IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 100, 101, 102 and 103 OF 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTERS OF OCEAN RIG UDW INC., DRILL RIGS HOLDINGS INC., DRILLSHIPS FINANCING HOLDINGS INC. AND DRILLSHIPS OCEAN VENTURES INC., (EACH IN PROVISIONAL LIQUIDATION)

OPEN COURT

Appearances:

On behalf of the Scheme Companies:

Mr Daniel Bayfield QC of South Square.

Instructed by Ms Caroline Moran, Ms Sherice Arman, Mr Nick Herrod, Mr Christian La-Roda Thomas and Ms Grace Boos of Maples and Calder

On behalf of the Joint Provisional Liquidators:

Ms Rachael Reynolds and Mr William Jones of Ogier.

Instructed by the Joint Provisional Liquidators.

On behalf of Highland Capital Management LLP:

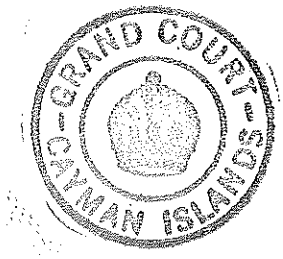
Mr Michael Todd QC of Erskine Chambers.

Instructed by Mr Stephen Leontsinis and Ms Heather Froude of Collas Crill

On behalf of Ad Hoc Group of Supporting Creditors

Mr Antony Zacaroli QC of South Square.

Instructed by Mr Tony Heaver-Wren, Mr David Bulley and Mr Jeremy Snead of Appleby.



On behalf of Archview Investment Group LP, Brigade Capital Management LP, Hof Hooreneman Banklers NV and Caspian Capital LP.

Mr Mark Goodman and Mr Hamid Khanbhai

of Campbells

On behalf of 2019 Notes Trustee

Mr Ben Hobden of Conyers Dill & Pearman (appearing at convening hearing and watching brief only at sanction).

Before: The Hon. Justice Parker

Heard: Convening hearing: 11, 12, 13 July 2017
Sanction hearing: 4, 5, 6 September 2017

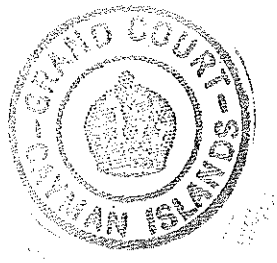
Draft Judgment Circulated: 13 September 2017

Judgment Delivered: 18 September 2017

HEADNOTE

Schemes of arrangement-class composition-convening hearing considerations-Section 86 Companies Law (2016 Revision)-Practice Direction (No 2) of 2010-sanction hearing considerations.

JUDGMENT



Introduction

1. *The first part of this decision concerns the convening hearing and whether each of the Scheme Companies has a single class of scheme creditor. The second part of this decision concerns whether the Schemes proposed should be sanctioned. Since objection has been made at both stages and I have*

heard argument at both stages, it is now convenient to give my reasons on both matters in one judgement.

Part 1.

2. Ocean Rig UDW Inc (UDW), Drillships Financing Holding Inc (DFH), Drillships Ocean Ventures Inc (DOV) and Drillships Rigs Holdings Inc (DRH) are each in provisional liquidation. They present four Petitions and Summonses for determination by the Court as the Scheme Companies. UDW is a Cayman Islands incorporated company. DFH, DOV and DRH are direct wholly owned Marshall Islands subsidiaries of UDW (together the Silo companies). The Scheme Companies are members of the Ocean Rig Group (the Group), an offshore ultra-deepwater drilling contractor that is publicly listed on the NASDAQ.

3. On 24 March 2017, each of the Scheme Companies presented winding up petitions to the Grand Court of the Cayman Islands and filed applications seeking the appointment of the joint provisional liquidators (JPLs). The Group is in severe financial distress. This has resulted from a lengthy depression in the global oil and gas markets which has rendered it unable to service its very substantial debt.

4. McMillan J made orders dated 27 March 2017 with respect to each of the Scheme Companies appointing the JPLs and determining that each of the Companies is insolvent or likely to become insolvent .

5. The Scheme Companies represented by Mr Bayfield QC are promoting four separate interlinked Schemes of Arrangement with their largest financial creditors in order to compromise over US $3.69 billion of New York law governed debt so as to return the Group to solvency. The purpose of the restructuring is to de-leverage the Group and allow it to continue as a going concern.

More specifically:

-DFH seeks to compromise its secured term loans with $1.83 billion plus accrued interest outstanding.
-DOV seeks to compromise its secured term loans with $1.27 billion plus accrued interest outstanding.
-DRH seeks to compromise its secured notes with $459.7million plus accrued interest outstanding.
-UDW seeks to compromise its unsecured notes with $131 million plus accrued interest outstanding, and its unsecured guarantees over the debt of the Silo companies.

The principal liabilities of UDW comprise the $131 million plus interest owed to the senior unsecured 2019 Note holders and $3.56 billion owed pursuant to the UDW guarantees of the indebtedness of the Silo

companies. The guarantees granted by UDW in support of the debt of the Silo companies are secured over the shares in the Silo companies, which have a single shareholder, UDW.

The creditors who fall to be dealt with comprise by the UDW Scheme compromise:

-Those persons having guarantee claims against UDW pursuant to the DRH indenture dated 20 September 2012 also known as 2017 Notes holders.
-Those persons having guarantee claims against UDW pursuant to the terms of the DFH Credit Facility and guarantee agreement dated 12 July 2013.
-Those persons having guarantee claims against UDW pursuant to the terms of the DOV Credit Facility and guarantee agreement dated 25 July 2014.
-The holders of the 7.25% senior unsecured notes due 30 April 2019 issued by UDW pursuant to an indenture dated 26 March 2014 known as the 2019 Notes holders.

6. It is worth noting that the 2019 Notes are unsecured, structurally subordinated at the bottom of the capital structure, and represent a very small proportion (approximately 4%) of UDW's (and the Group's) financial indebtedness.

7. The Schemes have the overwhelming support of the Scheme creditors. More than 90% of the Scheme creditors have agreed to the terms of a restructuring support agreement (RSA) to vote in favour of the Schemes.

8. The Schemes propose in essence that the Group's debt is exchanged for a mixture of (mostly) equity, a smaller debt burden, and cash. The vast majority of the value of the Group is in the Silo companies, predominantly within the DFH and DOV silos.

9. The JPLs ,represented by Ms Reynolds , who have looked in detail at the merits of the restructuring and have been intimately involved in all aspects of it, support the four Schemes and a single class in respect of all of them, including the UDW Scheme, as do the Ad Hoc Group (a group of Scheme creditors holding in aggregate the majority of the Group's debt), who are represented by Mr Zacaroli QC.

10. If the restructuring should fail for any reason it is accepted that the Scheme Companies will go into liquidation and there would be a Group-wide insolvency causing winding up and other insolvency proceedings in the various jurisdictions in which the Group subsidiaries operate. There would also likely be enforcement by the secured lenders over the assets of the Group. More specifically no value would be realised by UDW from its ownership of the Silo companies on a liquidation whereas on the

restructuring as proposed, UDW would have a substantial going concern value.

11. In other words the alternative to the Schemes will involve inevitably the liquidation of the Group and enforcement of security by creditors which it is accepted would result in value destruction generally for all creditors.

12. FTI Consulting has produced a liquidation analysis which appears in the Explanatory Statement. They confirm that a liquidation will involve a likely breakup of the Group and a distressed sale of its assets which would inevitably lead to a substantial destruction of the value of the Group, as compared to its value as a going concern. The survival of the Group's business depends upon the Group being released from the enormous debt burden under which it operates and the restructuring is premised on the assumption that the Group's business will remain viable in the medium to long-term if it is allowed to trade through the financial difficulties which have meant that is has been unable to service its debt.

13. The Scheme Consideration payable to those creditors who are eligible to receive it has been determined by a detailed allocation and valuation methodology, which was prepared by Evercore and is set out in the Explanatory Statement. In essence the allocation and valuation of the Scheme Consideration in each of the Schemes is based on the distributable value of each Scheme Company on a going concern basis and the values have been calculated by reference to the estimated enterprise value of the Silo companies and the non-silo subsidiaries and the projected cash balances of the Scheme Companies under the Group's business plan. For that purpose Evercore produced a value for each silo on a going concern basis using a discounted cash flow methodology.

14. The estimated recovery for Scheme Creditors under the Schemes is appreciably higher in each case than the estimated recovery the creditors would receive on a liquidation. The Explanatory Statement details and compares recoveries for Scheme Creditors under the proposed Schemes and recoveries on a liquidation of the Scheme Companies.

15. Those are the essential features of this case which have relevance to the matters the Court needs to consider when dealing with the matters proposed by the Scheme Companies.

16. I bear in mind that it is well established that in the context of schemes of arrangements the creditors are likely to be the best judges of what is in their commercial interests and in this case the Schemes had, prior to the convening hearing, already achieved over 90% levels of support of the Scheme creditors of each of the Scheme Companies.

17. Each of the four Scheme Companies seeks liberty to convene a single class meeting of its Scheme creditors to consider and, if thought fit, to approve the Scheme proposed by those companies.

Objections raised by Highland

18. There is no objection taken to the proposal that, in relation to each of the Silo companies' Schemes, there is a single class of Scheme Creditor. However, funds managed by Highland Capital Management LP (Highland), represented by Mr Todd QC, oppose one of the Schemes, the UDW Scheme. This is so notwithstanding that if the UDW Scheme becomes effective, Highland would also fare better than on a liquidation.

19. Highland holds 56.5% of the outstanding 2019 Notes issued by UDW and is in that capacity an unsecured creditor of UDW in the amount of $ 74,122,000. This represents approximately 2% of the total amount of the claims of UDW's Scheme Creditors.

20. The grounds of Highlands's opposition fell into two categories. First class composition and second, other grounds upon which the court unquestionably would decline to sanction the UDW Scheme (also referred to as blots).

21. Although the principal purpose of the convening hearing is to consider issues of class composition I was invited to consider broader questions of fairness and jurisdiction, and I did so. Whilst I heard substantial argument about the merits and fairness of the proposed Scheme, these matters are ordinarily to be dealt with at the sanction stage and not at the convening stage-see *Telewest* [2004] BCLC 342 at p 14 per Richards J.

22. A significant feature of Highlands's objection to being forced into a single class involves a draft Complaint which alleges that UDW and/or certain of its subsidiaries had improperly or fraudulently transferred property to related third parties and that such transactions should be set aside as fraudulent conveyances under the New York Debtor and Creditor Law.

23. Highland argues that the effect of the UDW Scheme is to remove entirely its status as a creditor of UDW and hence its ability to bring those claims. It wishes to pursue those claims in preference to accepting the UDW Scheme. It asserts that the Preserved Claims Trust (PCT) suggested as the way of dealing with these claims by the JPLs, is an inadequate and unfair replacement to its own draft Complaint which it wishes to bring against, among others, Mr Economou, the CEO and Chairman of UDW, and Mr Kandylidis, the President and CFO of UDW.

24. The PCT is intended to preserve the alleged claims of UDW and its relevant subsidiaries against third parties for the benefit of all UDW Scheme Creditors in order that they can be investigated and, if thought

meritorious, pursued. The UDW Scheme therefore involves, as a condition, the settlement of a trust by UDW and certain subsidiaries of claims against third parties.

25. Mr Todd QC in order to make good his submission that a single class for the UDW meeting was not appropriate argued that the creditor rights under the 2019 Notes are very different from the creditor rights under the UDW guarantee Schemes. Moreover he says that the UDW Scheme treats the 2019 Notes creditors differently from the UDW guarantee Scheme Creditors who are given significant and, he argues, unfair advantages and/or inducements. Those identified include in particular consent fees, director appointment rights and the payment of professional fees incurred by the two groups of creditors who have assisted the Scheme Companies to date in connection with the restructuring.

26. He goes on to assert that the Schemes grant the DFH and DOV Scheme Creditors security over currently unencumbered assets held outside of the respective debt silos, but do not grant any such security to the 2019 Notes holders.

27. He says that the 2019 Notes holders should therefore form a separate class to the UDW guarantee Scheme creditors because their rights to be released or varied, and the new rights which the UDW Scheme grants, are materially different.

28. Mr Todd QC relied on a number of points (which were set out in the first affidavit of Mr Poglitsch) including that: the UDW Scheme is the product of a commercial negotiation that excluded Highland; a proposal that Highland had put forward had been rejected without good reason; there was unequal treatment between Highland and the other 2019 Notes holders as compared with the UDW guarantee Scheme Creditors who are given significant and unfair advantages; the PCT takes away rights of Highland and is in any case inadequate to deal with the matters alleged by Highland in its draft Complaint.

29. The convening hearing, which lasted for 3 days, was therefore taken up with a detailed consideration of those points in connection with the UDW Scheme in particular.

30. Mr Bayfield QC for the Scheme Companies rejects all of these arguments. He submits that the Court should Order that the Scheme meetings be convened and that UDW has only one class of Scheme Creditor. He submits that the court should only deal with the issues raised by Highland which can be said to go to class composition or with any issue which is a "showstopper" in the sense of creating such inherent unfairness, that it would be a waste of time proceeding to convene the Scheme meetings .

31. He goes on to submit that the UDW Scheme provides the same basis of Scheme Consideration to all UDW Scheme Creditors and although the three Silo companies schemes offer different Scheme Consideration to their creditors there is good reason for that in relation to each of those Schemes and that this is not relevant to the assessment of UDW Scheme creditors' rights against UDW in any case.

32. Moreover Mr Bayfield QC argues that the security held by the UDW guarantee Scheme Creditors in respect of their UDW guarantee claims has no value as the shares in the Silo companies are of no value because the Silo companies are each insolvent. The fact that, technically, the UDW guarantee Scheme Creditors are secured and the 2019 Notes claims are unsecured does not fracture the class for this reason. All of the UDW Scheme creditors are effectively unsecured. See *Metinvest* [2017] EWHC 178 (Ch) per Mann J at paragraphs 16 to 18.

33. He says I should not follow the "holistic" approach adopted by Mr Todd QC in his argument as to the assessment of class issues and that I should carefully follow the numerous authorities that he referred me to as to the correct test to apply.

34. Focusing on the UDW Scheme, he submits that it is not a series of linked arrangements, but a single arrangement pursuant to which UDW's creditors, and all of them, have their existing rights against UDW released and receive in return new UDW shares in proportion to the value of their claims against UDW. That is a single arrangement and it gives no rise to any class issues.

35. Likewise the silo Schemes only deal with creditors' claims against the silo not against UDW and in return they distribute Scheme Consideration to compensate the creditors for the rights released and varied by those silo Schemes in each case.

36. So according to Mr Bayfield QC's submissions, which were supported by Mr Zacaroli QC and Ms Reynolds, there should not be two classes of creditor – Highland and the other pure 2019 Noteholders, and the rest, as Mr Todd QC submits.

37. Mr Bayfield QC submits in the alternative that even if I were to adopt the "holistic" approach to the relevant authorities which Mr Todd QC suggests that I should (and which Mr Bayfield QC says is consistent as to the correct approach both in England up to the Court of Appeal, in the Hong Kong Court of Appeal and in this Court) so that I were to aggregate all of the creditors' pre and post-Scheme rights against all of the four companies in the class composition exercise, I would still (applying the correct test) need to go on to determine whether those rights are so dissimilar from one another that the creditors could not consult together with a view to their common interest.

38. He says that the Court should conclude that they could consult together notwithstanding any dissimilarity of rights, because all of the creditors have an interest in the paramount intention of avoiding a liquidation of UDW and the rest of the Group. As the figures show in the liquidation analysis a liquidation outcome would be worse than a Scheme outcome and would be value destructive for everyone.

39. Following the Convening hearing I gave my decision without reasons, in the following terms:

Decision

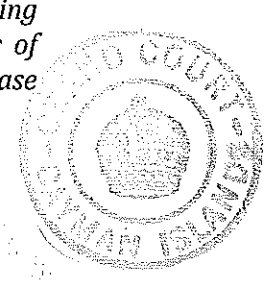
> *As I indicated to the parties at the conclusion of the hearing on 13 July 2017, I give my decision, without reasons at this stage, on the application by the four Scheme Companies (who are members of the Ocean Rig Group, known as UDW, DFH, DOV, and DRH) to convene a* ***single*** *meeting of creditors in each Scheme for the purposes of considering and, if thought fit, approving (with or without modification) each of the four Schemes.*
>
> *I consider it appropriate to grant the applications of the Scheme Companies ,and so Order in accordance with Section 86 of the Companies Law (2016 Revision) and the Practice Direction (No.2 of 2010) that such meetings be convened in accordance with the Directions proposed in the draft Orders.*
>
> *It is my intention to reserve my reasoned judgement until after the conclusion of the further application to sanction the Schemes.*
>
> *I am presently assigned to hear that application. If for any reason that is to be heard by another Judge, I will of course be willing to provide reasons for his or her consideration in advance."*

There now follows the reasons for that decision.

The Law

40. Section 86(1) of the Cayman Islands Companies Law (2016 Revision) provides that :

> *"Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company, or where a company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or the members of the company or class of members as the case may be to be summoned in such manner as the court directs."*



41. Section 86 of the Companies Law is substantially the same as the relevant provisions of the English Companies Act 2006 and is also substantially the same as sections of a number of Commonwealth company statutes. The relevant English and Commonwealth authorities have therefore been applied to Cayman Island schemes of arrangements over many years. As I have said, during the course of the hearing, I was referred to a considerable number of them.

42. Having considered those authorities in detail, the main question I have to decide is whether the proposal to convene a meeting of the single class of creditors in respect of each Scheme is in accordance with the principle that a class must be confined to" *those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest". Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573

43. The function of the court at the convening stage to approve the division of creditors or members into one or more classes for the purposes of voting, is an important part of the procedure because the correct composition of classes goes to jurisdiction and the court will have no discretion to sanction the scheme if the classes are not properly constituted in the first place.

44. This test is also set out set out below in the relevant Cayman Islands Practice Direction (No 2) of 2010.

Paragraph 3.2 provides in material part:

"*.... In every case the court will consider whether it is appropriate to convene class meetings and, if so, the composition of the classes so as to ensure that each meeting consists of shareholders or creditors whose rights against the company which are to be released or varied under the scheme, or the new rights which the scheme gives in their place,* ***are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.***" (My emphasis).

45. The principle in Paragraph 3.2 derives from a case decided well over 100 years ago:*Sovereign Life v Dodd [1892] 2 QB 573 at p 583 per Bowen LJ* which has been followed in a number of cases over the years and to some extent clarified.

46. Significantly in the Court of Appeal in *Re Hawk Insurance Co Ltd [2001] 2 BCLC 480, Chadwick LJ* said this at Paragraph 23.

"As I have indicated, I would have regarded it as self-evident, in the absence of authority that the relevant question at the outset is: between whom is it proposed that a compromise or arrangement is to be made? Are the rights of those who are to be affected by the scheme proposed such that the

scheme can be seen as a single arrangement; or is the scheme to be regarded, on a true analysis, as a number of linked arrangements?"

47. He then examined *Sovereign Life* in some detail and decided that the correct analysis was to look first at existing rights which are to be released or varied under the scheme, and then at any new rights which the scheme gives by way of compromise or arrangement to those whose rights are to be released or varied.

"It is in the light of that analysis that the test formulated by Bowen LJ in order to determine which creditors fall into a separate class-that is to say, that a class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'-has to be applied." Paragraph 30.

48. He went on to say at Paragraph 33:

"When applying Bowen LJ's test to the question 'are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it tobe regarded, on a true analysis, as a number of linked arrangements?' it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements-but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group."

49. In *Apcoa [2014] EWHC 3489 Ch Hildyard J at p 676* summarised the law as it had developed over the years since *Sovereign Life* as follows:

"The modern approach, which the practice established pursuant to Re Hawk both reflects and requires, is to break the question into two parts, and ask first whether there is any difference between the creditors in point of strict legal right, and only to proceed to the second question, at the convening stage, if there is; and if there is, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors of the proposed class, ignoring for that purpose any personal or extraneous interest or subjective motivation operating in the case of any particular creditor(s)"

50. Paragraph 3.3 of the Practice Direction provides:

"At the first hearing, the court will also consider any other issue which is relevant to the jurisdiction of the court to sanction the scheme, and any

other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the court to refuse to sanction the scheme."

51. It follows, as I have said, that the Court can also deal at the convening hearing with any other matter which would render the procedure inappropriate. So for example if an issue would unquestionably lead the court to decline to sanction the scheme there would be no point in expending the huge amount of time and money in proceeding on an incorrect basis, in circumstances where there is some fundamental "showstopper" or "roadblock": see *Re Indah Kiat International Finance Co BV [2016] EWHC 246 per Snowden J at p 28.*

52. After the meetings have been convened as Ordered by the Court a further application must be made to the court for the sanction of the scheme under section 86 (2) at which stage the court's principal function is to ensure that the scheme does not involve unfair or unreasonable conduct by the majority.

53. This is dealt with at **Part 2** of this judgment and was described by Chadwick LJ in *Re Hawk* as an opportunity for the Court, which is not bound by the outcome of the meeting, to safeguard against majority oppression.

54. In fact, a reasoned opinion by the Court in relation to class composition or jurisdiction at the convening stage only has significant advisory value and is not strictly binding on the Court at the sanction hearing see e.g *Apcoa per Hildyard J.*

55. It is also the case that when comparing the rights that would be released under the Schemes and the rights given to creditors pursuant to the Schemes, regard should be had to the liquidation comparator were the group to become insolvent: *see Telewest (No. 1) [2005] 1 BCLC 752 per Richards J at p 763 and Hildyard J in Apcoa at paragraph 109.*

56. It is clear that Hildyard J in *Apcoa* as well as analysing the turnover provisions and lock-up agreement in that case in detail, looked at the imminent insolvency of the group and its consequences and concluded that reasonable creditors would unite around a common cause of avoiding liquidation which would result in the destruction of value for all and a smaller recovery for all than might be achieved through a restructuring. So whilst insolvency being a worst-case scenario should not be used as *"a solvent for all class differences"* per Hildyard J at paragraph 117, it can be helpful in assessing whether there is an underlying common interest amongst creditors- hence his "more to unite than divide" approach.

57. Importantly in applying the test the court is concerned with the rights (as distinct from interests) between the company and the scheme creditors alone, and not in respect of any third parties.

58. In *UDL Holdings Ltd & Ors* [2002] 1 HKC172 Lord Millett said: at p 27

"The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings."

59. *UDL* (being a decision of the Hong Kong Court of Appeal) has been followed by a number of cases including in *Telewest (No1)* [2005] 1BCLC 752 by Richards J and *Apcoa* by Hildyard J.

60. Describing the reasons for persons with divergent interests to be allowed to vote as members of the same class for the purpose of ascertaining whether the scheme has been approved by the necessary majority, Lord Millett makes it clear that one of the reasons was to stop a small minority thwarting the wishes of the majority.

"Fragmenting creditors into different classes gives each class the power to veto the scheme and would deprive a beneficent procedure of much of its value. The former danger is averted [the risk of empowering the majority to oppress the minority] by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; the latter by requiring those whose rights are sufficiently similar they can properly consult together to do so..... A company can be regarded as entering into separate but linked arrangements with groups whose members have different rights or who are to receive different treatment. It cannot sensibly be regarded as entering into a separate arrangement with every person or group of persons with his or their own private motives or extraneous interests to consider" At page 184 B-D of UDL.

61. Moreover there have been a number of cases where creditors had rights which were different, but which the court held were not so different that they could not consult together: see e.g. *Telewest (No. 1).*

Decision

62. Having set out the basic legal principles, I will examine the fact specific issues which Highland asserts give rise to separate classes of creditors and to also see whether there are any grounds it has made out which would lead the Court to unquestionably decline to sanction the UDW Scheme.

63. I am not persuaded that any of the arguments as to unfairness Mr Todd QC advanced in relation to access to information, the rejection of Highlands's proposal and exclusion from certain negotiations has anything to do with class composition and I do not take him to have submitted that it does. Neither do I regard these matters as potential "showstoppers" or indeed as anything close to being so.

64. I accept Mr Bayfield QC's submissions that the arguments advanced by Highland in relation to existing rights and the rights given to other creditors as a result of the Scheme do not fracture the class. They share a common interest with Highland in avoiding a liquidation.

65. I also accept Mr Bayfield QC's submissions that the position of the UDW guarantee claims creditors does not fracture the class as their security is effectively worthless in the UDW Scheme, based as it is on the value of shares in the Silo companies. Those have in effect no value.

66. Similarly the submission that because the UDW guarantee Scheme Creditors have claims and rights against other entities within the Group (which are secured on the assets of the Silo companies and their subsidiaries) and which the 2019 Notes holders do not have, does not in my view fracture the class because the question of class composition, as I have set out above, needs to be looked at by reference to the existing rights of the UDW creditors against the company (UDW) only: see, for example, *UDL* above.

67. The test that has to be applied is as to *rights* against the scheme company, not as against third parties and not as to *interests.*

68. For example in the Australian case of *Nordic Bank plc v International Harvester Australia Ltd & Anor* [1983] 2 VR 298 approved by Chadwick LJ in *Re Hawk,* dual recourse creditors who could look to the scheme company and another company in satisfaction of their debt did not constitute a separate class from single recourse creditors.

69. As to the inducements which allegedly arise (according to Mr Todd QC) from consent fees paid to some creditors and which were not offered to Highland, it is commonplace in my experience in these complex restructurings for creditors to 'lock up' a vote in favour of a scheme in advance in consideration for a relatively small fee. They are not in my view sufficiently material in this case to fracture the class. The debt after all which is subject to these Schemes is in aggregate almost $4 billion.

70. In any event they do not constitute a right against UDW. They are paid to give those promoting these complex and expensive Schemes some visibility and certainty as to outcome, not to influence votes which would not otherwise be in favour. Moreover, the consent fees are being paid out of the assets of the Silo companies and are not given as a quid pro quo for

the release or variations of rights at UDW level. They do not make consultation impossible in one class of creditors' meeting. Mr Todd QC's reliance on Richards J's comment in *Telewest (No 1)* at *p 769* at paragraph 54 is misplaced because at that stage the judge was dealing with a hypothetical issue and no consent fees were in fact paid in that case. A number of subsequent cases have found that consent fees paid have not fractured the class, mainly on grounds of immateriality.

71. The professional fees reimbursement argument does not assist Mr Todd QC either as again such fees are not material and reasonably in my view, indemnify professional fees incurred to facilitate the restructuring. Likewise, I am not persuaded that the largest shareholder having a right to appoint a director to the board of the company fractures the class because a free-floating right available to any shareholder which sufficient holding does not create a difference in the rights granted by the UDW Scheme.

72. It is important to bear in mind as I have set out above, when considering the objections raised by Highland and in particular the arguments that certain creditors of the Silo companies are getting a better deal than Highland, that as a holder of the 2019 Notes only, it is structurally subordinate to those creditors. Those other creditors have direct claims against the entities within which the substantial part of the Group's value is. They have both guarantee claims against UDW in addition to their direct claims against the Silo companies.

73. The 2019 Notes holders are in a different position having only claims against UDW. It seems to me perfectly reasonable for the Schemes to recognise and give effect to that difference which reflects the economic and legal reality of the Group's debt structure. I believe Mr Todd QC also very fairly recognised this reality.

74. To recognise it does not lead to the conclusion that the creditors of UDW should not be placed into a single class for the purpose of voting on the UDW Scheme. When the UDW guarantee creditors are voting they will not (absent any cogent evidence to the contrary) in my view be voting with an interest adverse to their interests as UDW creditors simply because they have additional interest at Silo levels.

75. Mr Todd QC also fairly accepted the case that the outcome for all creditors in a UDW Scheme is better than an outcome in a UDW liquidation. That of course is subject to the point that Highland wishes to be excluded from the Scheme in order to pursue its own claims.

76. As I have said these allegations concern alleged fraudulent transfers to certain affiliated third parties of UDW and are set out in its draft Complaint. I have already indicated how the JPLs' propose to deal with that - by way of a Trust set up in order to preserve the claims (the PCT) to

ensure that they may be investigated and if appropriate prosecuted. It also provides the means to ensure that funds are made available for an initial independent investigation of the allegations.

77. It seems to me that by reason of their independence and professional expertise, the JPLs are appropriate people to be directing the independent Trustee's investigations and I take note that they will not be acting in their capacity as provisional liquidators in that regard. It seems to me that no unfairness results from this to Highland as all UDW Scheme creditors will benefit from any recoveries pro-rata in accordance with the amount of their Scheme claims against UDW.

78. The intended claim comprises rights which all UDW Scheme creditors would be able to bring to litigation if so advised. It is not a unique right of Highland alone to bring these claims. The PCT is set up so that if there is any value in the claims, the UDW Scheme creditors would be entitled to share in that value. I do not accept that there is any jurisdictional impediment on UDW's ability to 'scheme' its creditors' rights simply because Highland has identified causes of action comprised in a draft Complaint that it would like to bring for itself.

79. For these reasons, I have found that a single meeting of creditors should be convened for all Schemes and that the arguments Highland put forward as to class composition and to fairness which would leave the court inevitably to decline to sanction the Schemes, should not be accepted.

Part 2

80. Having approved orders dated 20 July 2017, scheme meetings were duly convened in accordance with those orders. The Schemes were approved and the turnout was high - 96%. All of the Silo company Schemes were unanimously approved and only Highland objected to the UDW Scheme.

81. It is also significant that of the 330 UDW Scheme creditors who voted in favour of the UDW Scheme, 8 of them who had no interest in the Silo Schemes (holding about 9% of the debt for which no consideration is due under the Silo Schemes) also did so. Those creditors could be fairly said to be in exactly the same position as Highland (as holding exclusively 2019 Notes and who are not members of, or affiliates of, the Group or the Ad Hoc Group).

82. As I indicated at the outset of this judgment, Highland objects to the sanctioning of the UDW Scheme and at a hearing lasting a further 3 days I heard those objections.

83. Before dealing with those objections I first set out the principles applicable to the sanction of a scheme.

The Law

84. Section 86(2) of the Companies Law provides as follows:

"If a majority in number representing 75% in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or the members or class of members, as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company"

85. It is well settled law that the relevant questions for the court at the sanction hearing are:

1. whether the scheme company has complied with the terms of the convening order and the statutory requirements of the Companies Law;

2. whether, at the scheme meeting, the class or classes of scheme creditor were fairly represented and the majority acted in a bona fide manner; and

3. whether the scheme is one that an intelligent and honest scheme creditor, acting in respect of its interests, might reasonably approve, such that the court should exercise its discretion to sanction the scheme.

86. The current edition of Buckley on the Companies Acts provides a helpful synopsis of the relevant principles at paragraph 219

"The sanction of the court is not a mere formality although the court has an unfettered discretion as to whether or not to sanction a scheme, it is likely to do so, as long as [the questions set out above] are satisfied."

87. Buckley goes on to state:

"Members and creditors are normally the best judges of what is in their commercial interest and are in a better place than the court to decide where their best interests lie. The test is not whether the opposing members or creditors have reasonable objections to the scheme, because a member or creditor may be equally reasonable in voting for or against the scheme. The court can sanction a scheme notwithstanding that there are members or creditors who sincerely contend that the scheme is unfair. The court is not however bound by the decision of the meeting. A favourable resolution merely represents a threshold which must be surmounted before the

sanction of the court can be sought. Parliament envisaged that the court's discretion whether or not to sanction would be a check or balance on the power of the majority to bind the minority. If the court is satisfied that the meeting is unrepresentative, or that those voting in favour did so with a special interest to promote which differs from the ordinary and independent member of the class, the court will not give effect to the majority's decision. The discretion of the court as to whether or not it should sanction the scheme is important, since once the scheme has been sanctioned it binds all parties, even the dissentients.

And further

"The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting. The court will decline to sanction a scheme if the classes have not been properly convened and properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some 'blot' is found in the scheme which had been unobserved when it had been approved by members or creditors, but will otherwise be slow to differ from the meeting. It is not only those matters which had not been appreciated at the time of the meetings which might lead the court to decide not to sanction the scheme, although aspects of the scheme which are perceived as defects by objectors, but which are deliberate and have been made plain, are not capable of being described as a blot on scheme. A scheme could be said to have a blot on it if it did not have the effect that the company and the members or creditors intended. The word blot has been said not to have any inherent meaning and it does not limit the discretion not to sanction a scheme to technical objections that render the scheme unlawful or inappropriate."

88. I take from this formulation and the authorities which give rise to it that the court's function at the sanction stage is to look carefully at the votes cast at the meeting, to ensure compliance with all the formalities, and to see whether the vote taken has been representative of the particular class and bona fide. The objective element to the test is then provided by the court seeing whether the scheme is one which an intelligent and honest creditor, acting in respect of its interest, could vote for.

89. 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.

90. Mr Todd QC relied on a decision of the Guernsey Court of Appeal in Re *Puma Brandenburg* (In the Court of Appeal of Guernsey) Civil Division – Appeal no. 508, 18 May 2017, to the effect that unfair prejudice and oppression as regards Highland, ought to feature as part of the court's assessment. To the extent that this would require the court to depart from the essential test I have set out above, I am not prepared to do so. Those considerations do not form part of any other authority I have been referred to in this area and they do not in my view form part of the fairness assessment applied to the question of sanction. I do not believe that the distinguished members of the Guernsey Court of Appeal intended to change the settled law in this area, or they would have said so and explained why.

91. There was much debate at the hearing as to the question of whether the class was fairly represented by those who attended the meeting (in person or by proxy) and whether the majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent.

92. In my view the critical question I have to consider in this regard is whether the majority of the UDW Scheme creditors who voted in favour of the Scheme have overridden the minority by reason of having interests which clash with those of the minority see *Re Alabama New Orleans, Texas and Pacific Junction Railway Company [1891]* 1 Ch 213 and if they did not have those other interests, whether they would not have voted in favour of the UDW Scheme.

93. Put another way, the question is whether the majority was primarily motivated by their own personal and commercial interests derived from the benefits available as guarantee Scheme creditors from the silo Schemes and sought in effect to coerce the minority so as to promote an interest that was adverse to the interests of the class, and were only doing so for that reason, not because they believed that the UDW Scheme was in the best interests of all UDW creditors.

94. The test was put in this way by Hildyard J in *Apcoa* at paragraph 130;

> *"In particular,if an allegation is made that a creditor had improper regard to interests other than those of the class to which he belonged, it is necessary for there to be a 'but for' link between the collateral interest and the decision to vote in the way that he did. The person challenging the relevant vote must therefore show that an intelligent and honest member of the class without those collateral interests* ***could*** *not have voted in the way that he did. It is not sufficient simply to show that the collateral interest is an additional reason for voting in the manner in which he would otherwise have voted."(*my emphasis).

95. I do not believe that the cases that Mr Todd QC showed me which preceded this decision meant that Hildyard J was setting out a new test which injected a new 'but for' element. In my view the learned judge was simply rationalising in modern language the test set out in the early authorities.

96. As to what is in the best interests of an intelligent and honest UDW Scheme Creditor, I again bear in mind in this regard that it is well settled that the best judges of what is in the commercial interests of the creditors are of course the creditors themselves see e.g. *In re English Scottish and Australian [1893] 3 Ch 385 per Lindley LJ:*

"If the creditors are acting on sufficient information and with time to consider what they are about, and acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be".

97. Hildyard J said this in *Apcoa paragraph 129:*

"...the court must give full weight to the decision of the creditors, acting in their capacity as members of the class in which they are voting. It is not sufficient for the court to determine that it would not have reached the same decision as the creditors themselves reached. In the absence of some procedural or jurisdictional hurdle (or of some blot on the face of the scheme itself) the court should only decline to sanction the scheme if an intelligent and honest member of the relevant class acting in respect of his interest could not reasonably have approved it."

98. There was some argument at the hearing as to whether the UDW Scheme meeting was properly held. As to this, the important point is that the meeting must give all creditors the opportunity to attend (in person or by proxy): see *Re Altitude Scaffolding* [2007] 1 BCLC 199 at paragraph 6 (citing *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at paragraph 12 Per Richards J:

"The court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon.".

99. The learned judge went on to say ,(holding that in the context of the scheme of arrangement the word 'meeting ' has its ordinary and natural meaning), at paragraph 18 (p.207):

"The fact that in many cases the members of the class do not in any real sense consult together does not mean that the word is to be given a quite different meaning".

100. It is in fact the case, of course, that it is rare for large numbers (in this case hundreds) of creditors to attend scheme meetings in person. That is why the opportunity to have dialogue in advance of the meeting and the fullness and fairness of the Explanatory Statement takes on great practical consequence.

Objections raised by Highland

101. As foreshadowed at the convening hearing Mr Todd QC maintained and elaborated upon many of the points he took earlier at the sanction hearing. This is of course something which he was perfectly entitled to do as broader considerations apply at the sanction stage and because the court is not bound by any decision that is reached at the convening stage. He maintained that the Scheme was unfair and that his client does not wish to be part of the Scheme.

102. The fact that I have determined at the convening hearing that the rights of creditors are not so dissimilar in relation to the UDW Scheme as to make it impossible for them to consult together with a view to their common interest so as to require them to be put into separate classes, does not prevent me from refusing to sanction the Scheme on the basis of any dissimilarities between the rights and interests of those creditors which is established. My discretion as to whether or not to sanction the Scheme is not encumbered by my earlier decision. I considered all of the arguments which by necessity were to some extent repeated afresh.

103. Mr Todd QC referred to a proposal that had been made by Highland that he submitted would be in the best interests of UDW and all of its creditors. This proposal, which would require a modification to the Scheme voted upon, had been rejected by UDW, the JPLs and the Ad Hoc Group for what Mr Todd QC submits were wholly unsatisfactory reasons.

104. He submitted that the court should direct the amendment of the UDW Scheme so as to give effect to this modification and/or to exclude Highland from those creditors of UDW that were bound by the Scheme and/or refuse to sanction the UDW Scheme on the ground that it was unfair to Highland.

105. Highland's proposal he submits seeks to ameliorate the position of Highland so that it is treated fairly. The effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the draft Complaint and the proposal seeks to carve Highland out the UDW Scheme to preserve its standing as a creditor. In return for being carved out, Highland would agree not to collect from UDW any sums due pursuant to the terms of the 2019 Notes or any Scheme Consideration arising by virtue of its rights under those Notes. He submits that if the proposal were accepted or if the court were to impose it on the parties, all UDW

Scheme creditors would be better off. He said that the proposal would not result in any delay, and can be accomplished by a very simple amendment to the Scheme documentation. It does not give Highland any special treatment, and was a genuine effort to resolve the matter. He also submits that the reasons given for the rejection were inadequate. He submits that Highland does not seek to 'hold out' with a view to derailing the Schemes. Rather this shows that what it really wants is to have to play no part in the UDW Scheme because it is unfair to Highland.

106. He also submitted that by the design of those promoting the Schemes none of the silo Schemes could take effect unless the UDW Scheme is approved by its creditors and sanctioned by the court. This is agreed by all parties. This he says gives a collateral motive to those creditors who derive substantial benefits from the silo Schemes when voting in favour of the UDW Scheme. There is of course a high degree of interconnectedness between the Schemes and it is the case that unless the UDW Scheme goes ahead the Group restructuring will not proceed as proposed.

107. He maintains the arguments advanced at the convening hearing concerning consent fees and other benefits under the RSA. He makes the point that his clients were not offered those benefits and points to a stark inequality of treatment. He also complains that the UDW guarantee creditors had already tied themselves to vote in favour of the UDW Scheme by virtue of the RSA so there was no meaningful vote with any integrity.

108. As to the meeting itself he contends that there was no intention on the part of UDW, the JPLs, or the Ad Hoc Group to engage in a dialogue as to the merits of the Scheme or indeed Highland's proposal.

109. He maintained his submission that the unfairness to Highland was a grave and serious one because: the UDW guarantee creditors will receive payments not made available to all UDW Scheme creditors and which were made in order to obtain their support for the UDW Scheme; those creditors therefore had rights and interests which were manifestly at odds with the UDW Scheme creditors as a whole and they were in addition receiving consideration with a view to locking them into the UDW Scheme; so they cannot be said fairly to represent the class of UDW Scheme creditors.

110. In this regard, he relied upon a passage in the judgement of Lord Millett in *UDL* who said it was open to the court at the sanction hearing to:

> *"...discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question."*

111. He also relies on Adam J in an Australian case *Chevron [1963] VR 249 at p.255:*

> *"The true position appears to be that where the members of the class have diverging interests because some have and others have not interests in a company other than as members of the class the court may treat the result of the voting at the meeting of the class as not necessarily representing the views of the class as such, and thus should apply with more reserve in such a case the proposition that the members of a class are better judges of what is to be their commercial advantage then the court can be. Insofar as members of the class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the views of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class".*

112. Reliance was also placed upon *Re Dee Valley [2017] EWHC 184* which confirms that members of the class must vote in the interests of the class as a whole and not in their own specific interests, if they are different from the interests of the class.

113. In this connection, I find that these authorities do not say that there is an inevitability that the votes in such circumstances will be disregarded or discounted where someone has an additional interest. It will turn upon whether the different interests, or the additional interests, are such that the creditor's vote is unrepresentative of the class in question.

114. Mr Todd QC submitted in conclusion that if the court was unable or unwilling to direct the amendment of the UDW Scheme so as to exclude Highland from those creditors that are bound by it, the court should refuse its sanction on the basis it was unfair to Highland. Mr Todd QC went so far as to suggest that Highland was the victim of a discriminatory scheme to eliminate $131 million of bond debt, leaving certain of UDW's other creditors outside of the Scheme. He suggested that it was unnecessary for there to be a UDW Scheme at all in respect of the 2019 note holders.

115. Mr Bayfield QC makes a number of submissions (dealt with to the extent necessary below) in answer to Mr Todd QC's arguments. He is supported by Mr Zacaroli QC and by Ms Reynolds in relation to these arguments. Mr Zacaroli QC on behalf of the Ad Hoc Group also made separate submissions in relation to Highland's complaint that the Scheme is unfair because it deprives Highland of its ability to pursue the New York Debtor and Creditor Law claims and the effect of the PCT. To avoid repetition, I will deal with Mr Bayfield QC's submissions as adopted by Mr Zacaroli QC and Ms Reynolds in the context of dealing with the issues in my reasons for the decision below.

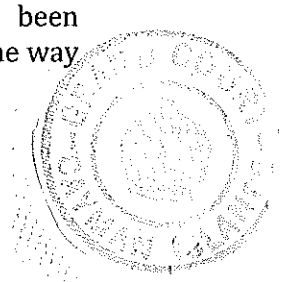
Decision

116. As I have said the only challenge in this case is that of Highland to the voting at the UDW Scheme meeting. No challenge has been made in respect of any of the other Scheme meetings, so this decision deals solely with the Highland objection to the UDW Scheme, upon which of course the other Schemes' effectiveness depends, because of their interconnectedness.

117. Dealing first with the lack of engagement arguments, I do not accept Mr Todd QC's submission that the UDW Scheme meeting was in any sense conducted unfairly or inappropriately or outside of the scope of the orders made convening it. He also suggested in argument that the UDW 2019 note holders may have looked at the Explanatory Statement, seen that the requisite majorities were already secured through the RSA and simply decided not to vote against it,as this restructuring was in effect a formality given the 'lock ups' that had been achieved under the RSA. I do not accept that the integrity of the voting has been in any way compromised. The Explanatory Statement carefully set out Highland's objections to the Scheme proposals. Any creditor wishing to support Highland was free to do so. Any creditor wishing to vote no could have done so.

118. Having reviewed the Chairman's report and the transcript of the meeting it is clear that it was fairly chaired by Mr Appell, one of the JPLs, and that all creditors had had an opportunity to participate and were given access to the meeting, including through a telephonic link. People were given a proper opportunity to ask questions and I do not accept that when the Chairman chose to read out the attorneys' correspondence rejecting Highland's proposal he was in any way failing to engage in a dialogue concerning it. He was simply informing the meeting of the recorded positions of the relevant parties. Neither was there any failure to set out the merits of the Scheme, which had been fully and fairly explained in the Scheme documentation, including in particular in the Explanatory Statement.

119. I find that all the formalities were complied with in this case. Highland had attended the meeting by its Chief Legal Officer and did not ask any questions of nor seek to consult with any UDW Scheme Creditor in person or on the telephone. He did ask questions of UDW's representative as to why Highland's proposal had been rejected by UDW, at which point the Chairman read out the relevant letters from the lawyers. I find that all the UDW creditors had the opportunity to access the relevant information and ask questions and consult together. No grounds have been established to show that the validity of the resolutions passed or the way in which the votes were cast should be impugned.



120. I do not accept Mr Todd QC's argument that this was a discriminatory, unlawful Scheme which victimises Highland.

A company is free to select the creditors that it puts a scheme to, including omitting from the scheme creditors who would or might otherwise form part of the class certain creditors, where there is a good commercial reason to do so: see *Garuda [2001] EWCA Civ 1896.* Mr Bayfield QC answers the point in addition by saying that the UDW creditors who are left out of the scheme are service providers that are considered by the company to be essential to the on-going activities of the company and who are being paid in the ordinary course because they continue to supply services for the on-going business. There is no evidence on that point but it seems to me that would be quite normal. The only other creditors who are left out relate to claims which are disputed and are being resolved. That is also quite normal in my experience.

121. As to Mr Todd QC's arguments that the voting had been unrepresentative and/or was affected by special interests, I do not accept that this is the case. It is not enough for him to show that the majority had additional interests which motivated them to vote in favour of the Scheme, as long as they were voting in favour of the Scheme on its merits and **not** against the class. There was no evidence or reasonable inference that I could draw to this effect.

122. It seems to me that the right conclusion is that they were voting in favour because it is a better outcome for them and for all UDW creditors to the alternative liquidation scenario. I am fortified in that view by those creditors in the same category as Highland who also voted in favour of the Scheme. Mr Todd QC has not satisfied me that an intelligent and honest member of the class without those additional interests could not have voted in favour of the Scheme. There is no reason to discount their vote in favour of the UDW Scheme where there are independent and good reasons for voting in favour. In this regard I fully endorse the reasoning of Hildyard J in *Apcoa* and see no reason to depart from it, (as Mr Todd QC would have me do).

123. As I have already said in my reasons dealing with the convening hearing the benefits derived by some creditors in the UDW Scheme reflect the rights of Scheme Creditors and the economic and legal reality and there are no grounds to conclude that the voting was in any sense unfair, unrepresentative or tainted by special interests. I find that the interest of all UDW Scheme Creditors to approve a scheme that is preferable to a liquidation aligns them.

124. I also dealt with my reasons in **Part 1** concerning consent fees at the convening hearing stage. The same reasoning applies to the questions before me concerning sanction. Not only are they not material but they are paid to the guarantee creditors not in their capacity as UDW Scheme

Creditors, but in their capacity as silo creditors. So the question is whether that gives them an additional interest which renders their vote unrepresentative of the class. I do not believe that it does. A consent fee at less than 1% of the principal amount of the debt does not have the effect of persuading a guarantee creditor to support the UDW Scheme in its best interests in circumstances where it could not reasonably otherwise do so. There is no unfairness to Highland, because the money which is being used to pay the consent fees comes out of the silo assets and were it not being paid to guarantee creditors by way of consent fee, it would be paid to them by way of silos Scheme Consideration. Highland has not been deprived of anything by not being offered consent fees and I do not find any unjustified inequality of treatment.

125. As to Highland's complaint, those matters feature claims alleging that wrongs were committed against UDW. There is nothing inherently unfair to Highland in the fact that the Scheme results in **all** creditors losing their ability to pursue these claims themselves. It is clear from the expert evidence served on both sides that all creditors have the same right to bring these claims and it is not a right that only Highland has. I find that the PCT is a much fairer way of dealing with any claims that may properly be asserted against officers of UDW and their affiliate's . It treats all of UDW's Scheme Creditors rateably and does not give any priority to anyone.

126. I take the view that any modification of the Scheme is in any event not open to this court even were I to think (which I do not) that the Highland proposal was a fairer way of proceeding for everyone. This is not only because it is not the role of the court to consider what would be the best scheme upon which there would be differences of view. The role of a court at a sanction hearing is to approve or not the scheme actually put to creditors, not some other scheme and particularly not a scheme which has been rejected by the company and the majority of creditors and the JPLs - see Lloyd J in *Re Equitable Life (no 2)* [2002] 2 BCLC 510 at paragraph 102:

"... It would be quite wrong to use [the provision] so as to foist on a class of creditors something substantially different to what has been approved at the relevant meetings". See also Lord Hoffman's decision in Kempe [1998] 1 WLR 271."

127. The power to amend which exists in the Scheme documentation requires the company's agreement and only deals with amendments which would have no material adverse effect on the interests of Scheme Creditors. There are a number of uncertainties which would arise in any litigation brought by Highland which, depending upon how it proceeds, could well end up with an adverse result for the UDW Scheme Creditors. One of those consequences is a disruption to the on-going management of the Group and another is potential competition between the PCT claims and

any claims Highland might seek to bring. As I said earlier the Trustee as controlled by the JPLs (in their capacity as directors of the Trustee) is well placed to decide upon the right strategy for all UDW creditors in respect of these claims.

128. I find that there has been compliance with the statutory requirements and with the terms of the convening orders in this case. I also find that the votes of the UDW guarantee creditors should not be disregarded or discounted.

130. I find that the UDW Scheme is an arrangement that an honest and intelligent UDW Scheme Creditor acting in its interests might reasonably approve. There is no reason established which gives the court any cause to hesitate in sanctioning the UDW Scheme and indeed all four Schemes. The restructuring of all four Schemes put together is the best way of maximising value for the creditors of the Group. It is based on a fair allocation methodology and it treats all creditors fairly. Under each of the four Schemes the creditors achieve a better result than in a liquidation. That is the position for the UDW 2019 Notes holders and the guarantee Scheme Creditors alike.

131. The vote at the UDW Scheme meeting was overwhelmingly in favour of the UDW Scheme. The purpose of the legislation is to give effect to the views of the large majority required by statute who approve schemes of arrangement, to proceed with implementation(and to release their rights in exchange for scheme consideration) in the manner prescribed , subject to the court's sanction applying the right tests to that exercise. Those tests should not be applied to enable minority creditors who have strongly opposing views to "hold to ransom" or "hold out" against the majority to prevent a scheme from proceeding, or to force a modification of it, or indeed to opt-out.

THE HON RAJ PARKER
JUDGE OF THE GRAND COURT