfeiffer had originally cited in support of his own evidence.

149. Furthermore, I am not satisfied that the second passage from the Frankfurt Decision provides any support for Professor Pfeiffer's view that the substitution of one debtor for another infringes the contractual principle "pacta sunt servanda" or gives rise to an unfair advantage where the Notes contain a substitution clause requiring the original debtor to guarantee the obligations of the new debtor. That passage comes two paragraphs after the Court had expressed the view that the debtor substitution involved a deviation from contractual principles and the Court had gone on to consider the effect of restructuring on the rights of the noteholders more generally.

150. Professor Pfeiffer was unable to point to any textbook in which the editors supported his view either that BGB, §307 was engaged or that the Frankfurt Decision supported his conclusion and would be followed. The best examples which Mr Al-Attar could give were the extracts from Hartwig-Jacob and Birke (above). In my judgment, neither of those passages supported Professor Pfeiffer's opinion. Neither suggested that a substitution clause would be invalid under BGB, §307 or that it would be invalid where it was a condition that the original debtor guarantee the obligations of the substituted debtor.

151. Moreover, the passage from Birke did not suggest that it was necessary to set out a list of non-exhaustive reasons either. Indeed, that passage was illustrative of the ambiguity in many of the passages upon which Professor Pfeiffer relied. All of the textbook writers agreed that it was necessary for a substitution clause to set out conditions which had to be complied with to ensure that the creditors were no worse off and for the issuer and substitute debtor to comply with them. But none suggested that it was formally necessary to set out a menu of reasons why – or the circumstances in which – the issuer was entitled to exercise the right of substitution at all.

152. I accept that the passage from Hartwig-Jacob which Professor Thole exhibited to Thole 3 suggests that this kind of list may be necessary. But Mr Al-Attar did not

address the passages from the same textbook which Mr Bayfield handed to Professor Pfeiffer and some of which he put to him in cross-examination. In particular, he did not address the following paragraph (original emphasis) in which Dr Hartwig-Jacob clearly rejected the view expressed by Professor Pfeiffer:

> "Within its scope of application, §3 **replaces the general GTC law transparency requirement of §307 para 1 sentence 2 BGB.** Although §3 and §307 para 1 sentence 2 BGB obviously have a similar "subject matter""

153. But even if compliance with SchVG, §3 does not prevent the presumption in BGB, §307(2) arising or discharge the burden of rebutting that presumption, I am satisfied that compliance with Clause 12(1)(e) and the provision of the Parent Company Guarantee provides the necessary compensation for the substitution of the Plan Company. Professor Pfeiffer could not point to any economic disadvantage to the Plan Creditors as a result of the substitution and fell back on the fact that the substitution permitted the Plan Company to apply to the English court under Part 26A. But it is clear that he was not aware that the Court had to be satisfied that the Plan Creditors were no worse off before it could sanction the Plan and he had not considered the possibility that the Parent Company might change its COMI to implement a restructuring plan in other jurisdictions.

(iv) Findings

154. I therefore accept the evidence of Professor Thole and I find that Clause 12(1) was valid and enforceable as a matter of German law. Mr Al-Attar did not submit that the Issuer Substitution was ineffective or that the Parent Company had failed to comply with its terms if I found Clause 12(1) was valid. But in case there is any doubt, I find that the Issuer Substitution was valid and effective and that the Court had jurisdiction to sanction the Plan.

VIII. Condition A: The "No Worse Off" Test

(1) Introduction

155. I turn now to the principal factual issue between the parties. To sanction the Plan the Court must be satisfied that the relevant class, namely, the 2029 Plan Creditors would be no worse off under the Plan than they would have been under the

Relevant Alternative. The Plan Company submitted that this test was satisfied because the 2029 Plan Creditors were likely to be paid in full under the Plan whereas they would recover only 63% of the sums due to them if the Group went into liquidation. The AHG disputed this on the basis that the Plan Company's evidence was so uncertain and unsatisfactory that I could not be satisfied that the 2029 Plan Creditors would be paid in full and because they were likely to receive substantially less than if the Group went into liquidation when the creditors would be treated on a *pari passu* basis.

156. BCG's starting point in the BCG Report was the "**Gross Asset Value**" or "**GAV**" of the Group's assets as at 30 June 2022 and 30 September 2022 based on valuations provided by the Group's professional advisers (below). They then forecast the future realisations from the planned sale of the residential properties between 2023 and 2026 based on a model which they had developed over the last five or six months. By applying this model and an asset-by-asset assessment of the development properties they were able to forecast that the 2029 Plan Creditors would be paid in full. Knight Frank disputed both the GAV of the Group's assets and the future realisations. They helpfully set out the differences between the parties in two tables in the Executive Summary. In summary, BCG forecast future realisations of the Group's assets of €7,119 million compared with Knight Frank's forecast of €5,372 million (a difference of approximately 25%).

157. There was some common ground between the parties. There was no dispute that the Relevant Alternative was liquidation of the Group, that this would take place principally in Germany and that the German Court would apply the same principles as an English Court in relation to the realisation of assets and the distribution of the proceeds to creditors. It was also common ground that if the Plan was implemented and the Group went through a solvent liquidation or wind down of operations, the Group would realise more on the sale of its assets than it would through a Court sponsored insolvency procedure. There was a difference between the parties in relation to the Insolvency Discount (as I explain below). But there was no issue that the Court should apply a discount of at least 5% in relation to the realisation of the Group's assets.

158. The real source of contention between the parties was, as I have indicated, the treatment of the 2029 Plan Creditors under the Plan. It was Ms Rickelton's evidence that because of the order of priority under the Plan, the 2029 Plan Creditors would be paid out last and, as a consequence, they were likely to recover only 10.6% of the amount due under the 2029 Notes whereas in an insolvency they would recover 56.1%. Ms Rickelton's evidence was based on Knight Frank's valuations (above) and she summarised her conclusions in Figure 1 of the Rickelton Report. When the Plan Company served its reply evidence (including Wolf 1), she adjusted this figure downwards.

159. The Plan Company's answer to the AHG's case was that even if Mr Gerlinger's evidence was accepted, the 2029 Plan Creditors were likely to be no worse off under the Plan than if the Group went into liquidation because the realisations forecast by Mr Gerlinger in the Knight Frank Report would trigger a breach of the Plan Company's financial covenants under the SUNs and the repayment of the 2029 Notes would be accelerated and become immediately due. In that event, so the Plan Company argued, the 2029 Plan Creditors were likely to recover a greater return than they would if the Group was put into an insolvency process. The AHG disputed this for a number of reasons which I will go on to consider in detail. Although the principal issue between the parties related to stage 3 of the NWO Test, I begin by considering the Group's GAV and then work through each stage of the test.

(2) The Group: Gross Asset Value

(i) The Yielding Assets

160. The expert witnesses divided the assets of the Group into two categories: the "**Yielding Assets**" and the "**Development Assets**". In his witness statement dated 24 March 2023 Mr Michael Schlatterer, who is a senior director at CBRE GmbH ("**CBRE**"), gave the following description of the Yielding Assets:

> "The "ADO Portfolio" comprises 366 "valuation units" which are made up of 14,783 residential units (of which 367 are under public rent control), 1,367 commercial units, 4,354 parking lots and 780 miscellaneous units. With the exception of two units, all units in the ADO Portfolio are located in Berlin, Germany. Berlin itself is

> divided into 12 boroughs and the 366 valuation units are spread across all 12 boroughs. Further, the properties in the ADO Portfolio have a wide range of construction dates from 1919 to 2002. 365 of the 366 valuation units are freehold-equivalent. 48 out of those 365 valuation units are separated into condominiums. A "valuation unit" can comprise a number of residential units (e.g. in a building), associated commercial units and parking lots."
>
> "The "Adler and Westgrund" Portfolio comprises a total of 243 valuation units as at 30 June 2022. These valuation units are made up of 9,621 residential units (of which 281 are under public rent control), 492 commercial units, 1,994 parking lots and 313 miscellaneous units (e.g. antennas, advertisements, etc.). The valuation units are spread across the federal states Berlin, Brandenburg, North Rhine-Westphalia, Saxony, Saxony-Anhalt and Thuringia (see 8 map below). 242 of the 243 valuation units are freehold-equivalent and 6 of the 243 valuation units are separated into condominiums. The majority of the residential units are located in Berlin and Duisburg."

161. Mr Schlatterer did not give evidence but Mr Gerlinger accepted that his description of the ADO Portfolio was correct and that CBRE had valued the Yielding Assets for about seven years. It was also Mr Schlatterer's evidence that CBRE had valued the ADO Portfolio at €3,934,468,000 and the A&W Portfolio at €1,450,432,000 at a valuation date of 30 June 2022 on an asset-by-asset basis giving a combined valuation of €5,384,900,000. On 18 November 2022 CBRE published abridged valuations of both portfolios at a valuation date of 30 September 2022. These valuations involved a slight reduction in the total value of the Yielding Assets to €5,277,309,700.

162. Mr Schlatterer also gave detailed evidence about CBRE's methodology and, in particular, about the discount and capitalisation rates which they had adopted. His evidence was as follows:

> "The Capitalisation Rates used in our valuation of the Yielding Assets were derived from the average Net Initial Yield ("NIY") achieved in comparable transactions involving residential properties that were observed by CBRE and reflected the market situation as well as the yield expectations of a potential investor. They implicitly included rental growth assumptions. The Discount Rates, which explicitly reflected rental growth in the cash flows, were derived from the Capitalisation Rate plus the average rental growth.
>
> The Discount Rate and Capitalisation Rate were adjusted individually for each local market to be valued, in accordance with

> the following criteria: (a) quality of the location; (b) demand and levels of value in the relevant local real estate market; (c) the prospects for the local market; and (d) development of rents and prices (yield compression)."

163. It was also his evidence that the resulting net present values were checked against comparable evidence (where available) and sales price data collected by the relevant local valuation committees:

> "The resulting net present values were checked against our analysis of comparable transactions (where available) from the sale price data collected by the relevant local valuation committees (Gutachterausschuss) and an analysis of the internal lease and sale database of the CBRE Valuation Department. If necessary, in the absence of transaction data, asking prices for comparable assets on offer at Value AG were also considered. If, in particular instances, results of our DCF calculations were found not to reflect the Fair Value of an individual building, the calculation was adjusted by means of a change in the Discount Rate and Capitalisation Rate using expert and experienced judgement."

164. Mr Gerlinger valued the Yielding Assets at €3,875,000,000. He had not been able to carry out individual asset-by-asset valuations in the time available but had valued the properties in five overall portfolios and "clusters" of individual properties. It became clear during his evidence that the principal difference between his valuation and the CBRE valuations was the choice of yield. For instance in relation to his Portfolio 1 which contained properties in Duisburg, he had analysed local information and arrived at a gross initial yield of 5.02%.

165. When Mr Bayfield took Mr Gerlinger to one of CBRE's individual valuation reports, Mr Gerlinger had no criticisms of any of the individual valuations of the assets in the ADO Portfolio on an individual level and he accepted that each of them was a thorough piece of work. However, he did not accept that CBRE had adopted the same thorough approach to the assessing the capitalisation rates and he stated that the only evidence which he had found in the CBRE valuations for the yields which they had adopted was in what he described as the "City Reports":

> "If I may add further, CB, for example, have only one piece of yield information in the whole report. This is coming from the city report which sits at the back. We remember the statement of Mr Schlatterer, that the cap rates -- well, no it is not different either. The discount

rates are basically the cap rates plus explicit growth rate. It depends on the cap rate. Then the cap rate is based on net initial yields observed in comparable transactions. I have not observed any in the report. Not a single one. So they help them -- which is acceptable. So they help themselves with looking at the multiples, which is the reverse of the gross initial yields that I am talking about here. When you scroll towards the end of any report, whether it is ADO or A&W including Duisburg, you will find the city report. The city report has one graph in there depicting three sets of yield data, so an average, a maximum and a minimum multiple. So the maximum multiple would apply for the best in Duisburg; the average -- for the unknown average, and the minimum for what they perceive to be the minimum. If you like, we can go to the graph. Having looked at the characteristics of Rheinhausen, the main cluster in here, with all the buildings partly refurbished in a similar location, I am of the opinion that it can't be valued as a yield and a multiple, because that's what they used, which is the top multiple for Duisburg because it's not the best location in the town. It's probably not the most inferior as well, but somewhere closer to the average. If the judge liked we can scroll to the city report and there you will find an average multiple which is pretty close to the 6.7 per cent here. So the reverse of that, which is around then 16 times. So my perception is CBRE have moved too high in terms of multiples for the gross initial yield to base the cap rate on it, to base a discount rate on it. A very essential part of the relation is grounded on a very thin set of information, using three data points. My perception is that they have taken a too optimistic approach in selecting the yield. Q. Can you take the judge please to where in your report 15 you have outlined all of this, please? A. I do it in that shortform underneath the table. Can you please scroll down? The second bullet, pointing out that the 5.02 per cent are 167 BPS below the average gross initial yield for stronger years. I didn't necessarily scrutinise the CBRE approach so much. I preferred to try to demonstrate the own approach. But having spoken about the differences between their valuation and mine, the difference that becomes obvious is the choice of the yields. It's not the market rents. I agree on the market rent. It's not the description of the properties. I agree on that. It's the choice of yields applied by CBRE which is on my perspective fairly thinly grounded, especially considering the capital market presence they have which would have allowed for much more transactional data including yields."

166. One difficulty for the Court in resolving the valuation disputes between the parties was that Mr Schlatterer was not called to give evidence and I could not compare his evidence with that of Mr Gerlinger. Counsel were agreed that they should not be taken to have accepted the evidence of a witness who was not called to give oral evidence and to be cross-examined. Mr Smith made it clear, therefore, that he did not accept Mr Schlatterer's evidence (and indeed submitted that I should reject

his evidence and accept the evidence of Mr Gerlinger). A second difficulty for the Court was that because of the tight timetable, Mr Bayfield was only able to cross-examine Mr Gerlinger on this issue for a short period of time. It could easily have taken three days of expert evidence alone simply to resolve the value of the Yielding Assets. For this reason I have no choice but to adopt the broad approach articulated in *Deep Ocean* and *Hurricane Energy.*

167. Doing the best I can, I am satisfied that it is more likely than not that CBRE have valued the Yielding Assets more accurately than Knight Frank and I find on a balance of probabilities that the value of the ADO Portfolio and the A&W Portfolio was €5,384,900,000 as at 30 June 2022 and €5,277,309,700 as at 30 September 2022. Although I found Mr Gerlinger to be a transparent witness who was trying to help the Court, I have reached this conclusion and made this finding for the following reasons:

(1) CBRE had seven years of experience in valuing both portfolios, they had valued them both on an asset-by-asset basis and Mr Gerlinger had no criticisms of the individual rental valuations. Given the time constraints, Knight Frank had been unable to carry out the same exercise.

(2) It is clear from Mr Schlatterer's evidence that CBRE adopted Capitalisation Rates for the purposes of their DCF calculations which were based on the general factors set out in the City Reports (as Mr Gerlinger pointed out). But Mr Schlatterer also gave detailed evidence that valuations were checked against comparable evidence and the sales data from the local valuation committees and that adjustments were made where necessary.

(3) I accept that evidence. Although the Plan Company may not have disclosed CBRE's working papers setting out the checks and adjustments which they made and Mr Gerlinger may not have had an opportunity to consider them, Mr Gerlinger candidly accepted that he had not provided the Court with his own analysis either or the calculations behind his individual yields. I add that the individual valuations by themselves covered many thousands of pages.

(4) Moreover, as Mr Gerlinger also accepted, CBRE Capital Markets had a unique database of investment transactions against which to test its valuations and this database would have been particularly useful in providing investment evidence for CBRE's Capitalisation Rates. Again, Mr Gerlinger had to accept that by comparison his assessment was largely based on intuition.

(ii) The Development Assets

168. Mr Peter Stark, who is a director in the Property Valuation Team at Apollo valuation and research GmbH ("**NAI Apollo**"), also gave evidence that the Group specialised in the acquisition, management and development of income-producing properties and that it had a portfolio of 28 residential and commercial development properties located in Germany's top cities including Berlin, Hamburg, Dusseldorf and Frankfurt. NAI Apollo had also valued the Development Assets as at 30 June 2022 and set out a table of those valuations which totalled €2,298,100,000 excluding Development Asset 24 (Schönefeld Nord Residential & Commercial) which NAI Apollo had not valued.

169. Mr Stark also gave evidence that NAI Apollo had valued each of the Development Assets by the residual valuation method using a specialist piece of software. He then set out an overview of the approach taken to individual valuations and the factors which NAI Apollo discounted or ignored. In the course of this description he expressed the following conclusion:

> "The LORA-based developer/residual calculation model of valuation outlined above is a detailed and orthodox methodology, which is routinely used to value the Adler Group's development portfolio (as it is used to value development properties generally). Furthermore, annual inspections of all of the Development Assets were carried out to verify the information about them provided by the Adler Group. I am satisfied that the approaches taken by NAI apollo in performing the Q2 2022 Valuations were the correct ones; certain of the developments are intended to be high-end, luxury residential accommodation. Calculating the market value of such a property will necessarily start with a higher projected sales proceeds figure. I am also satisfied that NAI apollo's valuation model appropriately values project costs, which is another factor that would affect the valuations arrived at."

170. Mr Gerlinger's evidence was that the value of the Development Assets as at 30 June 2022 was €1,588,000,000. In his report he accepted that each of the assets had to be looked at individually and that he had not had time to review each of NAI Apollo's valuation reports critically. He gave evidence, however, that Knight Frank had valued eight of the assets for a different client or clients:

> "3.127 As indicated above I am of the opinion that in Q3 2022 these selected eight developments were in total worth 50.1% less than the reported GAV of Q2 2022. The discount appears drastic. Selected reviews of the NAI Apollo valuations indicated that they applied low cost assumptions, low construction costs contingencies and particularly low developer profit to increase the residual asset value.
> 3.128 I acknowledge that any valuation of a development site is subject to a higher degree of uncertainty than the valuation of a yielding asset, as the value of a development site is very sensitive to small changes of exit yields, rents and construction costs. So, both my valuations and those of NAI Apollo commissioned by Consus or Adler RE are by nature subject to a higher degree of uncertainty. Having said that, a 50% difference between the results is beyond that degree of uncertainty and in my view brings into question the validity of these valuations."

171. It is unclear, however, from his report whether Mr Gerlinger carried out individual valuations of any of the remaining Development Assets and his explanation for the way in which he arrived at his overall valuation was as follows:

> "**My opinion of Gross Asset Values and Proceeds under the RA & RP**
> • For the forward sales I adopted the BCG assumption as the stipulations of the sales contracts and prepayments are unknown.
> • For the unidentified, sold asset I also adopted the BCG assumptions.
> • For the one in Mannheim under advanced negotiations, that was completed already in Q2 2022, I used a similar valuation approach than BCG.
> • As my valuation was undertaken mostly in August 2022, when markets had further deteriorated in comparison to Q2 2022, for the subject exercise I reduced the 50.1% discount to 40% for Q2 2022 and then extrapolated the 40% discount to all 21 developments."

172. Moreover, when Mr Gerlinger was asked about the time which would have been necessary to produce 22 separate valuations of the Development Assets and to give evidence about them, he accepted that it would have been a huge exercise:

> "Q. I understand the point that you say it was difficult in the timeframe to look at the 22 development assets. What do you mean by "discussing them here would exceed the scope of the report"? A. Where is that? Q. 3.124, the final part of the paragraph. A. I think if I was to discuss 22 development projects, they are quite large and complicated development projects. That alone would take, obviously, a long time to prepare for myself -- Q. That's your timeframe point? A. Exactly. Similarly it would take at least two hours per property to discuss it, to get to a meaningful outcome. Q. So you were worried about the length of the trial and not being able to deal with them adequately in cross-examination? A. Okay, no, I am speaking here about the scope of this report. So let's focus not on the time in trial. That would also be true, but actually on the volume of the report. That would be thousands of pages of reading. Q. You knew that CBRE and NAI Apollo had put in thousands of pages of reading, didn't you? A. I saw that later on, yes. But I didn't see any benefit of adding another 5,000 pages. Q. Okay. A. To get a meaningful outcome you would have to read, understand and compare them and discuss them. Q. You say in that paragraph that you agree that the development assets can't be valued in groups. They have to be valued individually, right? A. Sorry, where is that? Q. "But need to be looked at on a case-by-case basis, with which I agree"? A. Correct. Q. But you haven't provided valuations of any of the 22 individual development assets, have you? A. I have conducted eight valuations. I have not provided them to the court, if that is your question. Q. Okay. Can you remind yourself of what you say in paragraph 3.125, please. At 3.126 you compare the values that NAI Apollo gave with your own valuations, don't you? A. In the bottom line, exactly, yes. In the lower bottom line of the table, yes. Q. Can I ask you, given that you haven't produced any of the valuations to the court, how on earth the judge is meant to decide between your valuation and the NAI Apollo valuation? A. I have no opinion on the ruling of the judge, or of the opinion making of the judge. I agree it's a very broad brush approach and I have taken a shorter section of that in my report, but it's my true and fair view."

173. There was one issue of principle on which Mr Gerlinger disagreed with Mr Stark's methodology. It was Mr Stark's evidence that the progression of the development of each asset was attributable to the current financial position of the Group and not relevant to its valuation. In support of his approach he relied on the definition of "**Market Value**" in the International Valuation Standards ("**ISVs**") of the RICS Red Book. Mr Gerlinger did not accept this:

> "Q. Thank you. I want to show you what Mr Stark says about this point. He's a director of NAI Apollo as you know. Can we go to please. Can you remind yourself of paragraphs 44 to 45? He's right, isn't he, Mr Stark, that the current situation of the Adler Group is not

> relevant to the market value of the assets, particularly in circumstances where the group is requesting to be borrowing that money to fund CAPEX? A. I have a disagreement. If the development -- well, the state of the development is relevant, and that the state of development is not only relevant because Adler is in insolvency issues and therefore couldn't proceed with them. But this has an impact on the developments themselves. You have seen photographs of strip buildings where -- concrete buildings, high rises -- who are sitting now exposed to weather conditions for three winters now. It obviously deteriorates the quality of the concrete massively, any frost going into the steel. There are developments that don't progress for a certain reason, say in the Offenbach Hafen development the tower is sloping six degrees to the side. That needs additional CAPEX to remedy. Some developments have been -- they all have been stopped, basically, or almost all. So all these effects that led to delay, the actual delay that we have seen, leads to a deterioration of the project. In terms of image, in terms of the bare construction, bare quality of concrete, in terms of many more aspects, to marketability to end investors. So I disagree with 44 regarding your second sentence that this will be kind of yield by Adler receiving CAPEX to progress with -- or capital to progress with developments. My understanding is that the most of the CAPEX will be spent on -- correct me if I am wrong -- two properties only, which need to be completed and these are some of the forward sales. Whereas the majority -- the vast majority -- will be sold in present condition, maybe secured a little bit. Secured against so that the current building doesn't deteriorate even more. So my understanding was that under both options, so insolvency -- well, relevant alternative or restructuring plan -- Adler will not continue to complete most of the developments save for these selected forward sales. Q. One point I want to clarify, Mr Stark doesn't say that the condition of the development assets is irrelevant. He's talking about the characteristics of the progression of the development. That's right, isn't it? A. I would say that one leads to the other. If you don't progress with a building which is sitting three years unexposed, then the condition of the bare concrete will deteriorate."

174. Resolving the issues between Mr Stark and Mr Gerlinger in relation to the Development Assets presented the same two difficulties as resolving the issues between the experts in relation to the Yielding Assets. It also presented the added difficulty that each valuation of the individual Development Assets was an even more complex exercise than the valuation of individual Yielding Assets and involved a number of different inputs by each expert which it was not possible for the Court to test. Again, I have to adopt the broad test to this issue.

175. Doing the best I can again, I am satisfied that it is more likely that NAI Apollo have valued the Development Assets more accurately than Knight Frank and I find on a balance of probabilities that the value of the Development Assets (apart from Schönefeld Nord Residential & Commercial) was €2,298,100,000 as at 30 June 2022. I have reached this conclusion and made this finding for the following reasons:

(1) NAI Apollo carried out individual valuations of 27 of the 28 Development Assets and it was Mr Stark's evidence that the approach which NAI Apollo adopted was correct and that each valuation model appropriately valued the relevant project costs. In the absence of any evidence to the contrary, I am prepared to accept that evidence.

(2) I am not satisfied that the AHG were able to adduce any compelling evidence to the contrary. Mr Gerlinger accepted that he had not had time to review each of these valuations critically and he effectively accepted in cross-examination that he could not challenge the valuations directly.

(3) Moreover, Mr Gerlinger was only able to challenge Mr Stark's evidence on the basis of the eight valuations of the Development Assets which Knight Frank had carried out earlier. As I understood his methodology, Mr Gerlinger had taken those valuations and calculated that he had valued the properties at 50.1% less than NAI Apollo. He had then applied a discount of 40% to the remaining 21 Development Assets.

(4) I am not satisfied that this exercise provides clear evidence that NAI Apollo's valuation was wrong. Knight Frank had only valued 8 of the 28 Development Assets and Mr Gerlinger did not explain why he chose to reduce the discount which he had applied from 50.1% to 40%. In my judgment, this reflected a concern that the overall difference between his own valuations and the NAI Apollo valuations could not really be explained. In his report he described the difference as "drastic" and in his oral evidence he described it as "brutal".

(5) To compound the difficulty, Mr Gerlinger did not produce the eight valuations which formed the basis for the discount which he had applied

(although he accepted in cross-examination that he could have done so). It was not possible, therefore, for me to understand the differences between those valuations and the ones which NAI Apollo had prepared and whose should be preferred. In the end, therefore, I am left with a choice whether to accept the individual NAI Apollo valuations or to reject them entirely on the basis of the eight valuations which Knight Frank had carried out and which were not before the Court. I am not prepared to do so.

(6) Finally, it is not possible for me to assess how far the numerical difference between the NAI Apollo valuations and the Knight Frank valuations was generated by the difference of principle which I have identified above. Mr Bayfield pointed out to Mr Gerlinger that Mr Stark had not ignored the condition of each Development Asset only the progress of the development. But even if that difference was a substantial one, Mr Gerlinger did not suggest that Mr Stark was wrong in his application of the ISV definition of Market Value in the Red Book. I therefore accept that NAI Apollo's approach on this issue was the correct one.

(3) Stage 1: The Relevant Alternative

176. It is common ground that the Relevant Alternative to the Plan is that the Plan Company and the other Group companies go into a formal insolvency process. In the case of the Plan Company, this is an insolvency process in England (either administration or liquidation). In the case of the Parent Company, this is an insolvency process in Germany. It is also common ground that in both sets of proceedings the claims of the Plan Creditors would rank for payment *pari passu*. Indeed, Mr Smith stated in closing submissions that it was part of the AHG's case that the Relevant Alternative was an insolvency process in which all of the Plan Creditors were treated equally.

177. On the basis of the CBRE and NAI Apollo valuations BCG calculated that €2.1 billion would be available for distribution to the Parent Company's unsecured creditors of which €2.023 billion would be distributed to the Plan Creditors. This calculation was based on the following assumptions:

(1) In the first year, the administrators (as the Plan Company called them) would dispose of all non-critical entities and over the next four years it would dispose of critical entities and self-sustaining assets. BCG expected the first distribution to unsecured creditors to be made after 3 years and a final distribution after 5 years.

(2) The Parent Company would realise €2.435 billion from the sale of its own portfolio of assets. It would also realise €400 million by shareholder distributions from Adler RE (after repayment of its creditors) which would in part be realised by Adler RE from the sale of its interest in Brack Capital Properties or "**BCP**". The Parent Company would also realise €400 million by the repayment of company loans by Consus resulting in total realisations of €3.288 billion.

(3) €2.147 billion would be available to unsecured creditors after payment of secured debt and the costs of the insolvency process or processes and €2.023 billion would be distributed to the Plan Creditors of all classes. On slide 80 of the BCG Report BCG summarised their calculation of these realisations as follows:

- "GAV as per latest available valuations (Yielding: September 30, 2022; Development: June 30, 2022)
- Sale of Parent Company's asset portfolio to realize ~€2.4B proceeds, incurring ~€1.1B in market & insolvency effects on GAV
- Parent Company to receive ~€0.4B of excess cash from liquidation of Adler RE and ~€0.4B from Consus, after repayment of external debt in respective boxes
- Secured debt to be repaid with proceeds from sale of respective collateralized assets
- ~€65M interest received on accruing cash balance from sales proceeds until distribution
- Proceeds to unsecured lenders distributed in Q1 2026 and Q1 2028
- Repayment of ~€2.1B to unsecured creditors (o/w ~€2,023M SUNs (excl. New Money Fees), ~€16M SSDs, ~€64M Convertible), resulting in recovery of ~63%"

(4) €506 million would be paid to the 2029 Creditors in 2026 and 2028. This amounts to 63.25% of the principal of €800 million payable under the 2029 Notes. But it does not include any element of interest.

178. The principal reason why BCG calculated that Plan Creditors would realise only 63% of their claims rather than be paid in full was that the effect of insolvency would be to reduce the amount which the administrators could expect to realise from the Yielding Assets by €500 million from their existing GAV and from the Development Assets by €1.1 billion from their GAV. BCG also calculated that the total costs of the insolvency process and other costs of the process (for example, advisory fees and retention bonuses for key employees) would be €100m. As I have trailed above, I will refer to this insolvency effect as the "**Insolvency Discount**".

179. To identify the appropriate Insolvency Discount BCG conducted interviews with 10 experts who told them that discounts typically ranged from 20% to 40%. For the Yielding Assets BCG adopted a discount of 25% and for the Development Assets they accepted that discounts might vary from 10% to 100% depending on the stage of development and adopted a weighted average of 23%. The Plan Company also called Mr Gunther who gave detailed evidence about the factors which gave rise to an Insolvency Discount and expressed the expert opinion that the assumptions adopted by BCG were reasonable.

180. In section 8 of the Gunther Report, Mr Gunther gave evidence about a specific scenario where enforcement action is taken and the shares in the Group are transferred to a special purpose vehicle controlled by the creditors. Mr Smith described this in cross-examination as a "**Credit Bid**" and Mr Bayfield, Mr Perkins and Miss Wang used the term "**SUN Bidco**" to describe the vehicle which would acquire the assets (and I adopt both terms). In the Gunther Report, Mr Gunther's evidence was that he had significant experience of this situation:

> "8.3 I have worked for creditors in such a scenario, having previously set up, controlled, and operated bidcos. I also set up bidcos in distressed situations for and on behalf of stakeholders other than creditors, including customers, large industrial enterprises, and employees.
>
> 8.4. Examples of this work include:

> a) Bidco assuming control of Primacom, Germany's fourth largest cable operator, €390m of syndicated debt on behalf of creditors. Expert witness report on insolvency discount
>
> b) Bidco assuming control of Deutsche Lichtmiete AG, industrial services group, €200m of bonds and bilaterals on behalf of bondholders.
>
> c) Bidcos taking ownership of approximately 30 vessels, German ship operators, >€600m of bank debt, on behalf of ship finance banks
>
> d) Bidco assuming control of Neue Halberg Guss, Europe's 3rd largest grey iron foundry, on behalf of General Motors, VW Group, Daimler, Deutz, Opel, and IG Metall.
>
> e) Bidco assuming control of Industriecenter Obernburg, the industrial park and power generation on behalf of syndicated loan creditors.
>
> f) Bidco assuming control of Makro Cash & Carry Belgium, former Metro AG subsidiary, €700m turnover, 1,800 employees.
>
> 8.5. I would like to point out that my experience does not include bidcos in real estate situations. To the best of my knowledge, in my professional experience in Germany such problems did not exist in any material numbers or volume, given the favourable market environment for German real estate over the past ten years.
>
> 8.6. However, I believe that it is not implausible to infer from market reactions, most importantly customers (comparable to real estate investors) and supplier reactions, in the above cases that a change of control to a Bidco does not cause the same reactions as one would experience in insolvency. The opposite is the case, as external stakeholders consider such a move stabilising…..
>
> 8.8. In summary, I see no conceivable change of the disposal conditions between a solvent wind-down under the current ownership and a Bidco shareholder. In other words, no Insolvency Discounts should apply under a Bidco scenario."

181. Mr Gunther gave evidence that he had not been asked to look at the question of what Insolvency Discount the Plan itself might give rise to but rather the discounts to market value. He also confirmed that when he gave evidence about a potential Credit Bid, his assumption was that the assets would be sold "in the usual way":

> "Q. I see. You don't say this expressly in your report, but I think you're saying that in the plan scenario, there would be no insolvency discount at all to market value, is that right? A. I haven't looked at this question. I was asked what the insolvency discount are, and we have looked at the experience we have, what we did over the last five years in Germany, and we came to the conclusion that the discount of approximately 25 per cent is a correct estimation. Q. That's very

> interesting, Mr Gunther, because that's exactly what I was going to ask you. That you haven't looked at the discount under the plan scenario, have you? A. No."
>
> "Q. Now if we go back to 8.1 of your report, which we were looking at a moment ago, <H/46/257>, you referred there in the second sentence to all shares of the Adler Group being transferred to a special purpose vehicle "bidco" controlled by the creditors. Do you see that? A. I see that, yes. Q. I think there you are referring to the shares in the Luxembourg holding companies, is that right? A. Yes. Q. What are you assuming would then happen in relation to the properties? A. So then we believed this would avoid an insolvency situation. Q. I understand you say that. What in practical terms did you think would happen to the properties following the transfer of the shares? How are you assuming they would, in fact, be sold? A. After the transfer of the shares? Q. Yes. A. In the usual way. Q. When you say "in the usual way", you mean in the ordinary course of business? A. In the ordinary course of business, yes. Q. I see. So your opinion is dependent on those sales being made in the ordinary course of business; is that right? A. Yes."

182. Mr Gerlinger's evidence was that an Insolvency Discount of 5% was appropriate for the Relevant Alternative (although he compared that with the realisations under the Plan rather than with Market Value). He stated as follows in the Knight Frank Report at ¶3.31:

> "From my own experience and having spoken to investors with significant insolvency experience I would comment that all above arguments have some validity, but not to the extent that they would justify a 22.5% discount in comparison to a sale by Adler Group under the RP. Also, a recapitalised Adler Group has an even greater debt burden and a greater time pressure to sell the assets than under the RA. Hence, I am of the opinion that a discount of 5% (in comparison to the proceeds under the RP) is appropriate for the RA to reflect higher due diligence and insurance cost and reward for any remaining risk."

183. Mr Gerlinger did not identify the investors to whom he had spoken and he accepted in evidence that he was unable to say whether he had been involved in the sale of property assets in an insolvency. Ms Rickelton agreed that Knight Frank's approach was reasonable in the Rickelton Report. But she accepted in evidence that she had no direct experience of selling property assets as an insolvency practitioner. Mr Bayfield also took her to her expert report in *Re ED&F Man Holdings* in which she had given evidence for the plan company and in which she

had applied a range of "distressed discounts" of between 15% and 30%. Her evidence was as follows:

> "Q. I accept of course that ED&F Man is a very different group than Adler. But I want to focus on the principle. I think you would accept, would you not, that an inability to give representations and warranties is relevant to determining the relevant discount, how relevant may depend on the asset being sold? A. Yes, that's right. I think there is always a number of factors that one should consider when thinking about insolvency discounts. But then you have to apply it to the specific circumstances of the company. Q. The perception of financial distress is likewise relevant to determining the appropriate discount, isn't it? A. Yes, it's again a relevant factor to consider, and then apply it to the specifics of the case. Q. If we go to page 58 now, please, this is dealing with the discount applicable to a specific unit of the Commodities business called MLP. Can you read the final bullet point to yourself in its entirety, please? A. Yes, I have read that. Q. I think you are applying a 15 per cent discount to the valuation of assets belonging to companies which would not themselves be in a liquidation, but which would be affiliated with other companies in the same Commodities business which would be in liquidation. Is that correct? A. That's correct. Q. And you applied that discount because of the perception of distress and the inability to provide reps and warranties, didn't you? A. They were sort of the topics considered but it was applied to the situation and the impact that those factors would have in relation to this business and this group. Q. Yes. And those factors would be relevant to greater or lesser degrees in the appropriate insolvency discount in all cases? A. Yes. The sort of -- the backdrop can be very different for different kinds of businesses. That's often sort of based on how challenging it is to trade that sort of a business during an insolvency. You know, certain businesses can withstand an insolvency and be traded for quite a long time in that process and not impact value significantly, and other businesses, you know, are very susceptible to deterioration very quickly and there is a wide spectrum."

184. I accept Mr Gunther's evidence that the Insolvency Discounts applied by BCG are reasonable and I find on a balance of probabilities that if the Group went into liquidation the most likely of the two alternatives presented to the Court by the parties is that the Group's assets would be realised with Insolvency Discounts of 25% and 23% for the Yielding Assets and the Development Assets respectively. I make this finding for the following reasons:

(1) It is relevant for me to consider whether Mr Gunther's assumption about the sale of the assets in the ordinary course of business was correct when I

address the Plan Company's alternative case at Stage 3: see (6) (below). But there is no real dispute that CBRE and NAI Apollo valued the Group's assets by reference to Market Value (as defined by the Red Book) and I am satisfied that Mr Gunther's assumption was correct for the purpose of deciding what the likely outcome would be if the Parent Company and the Group companies went into an insolvency procedure (or, indeed, what the consequences would be for the Plan Creditors).

(2) On the other hand, I am not satisfied that Mr Gerlinger really addressed this issue. In the Knight Frank Report he compared a sale by the Group in insolvent liquidation (or the equivalent) and a sale under the Plan: see ¶3.31 (above). He was cross-examined on that paragraph and his evidence was that the greater debt burden and the time pressure to sell under the Plan justified a small discount only. Again, I return to this evidence at Stage 3: see section (6) (below). But this was not the basis on which CBRE and NAI Apollo had performed their valuations.

(3) In any event, I prefer Mr Gunther's evidence for the reasons which Mr Bayfield put to Ms Rickelton. I am satisfied that the perception of insolvency and the inability to provide the usual representations and warranties on a sale would justify a much higher discount. Although I accept Ms Rickelton's evidence that the Insolvency Discount will vary depending on the nature of the business being sold, I can see no reason why the discount should be less for property assets than for, say, commodities. Indeed, if administrators are unable to give title guarantees in relation to the land itself or warranties in relation to the performance of repairing obligations in leases of residential properties or compliance with an employer's obligations in relation to development properties, this inability is likely to generate a healthy discount.

(4) Mr Gunther's evidence was supported by the survey of other experts carried out by BCG. Although Mr Gerlinger and Ms Rickelton also relied on anecdotal evidence of this kind from investors and property professionals, they did not provide any detail, unlike BCG who set out in the BCG Report the substance of their interviews, the discounts identified by their interviewees and the reasons for adopting them.

185. I have found on a balance of probabilities that the GAV of the Yielding Assets was €5,277,309,700 as at 30 September 2022 and the GAV of the Development Assets (with one exception) was €2,298,100,000 as at 30 June 2022. I have also found that the most likely outcome in an insolvency is that the Group would realise those assets subject to Insolvency Discounts of 25% and 23% respectively. Mr Smith did not challenge the sequence of realisations in the BCG Report or the assumptions on which it was based. I, therefore, find that if the Plan had not been sanctioned, the most likely outcome is that the Group will realise €3.288 billion in total.

(4) Stage 2: The Consequences for the Dissenting Class

186. Again, Mr Smith did not challenge the specific consequences for the 2029 Plan Creditors set out in the BCG Report (if I accepted BCG's forecasts). I, therefore, find that if the Plan had not been sanctioned the most likely outcome is that €2.023 billion would be distributed to the Plan Creditors. I also find that if the Plan had not been sanctioned, the most likely outcome is that €506 million would be paid to the 2029 Creditors in 2026 and 2028 amounting to 63.25% of the principal of €800 million payable under the 2029 Notes.

(5) Stage 3: Primary Case

(i) The BCG Report

187. The Plan Company's primary case was that all of the Plan Creditors would be paid in full if the Plan was implemented. In support of its case, the Plan Company relied upon the BCG Report, in which BCG forecast the likely outcome if the Plan is implemented and compared this with the likely outcome in the event of the Relevant Alternative and the insolvency of the Group. In the Executive Summary, BCG set out their conclusions in the following series of bullet points:

> "• Under the Restructuring Plan, SUN noteholders are expected to recover 100% of FV plus interest and fees (in line with contractually agreed interest and fee payments). A general assumption for creditor recoveries is that the Group will repay debts as and when sufficient funds are available. Based on current projections and economic assumptions, an early repayment of the 2027 and 2029 SUNs at par

> per end of 2026 (prior to their respective contractual maturity) appears to be possible
>
> • In the Relevant Alternative, noteholders are expected to recover 63% of FV, with the delta to returns under the Restructuring Plan being primarily attributable to insolvency effects on realized asset prices
>
> • The comparator analysis concludes that all classes of creditors are better off under the Restructuring Plan in terms of quantum and timing of recoveries
>
> • The average maturity of recoveries for the SUNs is between 3 and 4 years as compared to 4 and 6 years under the Relevant Alternative"

188. On the next slide BCG stated that the Group's management had developed a business plan which formed the basis for the BCG analysis and that in their Management Case, the Group's management had forecast the following disposals:

> "• The Management Case foresees a disposal of €2.8B GAV yielding assets (three pre-defined disposal portfolios) and €1.7B GAV development assets through upfront sales by Q4/'24 (additional ~€250M GAV development assets disposed through pre-agreed forward sales). With proceeds generated from the disposal plan, the Group would have sufficient liquidity (through net proceeds from sale of assets) available to service its debt obligations as they become due and repay the New Money Facility during '24
>
> • The remaining portfolio of 9,744 residential units (€2.6B GAV) and some development assets (€0.4B GAV) is forecast to be sold until Q4/'26 to further support a deleveraging of the Group, while capitalizing on an expected market recovery
>
> • Given the significantly reduced asset base, the Restructuring Plan is complemented by an organizational scale down, which (i) foresees to gradually reduce the current organization of ~680 FTE as per January 2023 (~€52M personnel cost base in FY22) in line with planned asset disposals, and (ii) assumes a significant reduction of non-personnel costs
>
> • Provided that asset disposals are executed as planned, the Restructuring Plan would allow the Group to repay its outstanding financial liabilities at par plus interest and fees. Based on current projections and economic assumptions, an early repayment of the 2027 and 2029 SUNs at par per end of 2026 (prior to their respective contractual maturity) is forecast to be possible"

189. The first section of the report after the Executive Summary sets out the background to the Plan. In slide 17 BCG recorded that they had approached their modelling on the basis of the following corporate structure:

> "Company and shareholder structure
>
> • The Group consists of three boxes: the Parent Company, Adler RE and Consus; the Parent Company and Adler RE are publicly listed
>
> • The Parent Company is incorporated in Luxemburg and listed on the LAX, its ownership structure includes a 20.5% share held by Vonovia SE, a 7.4% share held by Gerda Caner and a 6.1% share held by Günther Walcher, with the remaining 66.0% being free float
>
> • The Parent Company holds a 96.7% stake in Adler RE and a 93.9% share in Consus; Adler RE has 3.3% free floating shares
>
> • Adler RE also holds a 63.0% stake in Tel-Aviv-based BCP, which itself is listed on the Tel Aviv Stock Exchange; additionally, BCP holds a 3.0% stake in Consus
>
> • While the yielding portfolio is held by the Parent Company and Adler RE, the development portfolio is primarily held by Consus and Adler RE"

190. In slides 18 and 19 BCG summarised the CBRE and NAI Apollo valuations and in section 3.1 they set out the key assumptions which underpinned the Management Case (and I note that on slide 35 they stated that the Management Case was based on "actuals per 30 September 2022"). The report also contained a number of graphs or tables on which Mr Wolf was cross-examined. The first set out what was described as the "Yielding asset price development" and showed a decrease in values of 10% by the end of 2023 with a recovery in value between 2023 and 2030. The assumptions on which this graph was based were stated to be as follows:

> "• Market model forecasts declining property values in Germany until end of 2023, average decrease of ~10% vs. CBRE valuation per June 30, 2022 (index)
>
> • Recovery expected to begin in 2024, property prices then grow with ~3% CAGR until 2030, enabling prices to surpass (nominal) 2022-levels in 2027
>
> • Berlin accounts for ~85% the Group's yielding portfolio GAV, thus driving overall development of its yielding portfolio valuation"

191. The second graph was also headed "Yielding asset price development" and stated that these value adjustments were in line with analysts' forecasts. The graph itself plotted a line between eleven analysts forecasts. BCG also added the following comments:

> "• We note, that based on updated valuation reports per December 2022, which have been provided by CBRE and NAI Apollo prior to the finalization of this report, the GAVs as per the BCG market model correspond with the actual valuations and show no material differences in total GAV for the yielding portfolio per 31.12.2022
>
> • Outlook for '23 in line with market expectations: Deutsche Bank, Berenberg, Moody's and S&P forecast real estate asset values of listed peers LEG, TAG, & Vonovia to decline by 10% in '23
>
> • Limited availability of projections after 2024: however, while market is expected to remain depressed throughout 2023, there is a consensus view that fundamentals of the German residential real estate market remain strong (see Background to Restructuring Plan chapter for more detail), driving market recovery in the medium- to long-term"

192. On slide 42 BCG set out a detailed timeline for the disposal of the Yielding Assets and stated that the Management Case disposal strategy was driven by the debt repayment schedule. On slide 43 they also set out a timeline for the disposal of the Development Assets and stated that their sale was planned to be finalised within 3 years. They then set out in a chart the various disposals which were forecast to take place and the cash which they were forecast to realise. The chart contained a discount of €414m to the gross asset value and in a separate box they provided the following explanation (which Mr Smith criticised as wholly unsupported by any evidence):

> "Discount calculation based on project analysis, considering:
>
> • Signed LOIs and/or offer letters for disposals in advanced negotiations or finalization stage (six projects with total GAV of €544M; one of them disposed in Jan. '23)
>
> • Previously obtained but withdrawn/declined offers
>
> • Price paid by Consus/Adler RE to purchase the project (with a focus on land value) and already spent CAPEX
>
> • Projects' future prospects with regard to micro-location and intended use (i.e., residential, commercial or mixed)"

193. Mr Wolf gave evidence that it was necessary for BCG to develop a specific model to forecast the sales of individual assets and their effect on the Group's payments under the SUNs. In Wolf 1 he stated this:

> "10. To forecast the proceeds of future asset disposals by the Group, BCG developed a market model to forecast the gross asset value of

> the Group's yielding assets through to 2030. As detailed at pages 38 and 39 of the Comparator Report, the model is based upon a range of commonly accepted macroeconomic factors which drive asset prices generally, and in the German real estate market in particular. 11. It was necessary to build a bespoke market model because, although short-term analyses are available publicly (e.g., from brokers/bankers) there is no reliable data forecasting price developments on the German real estate market in the medium to long-term (i.e. beyond 2024 when the Group expects to make asset disposals if the Restructuring Plan is implemented, or a liquidator would do so in the Relevant Alternative). In my experience, market models of the type developed by BCG are often used for the purpose of forecasting future prices. Ms. Rickelton acknowledges that such models are often necessary, but she questions the reliability of BCG's model, principally on the basis that interest rates and interest rate forecasts have increased since the model was finalized (as to which see further, paragraph 25 below)."

194. On slide 84 of the BCG Report itself, BCG explained the two models and methodologies which they had used to produce the forecasts in the following series of bullet points:

> "**Net cold rent model methodology**
>
> • Identification of main drivers (input variables) through research, correlations and expert knowledge; forecasts were made based on historical net cold rent, location (16 states plus 4 focus cities), maintenance costs, disposable income, and vacancy rate
>
> • Calculation of regression coefficients for each input variable (YoY) on net cold rent (YoY) based on historic data from 2012 to 2021
>
> • Aggregation of YoY-change for each input variable until 2030 based on official sources e.g., EUROSTAT, DESTATIS, Oxford Economics, Haver Analytics, BBSR
>
> • Prognosis of future net cold rent development (YoY) until 2030 based on determined coefficients and forecast of input variables
>
> • Backtesting and adjustment for market inertia and crisis years (COVID-19 and Ukraine war)
>
> **Multiplier model methodology**
>
> • Multiplier primarily driven by interest rate development; differentiated for location (16 states plus 4 focus cities) and property type
>
> • Derive multiplier YoY/CAGR change, based (historically) observed asset value changes and net cold rents
>
> • Analysis of sensitivity and strength of correlation between interest rate hikes and multiplier YoY/CAGRs

> • Determination of adjustment factor for inelasticity of interest rate changes, e.g., accounting for lag effects
>
> • Projection of short-term asset value evolution, based on lag effects of already carried out interest rate hikes, and impact of expected further interest rate adjustments"

195. On slide 85 BCG then set out a table of interest rates which they had used to develop the multiplier model. The slide was headed "Deep dive interest rates – forecast based on market/analyst consensus". The table purported to show predictions of the ECB Main Refinance Rate from 2022 to 2030 by IHS Markit and Bloomberg and then set out BCG's own assumption which was an interest rate based on the ECB Main Refinance Rate plus 125 basis points and rising from 3.75% in the last quarter of 2022 to 3.95% in the last quarter of 2023 and then falling back to 3.25% in 2026 where it remained constant until 2030.

196. When Mr Wolf gave evidence, Mr Smith asked him first why CBRE and NAI Apollo had not produced future valuations and his evidence was that they did not produce forecasts but valued real estate assets at a certain point in time. I return to this point in the context of Mr Gerlinger's forecast (below). Mr Wolf was then asked about the Management Case:

> "Q. I just want to ask you about the projected scenario under the restructuring plan if this is to be sanctioned. It is correct, I think, that this envisages a wind-down of the group and a disposal of all the assets leading to a liquidation of all the entities in 2027; is that right? A. Yes, that's correct. Q. And for these purposes, I understand it, you have relied on something called the "management case"? A. Yes, that's correct. Q. Is the management case actually a document that you have reviewed or is it something that you were told orally by management? A. No, it's not a document that we reviewed. It's a management case that has been laid out in the business plan model, so to say. It's on a system called Anaplan and there is basically for the -- I would say the relevant entities, there is the business plan, there's a P&L, cash flow and the balance sheet. Q. I understand. Just to get the position clear, let's just look at the relevant parts of your report. If we go firstly to page 3 of the BCG report <C/23/1430>, we can see there, the basis of preparation: "The comparator analysis builds upon information provided by the group's management during the engagement and primarily includes (but is not limited to) the following; latest management case per ... 2023." Then if we just pick it up, the second bullet point from the bottom: "For the outcome analysis under the restructuring plan, we have built on the management case, it's underlying assumptions and adjustments

made as set out by management." So if you like, that's the core material that you started with, isn't it? A. Yes, it is. Q. That, I assume, sets out management's assumptions, amongst other things, as to the timing of disposal of the properties; is that right? A. That's correct."

197. Mr Wolf accepted that the Plan involved the "liquidation of all of the companies and a release of all the employees by 2027". He also accepted that it was a "wind down plan". Mr Smith also cross-examined Mr Wolf about the two methodologies which went to make up the model:

> "Q. Exactly. And you have two models because one model is effectively trying to produce the growth in net cold rent, that's correct? A. That's correct. Q. And the other methodology is trying to predict how the multiplier is going to change over time? A. And the methodology is all the same. It is all regression analysis. Q. Exactly. Then what you need to do is look at your figure for future predicted cold rent and your figure for future predicted multiplier, you bring them together and hopefully that gives you your output, is that correct? A. That's correct. Q. I think we do in fact agree. I just want to look at those two methodologies in turn if I may. I am going to start with the net cold rent model methodology. If we look at the bullet points at the top of the page there, I just want to go through what this in fact involves. The first step -- this is the first bullet point -- is that you have tried to make an assessment of the main factors which you think affect market rent, is that right? A. That's correct. Q. And you have come up with location, maintenance, cost, household disposable income and vacancy rates? A. That's correct. Q. Anything else? A. No, we chose those. Q. Right. You are not property experts so how do you know what are the main factors that affect market rent? A. As I said, I am not a property expert. We had two in our team. Mr Jan Duken and Mr Olaf Rehse, and we also kind of checked that obviously with the company and other experts. Q. So it is essentially based on their judgment, is it, as to what sort of factors affect market rent? A. No, that's not correct. Because we tested whether there is a sufficient relevant -- with the regression analysis, we tested whether there is a sufficient correlation. Q. I see. So you have identified those factors and then this, I think, is the second bullet point, isn't it? You have undertaken some sort of statistical analysis to try to quantify the relationship between each of those factors and the level of rent, is that right? A. I think in general that's correct. We kind of tested the year on year development and how the impact of those factors is on the year on year development. Q. And this is the calculation of regression coefficients. What you have tried to do now is quantify the relationship between a change in a particular factor and then the change in rent? A. That's correct. Q. Based on a historical statistical analysis, correct? A. That's correct. Q. Thank you. The third step as I understand it, is having identified the factors that affects net cold rent, you have then sought

> to forecast each of those factors out to 2030, is that right? A. Yes. And we used what is available on market intelligence and information to do so. Q. I understand. So that involves forming a view on the level of each of household disposable income, vacancy rates, inflation and maintenance costs, and interest rates in Germany out to 2030, doesn't it? A. The interest rate is not relevant for the net income. Not directly. But in principle your assumption is correct. Q. So in relation to each of those other factors, apart from interest rates, you effectively have to form a view on how they are going to develop out to 2030? A. Yes."

198. Mr Smith then asked Mr Wolf about the multiplier model methodology and, in particular, the "deep dive interest rates" on slide 85. He asked Mr Wolf to explain why the Bloomberg rates appeared to be different from the most recent rate which Bloomberg had published on 23 January 2023 and, in particular, why the forecast rate of 2.70% for Q4/2023 appeared to be wrong. Mr Wolf could not explain the difference and said that there were many refinancing rates and that he would need to double check the rates which had been used. The following exchange then took place:

> "Q. Do you understand why we are concerned about it? A. Of course I can understand why you are concerned about it. Q. It undermines the reliability of your whole report, doesn't it? A. I wouldn't think so. It would undermine our report if our assumption would be wrong. Or not wrong -- anyway, as a difficult statement for an assumption. But we made an assumption on the interest rate. To my understanding on the forecasts that are shown on page 85, which are on the screen. We added the margin and then kind of go with that. And as we -- and as I agreed earlier on, if those interest rate assumptions are wrong, or if it would be different and if the development would be different, and our assumptions, of course there would be different results. At the moment I can't -- I understand your argumentation, but I say I am very sorry, I can't reconcile whether those Bloomberg ECB main financing rate to what extent relate to the assumption that we made in the report. Q. So were you involved in or did you supervise the exercise of obtaining these forecasts and inputting them into the model? A. Technically I am the responsible partner for the whole comparator report. Of course I am. But I didn't check whether and what kind of rate has been locked into the model in detail. If that could be your question -- Q. So you don't have personal knowledge of what's happened here? A. No. Q. Just go back a page on page 84 of the BCG report. Page 1511. Do you see under "Multiplier Model Methodology": "Multiplier primarily driven by interest rate development." Do you see? A. Yes. It in fact forecasts future interest rates are the key driver on the multiplier methodology, aren't they? A. That's correct. Q. So getting the

> forecast interest rates right is absolutely critical, isn't it, to the projection of the future multiplier? A. That's correct. Q. Do you accept it appears you have made some kind of error in relation to these forecasts? A. No. Because at the moment I can't reconcile that."

199. On 4 April 2023 the Plan Company served Wolf 2. Mr Smith objected to the report being admitted in evidence and after a contested application I ruled that the Plan Company could have permission to rely on the part of the report in which Mr Wolf dealt with interest rates (but not the remainder of the report). I also gave permission for Mr Wolf to be recalled and cross-examined on that part of Wolf 2. In that report Mr Wolf gave a detailed explanation for the source of the rates in the first two lines of the table on slide 85. He explained that the rate of 2.70% in the second line of the table (which he had been unable to explain when giving oral evidence) was based on the ECB "Survey of Professional Forecasters" published in October 2022 and he exhibited a copy. It was his evidence that this was the most reliable source although it did not include forecasts beyond 2024.

200. Mr Smith also cross-examined Mr Wolf about the future realisation of the Development Assets. He accepted that NAI Apollo were not involved in the preparation of the valuations. It was also put to him that the NAI Apollo valuations upon which BCG had relied were all draft reports and not the finalised versions. Mr Smith also put the figures on slide 43 to Mr Wolf:

> "You started -- if you just go on a page, please. And go on a page and another page. Yes, it is this page. So page 43, <C/23/1470>. You started as I understand it with a gross asset value of 2.426 billion, which is at June 2022, right? A. Yes, that's correct. Q. That's based on the NAI Apollo valuations, right? A. Correct. Q. Then you deducted certain forward sales of 249 million? A. Yes, that's correct. Q. Then you assume that the reminder of the portfolio is sold between 23 and 2025 for 1.764 billion euro? A. I see that, yes. Q. That involves a discount to the gross asset value of 414 million euro, correct? A. That's correct. Q. And you say in the box that we sort of see in the middle of page, that's a discount calculation based on: "Project analysis, considering: signed [letters of intent] and/or offer letters ... previously obtained but withdrawn/declined offers. "Price paid by Consus/Adler RE to purchase the project (with a focus on land value) and already spent CAPEX Projects' future prospects with regard to micro-location and intended use (ie residential, commercial or mixed)." So those are the factors you have taken into account in working out the discount to gross asset value, right? A. Yes. Q. So that exercise described in the box is something that's been

> undertaken by BCG, isn't it? A. The values have been laid out in the management case and we checked that to kind of understand the assumption that the management does in terms of values and so on, and wanted to have the supporting material, and so there are some letter of intent or things like that for certain real estates that we would like to see to justify those values. Q. I see. So actually it is a figure that was produced by management, was it, in the management case? A. The 414 is not produced in the management case. We actually reviewed that, and they were in -- in the process of reviewing there were changes. Q. Who came up with the figure of 414 million for the discount? A. It was the result of the review. Because that was the result of the review that we did with the management on that. Q. It's a combined exercise between you and management? A. Yes, indeed, yes."

201. In the "Complementary Material" which he annexed to Wolf 1, Mr Wolf also made a negative adjustment of €94 million to the excess cash to take account of the correction of Capex and operational cashflow expectations for several development projects (-€39m), additional advisory costs in relation to the restructuring (-€35m) and information about a backlog in required capital expenditures (-€20m). His evidence was that the effect of these adjustments was to reduce the available headroom from €403 million to €309 million. In cross-examination Mr Wolf agreed that this was a very small margin for error.

202. Finally, BCG's original forecasts assumed that the Group sold its stake in BCP: see slide 17 (above) for €600m. This figure was based on an external valuation carried out by external valuers, who had reduced their valuation of the business by €42.5 million. When he was asked why BCG had not made a similar reduction, Mr Wolf's evidence was as follows:

> "What I am failing to understand at the moment is given that they have reduced the value by 42.5 million, why that doesn't reduce the 600 million figure you have used in the BCG report. A. As I said it arrived very -- in due course before that, and we hadn't had any chance to actually understand what the -- what drives the 42 million. My assumption is that it is driven by a revised assumption on the real estate market as well because BCP is also something. And then it could be, you know, a fair assumption, but I am not -- we haven't done that analysis and that's also why we didn't -- we just flagged the number and didn't incorporate it in any model. My assumption would be that their prediction, or assumption for the real estate values for BCP in 23 are significantly lower than in the report that Mr Smith has just shown. We do not have applied any methodology like on how that predicts in -- Q. That's very interesting, Mr Wolf. You

said that your assumption is that Van Lanshot Kempen's assumption for real estate values of BCP in 23 are significantly lower than in the report. A. No, I didn't say that. Q. So you are assuming that they have lowered their view of property values, is that right? A. No. I just said as we -- we also assume in 23, a further drop in values, as you have seen early on, yes, compared to 2022. I don't know whether they have done a similar valuation. That might be the reason for that. But again, you know, we haven't tested that or tried to understand that, because it has been provided very late, the information -- Q. You did say -- A. And then just -- that can -- if the valuation holds then of course it will reduce. I have to just be very clear on that question. Q. As I understand it, you haven't actually spoken to Van Lanshot Kempen about the reasons for the reduction in their valuation? A. The valuation, please, no, I haven't. Q. You haven't? A. No, I haven't. Q. So you don't know why they have reduced the valuation, is that right? A. No. Q. Why didn't you speak to them about it? A. Again, the information came very late. There is a couple of other things that we have done. It is not -- we just haven't spoken to them, compared to the other things that we also need to prepare. Q. You don't know -- although I think you speculated on this a moment ago -- whether that reduction in value is because they have reduced their own view of likely property values? A. No, I don't know. Q. But it could be that, couldn't it? A. Since I don't know, it could be the case, yes. But again it's a current valuation and not -- then to be for the point in time when it is actually going to be sold."

(ii) The Knight Frank Report

203. The AHG relied upon the Knight Frank Report in answer to the BCG Report and the Plan Company's case that the 2029 Plan Creditors would be repaid in full. I have considered Mr Gerlinger's evidence in relation to the GAV of the Group's assets (above). His evidence in relation to the future values of those assets was based on his current valuations and the changes which he made to arrive at future values of individual assets were largely based on changes which he had made to the gross initial yield or "**GIY**" of each asset or cluster of assets at the projected sale date. Mr Bayfield asked him about these changes in yield in relation to one portfolio:

"Q. Okay. So then when we reach your opinion on value, in the table at 3.28, it appears to be the case that your position is that the GIY for the entirety of portfolio is 5.58 per cent for Q2/2022, 6.30 per cent for Q1/2023, and 6.09 per cent for 2024. Is that right? A. Correct. Q. Where have you got those figures from, Mr Gerlinger? A. The calculation I made. It's based on different yield assumptions for different subsections of the portfolio. So I separated the Duisburg

> cluster, which is the largest in portfolio 1. I treated that one. I treated Düsseldorf separately and Cologne separately and Dortmund separately and a few other smaller ones and these are the averages which result. Q. Where do we see the calculations leading to those averages? A. It's not on the report. Q. Why not? A. Because I thought were enough figures in there. How much can you read? Q. So what caused you to give a GIY for 2024 of 6.09 per cent rather than, say, 6 per cent? A. That's an average that results from the subclusters underneath. Q. Which we can't see because we don't have any of the calculations? A. Correct."

204. Shortly before this exchange, Mr Bayfield suggested to Mr Gerlinger that his assessment of future yields was based on intuition and Mr Gerlinger frankly accepted this:

> "Q. And the forecasts are based entirely on your intuition, aren't they? A. The forecast, yes, after the date of valuation of 15 March 2023 is predominantly based on intuitive explication. And part of the help to form an opinion would obviously be the yield table. So looking back, might history repeat. And, yes, yes, the period. Q. You haven't provided the court with any analysis that underlies your forecasts of future GIYs, have you? A. Not a formal analysis, no. Q. All you can offer is a bare assertion that if the refinancing costs remain on the current level, the economic indicators strongly suggest that the average reported GIY in Duisburg will grow above the level of 2020/2021. That's what you say? A. Correct."

205. Finally, Mr Bayfield took Mr Gerlinger to a passage in the RICS Red Book which suggested that a valuer should not describe or present his or her opinion of the future price of a property as a valuation based on market value and Mr Gerlinger accepted that he was wrong to do so:

> "Q. Let's look at the Red Book. Can you go to page 54, please? There is a heading at E: "Basis/Bases of valuation adopted. Can adopted." Can you read paragraph 3 to yourself in full? A. Okay. Q. Do you see the final sentence there: "In particular, it must never be described or represented as market value when you are looking at a future potential price for that property." Do you see that? A. I see that, yes. Q. Okay. Can we go back to your report, please <F/36/351>. If we could look, first, at 1.12. What you say is: "I have undertaken market valuations as at the following valuation dates ..." Do you see that the third bullet for the yielding portfolios and the second bullet for the development portfolio are future dates? Can we now go to 1.14 of your report, just below that? What you say is: "As a result the market values are not property-specific but relate to the selected portfolios of yielding assets 1-5 and the group development

> assets." Okay. So you use the term "market values", in relation to all of the figures that you come up with in this report, don't you? If you can go to <F/36/425> of the report, do you see at the top of the page you have a definition of market value? A. Yes. Q. And Red Book approaches, market approach, do you see that? A. Yes. Q. So actually, in purporting to give market values at future dates, you have in fact not acted in accordance with the Red Book, you have done the polar opposite of what the Red Book says, where it says it must never be described or represented simply as market value? A. You could be right. I should have stated that more clear the circumstances under which the forecasted future value have been stated."

206. Mr Bayfield also suggested to Mr Gerlinger that in the light of the Red Book guidance it was more appropriate to adopt BCG's approach of building a model based on the current valuations prepared by CBRE and NAI Apollo. Mr Gerlinger did not accept this although he accepted that this was the reason why CBRE and NAI Apollo had both been unwilling to provide future valuations of the Group's assets.

(iii) The Rickelton Report

207. Ms Rickelton's evidence was that if the Knight Frank Report was correct, then the 2029 Plan Creditors would be much worse off if the Plan was implemented than they would be if the Group went into insolvent liquidation. In the Rickelton Report she calculated that all of the Plan Creditors would be repaid in full apart from the 2027 Plan Creditors who would recover 44.8% of the sums due to them and the 2029 Plan Creditors, who would recover 10.6% of those sums. She also calculated that in the event of an insolvent liquidation and the debts of the Plan Creditors were repaid on a *pari passu* basis, the 2027 and 2029 Plan Creditors would recover 56.1%. In cross-examination she was even more pessimistic after taking account of Mr Wolf's evidence in reply:

> "Ms Rickleton, I think you will agree that figure 19 sets out your analysis of what the holders of the various series of SUNs will receive under the plan but using the Knight Frank valuations of the yielding assets and the development assets at the planned sale dates under the plan, is that right? A. That's correct. Q. I want to check a few points with you. Would you agree that this analysis shows that every series of the SUNs would be paid in full plus interest, other than the 27s and the 29s? A. Yes, that's correct. Q. And it suggests that the 29s would only make a recovery of 10.6 per cent? A. Yes, that's correct. Q. And that's of capitalised PIK interest, isn't it? A.

> Yes, you can see in the table under the column for 2025, the PIK interest of 98 which is paid then. That comprises the 10.6 per cent. Q. Therefore you say they will receive nothing on the principal owed to them on this basis? A. That's correct. Q. Actually, you say that adjustments have to be made to the figures, which may even result in a worse return for the 27s and the 29s. They were in an FTI document that was put to Mr Wolf yesterday. I think you were in court then, weren't you? A. Yes, so I think you're referring to the adjustments which came out of the reply evidence. Q. Yes. A. Yes, that's correct."

(iv) The Parties' Submissions

208. In their written closing submissions Mr Bayfield, Mr Perkins and Miss Wang submitted that BCG's market model was the best available evidence of the likely trajectory of German real estate prices from 30 June 2022 until the planned disposal dates of the relevant assets. They submitted that it was based on objective macro-economic data. They accepted that there was no certainty in the projection of future property prices but they submitted that this did not prevent the Court from sanctioning the Plan:

> "It goes without saying that there is no certainty in the projection of future property prices. However, the Court is required under Part 26A to form a view as to the likely returns to creditors in the relevant alternative. The evidence will rarely be straightforward, but the Court must do the best it can. Where there is a conflict between the evidence adduced by the company and an opposing creditor, it is submitted that the Court should seek to determine which party's evidence can be regarded as the best available evidence. The existence of uncertainty is not fatal; if it were then Part 26A would be at risk of becoming a dead letter.
>
> It is important to bear this point in mind when reviewing the AHG's skeleton argument. The AHG submits, for example, that "*the fact that there is no reliable data forecasting real estate values beyond 2024 might be thought to suggest that such values cannot be forecasted with any acceptable degree of certainty.*" This line of reasoning involves a misunderstanding of what Part 26A is all about. If taken to its logical conclusion, the AHG's argument suggests that it will rarely be possible for a company to cram down a dissenting class, since future recoveries will always be subject to significant uncertainty."

209. They placed particular reliance on *Re Hurricane Energy* (above) in support of their argument. In that case Zacaroli J held that Condition A was not satisfied but he

also stated that if it had been necessary to do so, he would have accepted that a particular forecast about the production of an oil well was the "most reliable evidence": see [83]. They submitted that I should simply choose the most reliable evidence. They also made a number of points in support of their submission that the BCG Report was the most reliable evidence and which I summarise as follows:

(1) BCG's market model has already proved itself to be reliable. In particular, in Appendix 6 they noted that they had been provided by CBRE with updated valuations of the Yielding Assets as at 31 December 2022 and there was no material difference between those valuations and the market model.

(2) They drew the Court's attention to the technical details of the market model and Mr Wolf's description of its development over two months. They also pointed out that in response to the Rickelton Report, Mr Wolf had performed a sensitivity analysis, which showed a deviation of only €50m still enabling the SUNs to be repaid in full.

(3) They also pointed out that BCG had made certain corrections to the Explanatory Statement, which demonstrated BCG's diligence. In particular, Mr Wolf had drawn attention to the reduction in the amount of headroom which is what an independent expert should do.

(4) They countered the AHG's criticism that the market model was inherently unreliable by pointing out that the input data was from reliable sources. In relation to interest rates, they accepted that Mr Wolf was not able to provide an immediate answer to the 2.7% figure on slide 85 (and I have set out the relevant passage from his cross-examination above). But they submitted that he confirmed in Wolf 2 that the source was taken from the ECB Survey of Professional Forecasters, which BCG considered to be the most reliable and authoritative source of information.

(5) They contrasted this with Mr Gerlinger's evidence. They submitted that the GIYs which he had adopted were "plucked out of thin air" and that he had not provided the relevant calculations or data. They also submitted that he had "breached the Red Book" by treating his projections of future property prices as if they were market valuations.

210. In his closing submissions Mr Smith submitted that BCG's market model was "simply an entirely unreliable and insufficient basis" for the Court to be satisfied that the NWO Test was met in the present case. He made the following criticisms of the BCG Report:

(1) The identification of the relevant factors which were said to affect the net cold rents and multipliers which were used to generate the model was very vague.

(2) The regression analysis which BCG had conducted to try and identify the statistical links between the various factors was opaque and "a black box" and it was not possible to interrogate what they had actually done.

(3) BCG had predicted household income, vacancy rates, inflation, maintenance costs and interest rates out to 2030 and this was fraught with uncertainty and any change in these inputs would have an effect on the output of the model.

(4) Mr Wolf accepted that the forecast of future interest rates was absolutely critical to the projection of the future multiplier but the position in relation to the data used by BCG was "shambolic" and Mr Wolf was unable to explain the errors made. Moreover, the data used by BCG for the January 2023 forecast did not correspond to the Bloomberg data (or any Bloomberg data).

(5) The BCG Report was inadequate because BCG did not conduct any sensitivity analysis. Mr Wolf accepted that there was a range of reasonable views and he was evasive when asked to explain why no sensitivity analysis had been carried out.

(6) The position in relation to the Development Assets was even more unsatisfactory because they were not the subject of the model but a project-by-project analysis. Moreover, it was entirely opaque how BCG had made the discount on slide 43 (in which NAI Apollo were not involved).

(7) BCG forecast a €600 million recovery on the sale of BCP was based on a single page valuation.

211. Mr Smith submitted that the Court should accept Mr Gerlinger's evidence because Knight Frank were experienced property valuers, Mr Gerlinger himself was an impressive witness, he had extensive experience and his approach was based on his professional expertise and judgment and, as I have explained, I found Mr Gerlinger to be a frank and straightforward witness who clearly had extensive professional experience.

(v) Findings

212. I begin with some remarks about the appropriate approach which I have adopted to what is a complex factual issue. I accept the submission that there is inherent uncertainty in the projection of future property prices and that the Court must take this into account in deciding whether or not to sanction the Plan. In *Virgin Active* Snowden J stated that at the first stage of the test the Court is not required to satisfy itself that a particular alternative would definitely occur and that if three possible alternatives are presented by the parties, the Court is required only to select the one that is more likely to occur than the other two: see [106] to [108].

213. In the present case, however, the principal issue between the parties was not about the first and second stages of the test (i.e. what the Relevant Alternative was and what its consequences might be for the 2029 Plan Creditors) but about the third stage, namely, what the outcome would be for the 2029 Plan Creditors if the Plan was sanctioned. But I see no reason why in principle the Court should not adopt the same test at the third stage as it does at the first stage. (Indeed, it may be implicit in the comparison required at the first stage of the test.) I do not have to be satisfied, therefore, that the 2029 Plan Creditors would definitely be paid in full if the Plan were sanctioned but merely that this is the most likely of the alternatives presented to the Court.

214. However, the parties have presented the Court with two alternatives which appear to me to be at either end of a spectrum. The Plan Company's case is that the 2029 Plan Creditors will recover in full and the AHG's case is that they will recover only 10.6%. In *Virgin Active* Snowden J suggested that the Court's function is to choose between them although he was presented there with a rather different choice. In the present case there is undeniably a range of possible outcomes and

even if I were to accept that the 2029 Plan Creditors would not recover in full, this would not necessarily demonstrate that they would recover less than 63% of the sums due under the 2029 Notes.

215. In my judgment, the statutory test itself provides the necessary guidance to resolve this issue. If the Court is satisfied that the 2029 Plan Creditors are likely to recover more than they will if the Plan is not sanctioned, then the NWO Test is satisfied. Moreover, the NWO Test is satisfied whether or not the Plan Company is able to persuade the Court that it is more likely than not that the 2029 Plan Creditors will recover in full. Even if, therefore, I were to accept many of Mr Smith's criticisms of the BCG Report, it would still have been open to the Court to sanction the Plan if it were more likely that the 2029 Plan Creditors would recover, say, 80% or 90% of the sums due to them under the 2029 Notes.

216. On the other hand, where I part company with Mr Bayfield, Mr Perkins and Miss Wang is in relation to the approach which I must adopt to the evidence. I am not satisfied that the right approach is simply to ask myself which of the BCG Report and the Knight Frank Report is the most reliable evidence. In my judgment, Zacaroli J was not attempting to formulate a new test in *Re Hurricane Energy* merely to explain how he would have approached the evidence in general terms if he had not rejected the plan company's evidence on the Relevant Alternative. In *Virgin Active* Snowden J described the dispute between the parties as "primarily a dispute as to valuation" and stated that as a matter of principle the normal civil standard of proof applies to a valuation dispute: see [134]. In my judgment, the present case involves a similar valuation dispute and I follow *Virgin Active* and also apply the balance of probabilities. This means that it would have been open to the Court to reject the evidence of both Mr Wolf and Mr Gerlinger as unreliable and to decide that the Plan Company had not established on a balance of probabilities that the NWO Test was satisfied (unattractive though that would have been).

217. With these comments in mind I turn to set out my findings in relation to the Plan Company's primary case at the third stage. After considering the detailed evidence (above) I prefer the evidence of Mr Wolf to the evidence of Mr Gerlinger in relation to the proceeds of the future sales of the Group's assets and I find on a

balance of probabilities that if the Plan is implemented the Group is more likely to realise the sums forecast in the BCG Report than the sums forecast in the Knight Frank Report and that it is likely the 2029 Plan Creditors will be repaid in full. I make this finding for the following reasons:

(1) The BCG Report is based on the valuations of CBRE and NAI Apollo as at 30 June 2022 and 30 September 2022. I have already found on a balance of probabilities that those valuations were accurate and I have preferred them to the valuations in the Knight Frank Report.

(2) The BCG Report is also based on the Management Case. Indeed, it is in large part a reflection of management's own forecasts. Although Mr Trozzi has been with the Group only a short period of time, I recognise that the management of the Group as a whole are best placed to forecast the likely outcome of the planned disposal of the Group's assets over the next 3 to 5 years.

(3) Moreover, BCG's forecast of property price development appears to me to be a "rational and considered view": see *Re ED&F Man Holdings* (above). On slide 40 they projected a decrease in asset values of about 10% to reflect the current fall in prices in Germany recovering to their current values in about 2026. Given that management proposes to dispose of all of the Group's assets by the end of 2026 a forecast that the Group's assets will be sold for less than their current GAV seems reasonable. The position would be very different if the Plan required a significant increase in property prices before the 2029 Plan Creditors were paid in full.

(4) I turn next to the evidence of Mr Gerlinger. I do not accept that he "breached the Red Book" in the sense that he undertook an improper or impermissible exercise and should not have undertaken an engagement which involved expressing an opinion on the likely prices which the Group would achieve in the future. But he did accept that it was not possible for a valuer to provide a Red Book valuation based on Market Value at a future date. Mr Gerlinger should, therefore, have qualified the Knight Frank Report (as he very fairly accepted) and both this and the fact that he could not provide Red Book

valuations undermines the weight which I can attach to his forecasts of future sales proceeds.

(5) Given the time constraints of the very significant exercise which he was asked to undertake, Mr Gerlinger had to fall back on intuition or "feel" to arrive at his GIYs. Moreover, he did not provide his workings or any of the data upon which he relied or the eight valuations of the Development Assets which he had undertaken. I make no criticism of Mr Gerlinger himself but this was another reason why I was unable to attribute much weight to his future valuations.

(6) Given that the Red Book does not permit a valuer to provide a future valuation at Market Value, this explains why CBRE and NAI Apollo did not give expert evidence (and Mr Gerlinger accepted that this was the reason why they were unwilling to do so). In those circumstances, it seems to me that the Plan Company cannot be criticised for choosing to instruct BCG to build a model to forecast the future proceeds of sale of the Yielding Assets based on a combination of the Management Case and macro-economic data.

(7) I turn next to the specific criticisms of Mr Wolf's evidence and the contents of the BCG Report. Although I have found that he was not an entirely satisfactory witness and that he was plainly unfamiliar with those slides which dealt with interest rates, I am not satisfied that the BCG Report can properly be described as "shambolic" or that Mr Wolf's evidence undermined the reliability of either the model or the report as a whole. I accept his evidence that the source of the forecast of 2.70% for Q4/23 on slide 85 was the ECB Survey of Professional Forecasters and I was provided with a copy. I also accept that this was the best available forecast.

(8) I am not satisfied either that BCG can be criticised for failing to carry out a sensitivity analysis in the BCG Report when the point was first taken by Ms Rickelton. As Mr Wolf explained, it was not simply a question of plugging in a different set of rates but involved a much more complicated exercise. But in any event, BCG did carry out a sensitivity analysis based on different interest rate assumptions when Mr Wolf came to make Wolf 1 and it

demonstrated that the Group would realise €50 million less in 2024 and 2025. Mr Smith did not challenge this analysis and it did not demonstrate that minor changes in interest rates would undermine the forecasts entirely.

(9) Mr Smith's other criticisms of the BCG Report were largely directed either at uncertainties which were either inherent in the forecasting process or unsupported in evidence by additional workings or information. I accept that these criticisms affected the weight which I could attach to the BCG Report. But I bear in mind the tight time constraints under which all parties were operating and the nature of the application. This was an application to sanction a restructuring plan and not a trial of an action after exchange of statements of case, full disclosure and meetings of experts. Indeed, many of the issues did not evolve and crystallise until days before the hearing.

(10) I must also compare the supporting information which BCG set out in the BCG Report and in Mr Wolf's evidence with the lack of supporting information which Mr Gerlinger was able to provide in relation to his GIYs and the changes which he made to them to reflect future sales. For the reasons which I have given, I make no criticism of him. But in the end, I have to choose between the detail in the BCG Report (acknowledging the gaps in the supporting data) and Mr Gerlinger's expert opinion based on his professional experience and feel for yields. In those circumstances, I prefer the evidence of Mr Wolf and accept the contents of the BCG Report.

(11) Finally, I accept Mr Bayfield's submission that there was no material difference between the model and the valuations carried out by CBRE as at 31 December 2022. The differences between the two were immaterial and this provides clear support for my conclusion that both the model and BCG's forecasts provide a rational and considered view of the amounts which the Group will realise in the future on the sale of both the Yielding and Development Assets.

(6) Stage 3: Alternative Case

(i) <u>The LTV Covenant</u>

218. If the Plan is sanctioned, each series of SUNs will be amended to include a new covenant requiring the Parent Company to maintain the loan to value ratio of its assets on each "Maintenance Reporting Date" which is defined as 31 March, 30 June, 30 September and 31 December each year and the date on which any financial reporting period ends. I will refer to this as the "**LTV Covenant**" and it provides as follows (in the English translation):

> "(3) *Maintenance of Loan-to-Value-Ratio* The Parent Guarantor will ensure that on each Maintenance Reporting Date the Maintenance Loan-to-Value-Ratio shall not exceed 87.5%.
>
> "Maintenance Loan-to-Value-Ratio" means the ratio of
>
> (i) the net financial indebtedness of the Parent Guarantor and any of its Subsidiaries, calculated on a consolidated basis determined in accordance with IFRS as "corporate bonds", "convertible bonds", "other loans and borrowings" and "other financial liabilities" less "cash and cash equivalents" (each as shown in the Consolidated Financial Statements of the Parent Guarantor) as of the relevant Maintenance Reporting Date
>
> to
>
> (ii) the Group's Total Assets less "cash and cash equivalents" as of the relevant Maintenance Reporting Date, provided, however, that any "trade receivables" or "other receivables" which have been written-down or written-off in the Consolidated Financial Statements of the Parent Guarantor as of June 30, 2022 that are still reflected in the Consolidated Financial Statements of the Parent Guarantor as of the relevant Maintenance Reporting Date shall, for the purposes of this definition, be included in the calculation at the lower of (x) their value in the Consolidated Financial Statements of the Parent Guarantor as of June 30, 2022 and (y) their value in the Consolidated Financial Statements of the Parent Guarantor as of the relevant Maintenance Reporting Date."

219. Mr Trozzi and Mr Wolf both gave evidence that if the future valuations in the Knight Frank Report were correct, this would trigger a breach of the LTV Covenant by 31 December 2024 when compliance with the covenant would be tested for the first time. BCG's detailed workings were set out on three slides which Mr Wolf exhibited to Wolf 1. He described their effect in his report and considered two scenarios which I consider in greater detail below:

> "**A. Scenario 1: Gerlinger asset values and Comparator Report disposal timeline**

> 46. In this scenario, we assumed that Mr. Gerlinger's opinion as to the asset values as at June 2022 and as to projected sales prices are correct. As to Mr. Gerlinger's opinion 5 Numbers are rounded on projected values, we note that he did not provide data on the development of value on a monthly or annual basis, hence we have assumed linear value development over time. We illustrate our sale price assumptions on page 14 of Appendix 2 for yielding assets and on page 15 for development assets in this scenario verses those assumed under the Restructuring Plan in the Comparator Report.
>
> 47. On slide 16 of Appendix 2, we illustrate how asset valuations and sales prices under the Plan assumed in the Comparator Report interact with the Group's obligations under the "LTV Covenant" (which provision is described in detail in Mr. Trozzi's third witness statement ("Trozzi 3"). This slide is extracted from the Comparator Report.
>
> 48. On slide 17, we rework the previous slide to contemplate Scenario 1. The red dotted line on the chart shows that, by Q4 2024, the asset values and sales prices (assuming annulment of the Release Price Mechanism on all sales) forecasted by Mr. Gerlinger on the disposal timetable he assumes will result in infringement of the LTV Covenant. Moreover, as this slide notes, asset sale proceeds will not be sufficient to cover the Group's cash requirements in Q1 2026, an earlier disposal of Portfolio 5 would be required to mitigate this (potentially incurring lower sale proceeds).
>
> **B. Scenario 2: Gerlinger asset values and Release Price Mechanism impact on timeline**
>
> 49. On slide 18, we show the same template slide again but in the scenario that takes into account the "Release Price Mechanism" that Mr. Trozzi describes in Trozzi 3. The red dotted line on the chart shows that, by Q4 2024, the asset values forecasted by Mr. Gerlinger on the disposal timetable he assumes will result in infringement of the LTV Covenant. Moreover, as this slide notes, the Group's cash requirements will not be covered anymore in Q3 2025."

220. Mr Smith did not challenge this evidence in cross-examination. Given the time constraints imposed upon the parties and their agreement that the failure to challenge a witness's evidence did not imply acceptance, I recognise that this is not a sufficient reason to accept Mr Wolf's evidence upon this point. But I have done my best to reconcile the relevant slides with the Knight Frank Report and to examine the assumptions and I am satisfied that I can properly accept it. I am satisfied, therefore, that if the future valuations in the Knight Frank Report are accurate, then the Parent Company will be in breach of the LTV Covenant by 31 December 2024.

(ii) Event of Default

221. Breach of the LTV Covenant will be an Event of Default under the SUNs (as amended) and will entitle each Holder (as defined) to serve notice declaring that their entire claim under the 2029 Notes is due and owing if the breach of covenant is not remedied within 40 days. Clauses 10(1) and 10(2) provide as follows:

> "(1) *Events of Default*. If an Event of Default occurs and is continuing, each Holder shall be entitled to declare due and payable by submitting a Termination Notice pursuant to paragraph (2) to the Paying Agent its entire claims arising from the Notes and demand (subject to paragraph (4) below) immediate redemption at the principal amount thereof together with unpaid interest accrued to (but excluding) the date of actual redemption. Each of the following is an "**Event of Default**":…
>
> (b) the Issuer fails to duly perform any other material obligation arising from the Notes (including the obligations under § 11) and such failure, if capable of remedy, continues unremedied for more than 40 days after the Paying Agent has received a request at least in text form (section 126b of the German Civil Code, Bürgerliches Gesetzbuch) thereof in the manner set forth in paragraph (2) from a Holder to perform such obligation;…..
>
> (e) insolvency proceedings against the Issuer or the Parent Company are instituted and have not been discharged or stayed within 90 days, or the Issuer applies for or institutes such proceedings; or
>
> (f) the Issuer or the Parent Company enters into liquidation unless this is done in connection with a merger or other form of combination with another company and such company assumes all obligations of the Issuer in connection with the Notes…
>
> (2) *Termination Notices*. Any notice by a Holder (i) in accordance with paragraph (1)(b) or (ii) to terminate its Notes in accordance with this § 10 (a "Termination Notice") shall be made by means of a declaration made in text form (section 126b of the German Civil Code, Bürgerliches Gesetzbuch) to the Paying Agent in the German or English language delivered together with evidence by means of a certificate of the Holder's Custodian (as defined in § 17(4)) that such Holder, at the time of such Termination Notice, is a holder of the relevant Notes."

222. Even if the Plan is sanctioned, the wording of Clauses 10(1) and (2) (above) will remain in their original form and their effect is to enable each of the 2029 Plan Creditors to declare that both principal and interest are due and payable immediately and to accelerate their claims to rank equally with the other Plan Creditors (apart from holders of the 2024 Notes). It is significant that no

amendment is proposed to Clause 10(1) because individual Plan Creditors will remain entitled to give notice under Clause 10(2) in the Event of Default despite the introduction of the Notes Representative (below).

(iii) The Notes Representative

223. SchVG, §5(1) permits a majority of creditors to appoint a joint representative to take the measures set out in SchVG, §5(3) and I have set out the provision in full above. SchVG, §19 also permits the creditors to appoint a representative in insolvency matters under the "**StaRUG**". It provides as follows in the English translation supplied by Professor Thole (and upon which Mr Smith and Mr Al-Attar relied in their Skeleton Argument):

> "(1) If insolvency proceedings have been opened in respect of the debtor's assets in Germany, the creditors' resolutions shall be subject to the provisions of the Insolvency Code unless otherwise provided in the following paragraphs. Section 340 of the German Insolvency Code shall remain unaffected. (2) The creditors may by majority resolution appoint a joint representative for all creditors for the purpose of exercising their rights in the insolvency proceedings. The insolvency court shall convene a meeting of creditors for this purpose in accordance with the provisions of this Act if a joint representative for all creditors has not yet been appointed. (3) A joint representative for all creditors shall be solely entitled and obligated to assert the rights of the creditors in the insolvency proceedings; in doing so they need not submit the debt instrument. (4) An insolvency plan shall offer equal rights to the creditors. (5) The insolvency court shall arrange for notices under the provisions of this Act to be additionally published on the internet at the address provided in section 9 of the Insolvency Code. (6) If a debtor includes claims from bonds in an instrument of the stabilisation and restructuring framework under the German Act on the Stabilisation and Restructuring of Enterprises [Unternehmensstabilisierungs-und Restrukturierungsgesetz], the preceding paragraphs shall apply mutatis mutandis."

224. SchVG, §19(2) expressly permits the appointment of a joint representative by the majority of creditors. It also provides that the Court should convene a meeting of creditors if a joint representative has not been appointed. Although I was not addressed on this point by the parties, the translation strongly suggests that under the StaRUG, the creditors must consider whether to appoint a joint representative and the court will convene a meeting if they fail to do so.

225. SchVG, §7 imposes an obligation upon a joint representative to act with the care to be expected of a prudent business manager. It also provides that the joint representative shall be jointly and severally liable to noteholders although it permits them to limit the liability of the representative and to decide what compensation may be awarded. Mr Bayfield set out the provisions of §7(2) and §7(3) in the Plan Company's Skeleton Argument (and this translation was not challenged):

> "(2) The joint representative shall have the duties and rights granted to it by law or by majority resolution of the noteholders. It shall comply with instructions given by the noteholders. To the extent that it has been authorised to assert certain rights of the noteholders, the individual noteholders shall not be entitled to assert such rights on their own, unless expressly provided for in the majority resolution. The joint representative shall report on its activities to the noteholders.
>
> (3) The joint representative shall be liable to the noteholders as joint and several creditors for the due performance of its duties. In the performance of its duties, it shall act with the care of a prudent business manager. The joint representative's liability may be limited by resolution of the noteholders. An assertion of compensation claims against the joint representative shall be decided by the noteholders."

226. Clause 19(1) of each series of SUNs provides for the appointment of Dentons GmbH ("**Dentons**") as the "**Notes Representative**". Clauses 19(2) and 19(3) then impose the following obligations upon the Notes Representative:

> "(2) *Duties and Powers*. The Notes Representative shall have the duties and powers provided by law (including in accordance with §19 SchVG) or granted by majority resolution of the Holders. The Notes Representative shall comply with the instructions of the Holders. To the extent that the Notes Representative has been authorized to assert certain rights of the Holders, the Holders shall not be entitled to assert such rights themselves, unless explicitly provided for in the relevant majority resolution. The Notes Representative shall provide reports to the Holders on its activities. The Notes Representative is, in particular, entitled to agree on the terms of and perform all actions, measures and declarations attributed to it in the Intercreditor Agreement and acts, in this regard, where relevant, on behalf of all Holders and without the need to obtain a prior resolution of, or instructions from, Holders. The Holders are excluded from enforcing their rights in this regard.

> 19(3) *Duties and Powers following an Event of Default*. If the Notes Representative has been notified in writing by the Issuer, the Parent Guarantor, a Subsidiary or any party to the Intercreditor Agreement that an Event of Default has occurred, the Notes Representative shall have the exclusive right to enforce the Holders' rights under the Notes. Notwithstanding anything to the contrary in these Terms and Conditions, the Holders have no individual right of enforcement under the Notes in such event. The Notes Representative is authorized to take any actions and make any declarations it deems prudent during the continuation of such event; in particular, without limitation, to declare a standstill on any receivables under the Notes, to temporarily or permanently waive a right of acceleration under the Notes or to release security or take any other action pursuant to section 5 paragraph 3 of the SchVG without the need to obtain a prior resolution of, or instructions from, Holders."

227. Clause 19(5) of the SUNs reflects the standard of care required by SchVG, §7(3) although the liability of the Notes Representative is limited to wilful default or gross negligence (or the German equivalents):

> "(5) *Liability*. The Notes Representative shall be liable for the performance of its duties towards the Holders who shall be joint and several creditors (Gesamtgläubiger). In the performance of its duties it shall act with the diligence and care of a prudent business manager (Sorgfalt eines ordentlichen Kaufmanns). The liability of the Notes Representative is limited to willful misconduct and gross negligence. The liability for gross negligence is limited to an amount of €10,000,000. The Holders shall decide upon the assertion of claims for compensation of the Holders against the Notes Representative."

228. I return to these provisions below in the context of the AHG's argument that the appointment of the Notes Representative is unfair. For present purposes, it is more important to focus on the power of the Notes Representative to waive breaches of the LTV Covenant. Clause 10(3) of the SUNs (once they are amended) will permit the Notes Representative to waive any Event of Default and to rescind the acceleration of any claims upon the instructions of a majority of 50% of the Holders. That clause provides as follows (and I underline the amendment):

> "(3) *Cure*. For the avoidance of doubt, the right to declare Notes due in accordance with this §10 shall terminate if the situation giving rise to it has been cured before the right is exercised and it shall be permissible to cure the Event of Default pursuant to paragraph (1)(c) by repaying in full the relevant Financial Indebtedness. <u>In addition, the Notes Representative shall be authorized to waive all past or existing Events of Default (except with respect to non-payment of</u>

> any amounts hereunder) and rescind any such acceleration with respect to the Notes and its consequences within three months of the acceleration, but only if rescission would not conflict with any judgment or decree of a court of competent jurisdiction, without the need to obtain a prior resolution of, or instructions from, Holders, provided that if Holders representing more than 50% of the aggregate principal amount of the Notes then outstanding instruct the Notes Representative (including by letter, fax or email) to waive an Event of Default and/or rescind any such acceleration, the Notes Representative shall be bound to waive the relevant Event of Default and/or rescind the relevant acceleration accordingly (as may be specified in more detail in such instruction)."

229. Clause 10(7) also provides that if an Event of Default has occurred and is continuing the Notes Representative may enforce the rights of the noteholders in legal proceedings:

> "*Other Remedies*. If an Event of Default occurs and is continuing, the Notes Representative may (a) in its discretion proceed to protect and enforce the rights of the Holders by such appropriate judicial proceedings as the Notes Representative shall deem most effective to protect and enforce any such rights, whether for the specific enforcement of any covenant or agreement in these Terms and Conditions or any Transaction Collateral or any Guarantee or to support the exercise of any power granted herein, or to enforce any other proper remedy, including requiring an enforcement of Transaction Collateral or any payment under one or more of the Subsidiary Guarantees on behalf of the Holders; and (b) enforce all rights of action and claims under these Terms and Conditions or any Transaction Collateral or any Guarantee without holding any of the Notes or the Global Notes or the production thereof in any proceedings relating thereto, and to bring any such proceedings on behalf of the Holders."

230. Given the time constraints, the parties were not able to address me in any detail on these provisions or take me to any expert evidence on German law although Mr Smith relied on the limitation of liability in Clause 19(5) and put this point to Mr Trozzi. In those circumstances I approach the construction of these clauses on the basis that the English version is accurate and that Clause 10(3) would be construed in the same way by both an English and a German Court.

231. If an Event of Default occurs as a result of a breach of the LTV Covenant and individual noteholders give notice under Clause 10(2), then in my judgment Clause 10(3) will have the following effect. If the Plan Company fails to pay the

sums which fall due following the service of the notice, then the Notes Representative will not be entitled to waive the breach of covenant unilaterally because of the words in brackets. But the Notes Representative will be required to waive the breach of covenant if instructed to do so by a majority of the noteholders of the relevant series. Moreover, this interpretation appears to me to be consistent with SchVG, §5(5) (above).

232. Dr Halasz referred in his witness statement to SchVG, §5 and §19. He also drew attention to the Notes Representative's powers under the Intercreditor Agreement, the power to waive a breach of covenant under Clause 10(3) and the power to take enforcement action under Clause 10(7). His purpose in doing so was to stress the wide powers which the creditors may confer on a joint representative under the SchVG and the wide powers which the SUNs will confer on the Notes Representative once the Plan has been sanctioned.

(iv) The Release Price Mechanism

233. Clause 19.6(a)(iii) of the New Money Facilities Agreement will also impose an obligation upon the Group not to dispose of the Yielding Assets at less than 20% of CBRE's valuations as at 30 June 2022 and not to dispose of Development Assets at less than 30% of NAI Apollo's valuations at the same date:

> "(a) No Obligor shall (and the Obligors shall ensure that no other member of the Group will) enter into a single transaction or a series of transactions (whether related or not and whether voluntary or involuntary) to sell, lease, transfer or otherwise dispose of any Property (whether by way of asset deal or share deal), which: (i) is for consideration other than cash (ii) is not on arm's length terms; or (iii) is made for a Net Purchase Price (or, in the case of individual apartment or condominium sales within an individual building complex in any period of twelve (12) Months, an average Net Purchase Price per sqm) that is, (A) in relation to yielding Properties, below 80% of the relevant gross-asset value (in the case of individual apartment or condominium sales within an individual building complex calculated as a per sqm value off the gross-asset value of that building complex); and (B) in relation to development projects, below 70% of the relevant gross asset value (in the case of individual apartment or condominium sales within an individual building complex calculated as a per sqm value off the gross-asset value of that building complex), in each case based on the relevant gross-asset value as reflected in the Company's IFRS financial report as of 30 June 2022."

234. I will refer to Clause 19.6(a) as the "**Release Price Mechanism**" (which is how Mr Trozzi described it) and it contained an exception for inter-group transfers (which is not relevant). It does not refer in terms to the CBRE and NAI Apollo valuations but the inference which I draw is that they were the values stated in the Parent Company's financial report as of 30 June 2022 and Mr Trozzi confirmed in Trozzi 3 that the SteerCo agreed to the Release Price Mechanism on the basis of those valuations.

235. The Release Price Mechanism is consistent with the duties of the members of the management board of a German or Luxembourg company (as Mr Trozzi explained them). In Trozzi 1 he gave the following evidence:

> "In addition, under Luxembourg law and German law (as applicable), the members of the management board of the Parent Company or Adler RE may be held personally liable to shareholders and/or creditors if the respective boards approve a sale of assets at deep discounts to gross asset value (particularly if a transaction deviates significantly from normal market conditions to the detriment of the company and there are no significant long-term benefits that could be reasonably expected to arise out of the sale). Furthermore, the respective boards must ensure that the proceeds from the asset disposals are at least sufficient (according to reasonable liquidity planning) to fully meet all payment obligations vis-à-vis all creditors of the relevant company when due. Forced sales at an undervalue would also likely result in a negative perception of the Group's business and will adversely impact the perception of the Group's remaining property portfolio."

236. Mr Trozzi exhibited to Trozzi 3 two charts prepared by PJT Partners ("**PJT**"), the Plan Company's corporate finance advisers, showing that if the future valuations in the Knight Frank Report were correct, the Group could never sell any of the Yielding Assets without committing a breach of the Release Price Mechanism and could only sell one of the Development Assets without doing so. In Trozzi 3 he also drew attention to the parallel provision in the New Money Facilities Agreement which gave the same right to the New Money Providers through the SPV lender to be used to make the loan. He continued:

> "21. There is no obvious reason why lenders under the agreement (i.e., New Money Providers), let alone a majority, would agree to waive this provision except in limited circumstances where the individual asset's circumstances justify a higher discount and the

> lenders (which, as I explain below, include holders of later-dated SUNs) conclude as a result that such waiver is consistent with their commercial interests. First, New Money Providers have bought into the New Money Funding based on their belief that the German real estate market will recover. 22. Second, waiver of the Release Price Mechanism would threaten their own recoveries as creditors of the Group. Several New Money Providers have material holdings in the later dated SUNs, such that it would not be rational for them to waive the Release Price Mechanism to allow assets to be sold at steep discounts and applied towards the New Money, and thereby reduce the pool of assets available in any subsequent liquidation for the remaining SUNs."

237. Mr Smith put a slide in the BCG Report to Mr Trozzi which suggested that the Release Price Mechanism was (as Mr Trozzi's label implied) not intended to prevent the sale of assets but to give the New Money Providers control over the process and that they would consent to disposals. Mr Trozzi fairly accepted this:

> "Q. And it says: "Management's development asset disposal plan is expected to be compliant with the Release Price Mechanism (no development asset sales at discount in excess of 30% in relation to GAVs as of Q2/'22), except for Development 3, 10 & 23 sales ... a simple majority of holders of new money notes would need to give consent to proceed with these sales." Do you see that? A. Yes. Q. They assume, as part of their programme of disposals as contemplated by the report that those waivers will be given, don't they? A. Yes. Q. So what the report contemplates is that where necessary in order to allow the property to be disposed of, the waiver of the RPM will be given by the new money lender, doesn't it? A. Yes, insofar as it would be a consideration on an asset by asset basis, which would then be taken by the lenders and the company looking at overall asset disposal programme. Q. Let me ask you just finally on this topic. If the release precise mechanism was genuinely intended to protect the holders of the SUNs, why wasn't it included in the terms of the amended SUNs? A. As I touched on at the beginning, it was deemed that it would be impractical and actually would -- would actually go counter to the ability of the company to properly manage asset disposals if every time there was a potential waiver needed, even if by a small amount, it would need to get consent from all six series of the SUNs, which again is a public process and would involve the sort of a lengthier exercise than securing the waiver from the new money providers. Which is a private instrument. Q. This rather suggests that this is not something intended to benefit the holders of the SUNs compared to the holders of the new money, do you accept that? A. I think this mechanism is designed to protect value and give the new money providers a say in the event that, again, asset sales are being asked to be considered at

> a higher discount than 30 per cent, and in this way it provides protection for all lenders."

(v) The Intercreditor Agreement

238. The parties to the Intercreditor Agreement will include not only the Plan Company and the Parent Company but a long list of subsidiaries set out in Schedule 1. The first part of the schedule lists those subsidiaries which will provide guarantees and the second part lists those subsidiaries which will provide security. A company called Global Loan Agency Services GmbH will also be a party to the agreement as the "**Security Agent**" acting as trustee for the "**Secured Parties**" and the "**Primary Creditors**". The Primary Creditors are the most important parties included in the definition of Secured Parties and they include all of the Plan Creditors, the New Money Providers and the SPV lender through which they will lend the New Money (defined as the "**Stabilisation Debt Lender**").

239. Clause 6.2 of the Intercreditor Agreement permits the Group to make payments to Plan Creditors as and when they fall due until any enforcement action is taken. Once an Event of Default has occurred, the Intercreditor Agreement contemplates "**Enforcement Instructions**" being given by the "**Enforcement Instructing Group**" under Clause 14.1 which is headed "**Instructions to enforce**" and provides as follows:

> "If either (i) the Stabilisation Debt Lender or (ii) the Majority Eligible Noteholders wish to issue Enforcement Instructions, the Stabilisation Debt Lender or the Notes Representative(s) representing the Eligible Noteholders (as the case may be) shall deliver a copy of those proposed Enforcement Instructions (an "Initial Enforcement Notice") to the Security Agent and the Security Agent shall promptly forward such Initial Enforcement Notice to the Stabilisation Debt Lender or each Notes Representative respectively. The relevant Notes Representative(s) shall promptly forward the Initial Enforcement Notice to the Eligible Noteholders."

240. Clause 13 is headed "**Decisions of the Primary Creditors**" and provides the contractual mechanism by which the members of the Instructing Group are determined. Clause 13.2 provides that the Notes Representative may give instructions to the Security Agent on behalf of those Plan Creditors who form the

"**Majority Eligible Noteholders**" and Clause 13.2(a) (to which Mr Smith referred Mr Trozzi) provides as follows:

> "If, pursuant to the terms of this Agreement, a decision, instruction or consent of the "Majority Eligible Noteholders" is required or requested, that decision, instruction or consent may be obtained through the decision-making procedure set out in paragraphs (b) to (h) below."

241. Clauses 13.2(b) to 13.2(g) provide forms and time periods for decisions to be taken by vote and to be communicated by the Notes Representative to the Security Agent. Clauses 13.2(g) and (h) then provide as follows:

> "(g) If Noteholders representing over 50 per cent. of the aggregate principal amount of a series of Eligible Notes vote (in accordance with the relevant Note Documents and applicable law) "yes" in respect of a Decision Request or if the Notes Representative otherwise obtains the relevant instruction from Noteholders representing over 50 per cent. of the aggregate principal amount of the relevant series of Eligible Notes, that series of Eligible Notes will be deemed to have voted "yes" to that decision in the full aggregate outstanding principal amount of that series of Eligible Notes.
>
> (h) If the aggregate principal amount of Notes represented by Eligible Noteholders voting "yes" in respect of a Decision Request (based on the information provided to the Security Agent by the relevant Notes Representatives and taking into account the provisions of paragraphs (f) and (g) above) is more than 50 per cent. of the aggregate outstanding principal amount of all Eligible Notes at the relevant time, the Security Agent shall be deemed instructed accordingly by the Majority Eligible Noteholders."

242. These provisions are very complex and it is not easy to anticipate in advance how many Plan Creditors would need to vote for enforcement if there was a serious difference of opinion between them about whether to put the Group into formal insolvency proceedings or whether to accept a Credit Bid. Mr Trozzi helpfully gave the following description of how it would work in Trozzi 3:

> "The Instructing Group comprises either the Lender SPV (representing a greater than 50 per cent. majority of the commitments under the New Money Facilities Agreement) or the Notes Representative acting on the instructions of the majority eligible noteholders (being those noteholders holding together at least 50 per cent. of the total outstanding principal amount of the SUNs at such time). To the extent that either the Lender SPV group or the Notes

> Representative issues instructions to the Security Agent to enforce the transaction security, such instruction would be forwarded to the respective other group and this begins a 30-day consultation period between the two groups (which such period may be waived by agreement, or dispensed with in certain circumstances (including in case of an insolvency of the relevant debtor)). At the end of such period, if no agreement has been reached as to the manner of enforcement, then the instructions provided by the noteholders will prevail. In this way, the SUN Holders (i.e. including the 2029 SUN Holders) essentially control the enforcement process. Assuming the full consultation period were used, this would put the earliest date for enforcement at the end of April 2025/beginning of May 2025."

243. Section 7 deals with the proceeds of any enforcement action taken by the Security Agent on the instructions of the Instructing Group of Primary Creditors. Clause 20.1 of the Intercreditor Agreement provides that the Security Agent shall hold the proceeds on trust to apply in accordance with the following waterfall:

> "Subject to Clause 20.2 (Prospective liabilities), all amounts from time to time received or recovered by the Security Agent in connection with the realisation or enforcement of any Guarantee or any Transaction Security (including by way of any Distressed Disposal) (for the purposes of this Clause 20, the "Recoveries") shall be held by the Security Agent on trust to apply them at any time as the Security Agent (in its discretion) sees fit, to the extent permitted by applicable law (and subject to the provisions of this Clause 20), in the following order of priority:
>
> (a) in discharging any sums owing to the Security Agent (other than pursuant to Clause 2 (Guarantee) and Clause 22.2 (Parallel Debt)), any Receiver or any Delegate and in payment to the Creditor Representatives of the relevant Creditor Representative Amounts;
>
> (b) in discharging all costs and expenses incurred by any Primary Creditor in connection with any realisation or enforcement of the Transaction Security taken in accordance with the terms of this Agreement or any action taken at the request of the Security Agent under Clause 10.5 (Further assurance – Insolvency Event);
>
> (c) in payment or distribution to the Stabilisation Debt Lender for application towards the discharge of the Stabilisation Debt Liabilities in accordance with the terms of the Stabilisation Debt Documents;
>
> (d) ranking equally amongst themselves and on a pro rata basis, in payment or distribution to the 1.5L Creditors (or, as the case may be, to their Creditor Representative(s)) towards the discharge of the 1.5L Liabilities in accordance with the terms of the 1.5L Debt Documents;
>
> (e) ranking equally amongst themselves and on a pro rata basis, in payment or distribution to the 2L Noteholders (or to their Creditor

> Representative(s)) towards the discharge of the 2L Liabilities in accordance with the terms of the relevant Note Documents;
>
> (f) if none of the Debtors is under any further actual or contingent liability in respect of any Primary Liabilities, in payment or distribution to any person to whom the Security Agent is obliged to pay or distribute in priority to any Debtor; and
>
> (g) the balance, if any, in payment or distribution to the relevant Debtor."

244. Mr Smith also took Mr Trozzi to the Intercreditor Agreement, Schedule 5 of which is headed "**Enforcement Principles**". It sets out general principles to which the parties must adhere in giving the instructions and exercising the powers set out above. Paragraphs 1 to 3 provide as follows:

> "1. In this Schedule 5: "**Enforcement Objective**" means maximising, to the extent consistent with a prompt and expeditious realisation of value, the value realised from Enforcement. "**Fairness Opinion**" means, in respect of any Enforcement, an opinion from a Financial Adviser that the proceeds received or recovered in connection with that Enforcement are fair from a financial point of view taking into account all relevant circumstances.
>
> 2. It shall be the primary and over-riding aim of any Enforcement to achieve the Enforcement Objective.
>
> 3. The Guarantee and the Transaction Security will be enforced and other action as to Enforcement will be taken such that either: (a) all proceeds of Enforcement are received by the Security Agent in cash for distribution in accordance with Clause 20 (Application of Proceeds); or (b) if and to the extent that the Secured Parties who would otherwise be entitled to receive a cash distribution in accordance with Clause 20 (Application of Proceeds) so agree, in any form other than cash (including, without limitation, by way of shares or debt securities)."

245. At the end of closing submissions there was a dispute between counsel whether any more than 99 properties owned by the Group would be subject to enforcement action or the proceeds held and distributed in accordance with the waterfall in Clause 20.1 (above). Mr Perkins submitted that the proceeds of all of the Group's assets would fall within Clause 20.1 and he relied upon the term "**Distressed Disposal**" used in the body of the Clause (above). This term and the associated terms "**Acceleration Event**" and "**Distressed Event**" are defined as follows in Clause 1.1:

> “"**Acceleration Event**" means: (a) the acceleration of any Liabilities other than the SSD Liabilities or the making of any declaration that any Liabilities other than the SSD Liabilities are prematurely due and payable by any Primary Creditor or group of Primary Creditors or Creditor Representative as a result of an Event of Default (other than as a result of it becoming unlawful for a Primary Creditor to perform its obligations under, or of any voluntary or mandatory prepayment arising under, the Debt Documents or in case of a termination following a change of control having occurred with respect to the Company or the Issuer);
>
> "**Distress Event**" means any of: (a) an Acceleration Event; or (b) the enforcement of any Transaction Security or the making of a demand under any Guarantee
>
> "**Distressed Disposal**" means a disposal or an appropriation of any Charged Property which is: (a) being effected at the request of the Enforcement Instructing Group in circumstances where the Transaction Security has become enforceable; (b) being effected by enforcement of the Transaction Security (including the disposal of any Property of a member of the Group, the shares in which have been subject to an Appropriation); or (c) being effected, after the occurrence of a Distress Event, by a Debtor to a person or persons which is, or are, not a member, or members, of the Group.”

246. Finally, the term “**Charged Property**” is defined as all assets which are from time to time the subject of the “**Transaction Security**” which included any “**Security**” created by the security documents in Schedule 2 including, as Mr Perkins pointed out, the shares in the 124 subsidiaries (who are parties to the agreement). But the term “**Security Documents**” was defined widely and did not depend upon any asset being listed in the Schedule:

> “"**Security Documents**" means: (a) each of the security documents set out in Schedule 2 (The Security Documents); (b) any other document entered into at any time by any of the Debtors creating any Security in favour of any of the Secured Parties as security for any of the Secured Obligations; and (c) any Security granted under any covenant for further assurance in any of the documents referred to in paragraphs (a) and (b) above.”

(vi) The Plan Company’s Exit Strategy

247. Mr Trozzi gave evidence that the Plan Company intended to carry out a corporate restructuring if the Plan was sanctioned. It is unnecessary for me to describe the structure in any detail but it provided for the creation of an intermediate holding company to be incorporated in Luxembourg holding a series of property

companies which would grant share pledges to the Security Agent. His evidence was that this structure would enable a Credit Bid to be made more easily:

> "The Luxembourg Share Pledge provides for various rights and remedies which become exercisable upon the occurrence of an Event of Default which is continuing, including appropriation and a power of sale in favour of the Security Agent. In the absence of a willing third party purchaser, it seems reasonable to assume that the Instructing Group would require the Security Agent to appropriate or sell the share(s) subject to the Luxembourg Share Pledge to an SPV established by a group of the secured creditors (including the Plan Creditors, assuming they remained holders of the SUNs), such that the secured creditors would assume control of the Group."

248. Mr Trozzi also gave evidence that the sale to a SUN Bidco would enable the orderly wind down of the Group and the sale of its assets without an Insolvency Discount:

> "Having assumed control of the Group, the result of such enforcement would be that the Group's assets would be held by a Plan Creditor-owned SPV, a solvent entity. It would then be a matter for the Plan Creditors to decide what to do with the underlying assets. One would expect the Plan Creditors to act rationally so as to maximise their recoveries. The Plan Creditors will be able to continue operating the business, possibly with additional investment or recapitalisation, in the interests of either delivering the Group's business plan or alternatively finding a third-party buyer for the business, so as to access a near-term cash recovery for all of the Plan Creditors still holding SUNs. Plan Creditors would also be able to avoid the deep discounts to asset values which would arise in insolvency proceedings, which is dealt with in more detail in Gunther 1 in Section 5."

249. Mr Smith cross-examined Mr Trozzi about a potential Credit Bid and he accepted that there were at least seven separate steps which the Group would need to take to achieve its exit strategy:

> "Now as I understand it you derive that figure because you proceed on the basis that under your envisaged enforcement scenario, all of the 2025 to 2029 SUNs would rank pari passu, is that right? A. Yes. Q. And secondly, that there would be no "insolvency discount" applicable to the disposals? A. Yes. Q. I suggest to you, Mr Trozzi, first of all, this is a rather specific enforcement scenario which you are envisaging. I just want to go through with you the very steps that are involved in it, and let's see if we agree. First of all there has to be a breach of the LTV covenant? A. Yes. Q. Secondly, one has to

assume that wouldn't be waived but enforcement would follow? A. Yes. Q. Thirdly, the SUNs, including the 2029 SUNs, would have control of the enforcement process? A. Yes. Q. Fourthly, they would cause an enforcement to take place under which the shares would be acquired by the new creditor owned SPV? A. Yes. Q. Fifthly, that would be carried out by way of a credit bid? A. Yes. Q. Sixthly, that new SPV would then be funded with any additional investment or recapitalisation required? A. Yes. Q. And finally the properties would then be disposed of orders of an insolvency process for no insolvency discount, is that right? A. Yes. Q. So there are effectively seven separate steps involved in the scenario, aren't there? A. Yes."

250. Mr Smith challenged a number of these steps. He challenged step 1 on the basis that the Plan Creditors would rely on the CBRE and NAI Apollo valuations and Mr Trozzi accepted that the Group would continue to use them. Mr Smith also challenged step 2 on the basis that the Majority Eligible Noteholders required no more than majority of the Plan Creditors:

"Q. If we just follow the definitions through. If we go to <C/16/1033>, we can see that majority eligible noteholders, in the middle of the page, is more than 50 per cent of the eligible notes. Do you see that? A. Yes. Q. And we perhaps don't need to turn it up, but the eligible notes include all of the SUNs, don't they, including the 2024 SUNs? A. Yes. Q. Now, if we just go back to the body of the intercreditor -- this time clause 13.2(g), <C16/1075>. 13.2(g), if you just look at that very quickly, first of all. That deals with note holder votes. Do you see that that provides that if over 50 per cent of the noteholders in one series vote yes, then the entire series is deemed to have voted yes, do you see? A. Yes. Q. So effectively it is sort of a grossing up provision in the voting, isn't it? A. Yes. Q. So just to give it an example, if 50.1 per cent of the 2024s vote in favour, then that is treated as a vote in favour by 100 per cent of the 2024s? A. Yes. Q. Then if we look at (h). What (h) then deals with is the aggregate position and all you need in order to trigger (h) is 50 per cent of the aggregated principal amount of all notes. That is obviously taking into account (g), isn't it? A. Yes. Q. So in practice you may have a majority instruction even if you don't hold 50 per cent of the entirety of the SUNs, do you follow? A. Yes. Q. Now. just pausing there, what I suggest to you is certainly so far as the 2029 notes are concerned, they do not have definite rights of enforcement as a series, do they? A. Not as an individual series. Q. Rather the right of enforcement, such as it is, is controlled by 50 per cent majority of all eligible notes, correct? A. Yes. Q. And that can be achieved by holding a simple majority in a sufficient number of individual series of notes, correct? A. Yes."

251. Mr Smith challenged the Plan Company's exit strategy on the basis that even if steps 1 to 7 were satisfied, there was an eighth step which the Group had to take before any Credit Bid could be accepted. It had to obtain the consent of the Secured Parties unless the bid was made for cash consideration. Mr Trozzi stated that this was something on which the Plan Company had taken legal advice but he accepted that a sale for non-cash consideration would require the consent of the Secured Parties. However, he also gave evidence that this exit strategy had been used before and he expected the Plan Creditors to give their consent:

> "Q. So in order to have a disposal for a non-cash consideration you need the agreement of all the parties, don't you? A. Yes. Q. And you have simply assumed that that agreement will be forthcoming, don't you? A. Yes. Q. You don't know whether it will be forthcoming or not, do you? A. I assume it will be forthcoming on the basis that an enforcement would be the best mechanism to ensure value is protected for all secured parties. Q. Do you know who the secured parties are for these purposes? A. Well, in the end, it's the SUNs and that is why. Q. So you are assuming that there will be consent by the SUNs to a credit bid, aren't you? A. Yes. Q. Why don't you say in your witness statement that that's one of the assumptions that you have made that underlies all of this? A. I think enforcement structures process, as laid out in my witness statement, are -- have been used before. So I didn't go into that level of detail to describe it. But again this is something that is -- I believe, I understand -- is understood by all the -- by the lenders."

252. Mr Smith also challenged Mr Trozzi's evidence that the proceeds of sale paid by SUN Bidco to the new Luxembourg intermediate holding company under the terms of the proposed pledge would be held by the Security Agent subject to the security enforcement waterfall in Clause 20.1 of the Intercreditor Agreement:

> "Q. And are you assuming, therefore, that the sales of the underlying properties are all achieved by way of the realisation or enforcement of security? A. I am assuming that security would be enforced at the top of the structure and then once sort of the -- in a post enforcement waterfall, once the properties are disposed and the asset -- and the monies realised, it gets distributed according to the form. Q. But if the properties aren't sold as a result of the enforcement or realisation of the security why would the waterfall apply? Let's assume the underlying company just sells the property in the ordinary course of its business, why is the waterfall going to apply to that? A. The scenario that I described in my witness statement is an enforcement scenario. So I have assumed that this waterfall would apply in that scenario. Q. Right. So you were assuming that the individual

properties are sold by way of the realisation or enforcement of security, are you? A. What I am assuming -- sorry, can you please clarify? Q. Are you assuming that the underlying properties are disposed of by way of the realisation or enforcement of security? A. What I am assuming is that the security would be enforced at the top of the structure for the lenders to own -- their intermediate company, to be able to in fact own the group. Then further down the structure, assets will be sold in an orderly manner, and then, again, once the proceeds have been realised would be distributed in accordance with the waterfall. Q. I don't think we can take this any further. We disagree with that as a matter of law, Mr Trozzi, but I have put the point to you and we will come back to that in closing submissions."

253. Finally, Mr Trozzi exhibited to Trozzi 3 a table prepared by PJT on the assumption that the future valuations in the Knight Frank Report were correct and using the same assumptions in the Rickelton Report at Figure 19 but subject to one important change. This assumption was that the sums available to the Plan Creditors were distributed on a *pari passu* basis rather than to the Plan Creditors in the order of their maturity dates. Based on the Knight Frank Report, PJT assumed (as Ms Rickelton had done) that €2,533 million would be available to the Plan Creditors and on this basis all of the Plan Creditors (including the 2029 Plan Creditors) would recover 74.6% of the amounts owed to them.

254. Ms Rickelton prepared a revised table in answer to this evidence. Based on the further evidence filed by the Plan Company, she made adjustments totalling €392 million to reduce the amount available for distribution to the Plan Creditors from €2,533 million to €2,141 million, deducted the €445 million to be paid to the 2024 Plan Creditors (who will be given priority under the Plan) and divided the balance of €2,696 million between the Plan Creditors arriving at a percentage recovery of 52.4%:

"**Distribution to remaining pari passu SUNs**	**1,696**
2025-2029 Notes FV Claim	3,238
2025-2029 Notes FV Recovery	52.4%"

255. Ms Rickelton accepted that when she calculated the percentage which the 2029 Plan Creditors would recover for the purposes of the Relevant Alternative in Figure 1 she did not include interest. She also accepted that when she calculated the percentage in her revised table, she had included PIK interest which would be

due to the Plan Creditors. Mr Bayfield suggested to her that she was not comparing like for like and, although she did not accept this, she did accept that if the interest was excluded, the relevant percentage was about 60%:

> "Q. At the very bottom of page, you refer to the notes "FV claim 3.238 billion", don't you? A. Yes, that's right. Q. And FV is fair value? A. Fair value. Q. That figure includes over 400 million euro of interest, doesn't it? A. Yes, I think so, yes. Q. And you have used that as the denominator to work out the recovery, haven't you? A. Yes, it would be consistent with the analysis we just looked at a moment ago. Q. But by including it you get a 54 per cent recovery in this scenario, don't you? A. That's correct, yes. Q. But if you were to exclude the interest, then actually the figure would be 50.6 per cent, wouldn't it? I am not expecting you to do the maths on the spot. A. That sounds about right, but that wouldn't then be a like for like comparison with any of the numbers in our report. Q. That, though, would beat your relevant alternative outcome, wouldn't it, if it was 60.4 per cent? A. But it isn't that number, because there's a higher claim under the restructuring plan."

256. Although Ms Rickelton was not able to do the calculation in the witness box, it is fairly simple. The principal amount due under all of the SUNs excluding the 2024 Notes (which have priority) is €2,800 million. €1,696 million is 60.57% of that total sum. Based on Ms Rickelton's concession, therefore, I am satisfied that as a matter of arithmetic the 2029 Plan Creditors will be no worse off under the Plan than they would have been if the Group had gone into insolvency even if the future valuations in the Knight Frank Report are correct. However, this only remains an arithmetical conclusion unless I am also satisfied on the evidence that the Plan Company's exit strategy is likely to succeed and that the proper comparison between that outcome and the insolvency outcome involves ignoring the PIK interest payable under the Plan.

(vii) The Parties' Submissions

257. Mr Smith submitted that the Plan Company's exit strategy, the Luxembourg enforcement scenario, was not a likely outcome. In particular, he submitted that it depended upon two connected points both of which had to be correct, namely, that the Release Price Mechanism would operate to prevent disposals of the Group's assets and also that the LTV Covenant would be triggered leading to a particular form of enforcement.

258. He submitted that the Release Price Mechanism would not operate to prevent the disposal of assets because it was a term of the New Money Facilities Agreement and the question whether to waive it was a matter for the New Money Providers. His case was that, in practice, they would waive the provision when it was required. He also pointed out that the BCG Report contemplated the provision being waived: see slide 43.

259. Mr Smith also submitted that the enforcement of the LTV Covenant was even more speculative. He pointed out that Mr Trozzi initially accepted (as he did) that it involved seven separate steps and that he also accepted (as he did) that an eighth step was required, namely, the consent of the Plan Creditors and the New Money Providers to a disposal of the Group's assets for non-cash consideration. He submitted that each of those steps was contingent and uncertain for the following reasons:

(1) *The LTV Covenant*: The question whether a breach of covenant had arisen would depend on the valuations used, the Parent Company would rely on the CBRE and NAI Apollo valuations and the Notes Representative could waive any breach of covenant if instructed to do so by a majority of the Plan Creditors in each class.

(2) *The Intercreditor Agreement*: The right to enforce any breach of covenant would be controlled by the Majority Eligible Noteholders and a vote of each series was also controlled by a simple majority of that series. In practice, SteerCo would be likely to control the enforcement process.

(3) *Credit Bid*: A credit bid required the consent of all of the Secured Parties and Mr Trozzi had simply assumed that all of the necessary consents would be forthcoming.

(4) *Distribution*: Mr Trozzi and Mr Gunther had assumed that the Group would dispose of its assets on a going concern basis following the enforcement of the new share pledge but at the same time he had assumed that the proceeds would be distributed in accordance with the security enforcement waterfall. That only applied in relation to the proceeds of the realisation of security

and most of the Group's assets did not form part of the security under the Intercreditor Agreement.

(5) *Insolvency Discount*: Mr Trozzi's assumption that the Group's assets would be sold on a going concern basis and without an Insolvency Discount could not be reconciled with his assumption that the proceeds of sale would be distributed down the security enforcement waterfall. Moreover, he was entirely vague about the additional investment or capital which would be required by the SUN Bidco to maintain the Group's assets pending their sale.

260. Mr Bayfield, Mr Perkins and Miss Wang attempted to address most of these submissions in their written closing note. In relation to the Release Price Mechanism they submitted that it made no sense for the New Money providers to waive the mechanism to enable the Group's assets to be sold at very low prices, that the BCG Report only contemplated that waivers might be needed in relation to three of the Development Assets and that there was no reason to believe that a global waiver of the release price mechanism was to be expected.

261. They also submitted that in the event that the future valuations in the Knight Frank Report were correct and a breach of the LTV Covenant was triggered, the most likely outcome was a sale to a SUN Bidco under the wider restructuring package. They also submitted that the great advantage of this process was that it did not involve an immediate "fire sale" of the Group's assets and a significant Insolvency Discount. In relation to the individual contingencies which Mr Smith identified they made the following submissions:

(1) *The LTV Covenant*: Mr Trozzi explained that the Group's consolidated financial statements were required to take into account the best available information as to asset values and if the Group's asset disposal programme was a failure, CBRE and NAI Apollo would take this into account. There was no evidence that either firm would deliberately overstate or inflate their valuations to prevent a breach of the LTV Covenant.

(2) *The Intercreditor Agreement*: Far from being to the disadvantage of the 2029 Plan Creditors, the provision for majority voting was advantageous to them since they represented the single largest series of SUNs. There was no basis

for the AHG to suggest that the Plan Creditors might not give the relevant Enforcement Instructions and allow the New Money providers to control the process instead. Moreover, SteerCo were €30 million short of the required majority to control the process (as the AHG themselves acknowledged in their Skeleton Argument).

(3) *Credit Bid*: Although consent to a bid involving non-cash consideration would require the consent of the Secured Parties (who include both the New Money providers and the 2029 Plan Creditors), it was not correct that a sale to a SUN Bidco would necessarily involve a non-cash bid. A non-consensual sale could take effect for nominal consideration and this approach had been taken in many previous cases.

(4) *Distribution*: It was correct that the security enforcement waterfall only applied to the proceeds of sale of the Transaction Security. But if the Group's assets were to be sold after the acceleration of the SUNs, those proceeds would have to be distributed rateably even if the waterfall did not apply.

(5) *Insolvency Discount*: Mr Bayfield relied on section 8 of the Gunther Report (above) in which Mr Gunther explains that similar enforcement structures have been used in many previous cases and that there is no reason to believe that an Insolvency Discount would be applicable upon an orderly sale of the underlying property assets.

(viii) Findings

262. I accept Mr Trozzi's evidence that the Release Price Mechanism was a key subject for negotiation between the members of SteerCo. I also accept his evidence that it is unlikely that the New Money providers would be willing to waive the mechanism to allow the Group's assets to be sold at a steep discount. On the other hand, it is likely that they would be prepared to waive the mechanism if satisfied that the relevant asset was being sold at market value. Indeed, I would expect them not to waive the Release Price Mechanism unless the Group obtains valuation advice from CBRE or NAI Apollo confirming that the asset was being sold for Market Value.

263. The alternative which I am currently considering is whether the NWO Test will be satisfied if the future valuations in the Knight Frank Report are correct. If CBRE and NAI Apollo provide clear advice that those valuations are correct and that the relevant assets are not being sold at a significant discount to Market Value, then I agree with Mr Smith that it is more likely that the New Money providers will waive the mechanism rather than prevent the sale or sales. However, if CBRE and NAI Apollo express the opinion that the relevant assets are to be sold at significant discounts to Market Value, then I consider it much more likely that they will enforce the mechanism.

264. In any event, I accept Mr Trozzi's evidence that the Parent Company's directors and the directors of its Luxembourg subsidiaries would be personally liable to the shareholders and creditors of the relevant Group companies if they approved a sale of assets at deep discounts to GAV without any long-term benefits for those companies arising out of the sale. Given that Mr Gerlinger forecasts that the Group will achieve significantly lower recoveries than the CBRE and NAI Apollo valuations which formed the benchmark for the Release Price Mechanism and because they may be subject to personal liability, I consider it highly likely that the directors will also want to take advice from CBRE and NAI Apollo before authorising sales at Mr Gerlinger's forecast prices.

265. I find, therefore, that on the assumption that the future valuations in the Knight Frank Report are correct, it is likely that New Money providers will waive the Release Price Mechanism to permit sales at those values but only after receiving valuation advice from CBRE and NAI Apollo that Mr Gerlinger's forecast sales prices represent Market Value at the relevant time. On the same assumption I also find that it is unlikely the directors will authorise the sale of assets at significantly lower prices or that the New Money providers would permit them to do so.

266. Mr Gerlinger adopted the same sales cycle in the Knight Frank Report as Mr Wolf did in the BCG Report. It is likely, therefore, that it will be apparent both to the Group and the Plan Creditors by 31 December 2023 that a breach of the LTV Covenant is likely to be triggered when it first comes to be tested. Moreover, I can see no reason why CBRE or NAI Apollo would not value the relevant assets accurately or within a reasonable range of Mr Gerlinger's future valuations if (as

I assume for present purposes) those valuations are accurate. Mr Smith did not provide me with any compelling reason why CBRE and NAI Apollo would continue to support their historic valuations if those valuations were no longer correct (particularly after a period of falling prices). Such conduct is likely to be negligent and might even be dishonest.

267. I find, therefore, that it is likely that the Plan Company and the Parent Company will be in breach of the LTV Covenant by 31 December 2024 (if Mr Gerlinger's valuations are correct) and that the individual 2029 Plan Creditors will be entitled to serve a notice under Clause 10(2) of the 2029 Notes declaring that the principal and interest are immediately due and payable. Moreover, I consider it very likely that the AHG would exercise that right. It is Dr Halasz's evidence that on 10 March 2023 members of the AHG gave notice under Clause 10(1) on the basis that the Plan (if sanctioned) triggered an Event of Default.

268. Clause 10(3) confers the power on the Notes Representative of the 2029 Notes to waive the Event of Default whether before or after the individual Plan Creditors have served a notice under Clause 10(2). I accept Mr Smith's submission that there is a potential conflict between the interests of individual Plan Creditors but the way in which the SchVG resolves such a potential conflict is by empowering the Notes Representative to act on the instructions of a majority. Clause 10(3) expressly provides, therefore, that the Notes Representative must waive any Event of Default or any acceleration if a majority of 2029 Plan Creditors instruct it to do so.

269. Dentons is not only the Notes Representative appointed under the 2029 Notes. The firm has also been appointed as the Notes Representative under all the different issues. It is unclear to me whether Mr Smith intended to argue that for this reason, Dentons would exercise the power in Clause 10(3) on the instructions of Plan Creditors who did not hold 2029 Notes at all or a majority of all Plan Creditors overall (and whether or not they formed a majority of the 2029 Plan Creditors). But if that was his argument, I reject it. There is no evidence to support the conclusion that Dentons would prefer the interests of the New Money providers or SteerCo or other Plan Creditors to the interests of the 2029 Notes. If they did, the

AHG would be quick to argue that any waiver was ineffective and that the Notes Representative was liable for damages under Clause 19(5).

270. I take Mr Smith's point that the limitations of liability in Clause 19(5) are wide. But if Dentons deliberately ignored the express terms of Clause 10(3) (or, worse, misrepresented to the 2029 Plan Creditors that they were acting on the instructions of the appropriate majority when they were not), I doubt whether those limitations would provide a defence to this kind of deliberate wrongdoing.

271. But in any event, I can see no compelling reason why a majority of the 2029 Plan Creditors (or, indeed, the Plan Creditors as a whole) will waive an Event of Default if it has occurred by 31 December 2024 especially if their expectation is that the Instructing Group will use the new structure and their powers under the Intercreditor Agreement (and accompanying share pledges) to accept a Credit Bid and the Group's assets are sold to a SUN Bidco. Indeed, I consider it likely that all of the Plan Creditors will issue notices under Clause 10(2) of their respective Notes to preserve their entitlement to share equally in the net proceeds of sale.

272. I turn next to the question of enforcement. I accept Mr Trozzi's evidence in Trozzi 3 that either a majority of the New Money Providers or the Majority Eligible Noteholders can form an Instructing Group to enforce the Transaction Security under the Intercreditor Agreement. I also accept his evidence that if there remains a dispute between them after the consultation period then the instructions given by the Majority Eligible Noteholders will prevail.

273. I also accept that because 50.1% of the Plan Creditors in each series can vote on behalf of 100% of the entire series and 50.1% of the Plan Creditors in all series (when aggregated) can vote on behalf of all Plan Creditors, it is in theory possible that less than 50% of the Plan Creditors might be able to give instructions either to enforce or not to enforce the Transaction Security. In their Skeleton Argument Mr Smith and Al-Attar suggested that it would be possible for Plan Creditors holding €850 million of Notes to control all €3.2 billion and I have no reason to doubt that this is correct in arithmetical terms. However, they had to accept that even on the most favourable assumptions SteerCo could not control all of the Notes and would need to acquire or obtain support from other Noteholders.

274. I also accept Mr Gunther's evidence that market reaction to a change of control to a Bidco controlled by creditors does not cause the same stigma as insolvency and Mr Trozzi's evidence that this is understood by all of the Plan Creditors. What Mr Smith did not explain is why SteerCo or the New Money Providers or the Majority Eligible Noteholders might want to block the enforcement of the Transaction Security or oppose a Credit Bid once it had become clear that the Group had taken steps to test the market fully.

275. Given that the Plan is supported by 84% of Plan Creditors (or 82% of Plan Creditors excluding the 2024 Plan Creditors), I would expect all of them to support a Credit Bid. If the Group is unable to realise its assets for the prices forecast by BCG and is in breach of the LTV Covenant, I would expect the management board to try and market its assets to a single purchaser (or, perhaps, different purchasers for tranches of the assets). If the Group is unable to find a single purchaser or group of purchasers, I consider it likely that most of the Plan Creditors, the New Money Providers and SteerCo will support a Credit Bid and form an Instructing Group to instruct the Security Agent to enforce the Transaction Security.

276. Indeed, the only Plan Creditors who currently oppose the Plan or a future Credit Bid are the AHG themselves. I have no reason to doubt that they currently believe that it is in their commercial interests to oppose the Plan and that the Relevant Alternative will lead to a better outcome for them. But if the Plan is implemented and the Group's sales turn out to be disappointing (as Mr Gerlinger forecasts), then the AHG are likely to support a Credit Bid if they consider it to be in their interests to do so and they are advised that the Group's assets can be sold without an Insolvency Discount (or much less of a discount). Mr Bayfield relied on the letter dated 10 January 2023 in which FTI, Akin Gump and Gleiss Lutz put forward their alternative proposal stating that the AHG wished to avoid an insolvency, if at all possible, and wanted to work constructively with the Group and the other Plan Creditors. I take this statement at face value.

277. For all the same reasons I consider it likely that the Secured Parties (who are essentially the Plan Creditors, SteerCo and the New Money Providers) would give their consent to a Credit Bid. In their closing note Mr Bayfield, Mr Perkins and Miss Wang submitted that consent to a sale for non-cash consideration would not

be required if the sale to the SUN Bidco was for a nominal consideration and they relied on the decision of Eder J in *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm) at [122]. I do not accept that the contractual terms were identical in that case and I would be hesitant to express a view on the construction of the Intercreditor Agreement given that it is governed by German law and this issue might possibly arise. However, the decision demonstrates that the use of a Credit Bid and the documents designed to give effect to it in the present case are familiar to both creditors and their advisers. Moreover, the reasons which Eder J gave at [122](c) for rejecting the argument that the intercreditor agreement contained a term preventing a sale for nominal consideration also explain why the Secured Parties would consent to a Credit Bid in the present case:

> "c A requirement preventing a sale or disposal for nominal consideration or for non-cash consideration would be uncommercial as it would seriously restrict the ability of the Lenders to obtain a recovery on their claims, particularly in times where there is a shortage of liquidity in the market and where pure cash bids may not be forthcoming or may be low in amount. To take an example of a company with £200 million of debt: it would be very odd if the Security Trustee were required to accept a cash bid of £50 million free of all debt and was unable to accept a bid which purchased the equity for nominal consideration but subject to retaining £150 million of existing debt."

278. I turn next to consider whether the proceeds of the Group's property sales will be distributed under the security enforcement waterfall. This issue arose right at the end of closing submissions and, again, I would be hesitant to express a final view about the scope of the Intercreditor Agreement. Nevertheless, I am not persuaded that the Transaction Security will not include most of the Group's assets (as Mr Smith submitted). A large number of the Group's subsidiaries will be parties to the Intercreditor Agreement for the purpose of providing guarantees and securities and their shares will also be pledged as Transaction Security.

279. Furthermore, section 7 of the Explanatory Statement summarises the Transaction Security which the Group intends to provide under the Intercreditor Agreement. It expressly states that: "Any asset which can be provided as security will be provided as transaction security, subject to the restrictions set forth in this section." There is no suggestion that the Group intends to exclude from the Transaction

Security any of the Group's assets unless it is unable to do so, and this was not put to Mr Trozzi.

280. But even if most of the Group's assets will not form part of the Transaction Security, I accept Mr Bayfield's submission that if Group assets are sold after the acceleration of each series of Notes, then the Group would be required to distribute the proceeds of sale in the same order of priority as the security enforcement waterfall. Once the secured creditors are paid off, the Group would have to distribute the proceeds of sale between the Plan Creditors rateably.

281. I find, therefore, that if the future valuations set out in the Knight Frank Report turn out to be accurate, then the Plan Company and the Parent Company will be in breach of the LTV Covenant in the 2029 Notes and the 2029 Plan Creditors will be entitled to serve notice under Clause 10(2) declaring that their debts are immediately due and payable. I also find that if this occurs, then the likely outcome is that all of the Plan Creditors will serve notice under Clause 10(2) and will form an Instructing Group to instruct the Security Agent to enforce the Transaction Security under the Intercreditor Group by accepting a Credit Bid from a SUN Bidco resulting in an orderly wind down and sale of the Group's assets. Finally, I find that in that event the likely outcome is that the net proceeds will be distributed rateably and on a *pari passu* basis to all the Plan Creditors.

282. Ms Rickelton's revised table sets out the financial consequences of the findings which I have made. She accepted that if the appropriate denominator was the principal sum of €800 million due under the 2029 Notes and not the principal sum plus PIK interest, then the 2029 Plan Creditors will recover about 60% of that sum. I accept that evidence and I am satisfied that Ms Rickelton's concession was properly made. I am also satisfied that if the correct denominator is €800 million and not €800 million plus the PIK interest to which the 2029 Plan Creditors are entitled under the Plan, then the 2029 Plan Creditors are better off than if the Group went into insolvency.

283. In my judgment, Mr Bayfield was correct to submit that the correct denominator is €800 million. The task for the Court under Condition A is to compare the <u>returns</u> on the creditors' claims to which the different counter-factuals presented by the

parties to the Court will give rise. When he used the word "returns" in *Re Virgin Active* Snowden J could only have had in mind a comparison between the actual sums which the creditors would receive on each hypothesis and not their contractual entitlements. Moreover, the fact that noteholders are unable to claim interest in an insolvency does not mean that they no longer have the contractual right to it. It just means that those rights are worthless and unenforceable.

284. Finally, I address the Insolvency Discount. It is necessary for me to begin by summarising the way in which Ms Rickelton analysed the figures. Her original comparison between the outcomes of the BCG Report and the Knight Frank Report were set out in her figure 1: see the Appendix. The figures which she took from the Knight Frank Report were €5,372 million (under the Plan) and €5,079 million (on insolvency). These figures reflected the 5% Insolvency Discount which Mr Gerlinger considered likely in circumstances where the Group did not go into formal insolvency but implemented a restructuring plan instead. Based on Mr Gerlinger's figures Ms Rickelton calculated that €2,533 million would be available for all the Plan Creditors (including the 2024 Plan Creditors): see the Rickelton Report, Figure 19.

285. In her revised table dealing with *pari passu* distribution between the SUNs Ms Rickelton adjusted the €2,533 million figure taken from the Knight Frank Report downwards to take into account a number of additional factors and after repayment of the 2024 Notes she calculated that €1,696 million would be available for distribution to the remaining Plan Creditors. On this basis she calculated that the 2029 Plan Creditors would recover 52.4% of their total claims. I have rehearsed these figures to demonstrate that throughout her calculations Ms Rickelton assumed an Insolvency Discount of 5% and no higher and if there is any doubt about this conclusion, I find that this is how Ms Rickelton arrived at her final figure.

286. I am satisfied, therefore, that the NWO Test is satisfied on the basis that both Mr Gerlinger's future valuations and his Insolvency Discount of 5% are accurate. However, I am far from satisfied that Mr Gerlinger was correct about the discount. Although he is a highly experienced property professional, he had no personal experience of sales by an insolvent company. Mr Gunther, on the other hand, has

very considerable experience in this field and gave evidence that the Insolvency Discount which BCG had adopted was accurate.

287. Accordingly, even if I am wrong to accept Mr Bayfield's submission that the correct denominator in Ms Rickelton's revised table was €800 million, it seems likely to me that a greater Insolvency Discount would have to be applied to the Knight Frank future valuations of the Group's assets if it went into insolvency. I make no specific finding on this point, however, because counsel did not present me with a revised calculation on this basis and none of the experts addressed it. I return, however, to the significance of this point in my general conclusions (to which I now turn).

(7) Summary

(i) Stage 1: The Relevant Alternative

288. I find on a balance of probabilities that the Group is more likely to realise the sums forecast in the BCG Report than the sums forecast in the Knight Frank Report. I also accept Mr Gunther's evidence that the Insolvency Discounts applied by BCG are reasonable and I find on a balance of probabilities that if the Group went into liquidation the most likely of the two alternatives presented to the Court by the parties is that the Group's assets would be realised with Insolvency Discounts of 25% and 23% for the Yielding Assets and the Development Assets respectively. I, therefore, find that if the Plan had not been sanctioned, the most likely outcome is that the Group will realise €3.288 billion in total.

(ii) Stage 2: The Consequences

289. I also find that if the Plan had not been sanctioned, the more likely outcome is that €506 million would be paid to the 2029 Creditors in 2026 and 2028 amounting to 63.25% of the principal of €800 million payable under the 2029 Notes.

(iii) Stage 3: The Comparison

290. I prefer the evidence of Mr Wolf to the evidence of Mr Gerlinger in relation to the proceeds of the future sales of the Group's assets and I find on a balance of probabilities that if the Plan is implemented the Group is more likely to realise the

sums forecast in the BCG Report than the sums forecast in the Knight Frank Report and, therefore, that the 2029 Plan Creditors will be repaid in full. On this basis the NWO Test is satisfied. I am also satisfied that the test is satisfied on the basis that the future valuations in the Knight Frank Report are accurate and that Mr Gerlinger's Insolvency Discount of 5% is also accurate.

(iv) Condition A: The Statutory Test

291. I accept Mr Smith's submission that future forecasts of property prices are inherently uncertain especially when based on macro-economic data. I also agree with him that it is perfectly possible for two highly experienced and competent property professionals to reach very different views about the value of property assets (especially where they are carrying out residual valuations). Finally, I accept that it will be ambitious for the Plan Company to pay off the 2029 Creditors in full.

292. Nevertheless, it is important to have in mind the statutory test which the Court must apply. I have to be satisfied that the 2029 Plan Creditors will be no worse off than they would be in the relevant alternative. It is not necessary, therefore, for the Court to be satisfied that the most likely outcome is that the 2029 Plan Creditors will be paid in full, only that the most likely outcome is that they will be better off. I am fully satisfied that this is the most likely outcome because even if the Group fails to achieve the sales prices forecast by BCG in the BCG Report and is only able to recover the sums forecast in the Knight Frank Report, I am still satisfied that the 2029 Plan Creditors will be better off. This is the consequence of my finding on the Plan Company's alternative case.

293. If I am required, however, to choose between the alternatives put forward by the parties like choosing from a menu, then I find that the most likely outcome is that the 2029 Plan Creditors will be paid in full and for the reasons which I have given. I also consider the least likely outcome to be the one put forward by the AHG, namely, that they will recover only 10.6% of the sums to which they are entitled. I have set out their rights under both the amended SUNs and the Intercreditor Agreement in some detail because I consider it highly unlikely that they will make no attempt to accelerate the 2029 Notes or press for enforcement action if the

Group is only able to achieve the future sales prices set out in the Knight Frank Report (or, indeed, worse). Indeed, one of them was already litigating the question in Germany whether the Issuer Substitution is valid and whether this Court had jurisdiction to sanction the Plan even before I had made the Order.

294. Finally, even on Ms Rickelton's figures there is not much to choose between insolvency and the Plan (always assuming that the 2029 Plan Creditors are entitled to give notice of acceleration under the 2029 Notes). Even if I am wrong to reject the AHG's case and my findings on Condition A are over-optimistic, then the Group should not miss the Relevant Alternative by much by implementing the Plan. The amount which the 2029 Plan Creditors will recover on a "worst case" basis is an important one in the context of Mr Smith's submissions on discretion. In my judgment, even if I am wrong to accept either the primary or the secondary case advanced by the Plan Company, I am satisfied that the Plan Company will not miss the Relevant Alternative by much. I will use the "near miss point" as shorthand for my conclusion on this issue.

IX. Discretion

(1) Maturity Dates

295. The Plan preserves the existing maturity dates from 2024 to 2029 apart from the maturity date of the 2024 Notes which is extended by a year. Mr Smith and Mr Al-Attar submitted that this involved a departure from the fundamental principle of *pari passu* treatment and that there was no justification for this departure. In particular, they submitted that it was not necessary to depart from the principle to rescue the Group as a going concern or to prevent a fire sale of the assets and that the Court has only sanctioned a departure from the *pari passu* principle where it was necessary to rescue the company as a going concern.

296. Mr Bayfield, Mr Perkins and Miss Wang submitted that I must approach this issue on the basis that the Plan will allow for the repayment of the SUNs in full. They accepted that in a number of recent cases a scheme or plan had been used to amend maturity dates. But they submitted that this was not an invariable practice and that there were at least two cases in which the maturity dates were preserved: see *Re Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) and *Re Gategroup Guarantee*

Ltd [2021] BCC 549. They also advanced the following reasons why the existing maturity dates of the SUNs (apart from the 2024 Notes) should be preserved in the present case:

(1) The staggered maturity dates will avoid a "debt wall" in which all of the SUNs will fall due for repayment at the same time. This could have a negative impact on asset prices.

(2) The existing maturity dates reflect commercial reality. The Plan Creditors acquired SUNs with different maturity dates which carried a greater credit risk and was no doubt reflected in the prices which they paid.

(3) The Plan is the only deal which commands sufficient support among the Plan Creditors. The Group has been engaged in negotiations with them for many months and the great majority of creditors have already voted twice to approve the proposals through a Consent Solicitation and at the Plan Meetings.

(4) Moreover, the Plan is supported by those Plan Creditors with later-dated notes and, in particular, by 2029 Plan Creditors who hold 2029 Notes without any cross-holdings in the 2024 Notes.

(5) In their letter dated 10 January 2023 the AHG put forward a proposal in which shorter dated notes continued to be favoured and the existing maturities respected. The AHG were not concerned, therefore, to achieve *pari passu* treatment as a matter of principle.

297. Mr Smith dealt with a number of these points in his closing submissions. First, he submitted that it would have been perfectly possible to structure the Plan in such a way that all of the SUNs shared *pari passu* in any recoveries as and when they were made and that Mr Trozzi accepted in evidence. He also pointed out that Zacaroli J considered the "only deal on offer" point to be a weak point in *Houst*. He submitted that the "debt wall" could be avoided without displacing the *pari passu* principle and that Mr Trozzi accepted that the Plan itself created a "debt wall" of €2.3 billion in the middle of 2025. Finally, he submitted that the decisions

in *Swissport Fuelling* and *Gategroup Guarantee* were irrelevant because they did not involve Liquidation Plans (as here).

298. In my judgment, the Plan does not involve a departure from the *pari passu* principle because it will preserve the existing maturity dates of the SUNs (apart from the 2024 Notes). I have found that if the Plan is implemented, it is likely that the Plan Creditors will be paid in full. There is, therefore, a significant difference between the restructuring plan in this case and the plans in many other Part 26A cases and the CVA cases where it is accepted on all sides that the creditors will not be paid in full. I might well have been prepared to accept that the Plan involved a departure from the *pari passu* principle if I had accepted the AHG's evidence and found that the most likely outcome was a significant shortfall even if the Plan was fully implemented. I might also have found that this was unfair and a fundamental objection to the Plan. But I did not accept that evidence.

299. Equally importantly, I am not satisfied that the Plan involves a departure from the *pari passu* principle even if the Group fails to achieve the forecasts in the BCG Report. If the Group falls significantly short of those forecasts, then in my judgment the most likely outcome is that this will trigger an acceleration of all of the SUNs, enforcement of the Transaction Security and distribution in accordance with the *pari passu* principle subject to repayment of the Secured Parties (whom I consider separately below). Again, if I could have been satisfied that the *pari passu* principle would not apply if the Plan Company went into default, I might well have found that this was unfair. But, again, I accepted the Plan Company's evidence in relation to this issue.

300. I readily accept that the exercise in which all of the valuation and financial experts were engaged was inherently uncertain and that the three alternatives which the parties presented to the Court did not involve clear alternatives but more of a spectrum. I also accept that I do not have a crystal ball and that I cannot be certain that the 2029 Plan Creditors will be paid in full or even that they will recover on a *pari passu* basis if the Plan Company defaults. I remind myself of the eight steps which Mr Smith put to Mr Trozzi and which would be required to bring about a *pari passu* distribution. Whilst I was satisfied that this was a likely outcome, it remains far from certain.

301. I must accept, therefore, that the Plan involves a greater risk for the 2029 Plan Creditors than it does for the Plan Creditors holding earlier-dated notes and it is possible (although, in my judgment, unlikely) that they might be worse off if they have to wait for the Plan to be implemented than if the Group was put into an insolvency process now. I put this point to Mr Smith and he went as far as to submit that because the *pari passu* principle is a fundamental principle, I had to be satisfied that the 2029 Plan Creditors would be paid in full before I could exercise my discretion to depart from it and to sanction the Plan:

> "MR JUSTICE LEECH: Let me just get this. So let's say for the purposes of argument that I am against you on condition A. I find that on a balance of probabilities the most likely outcome is that you are no worse off. That's the finding that I have to make. MR SMITH: Yes. MR JUSTICE LEECH: That's the hard finding. MR SMITH: Yes. MR JUSTICE LEECH: I can arrive at that in a number of different ways, leaving aside questions about whether the explanatory statement holds up, et cetera. There are two particular routes through to that. MR SMITH: Yes. MR JUSTICE LEECH: And I can make that finding even without being certain in my own mind that par recovery will be achieved. MR SMITH: Yes. MR JUSTICE LEECH: You say when it comes to discretion, all of that is water under the bridge, because in order to meet your point of principle about pari passu distribution, he has to satisfy me that you will be paid out in full if you should have to wait. MR SMITH: Exactly. That's exactly it."

302. I have considered this submission carefully and although it was powerfully made, I cannot accept it. In my judgment, it is not unfair to require the 2029 Plan Creditors to accept a greater level of risk than the other Plan Creditors and I am prepared to sanction the Plan even though it may have that effect. I have reached that conclusion for the following reasons:

(1) The Plan preserves the existing maturity dates of the SUNs (apart from the 2024 Notes). This reflects the commercial risks which the 2029 Plan Creditors assumed when they purchased them. I am not satisfied that the Plan involves a significant change to the balance of those risks.

(2) I consider it most likely that they will be paid in full but if the Plan's primary purpose fails, I also consider it likely that the maturity dates will be accelerated and that the 2029 Plan Creditors will recover more than if the

Group goes into insolvency measures. Equally importantly, I am satisfied that it is likely that they will not be treated differentially and that the *pari passu* principle will be respected.

(3) But even if the Group achieves neither of these outcomes, I am satisfied that the Group will not miss the Relevant Alternative by very much. Mr Bayfield submitted, and I accept, that the Group would have to realise at least £0.5 billion less than BCG has forecasted before it is in danger of producing a worse outcome than it would if it went into insolvency now. Moreover, even on Ms Rickelton's figures, the difference was between 56.1% and 52.4% (or possibly slightly less) assuming a *pari passu* distribution. This is my "near miss" point.

(4) The power of AHG's case on unfairness really rests on Ms Rickelton's Figure 1 and the comparison between the treatment of the near-dated SUNs (who all recover their claims in full) and the 2029 Plan Creditors (who recover only 10.6% of their claims). But I consider it to be unrealistic that the 2029 Plan Creditors will be unable to exercise their legal rights under the Plan to accelerate the 2029 Notes and even less realistic to assume that they will not attempt to do so.

(5) A majority of the 2029 Plan Creditors clearly take the same view and in my judgment their view of their own interests is a relevant factor to which I may (and do) attach weight. I also attach greater weight to their views than I would otherwise have done because, as Mr Bayfield pointed out, a number of 2029 Plan Creditors do not have holdings in the 2024 Notes.

(6) I accept Mr Bayfield's submission that as a matter of law I do not have to be satisfied that the Plan is the best plan available or that it could not be fairer. I also accept that the Plan involved detailed and lengthy negotiations and that it was ultimately the only restructuring plan which commanded a significant measure of agreement between the Group and the Plan Creditors.

(7) Nevertheless, I consider this to be a weak reason for sanctioning the Plan (as Zacaroli J did in *Houst*) and I do not attribute much weight to it. Despite the volume of evidence filed by the parties, I was not given a compelling reason

why the Plan Creditors wished to preserve the maturity dates and not to agree to harmonise them at the outset. If they had agreed to this, a great deal time and intellectual effort might have been saved in demonstrating to the Court why a default would result in a *pari passu* distribution.

(8) Again, I accept that the avoidance of a "debt wall" is a good reason for preserving the maturity dates. But in my judgment, this would not by itself justify the Court in sanctioning a scheme which was otherwise unfair. Moreover, Mr Bayfield's reliance on this point was undercut by Mr Trozzi's acceptance that the Plan itself involves a debt wall of sorts in 2025. It is clear, therefore, that this was not the most important reason for preserving the existing maturity dates and I also give it limited weight.

(9) Ultimately, I am persuaded by Mr Bayfield's very final oral submission at the end of the hearing. If the Plan works, he submitted, everyone is better off and the best judges of this are the Plan Creditors themselves, who voted by the requisite majority in every class for the Plan and by 62% in the dissenting class. Given the balance of risk, the right exercise of discretion is to give the management of the Group the opportunity to implement it.

(2) The Intercreditor Agreement

(i) <u>The 2024 Notes</u>

303. The Intercreditor Agreement provides for the 2024 Notes to rank after the New Money in priority to the other SUNs. The justification for this change in priority is that they represent the only series of SUNs which is subject to an extension of its maturity date. Mr Trozzi told the Court in cross-examination that this was the sole reason for them to be given priority and that the Plan Company has put this forward as "the only believable deal which would prevent the insolvency of the Group". He was unable to say whether this change of priority was dictated by SteerCo.

304. Mr Smith submitted that the extension of their maturity date was a bad reason to advance the priority of the 2024 Notes because the *pari passu* principle would apply in insolvency proceedings. He also submitted that there was no evidence that

the 2024 Plan Creditors would not have voted for the Plan without this change in priority or that the other Plan Creditors would not have voted for the Plan even if the 2024 Plan Creditors had opposed it. Finally, he submitted that SteerCo should have called evidence of the negotiations and in the absence of such evidence, I should draw the inference that the Plan Company dictated the relevant terms.

305. Mr Bayfield accepted that this was an "imperfect compromise" but submitted that the Court should approach this issue on the basis that Condition A is satisfied and that the 2029 Plan Creditors will be no worse off under the Plan even though the 2024 Plan Notes have been advanced in priority. Ms Toube submitted on behalf of SteerCo that its interests were broadly representative of the Plan Creditors as a whole and that they could not dictate terms to the other Plan Creditors.

306. In my judgment, the appropriate question in relation to this and the other issues which I address in this section of the judgment is the one framed by Mr Bayfield, namely, whether the priority given to the 2024 Notes means that the Plan is so flawed that the Court should not sanction it. For the following reasons I answer that question in the negative:

(1) There is no issue between the parties that the Court may sanction a scheme which has the effect of altering the priority of different classes of creditors: see *Houst* (above). Rather, the issue for the Court in this case is whether it would be unfair to the 2029 Plan Creditors to approve the Plan on the basis that it involves an alteration to the priority of the 2024 Notes. I accept Mr Bayfield's submission that the Court should approach this question on the basis that Condition A has been satisfied.

(2) The Plan involves an extension to the maturity date of the 2024 Notes but not to any other series of the SUNs. The quid pro quo for the agreement of the 2024 Plan Creditors to this extension is to give the 2024 Notes priority over the other SUNs. The holders of the 2024 Notes have temporal priority over the other holders of SUNs and they were being asked to agree both to an additional element of risk and to lock up their funds for another year and to compensate them they are to be given priority. In my judgment, this is a

good reason why an honest intelligent person might approve the Plan on these terms: see, e.g., *ED&F Man Holdings* at [54].

(3) Mr Smith's primary submission was that this was unfair because it involved a departure from the *pari passu principle*. But for the reasons which I have given I do not consider the Plan to involve a departure from the *pari passu* principle. If the Plan succeeds, the maturity dates of the other SUNs will remain unchanged and the 2029 Plan Creditors will be paid in full. But if it fails and the Group goes into default, then *pari passu* principle should be respected. On either assumption the 2029 Plan Creditors will be no worse off than they would be in insolvency proceedings.

(4) Mr Smith objected that this reasoning amounts to a resurrection of the "fair wind" point. I disagree. His primary objection to this individual feature of the Plan was the same as his objection to the Plan as a whole, namely, that it involved an unfair and unjustified departure from the *pari passu* principle. It is unsurprising, therefore, that the answer to his point involves the same answer.

(5) This leaves the question whether there was anything sinister about the compromise between the Plan Creditors themselves which points to a flaw either in the substantive terms of the Plan itself or in the votes cast at the Plan Meetings. The first holdings table which Milbank sent to Akin Gump on 11 March 2023 shows that SteerCo members hold 57.25% of the 2024 Notes. This might tend to suggest that they might have been motivated by a desire to prefer the 2024 Plan Creditors.

(6) However, the second holdings table which Milbank sent to Akin Gump on 24 March 2023 shows that at least three SteerCo members have very much larger holdings in the 2029 Notes than the 2024 Notes. In particular, one member holds €101.8 million of the 2029 Notes and €27.8 million of the 2024 Notes, a second member holds €44.4 million of the 2029 Notes and €27 million of the 2024 Notes and a third member holds €30.7 million of the 2029 Notes and €4.3 million of the 2024 Notes.

(7) I am satisfied, therefore, that there was no imbalance between the holdings of members of SteerCo in the 2024 Notes and their holdings in the other series of SUNs from which I could properly draw the inference that they were motivated by a desire to prefer the interests of the 2024 Plan Creditors above the interests of the other classes of Plan Creditors.

(8) But even if the members of SteerCo drove a hard bargain or even refused to vote for the Plan unless it contained a term which advanced the priority of the 2024 Notes, I am not satisfied that this had any causative effect on the outcome of the Plan Meetings or that the other Plan Creditors would not have approved the Plan. As Ms Toube pointed out, 65% of the Plan Creditors holding about €1.15 billion of the SUNs voted for the Plan. By way of comparison, SteerCo hold €1.4 billion.

(ii) The Convertible Notes/SSDs

307. In Trozzi 1, Mr Trozzi stated that one of the purposes of the Plan was to allow the Group to focus on refinancing or extending its remaining upcoming maturities including both the Convertible Notes and the SSDs. In Trozzi 3, he also stated that the Convertible Notes and the SSDs contained negative pledges which prohibit the Group companies from granting security over their assets without granting the same ranking security to the holders of those notes. Finally, in cross-examination Mr Smith suggested to him that the Group could have included both the Convertible Notes and the SSDs in the Plan and his evidence was that the reason why the Plan did not extend to them was because they did not contain a substitution clause.

308. In closing submissions Mr Smith submitted that it made no sense not to include these notes in the Plan because the Plan Company could have used the device of a deed poll and deed of contribution to overcome the absence of a substitution clause and give the English Court jurisdiction: see, e.g., *Gategroup Guarantee* (above) at [16] to [22]. In answer Mr Bayfield, Mr Perkins and Miss Wang submitted that this would not have been possible because the Parent Company (the issuer) is a Luxembourg company and the Convertible Notes are governed by German law.

309. In *Gategroup Guarantee* (above) the issuer had taken steps to move its COMI to England: see [18]. The foreign law experts instructed by the parties both regarded this as relevant to the question whether the restructuring plan (if approved) would be recognised and enforced in Switzerland and Luxembourg: see [212]. It may well be, therefore, that Mr Bayfield is correct that the absence of any connection with England might prevent the issuers from promoting a restructuring plan for the Convertible Notes and the SSDs. But I did not hear full argument on this point and I would be reluctant to decide this issue on that basis.

310. In my judgment, it was not unfair for the Group to exclude the Convertible Notes and the SSDs from the Plan for the following reasons:

(1) The face value of the Convertible Notes is €165 million and the face value of the SSDs is €24.5m. They represent a small amount of the overall debt of the Group which amounted to €6.1 billion on 30 September 2022. Moreover, the Convertible Notes and the SSDs mature in 2023 and have temporal priority over all other tranches of the Parent Company's debt and the SSDs have priority over the SUNs (because the debt was issued by ADO Lux and guaranteed by the Parent Company).

(2) In my judgment, these are good reasons why an honest intelligent person might approve the Plan without including terms to vary the Convertible Notes or SSDs. One of the purposes of the Plan was to buy time to refinance or extend them and if the Group is unable to agree terms with the creditors, then it will have sufficient funds to pay them off.

(3) But even if I am wrong and these are not good reasons for excluding the Convertible Notes and the SSDs from the Plan, I am satisfied that the terms of the Plan overall are not unfair to the 2029 Plan Creditors for the reasons which I have given in relation to the 2024 Notes.

(iii) The New Money

311. The New Money will be used to repay the Adler RE 2023 Notes (€500 million), capital expenditure incurred by Consus (€80 million) and to repay the Adler RE 2024 Notes (€300 million). The New Money will carry interest at 12.5% per

annum and together with fees the cost of the principal of €800 million is €937.5 million including OID Fees, Early Bird Fees, Ticking Fees and the Backstop Fees.

312. Mr Smith submitted that the benefit of the New Money was negligible from the perspective of the 2029 Plan Creditors. Ms Rickelton had also carried out an analysis of the New Money in the Rickelton Report. Her evidence was that SteerCo held 31.94% or €159.7 million of the Adler RE 2023 Notes and 24.96% or €74.88 million of the Adler RE 2024 Notes and in the table annexed to their letter dated 11 March 2023 Milbank confirmed these figures to be correct. It was also Ms Rickelton's evidence that SteerCo had already agreed to provide 44.06% of the New Money and was expected to provide 77.6%. Finally, it was her evidence that SteerCo stood to receive €53.3 million in fees of which €28.3 million consisted of Backstop Fees.

313. Mr Bayfield, Mr Perkins and Miss Wang submitted that it was important to recognise that all of the Plan Creditors were entitled to participate in the New Money and the deadline for election even for the inaccurately named Early Bird Fee did not expire until 31 March 2023 (i.e. days before the hearing). They also submitted that there was a genuine need for the New Money and that its pricing was set at market level and they relied on tables prepared by PJT. These showed that all of the individual fees were standard in restructuring plans in a number of jurisdictions and that both the coupon and the level at which the fees have been set are in the middle of the range.

314. Ms Toube also submitted that SteerCo had no special interest in the Adler RE Notes or in any class of SUNs. In their Skeleton Argument Ms Toube and Mr Phillips set out Milbank's analysis of the two holdings tables which they sent to Akin Gump on 11 March 2023 and 24 March 2023. Milbank broke down the various holdings of SteerCo and the three individual members (above) as follows:

(1) At least one SteerCo member holds more in terms of face value of the 2029 Notes than it does in the 2024 Notes, the Adler RE 2023 Notes and the Adler RE 2024 Notes combined. In particular, that member holds €44.4m of 2029 Notes as compared with €31m combined in the 2024 Notes and Adler RE 2023 and 2024 Notes.

(2) At least two SteerCo members have considerably larger holdings in later dated SUNs (i.e. November 2026 and later) than they do in earlier dated SUNs (i.e. January 2026 and earlier). In particular one member holds €187.5m in later dated SUNs and €78.2m in earlier dated SUNs and another member holds €79.6m in later dated SUNs and €49.4m in earlier dated SUNs.

(3) At least one member has no holdings in the Adler RE 2024 Notes and minimal holdings (approximately €4m) in the Adler RE 2023 Notes.

(4) At least three members hold more in terms of the face value of SUNs that are "primed" by the prior ranking security given to the 2024 Notes and the Convertible Notes than they do in those tranches.

315. As Mr Bayfield, Mr Perkins and Miss Wang submitted, it is well-established that a company can offer incentives to its creditors in the context of a restructuring plan. In *ED&F Man Holdings* (above) both Meade J and Trower J considered that it was permissible to offer "elevation incentives" when (as here) it was open to all creditors to participate in the New Money. In my judgment, the proposals in the present case are analogous. Moreover, I accept Mr Bayfield's submission that the coupon and the fees were set at market rates. Mr Smith did not challenge PJT's table and I was not taken to any evidence to suggest that it was wrong.

316. I also reject Mr Smith's submission on the facts that the purpose of the New Money was to enable SteerCo to elevate its own debt and to extract unreasonable fees from the Group at the expense of other creditors. I accept that the breakdown of holdings which Milbank set out in their two letters dated 11 March 2023 and 24 March 2024 is accurate and Ms Toube's submission both that there is no community of interest between the individual members of SteerCo and also that they have no special interest in the Adler RE Notes. Indeed, as Ms Toube submitted, the Adler RE Notes would have been repaid in full even if the Plan had not been sanctioned and no New Money had been provided. This is a point for which Mr Smith had no answer.

317. I am also satisfied that the New Money serves a genuine purpose which is of benefit to the Plan Creditors. Its purpose is to refinance the Adler RE Notes which rank the highest and mature first in order to enable the Group to wind down and

realise its assets in an orderly fashion. I have found that if it is able to do so, the likely outcome, if not most likely outcome, is that it will be able to repay its creditors in full. As Mr Bayfield submitted, this is in the interests of all of the Plan Creditors including 2029 Plan Creditors.

(iv) The Backstop Fee

318. I address the Backstop Fee separately because it was the only fee paid exclusively to members of SteerCo. Mr Bayfield submitted that there were two reasons for the Group to pay the Backstop Fee: first, there was a significant risk that the members of SteerCo might have to provide the entire New Money Facilities and, secondly, the Group needed the commercial certainty to ensure that the New Money would be available. They also submitted that the 3% fee was a reasonable fee comparable with fees in the market and less than the Group would be likely to pay to an investment bank.

319. Mr Bayfield, Mr Perkins and Miss Wang cited a number of decisions in which the Court had approved backstop fees. For example, in *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2683 Falk J (as she then was) approved a scheme which included such fees on the basis that there would be a much lower return in a liquidation and that it had the overwhelming support of the creditors notwithstanding the individual benefits: see [24] and [25]. PJT also produced a table which set out the fees payable in a number of restructuring plans or schemes between 2020 and 2022 ranging from 1% to 6%. A 3% fee is in the middle of that range and the fee in *Codere Finance* (above) was 2%. Finally, Mr Trozzi gave evidence that the alternative was a costly and time-consuming negotiation with a third-party provider who would need to conduct its own due diligence.

320. I am satisfied that it is not unfair to approve the Plan on terms that members of SteerCo receive the Backstop Fee of 3%. I accept the evidence set out in PJT's table and I am satisfied that the fee is reasonable. It is within the range of fees set out in the table and Falk J approved a 2% fee in *Codere Finance*. Finally, I accept Mr Trozzi's evidence that if SteerCo had not agreed to backstop the New Money it would have been necessary for the Plan Company to negotiate with an investment bank to underwrite the New Money Facilities, that it would have been

costly and time-consuming to negotiate that facility and that the Group would have been charged an arrangement fee of a similar amount.

321. Finally, in reaching this conclusion I have also taken into account the fact that a significant majority of the Plan Creditors have approved the Plan in the knowledge that it requires the payment of the Backstop Fee. I also take into account the fact that the Backstop Fee is very small in comparison to the overall benefits of the Plan and amounts to 1.8% only of the face value of the SUNs.

(3) The Shareholders

322. The Plan provides a 22.5% stake in the equity of the Parent Company to be issued to the New Money Providers but for the existing shareholders to retain their 77.5% interest in the Group. Mr Trozzi accepted in cross-examination that the logic for the shareholders to retain their equity was that the Plan Creditors would retain their claims and would be repaid in full together with interest. In their closing submissions Mr Bayfield, Mr Perkins and Miss Wang posed the rhetorical question: "That being so, it is not understood what justification needs to be given for the fact that the shareholders will retain their equity interest in the Group."

323. Mr Smith submitted that this was no basis for permitting the shareholders to retain an equity stake because the Group was otherwise insolvent, the creditors owned the company and they were entitled to the equity in the event that there was a restructuring surplus. He distinguished both *Amicus Finance* and *Virgin Active* on the basis that the shareholders provided new money which was being used to make payments under the Plan.

324. This is the point on which I have had the greatest concern about approving the Plan. I can see no obvious reason why the shareholders who have provided no support for the Plan and no additional funding should get the upside if the Plan succeeds. The Plan Creditors rather than the Shareholders take the risk that the Plan will fail. I, therefore, accept Mr Smith's submission that there is no compelling logic in Mr Bayfield's position that if the Plan Creditors are paid in full, the shareholders should retain their equity.

325. In *Amicus Finance* a 7.5% shareholder was providing new money: see [2] and [18]. I accept, therefore, that Sir Alistair Norris's dictum at [45] must be read in that context. In *Virgin Active*, however, where Mr Smith appeared for the plan companies, the opposing creditors advanced the same argument as he does now: see [234] to [235] and [266]. It was unnecessary for Snowden J to decide this issue but if it had been necessary for him to do so, he would have considered three points relevant: see [268] to [300]. First, the parties who were most affected by the retention of equity by the shareholders were the secured creditors and there was no basis for finding that they had taken anything other than a commercially rational approach to the Plans. Secondly, there was no basis for finding that the opposing creditors had been shut out of the negotiations. Thirdly, and finally, he accepted evidence that the Shareholders were prepared to provide new money on terms which were not available in the market from anyone else.

326. In my judgment, it is not appropriate to refuse to sanction the Plan because the shareholders will retain a 77.5% equity stake in the Group if the Plan succeeds. I have reached that conclusion for the following reasons:

(1) The parties who are most affected by the retention of equity in the present case are the New Money Providers. They negotiated a 22.5% stake in the Group in return for providing the New Money and it is not suggested that they took anything other than a commercially rational approach (to use Snowden J's language in *Virgin Active*).

(2) The New Money Providers might have attempted to negotiate a deal for 100% of the equity in the Group on the basis that the shareholders no longer had any economic interest in the Group. But if they had, there was no evidence that this would have affected the AHG's attitude to the Plan or that they would have taken the opportunity to subscribe for New Money. They called no factual evidence at all.

(3) Indeed, the AHG's position throughout the hearing was that insolvency proceedings were the best alternative outcome for the Group and the shares had no value. They strongly contested Mr Wolf's evidence that there was

headroom of €309 million and, on their own case, the shares had (and have) no economic value at all.

(4) Moreover, if the Plan Company had negotiated a better deal in which it agreed to issue equity to the New Money Providers which gave them a much higher equity share in the Group, it is highly likely that the AHG would have strongly objected on the basis that this was an improper incentive. In *Amicus Finance* this was a point of concern: see [44]; and in *Virgin Active* Snowden J said this at [290]:

> "But putting that aside, the other common feature of such cases is a concern that the creditors given the opportunity to "risk participate" in the scheme cases might be receiving something that could be described as "an incentive" (per Zacaroli J in *Re New Look Financing plc*) to skew the vote in the relevant class; or that the existing equity holders who had subscribed for new equity in the *North La Salle Street* case were not paying full value ("top dollar") for their new equity. In either situation, the underlying concern is not so much to impose a procedural requirement to offer an opportunity to all. The concern is that the terms of the "risk participation" or equity investment are not the best available, but include an element of disproportionate financial advantage or bounty for the relevant creditors which is not enjoyed by other similar or senior ranking creditors."

(5) It may be said that these are forensic points. But given that the likely outcome for the shareholders is that they achieve a 77.5% share in a restructuring surplus of €309 million, I am not satisfied that this is so unfair that I should refuse to sanction the Plan. The possibility (or even likelihood) that the shareholders might receive this windfall is not sufficient to justify putting the Group into insolvency proceedings at the expense of all of the Plan Creditors who have voted for the Plan.

327. Mr Bayfield submitted that there are countless schemes of arrangement in which a company has deferred its debts without reallocating the equity and he cited *Re House of Fraser (Funding) plc* [2018] EWHC 1906 (Ch) where Birss J (as he then was) described this as an "amend and extend" scheme. Although there is an analogy with the present case where the Proposed Amendments extend the maturity date of the Notes, I am not satisfied that this is sufficient to justify the

cram down of a dissenting class given the wider terms of the restructuring plan put before the Court.

(4) The Notes Representative

328. Finally, Mr Smith submitted that the Plan was unfair because it provides for the appointment of the Notes Representative which will have far-reaching powers to affect the rights of the Plan Creditors without their consent including the waiver of the LTV Covenant (above). In closing submissions, he highlighted three points:

(1) The Notes Representative would have the exclusive ability to exercise the rights of the noteholders under each series of SUNs in any future German insolvency or StaRUG.

(2) Following an Event of Default the Notes Representative will have the extensive powers set out in SchVG. It could reduce the principal amount of the debt or release the security.

(3) The Notes Representative would have the ability to waive Events of Default without instruction from the Noteholders.

329. Mr Smith rejected the analogy drawn by Mr Bayfield, Mr Perkins and Miss Wang with a note trustee appointed under bonds or notes governed by English or New York law and submitted that no justification had been offered for the appointment of the Notes Representative. He also submitted that it is objectionable that the same Notes Representative is to be appointed for each series of SUNs and will, therefore, have a conflict of interest. Finally, he submitted that I should treat the amendment permitting the appointment of the Notes Representative in the same way that the Court would treat wide powers to make further amendments to the SUNs. He cited *Re Cape plc* [2007] 2 BCLC 546 for the proposition that the Court is unlikely to sanction a scheme which permits or provides for future amendments: see [73].

330. I reject those submissions. In my judgment, it is not unfair to the 2029 Plan Creditors for the majority of the Plan Creditors in each series to approve the

appointment of a Notes Representative on the terms set out in Clause 10(3) and Clause 19 of the SUNs. I have reached this conclusion for the following reasons:

(1) SchVG §5(1) expressly permits the majority of creditors to appoint a joint representative to exercise the powers in SchVG, §5(3) and SchVG, §19(2) expressly permits the majority of creditors to appoint a joint representative to deal with insolvency matters under the StaRUG. Indeed, SchVG, §19(2) requires the Court to convene a meeting of creditors to decide whether to appoint a joint representative if none has been appointed already. Mr Smith did not explain why it was unfair in principle to the 2029 Plan Creditors to permit a majority of the Plan Creditors to exercise powers expressly conferred on them under German law.

(2) Moreover, it is difficult to see how the holders of the SUNs could exercise their rights under the Intercreditor Agreement unless the bonds contained mechanics for an agent to act on their instructions and a process for deciding what those instructions should be. The mechanism which the Plan adopts is the appointment of a Notes Representative. I am satisfied, therefore, that it is not unfair in principle to amend each series of SUNs to appoint a Notes Representative and to confer the power to act on behalf of all of the noteholders in that series.

(3) I turn next to the scope of those powers. In his witness statement Dr Halasz placed emphasis on the width of the powers which Clause 19(3) confers (including the power to exercise the creditors' restructuring rights under SchVG, §5(3)). But neither he nor Professor Pfeiffer suggested that Clause 19 or, indeed, Clause 10(3) was inconsistent with the SchVG or invalid as a matter of general law. In particular, neither suggested that the limitation clause in Clause 19(5) was void or ineffective because SchVG, §7(3) does not permit a joint representative to exclude all liability except liability for gross negligence or wilful default. I have no doubt that both would have raised this argument if it had any prospect of success in a German court.

(4) I might have been prepared to find that the appointment of the Notes Representative was unfair if Clause 10(3) and Clause 19 went beyond the

powers permitted or contemplated by the SchVG (or arguably so) or if they had been highly unusual and unacceptable to most noteholders. But Dr Halasz did not suggest that they were and a significant majority of Plan Creditors have approved the amendments to the SUNs. Again, I might have been prepared to find that the appointment of the Notes Representative was unfair if I had been satisfied that Clause 19(5) was unusual and in substance made the Notes Representative's obligations to each individual noteholder unenforceable. But Dr Halasz did not suggest that it was unusual to exclude liability except for gross negligence or wilful default and Mr Smith did not submit that it would be either unusual or unacceptable to noteholders to appoint a notes trustee under English or New York law on those terms.

(5) I accept that there are bound to be potential conflicts between the interests of individual noteholders within each series of SUNs and between the interests of holders of different series of SUNs. But the way in which the SchVG resolves those conflicts is to require the joint representative to act on the instructions of the majority. Moreover, SchVG §5 (which Dr Halasz did not quote in full) imposes some important limitations (both substantive and procedural) on that majority rule and this may explain why the individual noteholders are still entitled to give notice under Clause 10(2). In my judgment, therefore, there is no conflict between the duties which the Notes Representative owes to each individual noteholder under each series of SUNs. Those duties are set out in the SUNs themselves and are consistent with the general principle of majority rule in the SchVG.

(6) Moreover, the Notes Representative owes no duty to the noteholders under one series of SUNs to comply with the instructions of individual noteholders in another series or, indeed, an overall majority of all noteholders. There is not a shred of evidence to suggest that Dentons would be prepared to exceed their authority under the 2029 Notes and waive a breach of the LTV Covenant on the instructions of SteerCo or other Plan Creditors if no majority of 2029 Plan Creditors authorised them to do so. I have already expressed the view that this would be extremely unwise and that the limitations in Clause 19(5) might not save them.

(7) Finally, I am not satisfied that the exclusive powers conferred on the Notes Representative under the Intercreditor Agreement are unfair either. Although those powers can only be exercised by the Notes Representative, the Intercreditor Agreement contains a complex mechanism for voting on enforcement action. Mr Smith did not challenge Mr Trozzi's evidence (above) explaining how it was supposed to work in practice and I accept that evidence. In my judgment, that voting mechanism was intended to reflect the principles in SchVG, §5(3).

(8) Again, Dr Halasz did not suggest that the terms of the Intercreditor Agreement are invalid, unusual or generally unacceptable to holders of German bonds and a significant majority of the Plan Creditors have voted in favour of the Plan on these terms. In particular, he did not suggest that the voting provisions of the Intercreditor Agreement dealing with voting infringed the various safeguards in SchVG, §5 and, particular, the SchVG §5(2) which provides that a majority resolution will not bind disadvantaged creditors unless they expressly consent to that disadvantage.

(9) The AHG's complaint was in substance a complaint that the Intercreditor Agreement will give effect to majority rule and enable the Plan Creditors to use a Notes Representative to give effect to it. But the SchVG permits majority rule (apart from certain limited exceptions) and permits the appointment of a joint representative to act on behalf of all the noteholders on the vote of a majority. Part 26A also permits the Court to cram down a dissenting class of creditors where the majority have voted in favour of the restructuring plan.

(10) Finally, as Mr Smith recognised, the acid test is how Clause 10(3), Clause 19 and the provisions of the Intercreditor Agreement work in practice in the event of a breach of the LTV Covenant. I have made a series of detailed findings about how they are likely to work in that event in deciding whether Condition A is satisfied. Standing back and considering those findings, I do not consider that the likely outcome or the exercise of powers by the Notes Representative which it will involve is unfair to the 2029 Plan Creditors.

(5) Recognition

331. Mr Bayfield, Mr Perkins and Miss Wang submitted that in a scheme or plan with international elements, the Court will need some credible evidence which shows that there is "at least a reasonable prospect that the scheme will be recognised and given effect" in any other relevant jurisdictions where it is important that the scheme or plan is given effect: see Re *DTEK Energy BV* [2022] 1 BCLC 260 at [27](iv) (Sir Alastair Norris). In the present case, the relevant foreign jurisdictions are Germany (where the Group is headquartered and where its underlying assets are located) and Luxembourg (where the Parent Company is incorporated). They also submitted that it was highly likely that an order of the Court sanctioning the Plan would be recognised in both Germany and Luxembourg: see *Gategroup Guarantee* at [101] to [121].

332. I accept these submissions. They were supported by the evidence of Professor Thole in relation to German law and the evidence of Professor Prüm in relation to Luxembourg law. Mr Smith and Mr Al-Attar did not seriously challenge the evidence of either expert in relation to this issue and the AHG called no evidence on Luxembourg law. Moreover, the case which Mr Al-Attar put to Professor Thole in relation to the acceleration of the notes was entirely consistent with this conclusion. I am satisfied, therefore, that there is at the very least a reasonable prospect that the Plan will be recognised under both German law and the law of Luxembourg.

X. Acceleration

333. On 10 and 13 March 2023 members of the AHG served notices under Clause 10(2) declaring that €145 million of their SUNs were immediately due and payable because the Plan Company had commenced proceedings under Part 26A. They were followed by other members who gave notice under Clause 10(2) declaring that a further €40.3 million SUNs were immediately due and payable for the same reason.

334. The Plan Company does not accept that the notices are valid and in Thole 2, Professor Thole gave German law evidence explaining why, in his opinion, these proceedings were not "Insolvenzverfahren" (the German word) within the

meaning of Clause 10(1)(e) because that term is limited to proceedings under the German insolvency code "Insolvenzordnung". On 29 March 2023 the AHG served an expert report from Dr Robert Hanel contesting this view. Dr Hanel did not give evidence but Mr Al-Attar cross-examined Professor Thole on this issue and made detailed submissions on the issue.

335. Mr Bayfield, Mr Perkins and Miss Wang submitted that it was not necessary for this Court to decide whether the notices (above) were valid as a matter of German law as a precondition to sanctioning the Plan. They submitted that if the parties cannot resolve this issue, it will have to be determined by a German Court (and, if necessary, on appeal). In the meantime, the Plan Company will take the risk that this issue might theoretically be decided against it by a German Court. They submitted that this is not a technical or legal defect in the Plan which makes it inoperable or infringes some mandatory provision of law.

336. I would have been extremely reluctant to decide this point unless it had been absolutely necessary for me to do so. It is a question of construction of a term in the German language in notes which contain a German jurisdiction clause and are governed by German law. Moreover, if I had decided the issue and the German Courts later reach the opposite conclusion, it might well have undermined the Court's decision to sanction the Plan.

337. But in my judgment, it is unnecessary for the Court to decide this issue because I have reached the conclusion that the acceleration of the €185.3 million SUNs does not make the Plan unlawful or inoperable for the following reasons:

(1) Mr Smith and Mr Al-Attar did not suggest any reason why the Plan could not take effect whilst the question of acceleration is either resolved consensually or by the German Courts. In *Instant Cash Loans*, for example, Zacaroli J was prepared to sanction the scheme even though it left the company and the landlords to negotiate individual surrenders of the relevant leases.

(2) If the issue cannot be resolved by agreement between the parties, then it will be determined by the German Court. If the issue is resolved in favour of the

Plan Company, the Plan will take effect as anticipated and intended by the Plan Company in the Explanatory Statement.

(3) If the Court decides against the Plan Company, then a number of further issues may arise. The Plan does not amend Clauses 10(1) and 10(2) and at first blush the Proposed Amendments ought not to have any effect on the notices themselves. The Court may also decide that given that they were served before the Plan took effect, it is not open to a majority of the Plan Creditors in each series of SUNs to instruct the Notes Representative to waive the Events of Default or to rescind the notices or to use its exclusive enforcement powers.

(4) But even if the relevant members of the AHG are successful in persuading the German Court that they are entitled to enforce their SUNs and they are not prepared to extend time for payment, Mr Bayfield submitted (and I accept) that it will be open to the Plan Company simply to pay off the individual Plan Creditors. Mr Smith and Al-Attar did not suggest that this would be impermissible or unlawful under the SUNs (as amended) or under the Intercreditor Agreement.

338. I am satisfied, therefore, that the Court should not refuse to sanction the Plan because a group of creditors have served notices under Clause 10(2). I have two reservations about this conclusion which I should state. First, Mr Bayfield did not suggest that the Explanatory Statement anticipated this possibility. However, I am satisfied that the failure to do so should not prevent the Court from sanctioning the Plan. The individual Plan Creditors only served the notices under Clause 10(2) on 10 and 13 March 2023 (although they had served termination notices which were rejected on the day of the Convening Hearing). If it were otherwise, a group of dissenting creditors could derail a perfectly valid plan by raising an issue late or issuing proceedings in another jurisdiction shortly before the sanction hearing.

339. My second reservation is that if the Plan Company is unsuccessful in persuading the German Court that the notices were invalid, this may encourage other Plan Creditors to serve notices for the same reason and it may not be possible to pay off all of the Plan Creditors who do so. Again, I am satisfied that this objection should

not prevent the Court from sanctioning the Plan, which gives the Group time to achieve an orderly wind down and sale of the Group's assets. But it does not guarantee that the Plan Company will never commit an Event of Default and the Proposed Amendments are not intended to take away the rights of individual Plan Creditors under Clause 10 (as I have explained). Indeed, there was nothing to stop the AHG from waiting until the day after the Court had sanctioned the Plan and then serving notices under Clause 10(2) (as amended).

XI. The Explanatory Statement

340. The Explanatory Statement is 111 pages long excluding the Appendices (a number of which are essential to making sense of the principal document). Akin Gump originally set out a list of complaints about it. In their Skeleton Argument Mr Smith and Mr Al-Attar reduced this to two material inadequacies: first, the choice for Plan Creditors was not explained adequately because there was no sensitivity analysis and because BCG failed to update their report to take into account material changes in interest rates. Secondly, the Explanatory Statement failed to set out the cumulative benefits received by SteerCo. In his oral submissions Mr Smith concentrated on the first. He submitted that the Explanatory Statement gave no proper sense of the serious uncertainties surrounding the Plan, there was no sensitivity analysis and that any Plan Creditor reading it would think "that they would be very likely to get par recovery".

341. In view of my detailed findings in relation to Condition A, I am not satisfied that the Explanatory Statement failed to include sufficient information to enable the Plan Creditors to make an informed decision: see *Amicus Finance* at [37](a). Moreover, the Plan Company put forward a very detailed analysis which estimates the likely returns for Plan Creditors both in insolvency proceedings and under the Plan: see *Re Sunbird Business Services Ltd* [2020] EWHC 3459 (Ch) at [40] (Snowden J). I have found that this is the most likely of the alternatives presented to the Court and I am satisfied that Plan Creditors who understood this would not have been misled about the balance of risk for them.

342. Moreover, I am not satisfied that it was necessary for the Plan Company to include any sensitivity analysis or to update the market model to take into account interest

rates. Mr Wolf gave evidence that material short term increases in interest rates would not necessarily have had an impact on the market model and that sensitivity analysis based on changes in interest rate might have been misleading. I accept that evidence. Finally, I am satisfied that the Explanatory Statement contained sufficient information about the fees which SteerCo will obtain under the Plan. Indeed, I have summarised the relevant paragraphs (6.26 to 6.31) (above).

343. But even if there were serious deficiencies in the Explanatory Statement, I am not satisfied that they would have had any effect on the votes cast at the Plan: see *Sunbird Business Services* (above) at [96]. As Mr Bayfield pointed out, the terms of the Explanatory Statement are of less relevance to a dissenting class. The AHG opposed the Plan and Mr Smith and Mr Al-Attar did not suggest that changes to the Explanatory Statement would have made a difference to their votes (or call any evidence to the contrary). Moreover, Mr Wolf had carried out a sensitivity analysis by the time of the hearing and if the results of that analysis had been included in the Explanatory Statement, it would have provided further support for the Plan.

XII. Conclusion

344. For all of these reasons I am satisfied that it was appropriate to sanction the Plan and to give effect to the votes cast by the majority of the Plan Creditors in all classes including the 2029 Notes. I am grateful to all counsel and their instructing solicitors for their hard work and the quality of their submissions.