THE HIGH COURT

COMMERCIAL

[2020 No. 162 COS.]

IN THE MATTER OF NORDIC AVIATION CAPITAL DESIGNATED ACTIVITY COMPANY

AND

IN THE MATTER OF THE COMPANIES ACT 2014 TO 2018

AND

IN THE MATTER OF A PROPOSAL FOR A SCHEME OF ARRANGEMENT PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT 2014 TO 2018

JUDGMENT of Mr. Justice David Barniville delivered on the 11th day of September, 2020

Introduction

1. The applicant company, Nordic Aviation Capital Designated Activity Company (the "Scheme Company"), applied for orders under s. 453 of the Companies Act, 2014 (the "2014 Act"), sanctioning a proposed scheme of arrangement between the Company and certain of its creditors (the "Scheme Creditors") and for various related orders.

2. The Scheme Company is a major aircraft leasing company based in Limerick whose business has been severely affected by the COVID-19 pandemic.

3. The proceedings first came before me on 9th June, 2020 when the Scheme Company sought and obtained orders summoning meetings of the Scheme Creditors for the purpose of considering and voting on the scheme in the terms then being proposed. Various further orders were made in the course of the proceedings. The meetings of the Scheme Creditors proceeded on 9th July, 2020 (having been adjourned from 24th June, 2020). The scheme (in an

amended form)(the "Amended Scheme) was unanimously approved at both meetings of the Scheme Creditors on 9th July, 2020 (in value 98% of the unsecured creditors and 91% of the secured creditors attended and voted in favour of the Scheme at the respective Scheme meetings). I made further directions in relation to the sanction hearing on 10th July, 2020.

4. The sanction hearing proceeded on 21st July, 2020. Solicitors and counsel representing an ad hoc group of the secured creditors of the Scheme Company (representing just under 50% in value of the debt owed to the secured creditors) and two ad hoc groups of unsecured creditors appeared at the hearing and supported the Scheme Company's application for court sanction in respect of the Amended Scheme. Having had the opportunity of considering the papers in advance, and having heard counsel for the Scheme Company and counsel and solicitors for the Scheme Creditors who were represented at the hearing, and in light of the enormous urgency of the matter, I gave an *ex tempore* judgment immediately following the hearing. I made an order pursuant to s. 453(2) of the 2014 Act that the Amended Scheme be sanctioned and further directed pursuant to Article 53 of Regulation (EU) No. 1215/2012 (the "Brussels Recast Regulation") that a certificate be issued certifying that the court had jurisdiction to hear and determine the application pursuant to Article 1(1), Article 4 and Article 8(1) of that Regulation.

5. While I provided my reasons for making these orders in my *ex tempore* judgment, I indicated that I would prepare a more detailed written judgment in due course having regard to some of the unusual aspects of the application, including the extensive ancillary releases of parties provided for in the Amended Scheme and the international jurisdictional issues which arose on the application and which had not been the subject of any previous judgment of the Irish courts. That is the purpose of this written judgment.

Factual Background

6. The factual background to the Scheme Company's application was set out in a very extensive grounding affidavit sworn on its behalf by Soren M. Overgaard, a director and Chief Executive of the Scheme Company, on 10th July, 2020 (the "grounding affidavit"). There was no dispute between the parties in relation to the facts set out in that grounding affidavit. Several other affidavits were sworn in the course of the proceedings, and it will be necessary from time to time to refer to some of those affidavits in the course of this judgment.

The Scheme Company

7. The Scheme Company is an Irish incorporated company with its registered office in Limerick. The Scheme Company heads the Nordic Aviation Capital Group of companies (the "NAC Group"). The NAC Group has 138 subsidiaries operating in 16 countries across the world. Sixty-five of those subsidiaries are incorporated under the laws of Ireland. The NAC Group is the world's largest regional aircraft lessor and the fifth largest commercial aircraft lessor in terms of the number of aircraft held.

8. The NAC Group has built a leading platform specially designed to meet the needs of customers in the regional aircraft sector. That platform leverages the NAC Group's scale, state-of-the-art maintenance operations, long-standing client relationships and access to capital to efficiently locate new and secondary market aircraft acquisitions and facilitate a rapid return to service for redelivered aircraft. The NAC Group's business model maximizes the useful life of aircraft and leverages superior knowledge of regional aircraft assets and ability to evaluate maintenance status to efficiently trade aircraft in the secondary market.

The NAC Group's Fleet

9. As of 31st March, 2020, the NAC Group's fleet consisted of 490 in-demand aircraft, with lease arrangements with 75 customers in 50 countries. Of these, 423 were leased, 31 were subject to a binding lease or letter of intent to lease between the NAC Group entities

and a future lessee and 36 were Aircraft in Inventory (i.e. aircraft available for lease which were not currently subject to a binding lease or letter of intent).

10. The NAC Group's fleet is diversified across a variety of regional aircraft types, including ATR turboprops, Embraer regional jets and Bombardier aircraft (consisting of both turboprops and regional jets).

11. The NAC Group's aircraft are typically leased under operating leases, with agreements requiring the lessee to pay a monthly lease rental payment, and in many cases, include periodic payments for the maintenance of the aircraft (the "Supplemental Rent") based on usage. The lessee is responsible for paying monthly rental costs under the agreement regardless of hours flown or whether the aircraft is in use. As a lessor, the NAC Group receives the lease revenue and Supplemental Rent and also assumes responsibility for extending the lease term or redeploying the aircraft after the lease term expires. In some cases, the NAC Group may choose to sell an aircraft instead of re-leasing it. In line with industry practice, the NAC Group's leases are denominated in US dollars, which is also the functional currency of the NAC Group. Customers of the NAC Group include major international airlines such as Garuda, Azul, LOT Polish Airlines, Air Canada, AeroMexico and Deutsche Lufthansa.

Financing of the NAC Group

12. The NAC Group has in place a range of financing arrangements (the "NAC Group Debt"). As at 31st March, 2020, the NAC Group Debt was comprised of over 90 separate finance facilities, provided by over 85 different lenders, with a total sum of approximately US$5.923 billion advanced and outstanding under those facilities.

13. The NAC Group Debt can be separated into:-

(a) Unsecured debt in the sum of approximately US$3.697 billion (the "NAC Unsecured Debt"); and

(b) Secured debt in the sum of approximately US$2.226 billion (the "NAC Secured Debt")(together these are referred to below as the "Financing Arrangements").

14. The Scheme Company has guaranteed substantially all of the NAC Group Debt (which includes the payments under the finance leases). In addition, as explained below, pursuant to a Deed of Indemnity and Contribution dated 5th June, 2020 (as amended on 2nd July, 2020), the Scheme Company agreed to be liable as a primary obligor to the lenders under the Finance Lease Structures and the JOLCO Loan Agreements for any amount owing to them by the Finance Lessors and JOLCO Lessors (as those terms and arrangements are explained below).

NAC Unsecured Debt

15. NAC Aviation 29 Designated Activity Company ("NAC 29") is an Irish incorporated Company, having its registered office in Limerick. The Scheme Company is the sole shareholder of NAC 29.

16. NAC 29 is the primary obligor for the vast majority of the NAC Unsecured Debt (the "NAC 29 Debt"), with the exception of one unsecured facility whereby the Scheme Company is the primary obligor. The Scheme Company, however, has guaranteed all of the NAC 29 Debt.

17. The respective unsecured facilities (and the corresponding guarantees given by the Scheme Company) for the NAC Unsecured Debt are governed by English, German or New York law.

NAC Secured Debt

18. The secured facilities utilise, principally, three different forms of finance structure, being (a) Direct Secured Facilities, (b) Finance Lease Structures and (c) JOLCO Facilities.

(a) Direct Secured Facilities

19. The Direct Secured Facilities comprise finance of certain direct and indirect wholly owned subsidiaries of the Scheme Company (the "NAC Subsidiaries"), incorporated in Ireland, Singapore or Denmark. Each of those NAC Subsidiaries has furnished security directly to the respective lenders (the "Secured Lenders"). The Scheme Company guaranteed all of the Direct Secured Debt advanced to the NAC Subsidiaries, not just as surety, but also as a primary obligor (the "Secured Debt Guarantees"). As support for certain of those Secured Debt Guarantees, the Scheme Company separately furnished security over its shares in the relevant NAC Subsidiary. The Direct Secured Facilities and the corresponding Secured Debt Guarantees are governed by English or New York law.

(b) Finance Lease Structures

20. Some of the facilities that are governed by English or New York law are structured as a loan to an orphan special purpose vehicle (the "Lessor SPV"), which entered into a finance lease with the relevant NAC Group Company as finance lessee (the "NAC Lessee"). The payment obligations under the finance leases are guaranteed by the Scheme Company. The key structural features of this type of arrangement are that:-

(i) The obligations of the NAC Lessee under the finance lease are guaranteed by the Scheme Company in favour of the Lessor SPV (the "Finance Lease Guarantees");

(ii) The Lessor SPV assigns its rights under both the finance lease and the related Scheme Company guarantee to an agent (the "Secured Lease Agent"), who holds those rights for the benefit of the underlying lender (the "Finance Lease Lenders") and as security for the borrowings of the Lessor SPV; and

(iii) In the event of either the NAC Lessee defaulting under the finance lease, or the Lessor SPV defaulting under the loan, the Secured Lease Agent has the right to (i) accelerate the loan, (ii) enforce the assignment of the finance lease

and Scheme Company guarantee, and (iii) require payment from the Scheme Company for the lease termination amount.

(c) JOLCO Facilities

21. A slightly different finance lease structure is used for the facilities which are termed the "Japanese Operating Lease with Call Option" ("JOLCO"). The JOLCO Lessors financed or refinanced the majority of the purchase price of the relevant aircraft, with the proceeds of loans from one or more lenders (the "JOLCO Loan Agreements"), which are governed by English law. Certain rights of the JOLCO Lessors against the Group lessees and NAC DAC have been assigned by way of security to a security trustee (the "JOLCO Security Trustee"), for the benefit of the lenders under the JOLCO Loan Agreements (the "JOLCO Lenders").

22. In these structures, an additional layer of equity financing was provided by certain Japanese tax investors who have effectively paid the "deposit" for the purchase of the aircraft.

23. Pursuant to the JOLCO Leases, the relevant subsidiaries of the Scheme Company (as lessees) agreed to lease various aircraft from the JOLCO Lessors. There are two classes of rent payable, A Rent and B Rent. The A Rent equates to the loan repayments that are due by the JOLCO Lessor to the lender. The B Rent is payable at the end of the lease period and effectively reimburses the Japanese tax investors for the amount of their original equity investment.

24. The NAC Lessees enter into sub-leases with third parties to generate income from the aircraft. The JOLCO Leases are governed by English law. The Scheme Company has provided a guarantee (with a customary "principal debtor" clause) in respect of the obligations of the lessees under the JOLCO Leases (the "JOLCO Lease Guarantees"). These guarantees are also governed by English law.

The Scheme Creditors under the Finance Leases and JOLCO Leases

25. In respect of the relevant Finance Lease Structures and JOLCO Structures, the Finance Lease Lenders and the JOLCO Lenders are treated as the applicable Scheme Creditors for the purpose of the Amended Scheme.

Financial Covenants

26. The Unsecured Facilities and the Secured Facilities (together the "Facilities") contain a number of financial covenants that are tested by reference to the financial position of the NAC Group as a whole, many of which are given on a harmonised basis. This means that a breach of any of these financial covenants would cause an event of default under a very substantial portion of the financing arrangements of the NAC Group.

27. While the events triggered by breaches of such covenants vary from facility to facility, there are several overarching similarities. For instance, the majority of the Facilities contain a minimum NAC Group interest coverage ratio, and in respect of all Facilities containing such ratio, the minimum ratio is 150% (at any time) or 180% (at the end of any quarter).

28. The maximum NAC Group value to NAC Group debt ratio under most of the Facilities is 375%, excluding only a few exceptional facilities under which the maximum value to debt ratio is 750% or 1,000%.

29. The minimum NAC Group value trigger under most of the Facilities is US$1,125,000,000, or in the case of ECA-backed Facilities, US$1,300,000,000 at the end of

any quarter. Certain Facilities additionally require that the NAC Group maintain US$30,000,000 or US$40,000,000 in cash or cash equivalents.

30. By virtue of the Unsecured Debt Guarantees, the Secured Debt Guarantees, the Finance Lease Guarantees and the JOLCO Lease Guarantees (together the "Guarantees"), the Scheme Company is a primary obligor or equivalent under each of the Facilities.

31. The NAC Group's financing is structured such that certain Facilities have been borrowed by individual special purpose vehicles outside of the NAC Group, under which Facilities the Scheme Company is a primary obligor by virtue of the Guarantees.

32. Each Unsecured Lender, Secured Lender, Secured Lease Agent (on behalf of the Finance Lease Lenders) and JOLCO Security Trustee (on behalf of the JOLCO Lenders) has recourse to the assets of a NAC Group Company and/or outside special purpose vehicle (as applicable), either because:-

(a) their debts are formally secured over the assets of the borrower NAC Group Company and/or outside special purpose vehicle SPV (as applicable); or,

(b) in the case of the NAC 29 Debt owed by NAC 29 and its subsidiaries, because each Unsecured Lender in respect of that Unsecured Debt has the benefit of an unencumbered asset ratio covenant tested quarterly against the assets held by NAC 29 and its subsidiaries. The effect is that in practical terms, the rights of recourse to assets available to the Unsecured Lenders of NAC 29 and its subsidiaries mirror the rights of Secured Lenders over the other NAC Group companies and/or outside special purpose vehicles (as applicable) within the NAC Group.

Impact of the COVID-19 outbreak

Impact on the Aviation Industry

31. Human transmission of the highly infectious COVID-19 respiratory disease, caused

by the SARS-Cov-2 virus, was reported in late 2019. COVID-19 was declared by the World Health Organization ("WHO") as a pandemic on 11th March, 2020 and has since spread globally over the course of 2020.

32. The outbreak of the COVID-19 pandemic caused many public health officials across the globe to recommend precautions to mitigate the spread of the virus which include restrictions on international air travel and government guidance or orders limiting the movement of individuals. Additionally, many businesses have restricted non-essential travel for their employees as a result of the outbreak. These factors have depressed demand for air travel and severely disrupted many airlines' operations.

33. Commercial air traffic has fallen dramatically due to the COVID-19 outbreak. Most airlines have significantly reduced their capacity, and many could implement further reductions in the near future.

34. The cancellation of flights, in the period since March, 2020 prompted many airlines to process significant volumes of cash refunds and issue large amounts of travel credits to customers. Cancellations and cash refunds have negatively affected airlines' revenues and liquidity, with many airlines expecting such negative effects to continue if government authorities extend existing orders or impose new orders or other restrictions intended to mitigate the spread of COVID-19, if businesses continue to restrict non-essential travel for their employees, or if cautious attitudes to travel continue to depress future ticket sales.

35. Aircraft manufacturers have observed a significant increase in the number of requests for payment deferrals, contract modifications, lease restructurings and similar actions.

36. There is significant uncertainty with respect to when commercial air traffic levels will begin to recover, and whether and at what point capacity will return to or exceed pre-COVID-

19 levels.

Impact on the NAC Group

37. The COVID-19 outbreak has had a significant impact on the NAC Group's business. Prior to the outbreak, the NAC Group's results were already dependent on the aviation industry, which is cyclical, economically sensitive to prevailing economic conditions and highly competitive.

38. The COVID-19 outbreak has, however, disrupted the NAC Group's lessee customers' ability to meet their obligations under their leases. Sixty-five out of the NAC Group's 75 customers officially requested various degrees of lease concessions, extending all the way to a complete standstill in payments. This resulted in a very significant decrease of billed lease payments and Supplemental Rent collected by the NAC Group. In particular, the NAC Group was only able to collect 23%, 20% and 34% of billed payments for the months of April, 2020, May, 2020 and June, 2020 respectively. Since the foundation of the NAC Group in 1990, the month of May, 2020 was the worst month on record for percentage cash collections. Based on current cash collection assumptions, the NAC Group anticipated that cash collections for the months of July, 2020 and August, 2020 would be 30% of billed payments.

39. As a result of the disruption to the market caused by the COVID-19 outbreak, the NAC Group experienced an unforeseen drop in cash collection and the market value of the aircraft which form the core part of the NAC Group's asset base was expected to deteriorate significantly.

40. As a consequence of these developments, it was anticipated that by the end of July, 2020 the NAC Group could potentially breach, among other things, certain of its Financial Covenants under the Financing Arrangements, which are tested quarterly, with the possible triggering of acceleration or prepayment events on the basis of certain other provisions,

including material adverse effect clauses, third party lessee breaches of aircraft leasing agreements, aircraft going off-lease and/or restructuring actions taken by the NAC Group (the "Potential Breaches"). Furthermore, the uncertain liquidity position of the NAC Group meant that it was unlikely to be able to make scheduled principal and interest payments due under the Financing Arrangements while the current market conditions prevailed.

41. The NAC Group formed the view, therefore, that it was imperative that it be able to implement, as soon as possible, a series of arrangements with its lenders to defer the payment of principal in interest and final maturity amounts under the financing agreements and to waive any enforcement events which had already arisen or which might otherwise arise under any of the Financing Arrangements for the proposed period, namely, 30th June, 2020 to 30th June, 2021 (the "Waiver and Deferral"). That was the purpose of the Amended Scheme proposed by the Scheme Company which was the subject of this application for court sanction under Part 9 of the 2014 Act.

NAC Group's response to the Covid-19 outbreak

42. When it became apparent that the spread of COVID-19 would not be contained, the NAC Group began to actively assess both the anticipated reduction in lease rental cash-flows and a potential depression in the market value of aircraft that would result.

43. Based on a range of cash-flow scenarios generated by the NAC Group, a number of the NAC Group's credit facilities were identified as being at immediate risk of having certain of their respective covenants significantly challenged in near- to medium-term future. Based on those assessments, and with a view to relieving covenant pressure and maximising liquidity within the NAC Group as soon as possible, the NAC Group began to actively

consider its options, including the option of requesting appropriate waivers and/ or amendments and/ or the re-financing of the relevant facilities as soon as possible.

44. The NAC Group also implemented a range of further actions, including actions to:-

(a) stop incurring costs considered not absolutely necessary for the running of the NAC Group's business;

(b) stop cash payments to non-current airline lessees and instead use available off-sets; and

(c) reduce all non-essential expenditure (including on aircraft and selling, general and administrative expenses), and implement a hiring freeze.

45. Management of the NAC Group also engaged with the original equipment manufacturers and secured agreement in relation to its capital expenditure programme, which resulted in a reduction of US$220 million worth of capital expenditure commitments during the proposed covenant waiver period.

46. In view of the rapidly deteriorating market conditions, Rothschild & Co and Clifford Chance LLP were appointed by the NAC Group in March, 2020, to advise on the financial and legal practicalities of seeking and securing a waiver of the Potential Breaches, and to make contingency plans for the NAC Group in the event that no such waiver was secured. McCann FitzGerald, the NAC Group's Irish solicitors, were engaged shortly thereafter. Rothschild & Co, Clifford Chance LLP and McCann FitzGerald continued to advise NAC DAC in relation to its options, liquidity, debt service and covenant analysis up to and including in its application for court sanction in respect of the Amended Scheme.

47. In circumstances where over 85 Lenders financed the NAC Group, and in light of the short time-frame available within which a waiver and deferral of the Financial Covenants had to be implemented, the NAC Group concluded in early April, 2020 that it would not be possible to agree bilateral waivers and deferrals with each Lender. It was concluded, on the

basis of the advice received, that the only available option was to try and implement a waiver and deferral, in substantially the form of the "Waiver and Deferral" outlined below, by way of a statutory scheme of arrangement.

48. Therefore, the Scheme Company contacted a core group of Lenders during the course of April 2020 and May 2020, to discuss the challenges facing the NAC Group and the terms of a possible waiver and deferral to be implemented by way of a statutory scheme of arrangement.

49. As the NAC Group's operations are substantially run from Ireland and as the Scheme Company, NAC 29 and 65 of the NAC Group subsidiaries are Irish registered companies, it was decided to seek to implement the Waiver and Deferral by way of an Irish scheme of arrangement under Part 9 of the 2014 Act. In addition, at least one of the Scheme Creditors is Irish domiciled, Citibank Europe plc, which is owed the sum of approximately US$100 million by NAC 29 (as a co-borrower with Freyja Aviation One Malta Limited) which is guaranteed by the Scheme Company.

Deed of Indemnity and Contribution

50. The Scheme Company supplemented its existing obligations under certain of the Financing Arrangements by entering into a Deed of Indemnity and Contribution dated 5th June, 2020 (the "Deed of Indemnity and Contribution") which was subsequently amended by way of a Deed of Amendment and Variation dated 2nd July, 2020 (the "Deed of Amendment and Variation"). The Deed of Indemnity and Contribution and the Deed of Amendment and Variation are both governed by Irish law.

51. Under the terms of the Deed of Indemnity and Contribution (as amended), the Scheme

Company agreed:-

(a) in favour of the Lenders under each Finance Lease Financing Arrangement, that it would pay any amount and perform any obligation that the Finance Lessor under that Finance Lease Financing Arrangement is required to make payment of or perform; and

(b) in favour of the Lenders under each JOLCO Financing Arrangement, that it would pay any amount and perform any obligation that the JOLCO Lessor under that JOLCO Financing Arrangement is required to make payment of or perform,

(each being referred to as an "Indemnity Claim").

52. In addition, the Scheme Company agreed that if any NAC Group entity and/or any Finance Lessor/JOLCO Lessor ("Special Purpose Entity") became obliged to make payment of any indebtedness under the relevant Financing Arrangement, in circumstances where that indebtedness was also the subject of any form of guarantee, indemnity or similar assurance against loss granted by the Scheme Company (the amount of such indebtedness being the "Guaranteed Obligation"), the Scheme Company would pay to that NAC Group entity and/or Special Purpose Entity by way of contribution, an amount that is equal to the Scheme Company's share (calculated on the basis the basis of the terms set out in the Deed of Indemnity and Contribution) (the "Relevant Share") of the portion of the amount of that Guaranteed Obligation that was actually paid by that NAC Group Entity or, as applicable,

that Special Purpose Entity, within five business days of receiving written demand for the same (each such claim being referred to as a "Contribution Claim").

53. Under its terms, the Deed of Indemnity and Contribution (as amended) was stated to expire:

(a) on 31st July, 2020 (or such later date as the Scheme Company might agree to in writing) in the event that the Amended Scheme had not become effective by that date, or

(b) if the Amended Scheme had become effective by the date referred to above, upon the final day of the Covenant Waiver Period.

54. The Scheme Company entered into the Deed of Indemnity and Contribution (as amended) in order to assist the implementation and effectiveness of the proposed scheme of arrangement. In his grounding affidavit, Mr. Overgaard explained the reasons why the Scheme Company entered into the Deed of Indemnity and Contribution (as amended). Essentially, the intention and object of it was that the Lenders to the Finance Lessors under the Finance Lease Financing Arrangements and the Lenders to the JOLCO Lessors under the JOLCO Financing Arrangements would have a direct claim against the Scheme Company (although they were already contingent creditors of the Scheme Company, as a result of the guarantees given by the Scheme Company under the respective leases which were assigned to the Lenders). It was felt that the Deed of Indemnity and Contribution (as amended) would bolster their status as creditors of the Scheme Company and, accordingly, the ability to include those Lenders as Scheme Creditors for the purposes of the Amended Scheme. It was further explained by Mr. Overgaard that if any NAC Group Company (including any NAC Finance Lessee), Finance Lessor or JOLCO Lessor became obliged to make payment of any indebtedness under a Financing Arrangement which is guaranteed by the Scheme Company, that NAC Group Company Finance Lessor or Finance Lessor would have an ability to seek a

contribution from the Scheme Company (in accordance with the terms of the Deed of Indemnity and Contribution (as amended)). Mr. Overgaard explained that the existence of a contribution claim that those parties would have against the Scheme Company would facilitate the recognition of the Amended Scheme in the United States pursuant to Chapter 15 of the United States Bankruptcy Code. A legal opinion from Daniel M. Glosband (US Counsel) was exhibited by Mr. Overgaard to the grounding affidavit.

55. It should be noted that the Scheme Company's evidence (which I accepted) was that, by entering into the Deed of Indemnity and Contribution and the Deed of Amendment and Variation, the Scheme Company was not taking on any additional liability for which it was not already liable prior to entering into the Deed, or against which it did not have an ability to mitigate against and/or control, for the reasons explained by Mr. Overgaard.

The Proposed Waiver and Deferral

56. As noted earlier, the NAC Group's revenues primarily comprise lease income derived from the lease of aircraft to airlines. As a result of the COVID-19 outbreak in January, 2020 and the consequent global depression of demand for air travel, the NAC Group encountered an increased number of lessees withholding or deferring lease payments. As a result, the NAC Group experienced an unforeseen drop in cash collection and cash flow projections showed a deficit in cash flow from the end of July, 2020. The NAC Group also anticipated a potential depression in the market value of aircraft as a result of the COVID-19 outbreak. As a result, the NAC Group anticipated Potential Breaches, being breaches of certain of its financial covenants in the Financing Arrangements and the possible triggering of prepayment events on the basis of material adverse effect clauses and so on.

57. In those circumstances, the Scheme Company and the NAC Group formed the view that it would be necessary for the Lenders (amongst other things) to defer the payment of

principal and interest and final maturity amounts under the Financing Arrangements and to waive any enforcement event which had already arisen or which would otherwise arise under any Financing Arrangement. The Waivers and Deferral terms which were proposed were described in detail in the Updated Scheme Circular provided by the Scheme Company for the purposes of the adjourned scheme meetings. The key aspects of the Waiver and Deferral sought were summarized by Mr. Overgaard in the grounding affidavit. They included financial and other covenant waivers for the period from 30th June, 2020 to 30th June 2021, the waiver of enforcement action against lessees in respect of waived enforcement events, an equity injection by NAC Luxembourg II SA (the direct parent of the Scheme Company) of US$60 million to the Scheme Company within five business days after the Scheme Effective Date, the deferral of principal repayments with all final maturity payments being deferred for specified periods, interest deferral, the provision of an agreed form of security to the unsecured lenders on certain terms, a cash sweep, as well as other important elements.

Consequences of a Failure to Implement the Proposed Waiver and Deferral

58. The uncontested evidence before the court was that the implementation of the Waiver and Deferral prior to the end of July, 2020 would enable the Scheme Company and the NAC Group to avoid breaching their covenants or otherwise triggering any enforcement event under the Financing Arrangements and ensure that they had access to sufficient liquidity to meet their obligations until at least 30th June, 2021 and also that the Waiver and Deferral would put the NAC Group in a position to meet future obligations, contingent on the recovery of the air travel sector and aircraft market values following the COVID-19 outbreak.

59. It was the further uncontested evidence before the court that, if the Waiver and Deferral was not implemented by the end of July, 2020, it was likely that an actual or potential event of default, including, among other things, an actual or potential breach of a

financial covenant, would exist on that date in respect of one or more of the NAC Group companies and that such default might also trigger cross-defaults in one or more of the NAC Group's Financing Arrangements.

60. It was also the uncontested evidence before the court that, in addition to the above, if the Waiver and Deferral did not take effect, the Scheme Company and the NAC Group would run out of available cash required to continue operations at the end of July, 2020 and that the Scheme Company and the other NAC Group obligors would breach the terms of their respective Financing Arrangements, which would allow the Scheme Creditors to take enforcement action based on the resulting events of default and consequential cross defaults.

61. The consequence of all of this, on the evidence (which I accepted) was that the NAC Group companies might have had to make filings under Chapter 11 of the US Bankruptcy Code or there might have been an uncontrolled liquidation of the NAC Group. The consequential value destruction from the NAC Group being forced to take such steps would otherwise be avoided if the Scheme Creditors agreed to the Waiver and Deferral for the duration of the Covenant Waiver Period.

62. The Scheme Company put in evidence a report prepared by EY entitled "Entity Priority Analysis" dated 10th May, 2020 (the "EPA Report") for the NAC Group. The EPA Report provided an estimate of returns for the all creditors of the NAC Group under a theoretical break-up analysis of the NAC Group as at 31st March, 2020, assuming an entity by entity liquidation. This involved the cessation of trading, assignment of leases to the NAC Secured Creditors and the break up and sale of the remaining assets of the NAC Group assuming distressed values.

63. Based on various assumptions, the EPA report stated that the estimated average recovery of the NAC Group's unsecured financiers would be in the region of between 58.6%

and 63.2% and the estimated average recovery of the NAC Group's secured financiers would be in the range of between 62.4% and 70.2%.

The Scheme of Arrangement

64. While the Financing Arrangements are variously governed by English, German and New York law, as the Scheme Company is an Irish Company, with its headquarters in Limerick, with half of its board of directors being Irish nationals, with its operations being substantially run from Ireland and with 65 active Irish registered subsidiaries within the NAC Group (including NAC 29), it was proposed by the NAC Group and the Scheme Company to implement the Waiver and Deferral by way of an scheme of arrangement, under Part 9 of the 2014 Act.

65. Each Scheme Creditor under the Financing Arrangements was to be a Scheme Creditor in respect of the indebtedness owed to them by the Scheme Company as primary obligor under or in connection with the Financing Arrangements. The indebtedness owed to each Scheme Creditor by the Scheme Company as primary obligor was:-

(a) in respect of the NAC 29 Financing Arrangements, the amounts owed to the Scheme Creditors under the related guarantee and indemnity granted by NAC DAC in respect of the obligations of the NAC 29 Borrower;

(b) in respect of each Direct Financing Arrangement, the amounts owed to the Scheme Creditors under the related guarantee and indemnity granted by NAC DAC, in respect of the obligations of the Direct Secured Borrower under that Direct Financing Arrangements;

(c) in respect of each Finance Lease Financing Arrangement, the amounts owed to the Scheme Creditors in respect of that Finance Lease by the assignment to the Scheme Creditors of the related guarantee and indemnity given by NAC DAC to

the Finance Lessor and by the Deed of Indemnity and Contribution (as amended); and

(d) in respect of each JOLCO Financing Arrangement, the amounts owed to the Scheme Creditors in respect of that JOLCO Financing Arrangement by the assignment to the Scheme Creditors of the related guarantee and indemnity given by NAC DAC to the JOLCO Lessor and by the Deed of Indemnity and Contribution (as amended).

66. Certain financing arrangements of the NAC Group were excluded from the Amended Scheme. Details of those excluded financing arrangements and other aspects of the Amended Scheme were explained in Mr. Overgaard's grounding affidavit.

Procedural Background

67. On 5th June, 2020, an application was made on behalf of the Scheme Company for various orders in connection with the proposed scheme. By order made on 9th June, 2020, I entered the proceedings in the Commercial List. I made certain other orders and directions.

68. First, I directed the summoning of the following meetings: (a) a meeting of the Secured Scheme Creditors and (b) a meeting of the Unsecured Scheme Creditors pursuant to s. 450 (3) of the 2014Act.

69. Second, in exercising the court's jurisdiction to summon meetings under s. 450(3), I gave directions pursuant to s. 450(5) that the appropriate scheme meetings to be held were,

the meeting of the Secured Scheme Creditors and the meeting of the Unsecured Scheme Creditors.

70. Third, I directed that the scheme meetings take place on 24th June, 2020 and made directions in relation to the material to be provided to the Scheme Creditors. I also directed that the summoning of the scheme meetings be advertised.

71. Fourth, I gave directions in relation to the appointment of a chairperson of the scheme meetings (who was to be Mr. Overgaard).

72. Fifth, I gave directions in relation to the scheme meetings themselves (which provided for the remote participation at the meeting by the Scheme Creditors in light of the prevailing public health situation).

73. Sixth, I gave the Scheme Company permission to bring an application for the court's approval of the proposed scheme in the Commercial List, in the event that the scheme was approved by the requisite majority at the scheme meetings.

74. Finally, I confirmed the appointment of Mr. Overgaard as foreign representative in any proceedings under chapter 15 of the United States Bankruptcy Code with respect to the proposed scheme and directed that he, or such other appropriate person selected by the Board of the Scheme Company, be authorised to act as foreign representative in any proceedings under Chapter 15 in relation to the Scheme.

75. The Scheme Company complied with the various directions in relation to the summoning of the scheme meetings and the advertising of those meetings (as appears from Mr. Overgaard's grounding affidavit and from the affidavit of Elliot Roberts sworn on 9th July, 2020). I am satisfied on the basis of that evidence that the directions made by the court on 9th June, 2020, regarding notice of the scheme meetings, advertisement of the scheme

meetings and the making available of documents to the Scheme Creditors were all complied with.

76. Mr. Overgaard was appointed as chairperson of the Scheme meetings on 24th June, 2020. However, the completed voting/proxy forms received from the Unsecured Scheme Creditors by the submission deadline indicated that the special majority of Unsecured Scheme Creditors required to approve the scheme pursuant to s. 453(2)(a) would not be reached. In order to continue discussions with the Unsecured Scheme Creditors and their advisors and to identify and address their concerns with the proposed scheme terms, the chairperson determined that it was appropriate, in the interests of the Scheme Creditors, to adjourn the scheme meetings until 9th July, 2020.

77. In the meantime, constructive engagement took place between the Scheme Company and its advisors and various groups of Lenders. The Scheme Company prepared an updated scheme circular and applied to the court on 2nd July, 2020 for further directions in relation to the adjourned scheme meetings. I made further directions on 2nd July, 2020. Those further directions included directions for the remote conduct of the adjourned scheme meetings and for the delivery of an Updated Scheme Circular which set out and explained the revised terms of the proposed scheme (which became the Amended Scheme). Evidence of compliance with the further directions made on 2nd July, 2020 was provided in Mr. Overgaard's grounding affidavit and in the affidavit of Elliot Roberts and the affidavit of Maya Dattani sworn on 16th July, 2020, which were before me on 21st July, 2020.

78. The adjourned scheme meetings proceeded on 9th July, 2020. Mr. Overgaard was appointed as chairperson of those meetings. The evidence established that the resolutions were approved by 100% in number and value of the Scheme Creditors present and voting at each of the adjourned scheme meetings (representing 98% in value of the Unsecured Scheme Creditors and 91% in value of the Secured Scheme Creditors). The Scheme Company's sole

shareholder, NAC Luxembourg II SA, had resolved by written resolution to approve the terms of the amended scheme on 8th July, 2020.

79. By a further order dated 10th July, 2020, I listed the hearing of the application for sanction in respect of the amended scheme for 21st July, 2020 and gave directions in relation to the advertising of that hearing date and for persons intending to appear at the hearing to provide advance notice of their intention. Evidence of compliance with the directions made on 10th July, 2020 was provided in a sworn affidavit by Michael Murphy sworn on 21st July, 2020. Mr. Murphy's affidavit further confirmed that other waivers necessary for the Amended Scheme to achieve its intended effect had been agreed and executed by the relevant parties and that other necessary steps had been completed (including the provision of funds for the equity injection to the scheme Company of US$60,000,000).

The Hearing on 21st July 2020

80. The hearing proceeded on 21st July, 2020. In addition to the Scheme Company, two ad hoc groups of unsecured creditors and one group of secured creditors were legally represented at the hearing. Those parties confirmed that they were supporting the Scheme Company's application that the Amended Scheme be sanctioned. Having heard submissions from the parties, and having had the opportunity of considering the papers in advance of the hearing (including very helpful written submissions prepared on behalf of the Scheme Company), I gave my ruling on the application at the conclusion of the hearing in the form of an *ex tempore* judgment. I made an order sanctioning the Amended Scheme. I also granted a certificate pursuant to Article 53 of the Brussels Recast Regulation, certifying that the court had jurisdiction to hear and determine the Scheme Company's application pursuant to Articles 1(1), 4 and 8(1) of that Regulation. I indicated that I would elaborate on my reasons in the form of a written judgment which would address the legal issues which arose on the

application, including some issues which had not previously been considered in this jurisdiction.

Court Sanction for Amended Scheme of Arrangement

Preliminary Issues

81. While the test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number of recent judgments of the Irish courts, it is necessary before turning to that test, and to the reasons why I considered that the various elements of the test were satisfied in the case of the Amended Scheme, it is necessary to address three preliminary issues which went to the jurisdiction of the court to approve the Amended Scheme.

82. Those three preliminary issues concerned (a) the jurisdiction of the Irish courts to sanction the Amended Scheme (as distinct from the recognition and enforcement of the Amended Scheme in other jurisdictions, including other European jurisdictions); (b) the effect (if any) of the Deed of Indemnity and Contribution (as amended) on the court's entitlement or discretion to sanction the Amended Scheme; and (c) the implications (if any) of the inclusion of the ancillary releases to the court's jurisdiction to sanction the Amended Scheme. I will deal with each of those issues in turn.

(a) Jurisdiction

83. The Scheme Company is a designated activity company (DAC) incorporated under the 2014 Act which has its registered office in Limerick. It is the head company in the NAC Group. The court's jurisdiction to sanction a scheme of arrangement between a company and its members or creditors (as the case may be) depends on the relevant company being a "*company"* to which Part 9 of the 2014 Act applies. Part 9, chapter 1 applies in the case of a

"compromise or arrangement" which is proposed between a *"company"* and its creditors (or any class of them) or its members (or any class of them). Reading s. 10(1) and s. 964 of the 2014 Act together, it is clear that Part 9 of the 2014 Act applies to a company which is a designated activity company (DAC). That is so unless provision is otherwise made in Part 9. No such provision is made in that Part. The Scheme Company is, therefore, a *"company"* to which part 9 of the 2014 Act applies. Accordingly, the court had jurisdiction under Part 9 of the 2014 Act to consider and, if appropriate, sanction a *"compromise or arrangement"* between the Scheme Company and its creditors.

84. It should also be noted that, on the undisputed evidence before the court, the operations of the NAC Group (which is headed by the Scheme Company) are substantially run from Ireland. Not only is the Scheme Company a Company incorporated and registered in Ireland, but so is NAC 29, the borrower/issuer under the finance structure in respect of the unsecured facilities or financing arrangements referable to the NAC Group. As are 65 of the 138 subsidiaries in the NAC Group. In addition, as noted earlier, at least one of the Scheme Creditors is incorporated and registered in Ireland, Citibank Europe plc, which is owed the sum of approximately US$100 million by NAC 29, which debt is guaranteed by the Scheme Company.

85. In those circumstances, therefore, I was quite satisfied on the evidence that the court had jurisdiction to consider and, if appropriate, sanction a proposed scheme of arrangement between the Scheme Company and its creditors. A separate legal issue arose as to the likely recognition and enforcement of any order the court might make sanctioning the Amended

Scheme in other jurisdictions, including the United States and other European jurisdictions. I deal with that issue later in this judgment.

(b) Implications of Deed of Indemnity and Contribution (as amended)

86. As explained earlier, the evidence before the court (which I accepted) was that the purpose of the Deed of Indemnity and Contribution (as amended) was to create an indemnity claim and a contribution claim against the Scheme Company. Essentially, the two principal purposes of the deed were: (i) to create a primary obligation on the part of the Scheme Company, thereby creating a *"ricochet claim"* in the form of the contribution claim, which would assist recognition of the Amended Scheme in the United States pursuant to Chapter 15 of the United States Bankruptcy Code and (ii) the *"ricochet claim"* would also provide for or enable the releases of claims against the JOLCO Lessors, the JOLCO Lessees, the Finance Lessors and the Finance Lessees. The evidence also established to my satisfaction that, in entering into the Deed of Indemnity and Contribution (as amended), the Scheme Company was not taking on any additional liability for which it was not already liable prior to entering into the deed or which it did not have an ability to mitigate against or to control. In that regard, I accepted the evidence set out at para. 87 of Mr. Overgaard's grounding affidavit.

87. It was quite properly brought to my attention on behalf of the Scheme Company, that the implications of a company entering into a type of arrangement similar to the Deed entered into by the Scheme Company in the present case for the court's entitlement or discretion to sanction a proposed scheme, have been considered in a number of judgments of the English courts. My attention was drawn in particular to *Re A. I. Scheme Ltd* [2015] EWHC 1233 (Ch) (Norris J.), *Re Codere Finance* (UK) Ltd [2015] EWHC 3778 (Ch) (Newey J.) ("*Codere*"), *Re NN 2 NewCo Ltd* [2019] EWHC 1917 (Ch) and [2019] EWHC 2532 (Ch) (both Norris J.) ("*NN2 NewCo*") and *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) (Trower J.) ("*Lecta Paper*"). It is unnecessary for the purpose of this aspect of the judgment to discuss any of

these cases in detail. It is, I believe, sufficient for me to record that I was persuaded that there was nothing in principle to prevent the Scheme Company from entering into the Deed of Indemnity and Contribution (as amended) in order to achieve the objectives outlined by Mr. Overgaard on behalf of the Scheme Company. I accept that it was a reasonable and commercial arrangement for the Scheme Company to have entered into and that it had reasonable commercial objectives, both of which may have enhanced the prospect of the Amended Scheme being sanctioned by the court and being recognised in at least one other jurisdiction, the United States. On the evidence before the court, I did not regard the Deed of Indemnity and Contribution (amended) as presenting any bar, whether jurisdictional or otherwise, to the court proceeding to consider, and if appropriate, to sanction the Amended Scheme.

(c) Ancillary releases

88. Another potential jurisdictional issue which arose in this application concerned the inclusion, as part of the Amended Scheme, of a waiver and deferral which would not only bind the Scheme Creditors as against the Scheme Company, but would also bind the Scheme Creditors as against all NAC Group companies who are debtors under the relevant facilities and (in relation to the Finance Lease financing arrangements and the JOLCO financing arrangements) as against the Finance Lessors and the JOLCO Lessors. The undisputed evidence on behalf of the Scheme Company was that the ancillary releases of the obligations of the debtor companies within the NAC Group, of the finance lessors and of the JOLCO lessors were necessary to give effect to the compromise and arrangement proposed under the Amended Scheme, on the basis that, without those releases, the NAC Group debtor companies, the Finance Lessors and the JOLCO Lessors would retain liability in respect of the amounts owed and to the relevant facilities, thereby undermining the effectiveness of the

Amended Scheme. It was urged on the court on behalf of the Scheme Company that, the inclusion of these ancillary releases in the amended scheme did not deprive the court of jurisdiction to sanction the scheme as a "*compromise or arrangement*" under Part 9 of the 2014 Act.

89. Having considered several impressive authorities from a number of different jurisdictions which have a statutory procedure very similar (albeit not identical) to that contained in Part 9 of the 2014 Act, and having considered my own judgment in *Re Ballantyne Re: plc* [2019] IEHC 407 ("*Ballantyne*"), I concluded that the inclusion of the ancillary releases in the Amended Scheme did not undermine the status of that scheme as a "*compromise or arrangement*" under Part 9 of the 2014 Act or otherwise deprive the court of jurisdiction to consider and, if appropriate, sanction the scheme.

90. In *Ballantyne*, the scheme at issue provided for the releases of claims which certain guaranteed noteholders might have had against (amongst others) the relevant scheme company and the guarantor. The scheme at issue provided for a release of the guarantor's liabilities. The application to sanction the scheme in that case was opposed. I rejected that opposition. In doing so, I adopted what has been referred to in the cases as a "pro-release" interpretation of Part 9 of the 2014 act, and concluded that it was open to the court to sanction a scheme which provided for the release of third party claims. I followed the judgment of Finkelstein J. in the Federal Court of Australia in *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 ("*Opes Prime*") and the judgment of the Full Court of the Federal Court of Australia on appeal in the same case [2009] FCAFC 125. I also referred to and followed a number of the English judgments which were cited to me including *Re T&N Ltd (No. 3)* [2007] 1 BCLC 563 ("*T&N*") and *Re Lehman Brothers International (Europe) (In administration) (No. 1)* [2010] 1 BCLC 496 *("Lehman Brothers").* Each of those cases adopted a pro-release approach to the interpretation of statutory provisions very similar to

Part 9 of the 2014 Act. I concluded that it was appropriate to adopt the pro-release approach to the concept of a "*compromise or arrangement*" under Part 9. I was, therefore, satisfied in *Ballantyne* that I had jurisdiction to proceed to consider whether to sanction the scheme proposed in that case which included the relevant third-party releases.

91. The ancillary releases provided for in the Amended Scheme were somewhat different to those which were at issue in *Ballantyne*. In this case the relevant releases (comprising the waivers and deferrals contained in the Amended Scheme) were for the benefit of the NAC Group debtor companies, the Finance Lessors and the JOLCO Lessors, as well as for the benefit of the Scheme Company itself. However, while the detail of the releases provided for in the Amended Scheme may have been different to those which were considered in *Ballantyne*, and in the other cases referred to in that judgment, it did not seem to me that there was any real difference in principle between the releases provided for in the Amended Scheme here and those at issue in the cases considered in *Ballantyne* and in that case, itself.

92. It was my view that the inclusion of the ancillary releases in the Amended Scheme did not mean that that scheme no longer constituted a "*compromise or arrangement*" which could be sanctioned by the court under Part 9 of the 2014 Act. In that regard, I agree with the statement of Finkelstein J. in the Federal Court of Australia in *Opes Prime* that the words "*compromise and arrangement*" should be construed liberally and in a flexible manner. I also accept that it is consistent with the objectives contained in Part 9 of the 2014 Act to follow the approach set out in the "pro-release" cases to which Finkelstein J. referred to in that case (including *T&N, Daewoo Singapore PTE Limited v. CEL Tractors* [2002] 2 LRC 66 and *Re Metcalfe & Mansfield Alternative Investments II Corp.* [2008] ONCA 587). I further agree with his conclusion that:-

"…*provided that there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release." (*Per Finkelstein J. at para. 55).

93. The conclusions reached by Finkelstein J. were upheld by the Full Court of the Federal Court of Australia on appeal. I endorse the views of the Full Court set out in the following part of its judgment in *Opes Prime*:-

"*66. Doubtless there are limitations on the extent to which a scheme of arrangement purporting to be between a Company and its creditors or a class of its creditors can purport to affect property of the creditor that has no connection with the Company or the relationship of creditor and debtor between the creditor and the Company. The mere fact that a person or entity is a creditor of a Company would not, of itself, justify an arrangement between that person or entity on the one hand and the Company on the other whereby property of the person or entity were confiscated without any benefit to the person or entity. Such an arrangement would not be approved by the court pursuant to s. 411(4) (b)*[1].

67. A purported scheme of arrangement must involve some arrangement in a sense that is to be construed liberally. No narrow interpretation should be given to the expressions 'compromise' or 'arrangement'. An arrangement within the meaning of s. 411 connotes some element of give and take. A proposal that conferred no benefit on creditors and constituted the mere confiscation of interests would not be an arrangement within the meaning of s.

[1] This is a reference to s. 411(4) of the Corporations Act, 2001 being the statutory equivalent to s. 453 (2) of the 2014 Act

411. An arrangement must involve some bargain giving benefit to both sides. However, there is no reason to construe the term in s. 411 as restricting in any way the nature of the bargain that might be made between Company and creditors (Re: Sonodyne International Ltd. [1994] 15 ASCR 494 at 497 – 8), subject only to the additional requirement that the arrangement must be within the power of the Company and not in contravention of the Corporations Act.

68. *A scheme of arrangement between a Company and its creditors or class of creditors is no more than a proposal to vary or modify the Company's obligations in relation to its debts and liabilities owed to creditors or class of creditors. There is nothing to prevent the Company from posing, as part of the arrangement, a term to the effect that, in consideration of what the Company has provided under this scheme, the creditors will discharge not only the debts and liabilities of the Company, but also the liabilities of, for example, sureties for the same debts and liabilities of the Company.*

69. *It is permissible to incorporate in a scheme of arrangement an involvement or participation by an outsider, being a person or entity who is not a party to the scheme as a Company or creditor (see Re: Glendale Land Development Ltd (in liquidation) [1982] 1 ACLC 540). Such arrangements are commonplace in relation to schemes involving takeovers. A scheme of arrangement made between a Company and its creditors under s. 411 binds only the Company and the creditors. Nevertheless, there is no reason why a bargain might not be struck between a Company and creditors whereby the creditors are bound to enter into an arrangement with third parties. So long as there is some element*

of give and take, such that the creditors receive something in return for the benefit conferred on a third party, there is no reason in principle why that term could not be part of a scheme of arrangement as contemplated by s. 411.

70. Questions of fairness, of course, are different…

71. …

72. There is simply no textual basis for the claim that a scheme cannot include a provision affecting the rights of a creditor against a third party and no basis for a gloss to that effect. All that is required is a compromise or arrangement between the Company and its creditors. These schemes are clearly between the scheme companies and their creditors.

73. There is also no principled basis for a restrictive approach. Provisions of s. 411 are intended to provide a flexible mechanism to facilitate compromises and arrangements between insolvent companies and their creditors as an alternative to liquidation. If there is an adequate nexus between a release or indemnity, on the one hand, and the relationship between the creditor and the Company, as creditor and debtor, on the other hand, there is no reason in principle why a scheme could not validly incorporate a release and indemnity such as is provided for in the schemes. The claims against Merrill Lynch and ANZ that are released and are subject to the indemnity arise out of dealings with the scheme companies. Thus, the claims of creditors against the scheme companies and the claims against Merrill Lynch and ANZ substantially

overlap. The arrangement involves a settlement of claims that are significantly interrelated. Without the release, there could be no compromise or arrangement."

94. I agree with those observations and conclusions and, in my view, they applied with equal force to the releases provided for in the Amended Scheme in this case.

95. My attention was also drawn by the Scheme Company to a recent judgment of the Court of Appeal in Singapore in *Pathfinder Strategic Credit LP v. Empire Capital Resources PTE Ltd.* [2019] SGCA 29 ("*Pathfinder*"). In that case, in a judgment delivered by Sundaresh Menon C.J., the Court of Appeal of Singapore considered (albeit on an *obiter* basis) the jurisdiction of the court to sanction a scheme which sought to compromise a debt between the creditor and a third party. It was argued by a group of objecting creditors that only third-party releases which are "*necessary*" to give effect to the proposed scheme may be compromised under a scheme of arrangement. Their argument was that given the nature of a guarantee, while a primary obligor may propose a scheme that involves the release of its guarantor's liabilities, a guarantor cannot propose a scheme that involves a release of the primary obligor's liabilities because such a release is not "*necessary*" for the compromise of liabilities between the guarantor and its creditors. I observe here that the releases to which objection was taken by the objecting creditors in *Pathfinder*, were very similar to the ancillary releases contained in the Amended Scheme at issue in the present case.

96. While it might be noted that the Court of Appeal of Singapore in *Pathfinder* was dealing with this objection by way of appeal from a decision of the first instance judge convening the relevant scheme meeting in respect of a proposed scheme, the court considered that it was appropriate to deal with the issue as one of jurisdiction (on the basis of a construction of the relevant legislation). In contrast, while I had to deal with the issue as an

issue of jurisdiction, I dealt with it at the sanction hearing, rather than at an earlier stage of the procedure.

97. In dealing with the question of jurisdiction and the implications for the court's jurisdiction of the presence of the third-party releases at issue in the case, the Court of Appeal of Singapore in *Pathfinder* noted that the test which the first instance judge had formulated was whether there was a "*sufficient nexus or connection*" between the release of the third-party liability and the relationship between the company and the scheme creditors. The Court of Appeal agreed with the judge at the first instance that the decision of Finkelstein J. in *Opes Prime* was persuasive. The court found that there was "*much practical attraction*" in the "*sufficient nexus*" test (paras. 77 and 79).

98. The court in *Pathfinder* was satisfied that the "*sufficient nexus*" test reflected the law in Australia so far as schemes of arrangement were concerned and concluded that that was the appropriate test to be applied in Singapore under the relevant legislation there. It was not satisfied that a necessity test had to be applied. The court further concluded that there were no good reasons for drawing a distinction between a primary and a secondary obligation in the context of a guarantee for the purpose of determining jurisdiction under the relevant provisions of the legislation which was equivalent to Part 9 of the 2014 Act. On the facts, the court concluded that the debt owed by the other members of the corporate group, which included the scheme company in that case, to the relevant creditors was closely related to the creditor debtor relationship between those creditors and the scheme company. While the court found that the "*sufficient nexus*" test was the appropriate test, it held that even if the test of necessity were to be adopted, it would have been inclined to find that it was satisfied on the facts. The court stated (at para. 81) that:-

> "*In our judgment, having regard to the legislative context of s. 210 (1) any jurisdictional test would have to be applied in a commercially sensible manner*

> *particularly where a group restructuring is concerned. In this context, even if it was the guarantor and not the primary obligor who was the scheme applicant, a release of the third-party debt owed by the primary obligor to the scheme creditors would still be regarded as necessary, since otherwise liability and enforcement risks would merely be shifted between members of the corporate group and the overall restructuring objective would be entirely unmet. Indeed, without a release of the primary obligor's liability, it seems to us unrealistic to even expect a guarantor within the same corporate group to settle or compromise its contingent liability through a scheme of arrangement. In that context, the third-party releases must be viewed as necessary to give effect to the proposed scheme."* (per Sundaresh Menon C.J. at para. 81)

99. At the hearing, I found those observations of the Court of Appeal of Singapore and its ultimate conclusions on the third-party release issue in *Pathfinder* to be persuasive and indeed compelling. It seems to me that they are particularly apposite to the releases provided for in the Amended Scheme. I was, and am, therefore, happy to endorse and apply that court's observations and conclusions to the releases contained in the Amended Scheme.

100. For completeness, I should note that my attention was also drawn to another recent Australian judgment, that of Gleeson J. in the Federal Court of Australia in *Re Tiger Resources Ltd.* [2019] FCA 2186 ("*Tiger Resources*"). In that case, the court adopted a pro-release approach and applied the approach taken by the Full Court in *Opes Prime* and by David Richards J. in *T&N*. Gleeson J. concluded that, consistent with the broad interpretation to be given to the term, the proposed scheme at issue was an "*arrangement*" within the meaning of the relevant Australian legislation.

101. Finally, I should make reference to the recent judgment of Trower J. in the High Court of England and Wales in *Lecta Paper UK Ltd*. (see citation earlier). The particular

scheme at issue in that case provided for the release and discharge of the scheme creditors' claims under certain senior secured notes against, not only the scheme company, but also against the parent and all of the guarantors of those notes who were third parties for that purpose. Trower J. noted that it was "*well-established that a scheme of arrangement can release claims by a creditor against a third party where such a release is necessary in order to give effect to the arrangement*" (para. 20) (my emphasis). He concluded that, as a matter of principle, the same approach was applicable where two companies were jointly liable as co-obligors for the same debt and that if that were not to be the case, one of the principal obligors would remain liable for the entire debt and might be entitled to claim a contribution from the scheme Company. He observed that such a claim was capable of defeating the purpose of the scheme. He held, therefore, that in the case of two principal debtors, a scheme proposed by one could effectively provide for a release in favour of both the principal obligors in the same way as a scheme proposed by a principal debtor could provide for an effective release of claims against a guarantor (he referred in that context to *Codere* and *NN2 NewCo* (see citations earlier).

102. While Trower J. referred to the release at issue in that case as being "*necessary*" in order to give effect to the arrangement, I prefer to adopt the "*sufficient nexus*" approach referred to in *Ballantyne,* in the *Opes Prime* judgments and in *Pathfinder,* although I do not think that the judge was expressing a view one way or the other on the appropriateness or otherwise of the "*sufficient nexus*" approach, in circumstances where he found on the facts that the releases were clearly "*necessary*" for the scheme to be effective.

103. In deciding that the court had jurisdiction to consider the Amended Scheme, as being a "*compromise or arrangement*" within the meaning of that term in Part 9 of the 2014 Act, I applied the "*sufficient nexus*" test and concluded that there was a sufficient nexus or connection between the ancillary releases provided for in the Amended Scheme and the

relationship between the Scheme Company and its creditors. I was satisfied that without those releases, the effectiveness of the Amended Scheme would be completely undermined. However, I went on to say that, even if the requirement was to establish that the ancillary releases were "*necessary*" to give effect to the Amended Scheme, I would have been satisfied that the test was met in this case, as a failure to provide for those releases would have completely undermined the effectiveness of the Amended Scheme. On either basis, therefore, I was satisfied that the court had jurisdiction to consider the Amended Scheme as a "*compromise or arrangement*" under Part 9 of the 2014 Act.

Test for Court Sanction for a Scheme of Arrangement Under Irish Law

104. The test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number of recent judgments of the Irish courts. In *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("*Colonia*"), the High Court (Kelly J.) set out the test to be applied in the case of a scheme of arrangement in relation to a solvent company. The test was subsequently applied to takeover or acquisition schemes: In *Re Depfa Bank plc* [2007] IEHC 463 ("*Depfa*") (Kelly J.) and *In Re SCISYS Group plc* [2019] IEHC 904 ("*SCISYS*") (Barniville J.). The test has also been applied to schemes of arrangement providing for corporate restructuring in other situations, including schemes which provided for the migration to the ICSD Model of settlement (*In Re UBS EFTs public limited Company* [2019] IEHC 860 ("*UBS*"), *In Re Allergan PLC* [2020] IEHC 214 ("*Allergan*"), *In Re Xtrackers (IE) public limited Company* [2020] IEHC 330 ("*Xtrackers*") and *FundLogic Alternatives PLC* [2020] IEHC 428, (*"FundLogic"*) (all Barniville J.) and to schemes of arrangement concerning insolvent companies (*In Re Ballantyne plc* [2019] IEHC 407 (Barniville J.)). *Ballantyne* is the most relevant judgment for present purposes. I was satisfied that the test set out in *Colonia* and referred to, and applied,

in those other cases was the appropriate test to be applied in considering the Company's application for court sanction in respect of the proposed scheme and I apply it here.

105. In summary, the test requires the court to be satisfied that the following five requirements have been fulfilled, namely, that:-

(1) Sufficient steps have been taken to identify and notify all interested parties;

(2) The statutory requirements and all directions of the court have been complied with;

(3) The class of members (in the case of a scheme of arrangement between the Company and its members) has been properly constituted;

(4) There is no improper coercion of any of the members concerned; and

(5) The scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.

106. In addition to those five requirements, the court must also be satisfied that the scheme is not *ultra vires* the Company the subject of the application. That might be the case where the scheme at issue involved the sale of the entirety of a company's undertaking, in circumstances where there was no power in the company's constitution permitting such a radical alteration in its position (for example: *In Re Oceanic Steam Navigation Co. Ltd* [1939] Ch. 41). There was no suggestion that the Amended Scheme was *ultra vires* the Scheme Company and I was satisfied that it was not.

107. I will now deal with each of the five requirements, or criteria, of the test derived from *Colonia* and considered and applied in the other cases referred to earlier.

(1) Steps to Identify and Notify Interested Parties

108. There was no issue in relation to the compliance by the Scheme Company with this first requirement. The affidavit evidence of Mr. Overgaard, Mr. Roberts, Ms. Dattani, Mr. Khan (sworn on 16th July, 2020) and Mr. Murphy satisfied me that the Scheme Company had taken all of the necessary steps to identify and notify all of the relevant parties, being the Unsecured Scheme Creditors and the Secured Scheme Creditors. The affidavit evidence provided on behalf of the Scheme Company demonstrated to my satisfaction that, having obtained directions from the court in relation to the notification of the original scheme meetings and the adjourned scheme meetings and of the sanction hearing, and having provided the information and materials referred to in the various orders made by the court, the Scheme Company had complied with those directions and had ensured that all of the relevant parties were identified and notified of the scheme meetings and of the sanction hearing.

109. In those circumstances, I was satisfied that, as required by s. 452 of the 2014 Act, all persons affected by the amended scheme were duly notified of the Amended Scheme by means of the Updated Scheme Circular and the other material furnished to the Scheme Creditors (as explained in the affidavit evidence provided to the court) and that the Updated Scheme Circular contained the necessary information as required by that section.

110. I was, therefore, satisfied on the basis of all of the evidence, that sufficient steps had been taken by and on behalf of the Scheme Company to identify and notify interested parties of the Amended Scheme and of the adjourned scheme meetings and to provide them with the information required under s. 452 of the 2014 Act.

(2) Compliance with Statutory Requirements and Court Directions

111. The statutory requirements which have to be fulfilled before a scheme of arrangement can become binding on the creditors of the company concerned (in the case of a scheme between a Company and its creditors) are set out in ss. 452 and 453 of the 2014 Act.

112. Section 452 contains the requirements as to the information which must be provided to the relevant creditors in relation to the proposed scheme of arrangement. I concluded that the Updated Scheme Circular provided to the Scheme Creditors in advance of the adjourned scheme meetings, in accordance with the directions made by the court, contained the information required under s. 452.

113. Section 453(1) provides that a scheme will become binding on the creditors of the company concerned if certain conditions are satisfied. Those conditions are set out in section 453(2). In summary, the conditions are as follows:-

(a) There must be a "*special majority*" of those voting at the scheme meeting in favour of a resolution agreeing to the scheme. A "*special majority*" is a majority in number representing at least three fourths in value of the creditors (s. 453(2)(a));

(b) Notice of the passing of the resolution at the scheme meeting, and that an application will be made to the court in relation to the scheme of arrangement, must be advertised in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the Company is situated (s. 453(2)(b)); and

(c) The scheme must be sanctioned by the court (s. 453(2)(c)).

114. As regards the statutory requirement contained in s. 453(2)(a), Mr. Overgaard's grounding affidavit and his report, as chairperson of the adjourned scheme meetings, demonstrated that the Scheme Company had more than met the requirement of having achieved the statutory *"special majority"* of those voting at the scheme meetings in favour of

the Amended Scheme. All of the votes cast at the two scheme meetings were in favour of the Amended Scheme. With regard to the meeting of the Unsecured Scheme Creditors, 100% of those present and voting, representing 98% in value of the relevant unsecured debt, who voted, voted in favour of the Amended Scheme. As regards the meeting of Secured Scheme Creditors, 100% of those present and voting, representing 91% in value of the total relevant secured debt, voted in favour of it. Therefore, I was satisfied that this statutory requirement was complied with.

115. As regards the statutory requirement contained in s. 453(2)(b), I was satisfied on the basis of Mr. Murphy's affidavit that the relevant notices were published in the Irish Times, in the Financial Times (International Edition) and in Iris Oifiguil on 14th July, 2020. I was satisfied that the publication of these notices complied with the statutory requirement contained in s. 453(2)(b) and with the directions made by the court on 10th July, 2020.

116. As regards the statutory requirement contained in s. 453(2)(c), this requirement relates to the obtaining of the court's sanction for the proposed amended scheme, which was the subject of the Scheme Company's application and is the subject of this judgment. As I have indicated, I was satisfied that it was appropriate to sanction the amended scheme.

117. I was also satisfied on the evidence that the Scheme Company had complied with all of the orders and directions made by the court prior to the hearing of the Scheme Company's application on 21st July, 2020.

118. In those circumstances, I was satisfied that the second of the requirements or criteria which had to be fulfilled in order for the court to sanction the Amended Scheme were fulfilled, on the evidence before the court.

(3) Class of Members Properly Constituted.

119. The next requirement which had to be fulfilled by the Scheme Company was, that it had to demonstrate to the court that the classes of Scheme Creditors which voted at the adjourned scheme meetings on 9th July, 2020 were properly constituted.

120. In my order of 9th June, 2020, I gave a direction pursuant to s. 450(5) of the 2014 Act that the scheme meetings required to approve the proposed scheme should comprise two meetings: (a) a meeting of the Secured Scheme Creditors (as defined in the Scheme Circular) and (b) a meeting of the Unsecured Scheme Creditors (as also defined in that Circular). I was satisfied at that stage to give that direction on the *ex parte* application of the Company. Although no objection was taken by any person to the fact that the adjourned scheme meetings were conducted on the basis of these two classes of creditors, I had to be satisfied for the purposes of s. 450(3) of the 2014 Act that it was appropriate for the adjourned scheme meetings to proceed on the basis of these two classes of creditors.

121. It is well established that where no objection has been taken to the composition of the classes of creditors meeting at the relevant scheme meetings, the court should be slow to reach of different view as to the appropriateness of the meetings proceeding on the basis of those classes: see for example: *UBS, SCISYS, Allergan*, *Xtrackers* and *FundLogic*. I have previously endorsed the view expressed by Chadwick L.J. in the Court of Appeal of England and Wales in *Re Hawk Insurance Co. Ltd* [2001] 2 BCLC 480 ("*Hawk Insurance*"), that an applicant for sanction for a proposed scheme of arrangement would be *"entitled to feel aggrieved"* if the court, in the absence of any opposition and of its own motion, were to reach a different view as to the appropriateness of the class composition for the relevant scheme meetings to that reached at the earlier stage of the process (see, for example: *Allergan* at para. 28 and *FundLogic* at para. 48). However, as noted in the case law, as the court is not a rubberstamp, it was necessary for me to reconsider the position on this application, notwithstanding the absence of any objection to the appropriateness of the composition of the

classes of creditors at the relevant scheme meetings and notwithstanding the unanimous support for the Amended Scheme on the part of those creditors who were present and voted at those meetings.

122. The legal principles applicable to class composition have been discussed in a number of the authorities. They were very recently considered by me in my judgments in *Allergan Xtrackers* and *FundLogic*. At para. 30 of my judgment in *Allergan*, I stated as follows:-

> *"As discussed by me in UBS and in SCISYS, the leading statement on the question of the class composition of meetings is that made by Bowen's LJ. in the English Court of Appeal in Sovereign Life Assurance Company v Dodd [1892] 1 QB 405, where he stated:*
>
> > *'It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'"* (p. 583)

123. As noted in many of the cases, this test has been considered and applied in numerous subsequent cases. The relevant principles were very helpfully summarised by Lord Millett in the Court of Final Appeal of Hong Kong in *Re UDL Argos Engineering Ltd* [2001] HKCFA 54, by the English Court of Appeal in *Re BTR plc* [2000] 1 BCLC 740 and in *Hawk Insurance*, by Lloyd J. in the English High Court in *Re Equitable Life Assurance Society* [2002] EWHC 140 ("*Equitable Life*") and more recently by Hildyard J. in *Re Apcoa Parking (UK) Limited* [2014] 2 BCLC 285). In *Equitable Life*, Lloyd J. noted that it was necessary to balance the power of the majority and that of the minority and stated that:-

> "*…whereas unnecessary subdivision of a class may thwart a proper scheme altogether because of a veto thereby afforded to a small minority, on the other hand if*

it is said that there has been an unfairness or oppression on the part of the majority in a larger undivided class, the control mechanism is the court's scrutiny at the sanction stage: see Re Hawk insurance Co Ltd… and Nordic Bank plc v. International Harvester Australia Ltd…" (para. 46)

124. The test in *Sovereign Life Assurance* was approved in this jurisdiction by Laffoy J. in the High Court in *In Re Millstream Recycling Ltd* [2009] IEHC 571. It has also been approved and applied by me in several of the recent cases. In the case of a scheme of arrangement between a company and its creditors, the proper focus is on the legal rights possessed by the creditors of the company. If those rights are not so dissimilar as to make it impossible for the creditors to consult together with a view to their common interest, then it is appropriate to treat the creditors as a single class.

125. There is a useful summary of the test applied in England and Wales in one of the judgments on which the Scheme Company relied: *Re Stronghold Insurance Company Limited* [2018] EWHC 2909 (Ch) ("*Stronghold Insurance*"). In considering the class or classes of creditors (or members, as the case may be), the court applies a two-stage test. Hildyard J. described those stages as follows:-

"At the first stage, the focus is on rights: if there is no difference in their respective rights the fact that they may have opposing commercial or other interests is not relevant to class constitution (though it may become relevant at a subsequent stage). This requires consideration of (a) the rights of creditors in the absence of the scheme and (b) any new rights to which the creditors become entitled under the scheme. At the second stage of the test, if there is a difference in such rights, the question is whether, in the court's assessment and looking at the issue from the point of view of the two groups in the round (that is, not having regard to individual and special or separate commercial interests), the differences in their rights and their treatment

under the proposed scheme are such as to make it impossible for them to consult together with a view to their common interest…" (at para. 42)

126. The test as so described by Hildyard J. is very similar to that applied in this jurisdiction, as discussed in cases such as *UBS*, *Xtrackers* and *FundLogic*.

127. I agree with Hildyard J that the question of class composition is *"a matter of judgement on the facts of each particular case"* (para. 43). I also agree with him that the following points are relevant in the exercise of that judgement and I accept that they also reflect the law in this jurisdiction:-

"(1) Only those whose rights are sufficiently similar that they can properly consult together with a view to their common interest should be included in a single class; but equally, those with rights sufficiently similar to the rights of others that they can realistically be expected to consult together to that end should be required to do so, lest by ordering separate meetings the court gives a veto to a minority group (and see Warren J's emphasis on this in Re Sovereign Marine & General Insurance Co Ltd [2006] BCC 774; [2006] EWHC 1335 (Ch)).

(2) The test should not be applied in such a way that it becomes an instrument of oppression by a minority: Re Hawk at [33] (Chadwick LJ).

(3) In assessing class constitution, the court considers whether there is more that unites creditors than divides them (in considering the terms of the scheme at their proposed scheme meeting): Re Telewest Communications Plc (No 1), [40].

(4) A broad approach is to be taken, and the differences may be material, certainly more than de minimis, without leading to separate classes: Re

Telewest Communications Plc (No 1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752, [37]." (per Hildyard J. at para. 43)

128. In the present case, the Scheme Company formed the view (for the reasons set out in detail in Mr. Overgaard's grounding affidavit) that it was appropriate to treat the Scheme Creditors as two classes, the Unsecured Scheme Creditors and the Secured Scheme Creditors. For that reason, two scheme meetings of the Scheme Creditors were summoned and took place.

129. In determining the appropriateness of the composition of the Scheme Creditors for the purposes of the scheme meetings, the court may also be required to consider the appropriate comparator when determining the similarity or dissimilarity of the rights of the relevant scheme creditors. Where a company is insolvent, the appropriate comparator will normally be the rights of the creditors in a winding up of the company. That was recognised by the Chadwick L.J. had in *Hawk Insurance* (at para. 42). In *Sovereign Marine and General Co. Ltd* [2007] 1 BCLC 228, Warren J. in the High Court of England and Wales considered what Chadwick L.J. said in *Hawk Insurance* and stated:-

"The fact that the alternative to a scheme was an insolvent winding up was of significance not only because it provided a direct comparator for financial outcome, but also because it enabled a common interest to be identified." (at para. 87)

130. In considering whether the classes of creditors have been properly determined, the *"starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed"* (per Hildyard J. at para. 48 of *Stronghold Insurance*). Hildyard J. explained why that was so (at para. 49):-

"49. The reason is two-fold. First, a fair comparison between a policyholder's rights if there is no scheme and its rights under the proposed scheme depends on ascertaining the nature and quality of the right in the 'non-scheme world',

and the latter depends on the appropriate comparator. Secondly, only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights to be weighed fairly.

50. Thus, for example, the likelihood of imminent liquidation may accentuate or diminish the importance of lender priority according to the effect of liquidation on the rights in question, and on whether the assets of the Company on liquidation would be sufficient to cover all or only some debts according to their different positions in the debt waterfall."

131. Where a company, the subject of a proposed scheme, is solvent, the rights of the creditors in a liquidation may not be an appropriate comparator: *Re British Aviation Insurance Co Limited* [2006] 1 BCLC 665; [2005] EWHC 1621 (Ch). However, as noted earlier, where the company is insolvent, the rights of the creditors in a winding up will normally be the appropriate comparator.

132. The Scheme Company's evidence was that if the Amended Scheme was not approved by the Scheme Creditors and sanctioned by the court, it might be necessary for the NAC Group of companies to make filings under Chapter 11 of the US Bankruptcy Code or there might have had to be an uncontrolled liquidation of the NAC Group. In those circumstances, the Scheme Company considered that the potential recovery for the Scheme Creditors in the event of a liquidation of the Scheme Company and other companies in the NAC Group was the appropriate comparator to the recovery they would achieve under the Amended Scheme. I agreed that, on the facts, this was the appropriate comparator. I also noted the conclusions contained in the EPA report prepared by EY, which demonstrated that recovery by the

Secured Scheme Creditors and the Unsecured Scheme Creditors would be significantly impaired in the case of a breakup of the NAC Group as at 31st March, 2020, assuming an entity by entity liquidation.

133. In all the circumstances, therefore, I accepted that the appropriate comparator was the estimated outcome for the Scheme Creditors in a winding up of the Scheme Company and other companies in the NAC Group. I also accepted that it was appropriate to have two classes of Scheme Creditors, the Secured Scheme Creditors and the Unsecured Scheme Creditors, as the Secured Scheme Creditors had security over the assets of the Scheme Company and other companies within the NAC Group, whereas the unsecured Scheme Creditors did not have the benefit of such security.

134. For those reasons, I was satisfied that the classes of Scheme Creditors were appropriate and that the third requirement of the test to be met was clearly fulfilled by the Scheme Company.

(4) Coercion

135. The court must also be satisfied that there has been no coercion of the creditors in respect of the approval of the scheme. As has been pointed out in a number of the cases mentioned (including *Ballantyne*, *UBS*, *SCISYS*, *Allergan*, *Xtrackers* and *FundLogic*), every scheme in a sense involves an element of coercion, where a dissenting creditor may be bound by the scheme, notwithstanding its opposition to it. However, as explained in *Ballantyne* (at para. 63), what this requirement is focused on is improper coercion or pressure by one group or section of creditors on another, similar perhaps to the oppression of a minority interest in a company. The Scheme Creditors voted unanimously in favour of the proposed scheme and there was clearly no question of coercion in the present case. Therefore, I held that this requirement had also been fulfilled by the Scheme Company.

(5) Approval by Intelligent and Honest Person

136. The fifth and final requirement which must be fulfilled is that, the court must be satisfied that the proposed scheme is such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her own interests, might reasonably approve of it. This requirement has been widely considered and discussed in several Irish, and other, cases, a number of which were discussed by me in *Ballantyne*. It is unnecessary to consider the cases in any detail in this judgment.

137. The test was most succinctly put by Kelly J. in *Depfa* in the terms summarised in the previous paragraph. In considering whether the test is satisfied, it is important to bear in mind, as stated by Kelly J. in *Colonia* and in *Depfa*, and by me in *Ballantyne*, *UBS*, *SCISYS*, *Allergan*, *Xtrackers* and *FundLogic*, that the court does not act as a rubber stamp in considering whether to sanction a scheme which has been approved by the relevant scheme creditors. That said, however, the court will be slow to reach a different view in respect of the scheme to that reached by experienced persons involved in the relevant market or industry relevant to the company who voted in favour of it.

138. As I mentioned in *Allergan*, *Xtrackers* and *FundLogic*, Parker J. in *Re Ocean Rig UDW Inc*. (18th September, 2017, Grand Court of the Cayman Islands, Parker J), stated in the case of a creditor scheme:-

> *"It is clear, therefore, that the court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the*

scheme, and in that regard the court's own view as to whether the scheme is reasonable or even the best scheme is not relevant." (para. 89)

139. That is the approach which I have adopted in considering the Scheme Company's fulfilment of this element of the test.

140. I was satisfied that this requirement was clearly complied with by the Scheme Company for several reasons. Among those reasons were: first, the Amended Scheme had the overwhelming support of the Scheme Creditors. The Scheme Creditors are clearly sophisticated participants in a highly specialised market and were undoubtedly the best judges of what was in their commercial interest. The court should be very slow to second-guess the exercise by them of their commercial judgement. Second, the Scheme Company had the benefit of expert financial and legal advice in formulating the scheme originally proposed and the Amended Scheme. The Scheme Company and the NAC Group and their advisors worked closely and constructively with the Scheme Creditors and their representatives at all stages of the process, including in the period between the date on which the scheme meetings were originally convened and the date of the ultimate hearing of the sanction application. Legal representatives of the various groups of Scheme Creditors appeared at all of the procedural hearings in the course of the proceedings. The commercial rationale for the Amended Scheme was obvious (to ensure the survival of the Scheme Company and other companies in the NAC Group) and that was clearly outlined to the Scheme Creditors. Third, the EPA report prepared by EY demonstrated that the Scheme Creditors would do considerably better under the Amended Scheme than in a winding up. While that does not necessarily mean that the Scheme Creditors might not have concluded that it was in their commercial interests to vote against the Amended Scheme, they did not do so. On any objective view, there was a sound commercial basis for the Amended Scheme.

141. I was satisfied on the evidence that, the Amended Scheme was fair and equitable and that it was one which an intelligent and honest person, being a member of the relevant class of creditors, acting in his or her own interests, might reasonably approve of. The fact that the Scheme Creditors unanimously voted in favour of the amended Scheme was powerful evidence of that.

142. I was, therefore, satisfied on the evidence that all of the five requirements of the test were fulfilled by the Scheme Company. However, before I could be satisfied to sanction the Amended Scheme, it was necessary for me to address two further issues. Those issues concerned the likelihood of the recognition and enforcement of the Amended Scheme in other jurisdictions and the potential application and implications of the Cape Town Convention. I address those two issues in the final two sections of this judgment.

Recognition and Enforcement: Jurisdictional Issues

143. Before considering the particular issues in relation to jurisdiction under the Brussels Recast Regulation which arose on this application, it is necessary to deal with the more general point in relation to the potential recognition of the Amended Scheme in other relevant jurisdictions.

144. In *Re Magyar Telecom BV* [2014] BCC 448 ("*Magyar Telecom*") and in *Lecta Paper*, it was observed that the court will not generally make an order which has no *"substantial effect"* and that *"before the court will sanction a scheme it will need to be satisfied that the scheme will achieve its purpose"* (per Trower J. in *Lecta Paper* at para. 39). I agree with those observations. A similar approach is taken in this jurisdiction.

145. The Scheme Company provided evidence that the Amended Scheme would be recognised in various relevant jurisdiction including England, New York and Germany. Mr. Overgaard exhibited to the grounding affidavit legal opinions from English, US and German

counsel as evidence that the Amended Scheme would be recognised in those jurisdictions (bearing in mind that the Financing Arrangements are governed by English, New York and German law). In addition, Mr. Overgaard exhibited legal opinions from counsel in several other relevant jurisdictions where NAC Group company borrowers and Finance Lessors, whose debts were to be amended by the Amended Scheme, are incorporated. Opinions were provided from counsel in the Cayman Islands, Cyprus, Denmark, Japan, Malta and Singapore.

146. I considered those legal opinions and formed the view that they demonstrated that the Amended Scheme was likely to have substantial effect and was likely to be recognised in each of those jurisdictions. Indeed, I note that the Amended Scheme has since been recognised in the United States under Chapter 15 of the US Bankruptcy Code. The question of the potential recognition of the amended Scheme under the Brussels Recast Regulation was raised by the Scheme Company and was addressed in detail in the very helpful legal opinion provide by David Allison QC and in the comprehensive written submissions provided by the Scheme Company. I was satisfied that the Amended Scheme did fall within Article 1 of the Brussels Recast Regulation and that the proceedings seeking sanction for the Amended Scheme involved *"civil and commercial matters"* under that Article of the Regulation. I was also satisfied that the court had jurisdiction to sanction the Amended Scheme under various provisions of the Regulation, in circumstances where several of the Scheme Creditors were domiciled in other Member States of the European Union such that the scheme could be recognised in those jurisdictions. I set out briefly now my reasons for being so satisfied.

147. The first issue to address is whether the amended Scheme fell within Article 1 of the Brussels Recast Regulation. That issue has been considered in several English cases which were referred to in Mr. Allison's opinion and in the Scheme Company's written submissions.

148. Article 1 of the Regulation provides that it applies in *"civil and commercial matters"* and does not extend to certain types of cases (which are not relevant for present purposes). However, Article 1.2(b) provides that the Regulation does not apply to:-

> *"bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;"*

149. An application to sanction a scheme of arrangement is not a *"bankruptcy"* or a *"proceeding relating to the winding-up of an insolvent company"*. However, it could potentially have fallen within the term *"judicial arrangements, compositions and analogous proceedings"* under Article 1.2(b). However, although that was the conclusion reached in two English cases under the precursor to the Brussels Recast Regulation (*Re DAP Holding NV* [2006] BCC 48 and *Re La Mutuelles du Mans Assurances IARD* [2006] BCC 11), that is not now the prevailing view of the English courts. That view is based on the fact that it was clear from the relevant *travaux preparatoires* of the original Brussels Convention (from which the Brussels Recast Regulation was ultimately derived) and the Draft Insolvency Convention that both instruments were designed to dovetail with each other. The two relevant instruments are now the Brussels Recast Regulation and the Recast Insolvency Regulation (Regulation (EU) 2015/848). Schemes of arrangement are not included in the list of insolvency proceedings in Annex A to the Recast Insolvency Regulation. In order to ensure that an application to sanction a scheme of arrangement does not fall within a gap between these two Regulations, they are considered to dovetail with each other. The existence of the dovetailing principle as between these regulations (or more correctly between their predecessors) was confirmed by the CJEU in *Nickel & Goeldner Spedition GmbH v. Kintra* UAB [2015] QB 96 (at para. 21) and *Comite d'entreprise de Nortel Networks SA v. Rogeau* [2015] BCC 490 (at para. 26). That principle has been applied in several of the recent English cases.

150. In *Re Rodenstock GmbH* [2012] BCC 459 ("*Rodenstock*"), Briggs J. held that proceedings seeking court sanction for a scheme in relation to a solvent company fell within the scope of the original Brussels Regulation. He held that they were clearly *"civil and commercial matters"* within Article 1.1 and that they were not excluded from the Regulation under Article 1.2(b). He held that it was no part of the purpose of that exclusion, construed by reference to the *travaux preparatoires*, to exclude any civil or commercial matter which did not fall within the scope of the Insolvency Regulation or which was not connected with bankruptcy or insolvency. While Briggs J. left open the question as to whether schemes of arrangement in relation to insolvent companies were within the scope of the original Brussels Regulation, even if they were not proposed as part of insolvency proceedings, that issue was determined by David Richards J. in *Magyar Telecom*. He stated:-

> *"As schemes of arrangements are not insolvency proceedings falling within the Insolvency Regulation and as it is generally accepted that the purpose of Article 1.2(b) is to enable the Judgments Regulation and the Insolvency Regulation to dovetail almost completely with each other…, it logically follows that the exclusion in Article 1.2(b) does not extend to a scheme of arrangement involving an insolvent Company, at least unless the Company is the subject of an insolvency proceeding falling within the Insolvency Regulation. In other words, an order sanctioning a scheme between an insolvent Company and creditors is subject to the Judgments Regulation, at least if the Company is not subject to insolvency proceedings to which the Insolvency Regulation applies…"* (para. 29)

151. Those cases were referred to by Snowden J. in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) ("*Van Gansewinkel*"). In that case, Snowden J. made express reference to the dovetailing principle (at paras. 43 and 44) and noted that it had been endorsed (albeit not in the context of a scheme case) by the CJEU in the two judgments referred to earlier.

152. I was persuaded by the reasoning contained in *Rodenstock* and, in particular, in *Magyar Telecom* and agreed that an application for court sanction in respect of a scheme of arrangement in relation an insolvent company is a *"civil and commercial matter"* for the purposes of Article 1.1 of the Brussels Recast Regulation and is not excluded from that Regulation under Article 1.2(b). I was satisfied that an application for sanction in respect of a scheme in relation to an insolvent company is not an "*insolvency proceeding*" under the Recast Insolvency Regulation and that logically, therefore, on applications for court sanction in respect of a scheme of arrangement for an insolvent Company falls within the Brussels Recast Regulation.

153. Having reached that conclusion, it was then necessary to consider whether the court had jurisdiction to sanction the Amended Scheme under Chapter II of the Brussels Recast Regulation, in circumstances where some of the Scheme Creditors were domiciled in other Member States of the European Union.

154. I was persuaded that I should adopt the usual practice of the English Courts of assuming (without deciding) that Chapter II of the Brussels Recast Regulation applies and that the Scheme Creditors are *"defendants"* who are being *"sued"* by the Scheme Company for the purposes of Chapter II (although I believe that those assumptions are actually correct). The practice of the English Courts is to consider whether, on the basis of that assumption, jurisdiction can be found under Chapter II and, if it can, they take the view that there is no need to test whether that assumption is correct. In most, if not all, of the English cases, the court has concluded that it would have jurisdiction under Chapter II, often in reliance on Article 8, on the basis that one or more of the scheme creditors were domiciled in the UK: *Magyar Telecom*, *Van Gansewinkel*, *Re DTEK Finance PLC* [2017] BCC165 (Newey J.) and [2016] EWHC 3563 (Ch) (Norris J.) ("*DTEK*") and *Lecta Paper*. As that seemed to me to be a sensible approach, I was prepared to adopt it in the present case.

155. The Scheme Company relied on Article 4.1, Article 7(1)(a) and Article 8(1) of the Brussels Recast Regulation. I was satisfied that the court had jurisdiction under Article 4.1 and Article 8.1. In those circumstances, the Scheme Company agreed with my suggestion that it was unnecessary to consider whether the court had jurisdiction in respect of the Scheme Creditors under Article 7(1)(a).

156. Article 4.1 provides that:-

> *"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."*

157. On the evidence, at least one of the Scheme Creditors is domiciled in Ireland, Citibank Europe plc. That creditor was owed approximately US$100 million by NAC 29. That debt was guaranteed by the Scheme Company. That Scheme Creditor was entitled to appear to oppose the Scheme Company's application for sanction in respect of the Scheme and would be bound by the result of the application. On that basis, it could be regarded as a person being *"sued"* in the courts of its Member State for the purposes of Article 4.1 of the Brussels Recast Regulation.

158. As regards Scheme Creditors domiciled in other Member States of the EU, I was satisfied that Article 8(1) of the Brussels Recast Regulation applied. Under that provision, a person domiciled in a Member State may also be sued:-

> *"where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;"*

159. On the basis that those Scheme Creditors can be regarded as *"defendants"* (on the basis that they too could have appeared and opposed the application and would be bound by the result), and having regard to the fact that at least one of the Scheme Creditors is domiciled

in Ireland, I was satisfied that the court had jurisdiction in relation to the Scheme Creditors who were domiciled in other Member States, in accordance with the provisions of Article 8(1). A similar conclusion was reached in a number of the English cases including *DTEK* (at the convening hearing before Newey J. and at the sanction hearing before Norris J.), Re *Metinvest BV* [2016] EWHC 79 (Ch) and *Lecta Paper*.

160. While in *Van Gansewinkel*, Snowden J. considered the numbers and size of the scheme creditors domiciled in England and concluded that they were sufficiently large to satisfy the test of expediency in Article 8(1), other judges took the view that it was unnecessary to consider the numbers and size of the creditors domiciled in England for the purpose of determining whether Article 8(1) is engaged and that it was only necessary for one of the creditors to be domiciled in England for that purpose: *DTEK* (Newey J. and Norris J.) and *Lecta Paper*. I preferred the approach adopted in the latter cases which seemed to me to be more consistent with the express wording and objective of Article 8(1). I do not believe that it is necessary to establish that more than one Scheme Creditor is domiciled in Ireland or for the court to consider the size of the Scheme Creditor's claim in order for Article 8(1) to be engaged. In any event, the one Scheme Creditor who is domiciled in Ireland could not, having regard to the size of its debt (US$100 million), be said to be immaterial. I was satisfied that, in those circumstances, it was expedient to hear and determine the application to sanction the Amended Scheme insofar as it applied to all EU domiciled Scheme Creditors under Article 8(1).

161. In those circumstances, I held that the court had jurisdiction to hear and determine the Scheme Company's application for court sanction in respect of the Amended Scheme under Article 1(1), Article 4(1) and Article 8(1) of the Brussels Recast Regulation. On that basis, I concluded that the Scheme was likely to be recognised in other Member States of the European Union under the provisions of the Brussels Recast Regulation.

The Cape Town Convention

162. The Scheme Company quite properly drew to my attention the provisions of the Cape Town Convention and its accompanying Aircraft Protocol (both of which have force of law in Ireland pursuant to s. 4(1) of the International Interests in Mobile Equipment (Cape Town Convention) Act, 2005). In the event that the Cape Town Convention and the Aircraft Protocol applied to the Amended Scheme, fundamental difficulties might have arisen as regards court sanction for the scheme, having regard to the provisions of those legal instruments. The Scheme Company forcefully argued that the Cape Town Convention and the Aircraft Protocol did not apply and that schemes of arrangement, including the Amended Scheme, fell outside the definition of *"insolvency proceedings"* for the purposes of the Cape Town Convention and the definition of an "*insolvency related event*" under the Aircraft Protocol.

163. The Scheme Company provided expert evidence in support of its position in the form of an affidavit and expert report by Professor Jennifer Payne, Linklaters Professor of Corporate Finance Law at the University of Oxford. Professor Payne's conclusion was that the Amended Scheme did not fall within the definition of *"insolvency proceedings"* for the purposes of the Cape Town Convention and did not fall within the definition of an *"insolvency-related event"* for the purpose of the Aircraft Protocol. Detailed written submissions were also provided on behalf of the Scheme Company which argued for that conclusion, in the event that the court found it necessary to deal with this issue. The Scheme Company also provided evidence from Joe Fay, a solicitor in McCann Fitzgerald, as to the status and role of the Aviation Working Group and the Cape Town Convention Academic Project and, in particular, as to the status of certain annotations made in June, 2020 to the Official Commentary on the Cape Town Convention.

164. Ultimately, I took the view that it was unnecessary for the court to embark upon a consideration of the potential issues arising under the Cape Town Convention and the Aircraft Protocol and that, in circumstances where none of the Scheme Creditors and, most importantly, none of the Secured Scheme Creditors, were opposing the Amended Scheme or relying on the Convention or the Protocol, the court should not get into this area. I was satisfied that, while a strong case was made on behalf of the Scheme Company that the Cape Town Convention and the Aircraft Protocol did not apply, it was not necessary for me to decide that issue in this case, having regard to the overwhelming support for the Amended Scheme by the Scheme Creditors and most significantly, for present purposes, by the Secured Scheme Creditors. While a small number in percentage and value terms of the Secured Scheme Creditors did not vote at the meeting of Secured Scheme Creditors, those creditors were provided with extensive information concerning the Amended Scheme and had ample opportunity to participate at the relevant scheme meeting. Those Secured Scheme Creditors who did not participate at the relevant scheme meeting did not appear to oppose sanction in respect of the Amended Scheme. The group of Secured Scheme Creditors who did vote and who were represented at the sanction hearing did not rely on the Cape Town Convention and the Aircraft Protocol and did not oppose the application for sanction in respect of the Amended Scheme. In those circumstances, I felt that it was not necessary and, indeed, might be inappropriate for me to embark upon a consideration of the issues arising under the Cape Town Convention and the Aircraft Protocol. I decided that it would be appropriate to leave over to a future case a determination of the potentially controversial issues which could arise in terms of the potential application of the Cape Town Convention and the Aircraft Protocol to schemes of arrangement under the 2014 Act. For those reasons, I did not find it necessary or appropriate to decide those issues in this case.

Conclusions

165. In conclusion, I have set out in this judgment the reasons why I was satisfied to make an order sanctioning the amended scheme of arrangement between the Scheme Company and the Scheme Creditors pursuant to s. 453(2) of the 2014 Act at the conclusion of the hearing on 21st July, 2020. I was satisfied that the Amended Scheme was fair and equitable and have explained in this judgment why I felt that it was appropriate for the court to exercise its discretion to sanction the Amended Scheme.

166. I have also explained in this judgment why I was satisfied that the court had jurisdiction in relation to the Amended Scheme under the provisions of the Brussels Recast Regulation and why I felt that it was unnecessary for me to decide any issues in relation to the Cape Town Convention or the Aircraft Protocol.