THE HIGH COURT

COMMERCIAL

[2023] IEHC 548

[2023 No. 69 COS]

[2023 No. 74 COS]

IN THE MATTER OF EFW21 RENEWABLE ENERGY LIMITED

AND

IN THE MATTER OF EFW21 RENEWABLE ENERGY (IRELAND) LIMITED

AND

IN THE MATTER OF

A PROPOSED SCHEME OF ARRANGMENT PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT, 2014 AS AMENDED.

Judgment of Mr. Justice Michael Quinn delivered on the 11th day of October 2023

1. EFW21 Renewable Energy Limited ("EFW21") and EFW21 Renewable Energy (Ireland) Limited ("EFW21 Ireland") intended to propose schemes of arrangement pursuant to the provisions of Part 9 of the Companies Act, 2014. I refer to these two companies as the "Scheme Companies" or the "Companies".

2. The first step in the procedure pursuant to Part 9 is the convening of meetings of the creditors or class of creditors intended to be bound by the scheme. The purpose of these meetings is to consider and vote on the proposals for a scheme of arrangement.

3. Section 450 provides that directors of a company may convene the appropriate meetings, or the court, on application made by the company (or a creditor or its liquidator), may order the summoning of the meetings. In this case the directors have applied for an order

pursuant to s.450(3) for the convening of the meeting and for ancillary directions concerning the convening and conduct of the meetings.

4. At this first step in these proceedings, namely the "convening", a substantial number of creditors opposed the making of an order. The principal ground of opposition was that the scheme circular exhibited by the Companies and intended to accompany the notification of meetings to consider and vote on the proposed scheme was manifestly deficient and did not comply with the requirements of s. 452 concerning the information to be provided with a notice convening a meeting. The objectors submitted that the proposed scheme circular was so deficient that the court should exercise its discretion to refuse the order convening meetings.

5. Unusually therefore the convening hearing was a contested hearing.

6. On the second day of the hearing the court was informed that the parties were engaging constructively in relation to further information to be provided by the Companies to the investors. On consent of the parties the court adjourned the application to enable this process continue.

7. After two further adjournments the hearing of the application resumed on 20th July, 2023. On that occasion the court was informed that the creditors who had originally objected to the convening order were no longer maintaining their objection to the order convening the meetings. This change of position arose from two developments.

8. Firstly, during the period when the matter was adjourned further information had been exchanged, among the parties, with the assistance of restructuring professionals and other advisors. A new version of the proposed circular was exhibited by the Companies which it was said would contain the further information provided, thereby ensuring that all of such further information would be placed before all creditors in the circular accompanying the notice convening the meeting.

9. Secondly, the court was informed that substantive changes were being made to the proposed scheme of arrangement. These were reflected in a revised draft of the proposed circular and appendices and of the intended scheme documents, all of which were exhibited.

10. In light of these developments and new exhibits the hearing proceeded. However in circumstances where the position adopted by the original objecting creditors was not being maintained the contents of the original and revised circular were not subjected to the same degree of critical analysis or submissions by the parties at the resumed hearing as might have been the case had the objection been maintained. Nonetheless, the jurisdiction of the court conferred by s. 450 and by Part 9 is a supervisory one, and not a "rubber stamp" exercise. The court must have regard to the fact that the process affects not only those who have participated in these hearings but all investor creditors in the class intended to be bound by the scheme. Serious allegations and objections were made at the convening hearing regarding the contents of the proposed scheme circular. Although the objections to the making of the convening order were withdrawn, the objectors did not state that they were withdrawing all their objections and reservations. Therefore, the court in exercising this jurisdiction must consider the objections made about the circular.

11. I had regard to all the evidence presented and submissions made over three days of hearing (18 May 2023, 20 July 2023 and 31 July 2023). I decided that the proposed scheme circular, as revised in preparation for the final day of the hearing, and a final version of which was exhibited on 31 July 2023, was not manifestly deficient, such as to warrant refusal of an order convening statutory meetings to consider and vote on the proposed schemes of arrangement. I therefore made the order and directions applied for, and stated that I would give my reasons later, which I do by this judgment.

12. Those who were represented at the hearings before this court, and others who would be affected by the scheme, will have the forum to challenge the scheme of arrangement at a

sanction hearing if it is approved by the required special majority and ultimately placed before this court for sanction pursuant to s. 453 of the Act. The adequacy or otherwise of information can still be a factor at such a hearing and can be relied on by any objectors, including those represented at these hearings, although arguably less weight would attach to objections on this (the "information") ground by those who have now withdrawn their objection to the convening order. It is well established that defects in information provided to creditors can be a material irregularity which would inform the court's determination at a hearing to sanction any scheme of arrangement (see *Mizen Design v. Peabody Construction* [2023] EWAC 973 and *Re Sunbird Business Services Ltd* [2020] EWAC 2493.)

Part 9 of the Act

13. Section 450 (3) of the Act is the section invoked by the Companies on this application and provides as follows:

> *"Where a compromise or arrangement referred to in subsection (1) is proposed and the directors of the company do not exercise the powers under that section* [the power to convene meetings of their own volition], *the court may, on the application, at any time, of any of the following persons* [being the company any creditor member or liquidator], *order a scheme meeting or scheme meetings of the creditors or members (or, as the case may be, the class of either of them concerned) to be summoned in such manner as the court directs."*

14. Section 450 (5) provides that in exercising its jurisdiction to summon meetings the court:

> *"may, in its discretion, where it considers just and convenient to do so, give directions as to what are the appropriate scheme meetings that must be held in the circumstances concerned".*

15. Section 451 provides that where an application is made for a convening order the court may:

> *"on the application of any of the following persons, on such terms as seem just, stay all proceedings or restrain further proceedings against the company for such period as the court sees fit."*

16. When this matter was first listed for directions on 8 May, 2023 before McDonald J. he granted a stay, on terms that any party affected by the stay may seek to have the stay discharged as against them. Subsequently an order was made varying the stay so as not to preclude the initiation of any application pursuant to s. 747 of the Act for the appointment of an Inspector. Such an application has been commenced by one of the investors and I shall return to that subject later.

17. Section 452 provides as follows:

> *"(1) Where a scheme meeting is convened or summoned under section 450 there shall—*
>
> *(a) with every notice convening or summoning the meeting which is sent to a creditor or member of the company concerned, be sent also a circular (in this section referred to as a "scheme circular")—*
>
> *(i) explaining the effect of the compromise or arrangement,*
>
> *(ii) stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons,*
>
> *(iii) where the compromise or arrangement affects the rights of debenture holders of the company, giving the like explanation in*

relation to the debenture trustees as it is required under subparagraph (ii) to give in relation to the company's directors,

(b) in every notice convening or summoning the meeting which is given by advertisement, be included the scheme circular or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the scheme circular." (emphasis added)

18. The principle controversy in this case, so far, has been the adequacy or otherwise of the proposed scheme circular.

19. Section 453 provides as follows:

"(1) If the following conditions are satisfied, a compromise or arrangement shall be binding, with effect from the date of delivery referred to in section 454 (delivery to the Registrar of Companies)*, on all the creditors or class of creditors referred to in section 450 (1)(a) or all the members or class of members referred to in section 450 (1)(b) (or both as the case may be)* (namely any creditors or members intended to be bound by the scheme and given notice of the meetings) *and also on—*

(a) the company, or

(b) in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(2) The conditions referred to in subsection (1) are:

(a) a special majority at the scheme meeting, or, where more than one scheme meeting is held, at each of the scheme meetings, votes in favour of a resolution agreeing to the compromise or arrangement (a "special majority" is defined by s. 449 to mean a majority in number representing 75% in the value of the

creditors or class of creditors or members or class of members present and voting either in person or by proxy at the scheme meeting)*;*

(b) notice—

(i) of the passing of such resolution or resolutions at the scheme meeting or scheme meetings, and

(ii) that an application will be made under paragraph (c) to the court in relation to the compromise or arrangement,

is advertised once in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situated; and

(c) the court, on application to it, sanctions the compromise or arrangement."

20. The process follow three stages. The first is the convening of the meeting of the creditors or class of creditors intended to be affected by the scheme, whether by the directors or, as in this case by an order of the court. Secondly, the holding of a meeting. This is essentially an exercise in democracy and if the proposals are approved by the required special majority the matter can proceed to the third stage.

21. Thirdly, the sanction of the court pursuant to s. 453 (2) (c). The criteria for sanction are well established, as identified by Kelly J. in *Re Colonia Insurance (Ireland) Ltd* [2005] IR 497, by Kelly J. in *Depfa Bank Plc* [2007] IEHC 463 and by Barniville J. (as he then was) in *Nordic Aviation Capital DAC* 11th September, 2020 – (2020, 162 COS). The five criteria are summarised by Barniville J. in Re Nordic as follows:

(i) that sufficient steps had been taken to identify and notify interested parties

(ii) that statutory requirements and all directions of the court have been complied with.

(iii) the class of members (in the case of a scheme of arrangements between the company and its members) has been properly constituted.

(iv) there is no improper coercion of any of the members concerned and

(v) 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.

22. Most of the reported cases concerning schemes pursuant to Part 9 (and its predecessor sections 201 and 202 of the Act of 1963) address the conditions for sanction of the scheme itself. Some cases have concerned also the question of whether the company has in formulating proposals properly classified the creditors and other parties to be affected by the scheme. See *Re Pye Ireland Ltd* unreported, Costello J. 11 March, 1985 and *Re Millstream Recycling Ltd* [2010] 4 IR page 253. No Irish case has been reported concerning objection to a convening order on grounds relating to the adequacy or otherwise of a scheme circular.

The convening hearing

23. In *Re Noble Group Ltd (No. 1)* [2019] 2 BCLC 505, Snowden J. considered the function of the convening hearing:-

> *"It has often been stressed that the function of the court at the convening stage is "emphatically not" to consider the merits or fairness of the proposed scheme: see e.g. Re Telewest Communications plc (No. 1) [2004] EWHC 924 (Ch) [2005] 1 BCLC 752 (David Richards J). Those issues will arise for consideration at the future sanction hearing if the scheme is approved by the statutory majority of creditors. The primary function of the convening hearing is to consider the question of the proper formulation of classes for the scheme meeting(s) that the court is being asked to order be convened… It is not, however, limited to that issue: other jurisdictional or quasi-jurisdictional issues may be raised."*

24. The matter was succinctly put by Sir Alistair Norris in *Re DTEK Energy BV* [2022] 1 BCLC 247 as follows:-

> *"It is useful to remind oneself that it is not the function of the court at this stage to consider the merits or fairness of the proposed scheme: and that it is the function of the court –*
>
> *i) to consider whether adequate notice of the convening hearing has been given which affords those affected by the scheme a fair opportunity to raise relevant issues at the hearing;*
>
> *ii) to consider threshold issues relating to the existence of jurisdiction (leaving to the sanction hearing issues relevant to the exercise of the jurisdiction);*
>
> *iii) to consider matters of class composition;*
>
> *iv) to consider the arrangements for ascertaining the wishes of scheme creditors at scheme meetings; and*
>
> *v) to consider whether there exists any "roadblock", any matter that would stand in the way of sanction being given even if the scheme were approved at the scheme meeting, such that the convening of the scheme meeting is without point."*

25. In the majority of applications which come before this court under s. 450, the principal focus is on establishing that the classes of creditors have been properly formulated. The classic test for this is that each class *"must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest"*. See Bowen L.J. in *Sovereign Life Assurance Company v. Dodd* (1892) 2 Q.B. 513 and numerous Irish cases following and applying that principle *(Re Millstream Recycling Limited* (Laffoy J.), *Xtrackers (IE) Plc* (Barniville J.) and *Nordic Aviation DAC* (Barniville J.)). Other matters typically addressed at the convening hearing concern directions

as to administrative matters for the meeting such as the fixing of date and time for the meeting, directing appropriate forms of advertisement, directions regarding the voting procedures, the conduct of the meeting, and the person to chair the meetings.

26. No Irish case law has been cited in which objections were raised at the convening stage as to the adequacy of information to be contained in the circular and whether it complies with the requirements of s. 452. However the equivalent provision in the English legislation, Part 26 of the Companies Act, 2006 (and its predecessors) has been the subject of close examination in a number of cases which are of assistance to this court and to which it is useful to refer. In some of these cases, the court has refused to order the convening of the meetings or adjourned applications for a convening order where it is found that the scheme circular was manifestly deficient. Some of these cases concerned extreme findings. In *Re Indah Kiat International Finance BV* [2016] EWHC 246 (Ch), Snowden J. refused to order the convening of meetings where he found that the proposed circular was: -

> *"inaccurate and/or incomplete in its account of the genesis of the scheme proposals and the role played by the supporting creditor. The circular did not provide sufficient information about such matters for the scheme creditors to be able to form a proper view as to the appropriate weight to be attached to the voting intention of the supporting creditor and the recommendation of the deponent, a director acting on behalf of the scheme company."*

27. In that case, Snowden J. found that the circular and the *"fairness opinion"* provided by consultants FTI did not contain the full and required analysis of all of the relevant alternatives to the scheme. He then considered the role of the court at a convening hearing:

> *"39. It is, of course, well understood that the convening hearing is 'emphatically not' the occasion upon which the court considers the merits or demerits of a scheme or engages in a debate as to any of the discretionary factors which will ultimately be*

relevant to the decision whether or not to sanction the scheme at the sanction hearing: see e.g. Telewest Communications plc (No.1) per David Richards J. As I have indicated above, the only issues that are generally appropriate to be considered at the convening hearing are the proper class composition of the scheme meetings, together with any other essential issue which, if decided against the scheme company, would mean that the court simply had no jurisdiction or would unquestionably refuse to sanction the scheme.

40. But the court is not bound to accept at face value bare assertions in the evidence in relation to class composition or any other matter. At the convening hearing, the applicant company has the burden of adducing evidence of sufficient quality and credibility to persuade the court to act. Further, and importantly, whether or not there is any opposition, the company proposing a scheme of arrangement has a duty to make full and frank disclosure to the court of all material facts and matters which may be relevant to any decision that the court is asked to make. The scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court.

41. In addition, the task of producing an explanatory statement is the sole responsibility of the scheme company, and it is well-established that the scheme company has a duty to place before members or creditors sufficient information for them to make a reasonable judgment as to whether the scheme is in their commercial interest or not: see e.g. Re Heron International NV [1994] 1 BCLC 667 and Residues Treatment & Trading Co Ltd v Southern Resources Ltd [1988] 14 ACLR 375 cited with approval by Neuberger J in Re RAC Motoring Services Ltd [2000] 1 BCLC 307.

42. It is most assuredly not the function of the court at the convening hearing to approve the contents of the explanatory statement (not least because the court has no

means of investigating whether what is said is accurate or complete). However, if the court detects, or its attention is drawn to, manifest deficiencies in the draft explanatory statement, it must be entitled to decline to convene the scheme meeting unless and until they are corrected. To proceed otherwise would risk non-compliance with the essential requirements of section 897 of the Companies Act 2006, or the court subsequently declining to sanction the scheme on the basis that it could have no confidence in the statutory majorities that had been obtained. But it must be emphasised that even if the scheme company purports to correct the identified deficiencies, this cannot preclude a challenge by a scheme creditor to the adequacy of the explanatory statement at the sanction hearing."

28. In other cases, the court has found that inadequate information was being provided concerning the proposed releases of liability for current and former directors of the scheme company or details relating to them.

29. *Indah Kiat* is a rare case in which the court refused a convening order on this ground. Most of the cases where the scheme circular has come under scrutiny, have been at the sanction hearing. One such case is *Re Sunbird Business Services* [2021] IBCLC 605, where Snowden J. refused to sanction a scheme, principally due to defects in the documentation of the scheme and the scheme circular. He stated in that case: -

"The scheme jurisdiction cannot be used to force a compromise on dissenting creditors unless there has been scrupulously fair and accurate compliance with the statute and the practice statement. The court is not involved simply to rubber stamp the wishes of the majority irrespective of whether there has been such compliance.

The paucity of information provided by the Company as part of the scheme process in this case, and indeed its general approach to engagement with creditors whom the

directors clearly felt were irrelevant or would be an obstacle to their plans, fell a considerable distance short of what was required for a fair process under [Part 26]."

30. In *Re Virgin Active Holdings Limited & Ors.* [2021] EWHC 814 Snowden J emphasised how rare it would be for the court to refuse a convening order by reference to complaints affecting the scheme circular:

"98. It is important to appreciate that neither my judgment in Sunbird nor paragraph 15 of the Practice Direction should be taken as signifying any intention that the convening hearing should become the forum for a detailed consideration by the court of the accuracy or adequacy of the contents of the explanatory statement. Paragraph 15 makes clear that the role of the court at the convening stage is primarily to consider whether the form of the explanatory statement is appropriate, and the court does not approve the accuracy or adequacy of the explanatory statement when convening the scheme or plan meetings.

99. In most cases, therefore, as was the case in Sunbird, the appropriate time at which a challenge to the accuracy or adequacy of the explanatory statement should be made is at the sanction hearing. That said, as I explained in Indah Kiat International Finance Co BV [2016] BCC 418 at 42 it is possible that if the court at a convening hearing detects or has its attention drawn to a manifest deficiency in the draft explanatory statement, the court must be entitled, if it thinks fit, to decline to convene the scheme or plan meetings unless and until that manifest defect is corrected. But that will be a rare case."

31. A helpful discussion of is to be found in the opinion of Lady Wolffe in *Re Premier Oil plc* [2020] CSOH 39:

"130. In considering the criticisms of the explanatory statement it must be borne in mind that the purpose of the explanatory statement is to present the group directors'

presentation of the benefits, disadvantages and purposes of the scheme proposed as they see it. Here, the schemes are complex arrangements. The explanatory statement is extremely detailed. It totals 583 pages (of which 450 are the appendices). Notwithstanding its length, its presentation of the schemes is clear and intelligible and the format of the explanatory statement (including its provision of defined terms, contents and its division into discrete headed sections) is accessible, well-ordered and readily navigable. The amount of information provided is commensurate with the complexity of the schemes. It is recognised that in a case of great complexity not every relevant fact can be stated (per Maugham J in Re Dorman Long and Co Ltd [1934] Ch 635; see also the comments of Neuberger J (as he then was) in Re RAC Motoring Services Limited [2000] 1 BCLC 307 at 328). The nature of ARCM's criticisms is not so much that there are omissions, but that ARCM fundamentally disagree with the group directors' views of the business case for, and benefits of, the acquisitions. The ARCM materials are directed at supporting those criticisms and, to a large extent, repeat (in this context) the criticisms of the schemes they have advanced under other headings.

[131] In reflecting on the proper approach to these criticisms, I note that the courts have long recognised that there is ready scope for arguments that the directors should have expressed themselves more fully or differently in their explanatory statements. It is in relation to those sorts of criticisms that Clauson J (sitting in the Court of Appeal) stated in Re Imperial Chemical Industries Ltd (at p 617) that:

> *'Where the matter is one of difficulty, the court will always scrutinize such a circular very carefully; but where, as in this case, there is no suggestion that the directors were doing otherwise than honestly putting forward to the best of their skill and ability a fair picture of the company's position, the question is*

> *not whether the circular might not have been differently framed, but whether there is any reasonable ground for supposing that such imperfections as may be found in the circular have had, with or without other circumstances, the result that the majority (who have approved the proposal placed before them) have done so under some serious misapprehension of the position.'"*

32. In that case, Lady Wolffe said that having considered the reports of the objectors and the company's explanatory statement she was of the view that the criticisms of the statement simply reflected "differences of commercial judgment". She found that there was nothing in the evidence which would suggest that the explanatory statement was "not soundly based or that the conclusions and views expressed in it are outwith the range of views which directors of the group could reasonably form. In this context it does not suffice to show that others might have come to different judgments on such matters. Accordingly, I am not persuaded that the explanatory statement suffered from any deficiency such that it precluded the scheme creditors from forming a reasonable judgment on the schemes."

33. I regard these authorities as persuasive when considering whether a company has complied with s.452(1)(a). I see no reason to deviate from them. The principles to be drawn from them and which are relevant to this case may be summarised as follows:

(1) The convening hearing pursuant to s.450 is not the occasion to consider the merits of the proposed scheme of arrangement unless it is said that the outline of the scheme is such that it could never pass the test for ultimate sanction. This would be a most extraordinary case and is not said in this case.

(2) It is not the function of the court at the convening hearing to approve or endorse the contents of the scheme circular.

(3) The circular is the sole responsibility of the company proposing a scheme. The proposer is under a duty to place before the creditors to be affected by the scheme

information which is sufficient to enable the creditors to determine, before voting on the scheme, whether the scheme is in their commercial interests. This information should extend to a meaningful description of the alternative outcome facing the parties, such as liquidation.

(4) The court has a discretion to refuse to convene the meetings if persuaded that the proposed circular is manifestly deficient.

(5) A circular is manifestly deficient if it does not contain the information necessary to enable the creditors participating in the meeting and desirous of voting to exercise their own informed commercial judgment in deciding to vote for or against the proposals. One of the tests at a sanction stage is whether no reasonable person, acting in his or her own interests would have supported the proposals. There may be different ways to show that this test has failed, such as proof of an ulterior motive for the manner in which the majority have voted. Another way would be to demonstrate that the parties have voted on a scheme in circumstances where they have been deprived of the information required to make a properly informed decision. That element of the test would be failed if it were shown that the scheme circular was so deficient as to cause such an information deficit.

(6) It is not sufficient to show that the readers of a scheme circular dislike or disagree with its contents or presentation of the information. In cases where investors or creditors have or will incur financial loss there is likely to be a background of contention and creditors will dislike what they are reading. The circular may not answer all of their questions but that does not mean that it fails to comply with the requirements of s.452 of the Act.

(7) The examination of the level of information made available to creditors will typically be made at the sanction hearing. It would be a very rare case where a court at

the convening hearing could be persuaded that there is such a deficiency in the proposed circular that it should refuse to convene the meetings.

(8) Where the court is asked to make an order convening meetings its decision is limited to matters which affect the making of that order and ancillary directions. A finding that there is no warrant to refuse to convene the meeting on the ground of a manifestly deficient scheme circular does not preclude objections at the sanction stage which could include objections relating to the information process. Nor does it bar other potential remedies.

(9) Whilst the withdrawal of opposition to a convening order is not conclusive as to the adequacy or otherwise of a scheme circular, the Court may have regard to the fact that such opposition is withdrawn or that notice parties make no opposition.

34. In this case one creditor has initiated proceedings pursuant to s.747 of the Act for the appointment of an Inspector under Part 13 of the Act to investigate the affairs of one of the Companies. That application is opposed. However it is clear that there may be another day or another forum in which facts leading to the proposing of schemes of arrangement will come under scrutiny, whether under s.747 or other provisions of the Act. The findings of the court on this application take account of the limited amount of documents exhibited and required to be exhibited, together with submissions, and are confined to the particular decision I am required to make under s.450(3). They cannot bind any other forum or court where different or even plenary proceedings may be required to find facts or determine remedies.

This case – the Scheme Companies and the Solar 21 Group

35. The Scheme Companies are wholly owned subsidiaries of Solar 21 Renewable Energy Limited ("Solar 21"). Solar 21 is the parent company of a group of companies which specialise in renewable energy infrastructure. The principal shareholder and director of Solar 21 is Mr. Michael Bradley.

36. The scheme companies were established as the investment vehicles for an "energy from waste" project referred to as "Project 1". The project was intended to be developed at the Melton Waste Park, Hull, England by another subsidiary East Riding Green Energy Park Limited (East Riding Green Energy). East Riding Green Energy was owned as to 51% by Solar 21, as to 24% by Green Zone Consulting Limited (owned and controlled by Mr. Bradley's brother Andrew Bradley), as to 20% by another Solar 21 subsidiary Melton Energy Tech Limited, and as to 5% by EFW21 Ireland, one of the Scheme Companies.

37. The Solar 21 Group had a number of other projects in progress before the Scheme Companies were established, and which are relevant to the proposed scheme. Those were held under the ultimate control of Solar 21 and Green Zone Consulting, with some other minority interests. The most significant were the following.

38. The Tansterne Biomass plant was under a subgroup owned by Biomass 21 Renewable Energy Limited (Biomass 21).

39. The Plaxton Biogas plant was under a subgroup owned by Biogas 21 Renewable Energy Limited (Biogas 21).

40. The group held an interest in a project called North Lincolnshire Green Energy, through a company also owned and controlled as to 56% by Solar 21, and as to 44% by Green Zone Consulting.

41. There were a small number of other companies in the group which are of limited direct significance, for this application. They were engaged in management and services to the group, namely Solar Clear Limited (SCL) and First Element Limited, both of which were also under the control of Solar 21.

The investments

42. Between 27 April 2018 and 16 June 2020, the companies raised STG£209.5 million from investors to fund the development of "Project 1". The funding had an initial term of 3.5 years.

43. Most of the investors were individual persons or corporate entities holding pension interests for persons. Investments in EFW 21 were made principally by way of loan notes, and in EFW 21 IRL, as preference shares.

44. Project 1 encountered significant delays and other complications. Its planned technology provider entered administration in January 2020. Cost overruns, delays and other complications caused the group to make a decision in December 2022 that Project 1 was no longer viable and decided that it should be cancelled. Prior to the cancellation, the Scheme Companies had invested approximately STG£17.2 million in Project 1. It is considered unlikely that that amount will ever be recovered by the Companies.

45. During the time when Project 1 was delayed and efforts were being made to resolve its issues, the Scheme Companies made loans and advances, sourced from the monies raised from investors, totalling STG£90.7 million to other companies in the group. Of this, STG£76.9 million was provided to Biomass 21 and Biogas 21, the Companies responsible for the projects referred to respectively as the Tansterne Biomass Plant and the Plaxton Biogas Plant. Those were not the projects described in the Information Memorandum for the Companies' investments.

46. In his affidavit grounding the application, Mr. Bradley says that these intra group loans were made in circumstances where it was expected that the monies would be repaid to the Companies in sufficient time to meet repayment dates under the investment documents. He says that the Group believed that this could be achieved having regard to certain offers which had been received from third parties to acquire the Tansterne Plant. He also said that he believed that in circumstances where, due to delays, the funds were not being utilised in

respect of Project 1, they could at least earn interest for the benefit of the Companies. He said finally that it was intended that the use of these monies would facilitate the completion and disposal of the Tansterne and Plaxton projects which would in turn facilitate the repayment of amounts to the Scheme Companies.

47. The Tansterne and Plaxton projects were themselves delayed. The inter – company loans made by the Scheme Companies have not been repaid. Therefore, the Scheme Companies have been unable to meet their obligations under the loan notes and preference share instruments which have been maturing since 1 November 2022.

48. The grounding affidavit and exhibited reports reveal that of the total sum of STG£209.4 million "raised" by the Companies, STG£143,436,000 was raised in cash funds from investors in the Companies including those who objected to this application. The balance was said to have been raised by investors in other group companies, including Biomass 21 and Biogas 21, electing to "roll over" their investment. Mr. Bradley's affidavit reveals that the cash amount raised of STG£143.4 million, was disbursed as described below. Much of this information is said by the investor creditors to be coming as new information which the investors say reveal that the Companies applied the investment funds otherwise than as permitted in the Information Memorandum and the instruments recording their investments.

Fundraise fees	STG£22.5 million
Investment in EFW 21 Project 1	STG£17.1 million
Transfers to SCL (Solar Clear Limited, a management services company in the group)	STG£4.9 million

Solar 21 exit payments for investors having early exit dates on 15 November 2021	STG£2.9 million
Solar 21 – other exit payments, used to repay investors in the Tansterne and Plaxton projects	STG£36.182 million
Investor coupon payments	STG£1.159 million
EFW 21 pension investor exit payments for pension investors having an early maturity date	STG£1.9 million
Loan to Biomass 21	STG£26.4 million
Loan to Biogas 21	STG£14.2 million
Loan to Solar 21 IRL	STG£13.8 million

49. It has been disclosed that a foreign exchange gain of STG£2 million was earned and that there remained at the bank a credit balance of c. STG£3.6 million.

50. A contentious aspect of the entire matter is the making of loans to Biomass 21 and Biogas 21 and the advances to Solar 21 to repay investors in respect of the Biomass 21 and Biogas 21 projects.

51. In the grounding affidavit of Mr. Bradley, he asserts that the directors of the Scheme Companies considered that it was appropriate and in the best interests of the scheme companies to lend funds to certain other members of the group. The reasons he gives for this include the following: -

(a) that the loans would allow the Scheme Companies to earn interest while Project 1 was at a pre – construction stage;

(b) it was expected that the terms and maturities of the inter company loans would facilitate a repayment in time to allow the Project 1 construction to be still met on time;

(c) that the transfer of funds to relevant deposit accounts would avoid negative interest rates;

(d) that the group had received offers suggesting that the assets being funded partly by this lending would be realised for amounts sufficient to repay the relevant lending.

52. Other justifications are given such as the fact that security for intercompany loans was taken and that appropriate documentation prepared by legal advisors was put in place.

53. Mr. Bradley says also that when making decisions in relation to this, the directors of the scheme companies gave due consideration to the Information Memoranda and investment documentation associated with the Scheme Companies' investments.

54. The Companies ability to repay amounts owing in respect of the investors loan notes and preference shares had become dependent on the repayment of the inter – group loans. The Tansterne Biomass project and the Plaxton Biogas plant themselves encountered difficulties, delays and cost overruns. Therefore, the relevant group companies have been unable to realise those projects within the group's intended timeframe and this in turn has left the Companies unable to honour the maturity dates on the investments.

55. Some tranches of the investments reached maturity in November 2021 and some repayments were made. No repayments or exit payments have been made to the investors since 25 January 2022.

56. The investment instruments contained covenants restraining enforcement against the Companies for a period of two years after the maturity dates in each case.

57. In summary, some £90.7 million was advanced to other group companies, of which £76.9 million was used in respect of the Tansterne Biomass Plant and the Plaxton Biogas Plant.

58. The directors say that the making of these loans was appropriate in all the circumstances and in the best interests of the scheme companies. They say that they considered the merits of all of the options available to them and the relevant *"corporate benefit"* to the scheme companies. They say that they gave due consideration to the information memoranda and investment documents including the scheme companies loan notes.

59. The Companies say that when it became apparent that the projects would not become operational or be sold in time to meet maturity dates under the investments, they acted diligently and in the interests of all the stakeholders and investors. They consulted professional restructuring advisors and have devised now the proposed schemes. They say that the only prospect of avoiding an insolvent liquidation of the Scheme Companies is through the proposed schemes of arrangement.

60. The Companies retained Alvarez and Marsal (A&M) as its financial advisor and Addleshaw Goddard as its legal advisor to assist in developing and considering options for a restructuring.

The proposed schemes

61. The essence of the intended restructuring through the schemes as initially presented is follows: -

(1) The maturity dates under the loan notes would be extended. In other words, the investors money would be "left in" to be applied for the purpose next mentioned.

(2) Instead of pursuing immediate recovery of intra group loans (such as would occur on an insolvency event), the funds advanced, and other funds, will be used to fund the completion and commissioning of the Tansterne Biomass project and the Plaxton Biogas project so that they can be realised for the benefit of the investors. The objective is to enable the further development and ultimately disposal of the Tansterne Biomass project, the Plaxton Biogas plant and project rights in the North Lincolnshire Green Energy project.

(3) The proceeds of these projects will be applied to repay amounts owing to the Scheme Companies and additional contributions would be made to improve the position of the scheme creditors.

(4) Contributions would be made by Solar 21 (estimated at £27m) and Greenzone Consulting Limited (£8.998m), funded from the proceeds of their interests in the North Lincolnshire Green Energy project.

(5) Greenzone will also make interest free loans available totalling £4.9 million to fund the completion and operation of the Tansterne Biomass plant.

(6) Greenzone will release its contractual claims against the Scheme Companies for £5.5million.

(7) Other assets in the group will be realised and proceeds made available to fund or contribute towards repayments in the schemes.

(8) Third-party creditors of the group will be paid to avoid insolvency of relevant group companies thereby jeopardising the prospect of making a return under the scheme.

(9) The scheme will provide for releases of any potential claims against directors or shadow directors of the company, save that the release or waiver of claims against such parties shall not apply in respect of *"fraud, gross negligence or*

wilful misconduct". The terms of these releases are themselves controversial, in so far as a number of the objectors say that they are an unwanted limitation on potential remedies against the promoters of the scheme companies.

62. The Companies say that if these schemes are not approved, the most likely alternative is that all companies in the group will be forced to enter insolvency proceedings. They say that on the occurrence of a formal insolvency, the returns to investors in the scheme companies will be significantly lower.

63. In the initial description of the scheme, it was said that the companies expect that, if the restructuring is implemented in accordance with their proposals, scheme investors are likely to receive 61.2% of what they are owed, representing 80% of the original monies invested by them.

64. In the later modification of the proposals, presented to the notice parties during the adjournments, the level of contribution by Green Zone was increased by circa £33 million. Other modifications included certain changes in management and governance, and the appointment of an investors representative committee to be chaired by an independent restructuring professional Mr. Fennell of Interpath Advisory.

This application

65. Before the court are applications by each of the Scheme Companies for orders in the following terms.

1. An order pursuant to s. 450(3) of the Act that a meeting of the companies scheme investors be convened for the purpose of considering and if thought appropriate approving a scheme of arrangement between the companies and the investors.
2. An order pursuant to s. 450(5) of the Act that the scheme investors comprise one class for the purpose of the scheme meeting.

3. Directions concerning the mode of convening, notification and conduct of the scheme meetings including such matters as the location of the meeting, quorum, identity of the chair, advertisement, the requirement that the scheme be accompanied by circular in accordance with s. 452 of the Act, and arrangements concerning the conduct of the meeting itself such as voting polls and proxies.
4. An order that all proceedings be stayed or any further proceedings be restrained against the company for such period as the court sees fit and at such terms as seems fit. (This order was made at the initial directions hearing, and was subsequently modified such that it would not apply to any application by a creditor pursuant to s. 747 of the Act for the appointment of an Inspector.)

66. The grounding affidavit of Mr. Bradley exhibits the proposed scheme circular. It describes the status of the Scheme Companies, the events giving rise to the necessity for the schemes, the purpose of the schemes and of the wider restructuring of the Group and summarises the terms of the proposed schemes. The Appendices include such items as definition and interpretation, instructions and guidance for "scheme investors", the forms of the proposed notices of meetings, proxy forms, details of the investments, and the "Key Restructuring Documents" comprising a Restructuring Implementation Deed, a Global Deed of Release, an Override and Amendment Deed, and forms of Shareholder Resolutions and Rights Variation Covenant, and an "Intra-Group Reorganisation Steps Plan". Importantly, for the purpose of this judgment, the Appendices include the following:

> Appendix 7; Relevant Alternative Report; being a report by Alvares + Marsal dated 27 April 2023.
>
> Appendix 8; Report of the Independent Observer, being a report by Mr. John Mc Stay, of McStay Luby, dated 11 May 2023

67. The scheme circular summarises the essence of the scheme as originally presented, as follows: -

A. Utilising funds which include the funds advanced by the investors for Project 1, the Group will complete, commission and sell the Tansterne and Plaxton projects as trading businesses, and will sell its rights in the North Linconshire project.

B. The Proceeds of the disposals will be available to the Scheme Companies

C. The investors' rights under the loan notes and preference shares will be modified. They will be deferred in time and their recourse would be limited to the assets of the Scheme Companies enhanced by the proceeds of realisation of the Group's interests in Tansterne, Plaxton and North Lincolnshire, and contributions by Solar 21 and Green Zone Consulting.

D. Financial contributions from Solar 21 and GZW.

Alvares and Marsal

68. The report of A & M runs to 109 pages, including appendices. After general introductions and background, it includes a section headed "Scheme Companies' Sources and Uses Of Funds". It also includes what are described as "Key Balance Sheets" and an "Entity Priority Model" (EPM).

69. The section Sources and Uses of Funds contains a detailed description of the sources of funds received by the Scheme Companies, and a breakdown of the manner in which the cash received of £143.4m was applied. They include narratives and breakdown of the fund raise fees, the investment made into Project 1 itself, transfers to a connected company Solar Clear Limited, exit payments made to investors in the Scheme Companies and to investors in the earlier Tansterne and Plaxton projects, and the loans to Biomass 21 and Biogas 21. The amounts under each of these headings are further broken down by entity to show the names and details of payees, description of the payees and their connections to the Group and its

promoters, amounts paid in commissions and fees for management and other services, and the terms on which loans were made.

70. The Entity Priority Models are an examination of the likely recoveries to creditors of different entities in the Group under different scenarios, namely the "Schemes Scenario" and the "Alternative Scenario", the alternative being based on an assumption that if the schemes are not approved the companies would enter formal insolvency proceedings meaning liquidation in Ireland and administration or liquidation in the case of companies subject to English laws. Whilst the Entity Priority Models concentrate on the Scheme Companies and East Riding Green Energy Park Limited, the company directly responsible for Project 1, it includes also inputs by reference to recoveries anticipated from other group entities such as Biomass 21, Biogas 21 and contributions from Solar 21 and from Green Zone Consulting.

71. The Entity Priority Models state that the Group has taken independent tax advise from Warren and Partners, from A&M Tas and from "Irish Tax Counsel." It has taken valuation from the firm Hilco Appraisal Limited.

72. The appendices include what are described as "Waterfall Assumptions" illustrating the potential outcome of schemes both excluding and including contributions from Solar 21, the parent company. This is followed by descriptions of illustrative recoveries by each entity, again not limited to the Scheme Companies but including Biomass 21, Biogas 21, and other entities in the group which are not currently obligors to the scheme investors.

73. The A & M report also explains that its assumption is that the relevant alternative scenario for comparison purposes is formal insolvency proceedings, meaning in Ireland liquidation for the Scheme Companies and others and in England administration or liquidation depending on the circumstances of the company.

74. Brief reference is made to the possibility of other scenarios such as more fundraising or an accelerated sale of the plants at Tansterne and Plaxton. A & M conclude that the only

two realistic alternatives are schemes of arrangement as proposed or liquidation or administration.

75. Critically A & M report that "it is the view of the directors that the scheme companies cannot meet their obligations." (emphasis added) They say that it is management's view that the schemes will provide a stable platform to complete and exit the Tansterne and Plaxton projects and that this course of action will maximise recoveries for creditors when compared to alternative scenario of a group wide insolvency.

76. The A & M report contains many assumptions. It states that it has not reviewed or stress tested the underlying business plans on which the schemes are based and offers no assurance that the result projected can be successfully delivered.

77. The objectors say that the extent of the disclaimers, reservations and qualifications is such that they can take no confidence from the contents of the A & M report. That of course is a decision for themselves. It is an entirely separate question as to whether the report contains the information required to enable creditors to make their own decisions when voting at a statutory meeting.

78. The objectors protest that the A & M report contains numerous exclusions and statements to the effect that it is not an audit and has not been stress tested. But it is clear from these sections of the A & M report that they at least contain a narrative as to the source and application of funds by the scheme companies. Whatever requirement there may be for forensic examination of these payments and their validity in another context or forum, this is not an audit exercise and there is no requirement that a scheme circular be such a thing. The document on its face contains detail of the source and application of the funds.

79. As regards information, my conclusion is that the A+M report at least discloses the "money trail". Further questions may remain arising from the reservations of the objectors, but I do not conclude that the A+M report taken with other appendices to the Scheme

Circular, at least in its final form, is so deficient that the Court should refrain to make the convening order.

John McStay

80. The Companies appointed Mr. John McStay of McStay Luby to prepare a report for the benefit of scheme investors as to the feasibility and fairness of the proposed restructuring taking into account all of the circumstances of the companies, including the history of the matter and the prospect for successful realisation of the ongoing projects. It is also proposed that Mr. McStay act as chairperson of the statutory meetings if convened.

81. Mr. McStay's report also contains, as one would expect, limitations and qualifications as to the source of his information and he makes it clear that he has not conducted an audit or a forensic examination. His function is to express an opinion as to whether the acceptance and confirmation of the proposals is more beneficial for the scheme investors than the potential alternative approaches and outcomes.

82. Mr. McStay reports that in his opinion the approval and implementation of the schemes will be more favourable to the interests of scheme investors than the likely alternative outcome, which is principally insolvency proceedings. He says that the difference is principally driven by the following.

1. Improved exit values because the projects are completed before sale.
2. Contributions from the group that would not apply in the alternative scenario, including the contribution of Solar 21's interest in the North Lincolnshire project.
3. The contribution of €9 million from Green Zone Consulting following the sale of shares in the North Lincolnshire project.
4. Connected parties releasing certain claims against the Scheme Companies
5. Lower costs.

83. Mr. McStay states that the financial circumstances of the Scheme Companies are such that there is a real prospect of the companies having to be placed in insolvent liquidation. In that event the likely return for the scheme investors would be "approximately low double-digit percentage of the sum of money originally invested". He adds that the timeline to even such a return could be up to five years from now allowing for potential litigation which may follow associated with liquidations.

84. Mr. McStay says that while there is some risk and no guarantees of an optimum outcome, the proposed orderly disposal of assets and Group contributions to the Scheme Companies is still more favourable than the relevant alternative. He notes in particular the contributions by Solar 21 and GreenZone Consulting, funds which he says would not otherwise be available to the creditors on a winding up.

85. Mr. McStay says that he has also considered the advisability "on purely commercial terms" of the alternative of litigation against the promoters. He says that such litigation can be slow and problematic and would be of questionable value when compared to the proposed schemes. He emphasised that it is not his function to defend the actions of the companies and their promoters up to now, but to advise and report on the solution proposed by the Scheme Companies.

86. For two reasons it is not necessary for me to expand further on the detail of the proposed plan or these reports.

87. Firstly, the proposed scheme of arrangement has evolved into revised proposals under which the Companies now say that the return potentially, although not guaranteed, could be as high as 100% of the cash investment made by the scheme investors, although not the entire amount which would otherwise have been due on maturity.

88. Secondly, this is not the occasion to scrutinise the proposed schemes. If a special majority approve the scheme at the statutory meeting any objections can then be considered at a sanction hearing.

Hearing on 18 May 2023

89. The matter came for hearing before this court on 18 May 2023. A large number of investors and brokers (some of whom were investors in their own right and others were representing investors) were represented by counsel and solicitors.

90. Extensive submissions were made that the proposed scheme circular was so deficient that I should refuse a convening order or adjourn the matter until these matters are rectified. Reliance was placed on the judgment of Snowden J. in *Indah Kiat* [2016] EWHC 246 (Ch).

91. The objections largely fall into two categories. Firstly, the objections most relevant to the application before the court under s. 450 are those which relate to the contents of the scheme circular.

92. Secondly, representations and submissions were made which go to (a) the history, and the grievances by investors that their monies had been applied to projects other than those described in the Information Memorandum and, on their submissions, in breach of the loan notes and other investment instruments, pursuant to which they invested (b) complaints as to the fairness of the scheme in its own right, although no party suggested seriously advanced the proposition that the fairness or otherwise of the scheme was for determination at this hearing and (c) a number of complaints and expressions of lack of trust and confidence in the promoters of the Companies such that investors could not have confidence that the proposed schemes of arrangement would be delivered and implemented.

93. As regards the scheme circular the following objections were made.

94. Firstly, that creditors were not being given complete and sufficient details of the assets and liabilities of directors or members of the group.

95. Secondly, that the prospect of pursuit and recovery against Mr. Bradley and other promoters of the companies in the context of the "relevant alternative" had not been assessed.

96. Thirdly, that the Scheme Companies had applied investor funds for purposes not permitted by the documents issued at investment stage, including funding different projects, and the payment of fees, charges and commissions to other group entities.

97. Fourthly that the report of Alvares and Marsal as to the relevant alternative was so qualified that it did not contain sufficient information to enable creditors make an informed decision when it came to voting on proposals for a scheme of arrangement.

98. Fifthly, that the delays and cost overrun issues experienced by the group companies in respect of the projects at Tansterne, Paxton and the interests in North Lincolnshire have already been such that there was no reason to believe that they would be resolved by the provision of additional funding or on a timely basis to implement the scheme.

99. Sixthly, that without more information investors could not take a view on whether the contributions being proposed by Solar 21 and Green Zone Consulting were proportionate to the impairment which the scheme would impose on investors. In other words, it was being suggested that greater clarity was required as to "whether the pain was being shared equally".

100. Seventhly, one objector submitted that insofar as it was now apparent that monies invested by the scheme investors in Project 1 had been used to repay or redeem investments in the earlier projects promoted by the group, this "is the definition of a Ponzi scheme".

101. Eighthly, objections were made to the level of commissions, fundraising and other fees paid to entities controlled or owned by Mr. Bradley. Reference was made to a fee of £22.57 million in respect of Project 1, which "never got off the ground".

102. Ninthly, that since A & M and McStay Luby were retained by the Companies, there was a necessity for scrutiny by an independent insolvency practitioner, perhaps even by the use of an examinership pursuant to Part 10 of the Act, or a SCARP process (Small

Companies Approved Rescue Procedure) pursuant to Part 10A of the Act (Companies (Rescue Process for Small and Micro Companies) Act 2021)

103. Tenthly, one objector asserted that the disclosures made by the proposed Scheme Circular demonstrate that the affairs of the Companies ought to be further investigated. That investor has now issued an application pursuant to s. 747 of the Companies Act, 2014 for the appointment of an inspector to investigate the affairs of one of the Companies. The Companies have stated that they will oppose that application.

The Companies' response

104. The Companies submitted that it is "for another day" for this or any other court to consider the implications of the manner in which funds were applied. They submit that the material contained in its scheme circular and its appendices is full disclosure of the manner in which all of the funds invested were applied and that insofar as this is at the heart of the objections, the information has been provided and is to be found in the detail of the appendices, exhibited to the affidavit of Mr. Bradley. They submit that this evidences full candour on the part of the Companies. They say it is understandable that investors are angry and may have more questions, but that it is the Companies themselves which have provided the level of detail already before the court. This being the case, they submit that there is no lack of candour, and that the test of 'manifestly deficient' described in Indah Kiat is not met.

Hearing 20 July 2023 and further exchanges

105. On the second day of the hearing the court was informed that the parties had engaged in further discussions about the level of information to be provided and requested an adjournment of the application with a view to ascertaining whether the outstanding issues regarding information could be resolved.

106. After two further adjournments, when the matter came before the court on 20 July 2023 the court was informed that revisions were being made to the scheme itself, and that

further information would be provided which would be included now in a revised scheme circular. In those circumstances none of the parties who had appeared were maintaining their objections to the making of a convening order.

107. It is not necessary for the court at this point to analyse and compare the terms of the revised proposed revisions to the scheme, save to note that they include the following.

108. The original scheme was based on maximising return for scheme investors by providing a platform for the recommissioning and ultimate sale of the Tansterne Biomass and Plaxton Biogas plants, realisation of the company's interest in the North Lincolnshire Green Energy, and defined contributions from Solar 21 and Green Energy Consulting. It was initially envisaged that Solar 21 would make a contribution from the sale of its interest in North Lincolnshire Green Energy of approximately £27m and Green Zone Consulting would make a contribution capped at £9m from the proceeds of its stake in the North Lincolnshire project.

109. Under the proposed changes the level of support from Solar 21 was maintained, but there was a significant increase in the prospective level of support from Green Zone Consulting to an amount now estimated at £36.4m, as distinct from the previous cap of £9m. It is said therefore that the total estimated value of contributions from Solar 21 and Green Zone Consulting is £63.4m. Other enhancements were referred to and the result is that it is now anticipated that if the schemes are successfully implemented recoveries to the scheme investors would be increased to approximately 93.9% of the principal amount originally invested.

110. Another development was that the Group had received a significant non-binding offer for the purchase of Tansterne and Plaxton. A third report of Mr McStay states that if these plants are sold for the amounts indicated in the non-binding offer and if the rights in the North Lincolnshire project are realised for the amounts currently anticipated, investors could

receive an amount equal to the entire principal amount invested by them although not the full amount anticipated to be recovered on maturity, which is the legal obligation of the Companies.

111. Further changes were proposed in the governance of the Companies going forward. Firstly, a Scheme Investor Liaison Committee will be appointed. Secondly, Mr Bradley will resign as CEO of the Group and will grant a proxy in respect of his shares in Solar 21 to a new non-executive chairperson. Thirdly, Mr Kenneth Fennell of Interpath Advisory will be appointed as an observer on the Board of Directors of each scheme company. The revised scheme identifies the powers and obligations of Mr Fennell.

112. During the period of adjournments, extensive engagement and exchanges of information took place between the Companies and their advisors, including Mr McStay and Mr Barry Robinson of BDO, representing the interests of a number of scheme investors and their advisers and brokers.

113. A meeting was held attended by representatives of A+M, by Mr Robinson and by Mr McStay. On 22 June 2023 Mr Robinson made a report which has been exhibited in which he stated the following:

> *"I do not believe that the scheme companies have made full and frank disclosure to the court of all material facts and matters which may be relevant to any decision that the court is asked to make. As a result of not doing so, in my view the scheme companies have therefore not exhibited the utmost candour with the court.*
>
> *In my view it is of critical importance to those investors who invested in EFW 21 Project 1 to be provided with a clear understanding of what happened their funds, into which legal entities they were paid, and for what purpose. This would enable them to be better informed as to how they may wish to proceed."*

114. Mr Robinson identified further information which he said was required.

115. The Companies and Mr McStay reject the report of Mr Robinson. This led to further exchanges of correspondence in which the Companies' solicitors Messrs Addleshaw Goddard responded to his report addressing questions under thirty headings. In many cases they cited information which they said was to be found in the A+M Report.

Hearing 31 July 2023

116. At the final adjourned hearing on 31 July 2023 there was produced on affidavit of Mr. Bradley sworn that day which exhibited a revised Scheme Circular and appendices, and clarified a number of matters concerning the contribution of Green Zone Consulting (to ensure that necessary interest payments were maintained) and concerning waivers of claim by Green Zone Consulting and by Clear Financial.

117. The exhibits included a centrally important new Appendix to the Circular, being Appendix Eleven. Appendix Eleven is a 22 page document headed "Additional Disclosures". This Appendix refers to the requests it received for clarification and further information from advisors to a number of the Scheme investors and certain brokers arising from the draft documents exhibited in the grounding Affidavit of Mr Bradley. The Companies state their opinion that some of the queries raised and additional information sought are not relevant to the investors assessment of the schemes. They state that they have already, in the initial draft circular and in the course of exchanges and meetings referred to above, provided relevant information and answers to relevant questions. In the interests of ensuring parity of information to all scheme investors who will be invited to vote on the schemes, a summary of relevant queries and answers is contained in the new Appendix. The Companies state also that any scheme investor who desires to see the entirety of the material information referred to in the additional disclosures and correspondence referred to in the Appendix may download copies of that material from the Scheme's website.

118. Appendix Eleven refers to additional accounting and legal information in two categories: -

(1) A tabular summary of all relevant security granted within the Group.

(2) Management accounts to 31/5/2023 and draft financial statements to 31/12/2022 in respect of thirteen companies in the Group, outside of the Scheme Companies.

119. The Appendix then contains "Selected responses to queries and comments", under five topics: -

(1) Background and general

(2) Valuations of Tansterne Biomass Plant and Plaxton Biogas Plant

(3) Operational matters concerning Tanstrene and Plaxton

(4) North Lincolnshire Green Energy Project

(5) The Bradleys and Green Zone Consulting.

120. The 'Background and General' includes questions and answers regarding funds raised, liabilities incurred, expenditure, detailed questions regarding timing, recording and monitoring of expenditure, governance, the costs associated with supervision and monitoring of the proposed schemes, the basis for payments to creditors not being impaired by the schemes, the contributions to the schemes by non-scheme companies in the Group and other parties.

121. The sections relating specifically to Tansterne, Plaxton and North Lincolnshire Green Energy contain in depth questions and answers of fact and of a legal, accounting, tax, planning, valuation and commercial nature.

122. The section relating to the Bradleys and Green Zone Consulting is more concise but, with one exception regarding financial statements, contains answers to the questions put.

123. In many places, both in the correspondence exchanged with advisors, and in Appendix Eleven, replies are made by citing references in the A+M Report or other material

previously provided. The purpose of Appendix Eleven is to bring the questions put by various investors and the replies furnished together so the information and source references are available to all those who receive the Scheme Circular, and not only those who participated in the hearings before this Court.

124. There was also exhibited a Third Report of Mr. McStay. Appended to this is the report of Mr Robinson of BDO and the correspondence between Addleshaw Goddard on behalf of the Companies and Crowley Miller and others on behalf of certain objecting investors.

125. In light of the confirmation that this information will be contained in Appendix Eleven none of those who initially objected to the making of the convening order maintained that objection.

126. It is clear that the decision to withdraw objection to a convening order has been informed by either or a combination of both the additional information provided in exchanges and the proposed changes to the scheme. I shall not speculate as to those reasons, but if that change of position were due only or largely to changes in the proposed scheme of arrangement, this would suggest that the scheme circular is still susceptible to some or all of the objections originally made. Even in circumstances where no party has pursued its objection on the Indah Kiat ground it is still necessary for the court to consider whether the circular was so manifestly deficient that I should refuse the order made. Nonetheless, in doing so it is appropriate for me to have regard to the fact that the parties who opposed the making of a convening order on Indah Kiat grounds are no longer maintaining that objection.

127. There has also been exhibited before the court emails and correspondence received by the Companies from a number of parties who have not come to court to voice their objections but who state that they wish to have the opportunity to vote on the scheme. Significantly a number of these have said in their communications as exhibited that they have strong

objections to the manner in which the Companies have applied their invested funds, but they nonetheless wish to have the opportunity to consider and vote on any proposals for a scheme of arrangement.

128. The most significant objections raised to the circular were that the "money trail" was not satisfactorily explained. I carefully read the A+M Report and considered the submissions which I have summarised. I concluded that it, coupled with later clarifications, provided in Appendix Eleven, contains a description of the sources and application of money into and from the Scheme Companies and other entities in the Group and met the test for S.452(1)(a), namely that it is not so manifestly deficient for its purpose, which is to enable creditors make informed decisions as to voting on proposals for a scheme of arrangement, that the court should refuse to make the convening order.

129. This does not mean that there are not further questions which can be put, or facts to be found, or that a forensic examination may not ultimately be necessary in another context. Nor does it mean that the Scheme Companies and their officers are immune from any accountability for events which have occurred. The effect of the scheme on any remedies available to investors does not fall for examination on this application.

130. I therefore made the order pursuant to S.450 convening the meetings proposed by the Companies.

Class composition

131. No controversy was raised at the hearings regarding the proposal by the Companies that all of the scheme investors in each case comprise one class for the purpose of the scheme meetings. Nonetheless, it is clear for the judgment in 'Nordic', that in exercising this supervisory jurisdiction, the Court must be satisfied that the proposed classes are appropriately formulated.

132. The essential principle informing the establishment of classes is that stated by Bowen L.J. in *Sovereign Life Assurance Company v. Dodd* [1982] 2 QB 573, where he stated: -

> *"We must give such a meaning to the term 'class' as would prevent the section being so 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."*

133. In *Nordic Aviation Capital DAC* [2020] IEHC 445 Barniville J. considered all of the leading authorities on the subject and approved the "two stage" test, described by Hildyard J in *Re Stronghold Insurance Company Limited* as follows:

> "At the first stage, the focus is on rights: if there is no difference in their reparative rights the fact that they may have opposing commercial or other interests is not relevant to class contribution (though it may become relevant at a subsequent stage). This requires consideration of (a) the right 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 interests.

134. The many cases applying this test include decisions where variations in interest rates and maturity dates of loans or other interests have not precluded the constitution of a single class, as in *Re Primacon Holding GmbH* [2011] EWHC 3746 (Ch.).

EFW 21

135. In this company, there are certain differences between the rights of the loan note holders. They rank *pari passu* for the amounts owing but have marginally different interest rates and different maturity dates. The differences are as follows.

136. Firstly, the Notes carry interest rates ranging between 6.8572% and 8.572%. Secondly, the maturity term for all notes was 3.5 years, so they have a range of maturity dates referable to their issue dates. Thirdly, some of the notes carry right of conversion to ordinary shares. It is said that as matters stand, the ordinary shareholding holds no economic value. Fourthly, some of the notes were issued for cash, whereas others reflect reinvestment by noteholders in Biomass 21 and Biogas 21.

137. The proposed scheme affects all the Notes in the same way. It extends the maturity for them all to four years after the effective date of the restructuring, whilst interest will continue to accrue at the prevailing rates. In the relevant alternative, a winding up, they would all prove for principal and accrued interest. That is also the basis of calculating the quantum of their votes.

138. It was submitted that there was no necessity to constitute separate classes by reference to the four differences described above, and they are capable of considering and consulting together. I accept that they have "more in common than divides them", to use the words of David Richards J. in Re Telewest Communications PLC 2004 EWHC 924 Ch. One class meeting is appropriate in this case.

EFW21 IRL

139. In this company, the investors' interests are reflected in subscription for preferred shares. Their rights are stated under the constitution of the company to rank *pari passu* and the only difference between different groups within the class is a small difference in dividend rates, some being at 8% and others at 8.572%. In every respect, however, they rank *pari passu* as regards their rights against the company.

140. The treatment of preference shareholders in the proposed scheme is by reference to the par value of the shares and accumulated and accruing dividend rates. Similarly, they will vote in respect of the par value of their shares and accumulated unpaid dividends.

141. I am satisfied that the differences of dividend rates is marginal, and does not prevent them from consulting together in a single scheme meeting with a view to their common interest.

Connected parties

142. Certain of the investors are connected parties in that certain of the loan notes are beneficially owned by Solar 21 of which Mr. Michael Bradley is the sole director and shareholder, and in EF21 certain other loan notes are owned by Mr. Andrew Bradley.

143. Similarly, in EF21 IRL, a number of the preference shares are held by MB Planning Limited, an entity of which Mr. Michael Bradley is a director and the sole shareholder.

144. The question of connected creditors was the subject of controversy in the case of *Millstream Recycling Ltd* and has been considered in other cases. It is submitted in this case, that the rights attaching to the interests of these connected parties are the same as those of other scheme investors and so, *"are definitionally within the same class"*. That is correct, but in Millstream Recycling Laffoy J. considered that such connected creditors should be classed differently. To remove any controversy on this subject, the connected parties have undertaken to be bound by the scheme and have undertaken not to vote or procure voting in respect of their relevant interests in the Companies. That is a proper approach to adopt and, in reliance on that undertaking, I shall not direct a separate class meeting for those parties. I am satisfied to direct a meeting of a single class of scheme investors in each case.