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Case No: CR-2020-003942

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 16 December 2020

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF SUNBIRD BUSINESS SERVICES LIMITED

AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

- -

Andrew Thornton QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Company**

Mr. Rupinder Bains (a creditor) appeared in person

Hearing dates: 1 and 2 December 2020
Further written submissions 7 December 2020

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 9.00 a.m. on 16 December 2020.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is an application by Sunbird Business Services Limited ("the Company") under Part 26 of the Companies Act 2006 ("the CA 2006") for an order pursuant to section 896 CA 2006 sanctioning a proposed scheme of arrangement between the Company and its creditors ("the Scheme Creditors" and "the Scheme" respectively). It raises issues as to the adequacy of financial information provided to creditors for the purposes of considering a scheme of arrangement in relation to a relatively small or medium-sized private company.

Background and overview

2. The Company is the ultimate holding company and provider of finance for a group of operating subsidiaries that provide flexible office space in a number of African countries including, in particular, Kenya and Tanzania. Its main directors are Mr. Michael Aldridge ("Mr. Aldridge") and Mr. William Sykes ("Mr. Sykes").

3. The Company and its group has been funded by a combination of equity and short term debt instruments from the private sector. The group found it difficult to service the level of its debt during 2019 and was planning to raise more capital in 2020, but its performance, cash generation and profitability suffered as a result of the COVID-19 pandemic. The Company's evidence is that without a restructuring of the Company's balance sheet to reduce its level of debt and an injection of new working capital, the companies in the group would run out of cash and be forced into a formal insolvency process.

4. To this end, the purpose of the Scheme is to pave the way for future fund raising by strengthening the Company's balance sheet by a debt to equity swap under which about US$15.9 million (plus accrued interest) of the longer-standing financial debt owed by Company will be converted into A1 Ordinary Shares in the Company in proportion to the value of the debt held. The conversion rate for the debt to equity swap will be one A1 Ordinary Share for every US$0.33 of debt held.

5. Then, to provide the necessary working capital for the continued operations of the Company's group of subsidiaries pending some further refinancing, and conditional upon the Scheme becoming effective, the Company will raise working capital for the group by a fully underwritten rights issue of further A1 Ordinary Shares in the Company (the "Rights Issue"). The Rights Issue will apply to all of the Company's existing shareholders, including the Scheme Creditors in respect of their converted debt, and will raise a further US$3 million at a subscription price of US$0.20 for each new A1 Ordinary Share.

6. This judgment follows two earlier judgments. In the first judgment given on 18 September 2020, I dismissed the Company's application for sanction of a first scheme (the "Original Scheme") in near identical terms to the current Scheme: see [2020] EWHC 2493 (Ch). That judgment contains greater detail of the background to the restructuring proposal and the disputes that have arisen between the Company and those who have opposed the Company's plans. I shall not repeat that background here, but shall simply note that I refused to sanction the Original Scheme because I found that the information provided by the Company to the Scheme Creditors was inaccurate,

incomplete and, in certain respects, misleading. I also criticised the manner in which the Company had approached the scheme process.

7. The Company contends that it has now rectified the defects that I identified in my first judgment. It has returned to court to promote the current Scheme with a revised explanatory statement (the "Scheme Document"). It is also important to note that for the purposes of the new Scheme, Scheme Creditors were released from the lock-up agreements under which they had previously undertaken to support the Original Scheme.

8. In my second judgment given on 28 October 2020, I ordered the convening of a single meeting of the Scheme Creditors to consider and if thought fit, to approve the current Scheme: see [2020] EWHC 2860 (Ch).

9. The Scheme was approved by the requisite majorities at the meeting of Scheme Creditors held on 20 November 2020. All but two of the Scheme Creditors (30 out of 32), holding 99% in value of the Scheme Debt, voted at the Scheme Meeting. The Scheme was approved by 24 out of the 30 Scheme Creditors who voted – i.e. 80% in number. Those voting in favour held 86% in value of the Scheme Debt voted. The required statutory majorities in favour of the Scheme were thus easily obtained. Even if all of the directors and existing shareholders were excluded, the Scheme would still have been approved by a significant majority of "pure" Scheme Creditors – albeit not by a 75% majority by value.

10. In spite of this strong support for the Scheme, sanction is opposed by the same parties who opposed the Original Scheme and who appeared at the convening hearing ("the Opposing Creditors"). They include, in particular, Mr. Rupinder "Mike" Bains ("Mr. Bains") and other creditors associated with him, together with an unconnected creditor, Beach Resorts Investments Limited ("BRIL"). Mr. Bains is the ex-finance director of the Company, who has been in dispute with the Company since leaving office just over a year ago.

11. The essence of the Opposing Creditors' objection is that the financial information in the revised Scheme Document is still inadequate, contains numerous inaccuracies and in material respects is unverified by any independent person. They contend that no reasonable Scheme Creditor could have made an informed decision upon the merits of the Scheme on the basis of such information, and that neither the Scheme Creditors nor the court can be confident that the Company and the group will be solvent and financially viable after the implementation of the Scheme and Rights Issue, so that the court would be sanctioning the Scheme in vain.

The Scheme and Scheme Document in outline

12. In broad outline, the commercial and operative terms of the Scheme are unchanged from the Original Scheme. Changes have, however, been made to the definition of Scheme Debt to clarify precisely (by way of a schedule) the liabilities owed to each of the 32 Scheme Creditors to be converted into new A1 Ordinary Shares under the Scheme.

13. The Scheme Document is, in certain respects, unchanged from the document used in relation to the Original Scheme. Most relevantly, the most recent audited accounts of

the Company still date from 31 July 2018, and the most up-to-date financial information is still unaudited pro forma balance sheets and profit and loss accounts of the Company and the subsidiaries to 31 July 2020.

14. In most other relevant respects, however, the revised Scheme Document has been substantially expanded and improved from the earlier version used in relation to the Original Scheme.

15. Importantly for present purposes, the Scheme Document includes an expanded section summarising an analysis of the estimated returns to Scheme Creditors if there were to be a formal insolvency of the Company and each of its subsidiary companies. In contrast to the document for the Original Scheme, this section of the Scheme Document provides more detailed information on the legal positions of each of the operating subsidiaries. The Scheme Document also contains an expanded section outlining the views of the directors as to a range of potential alternatives to the Scheme (none of which they consider viable).

16. The view of the directors as to the likely minimal return to Scheme Creditors if there were to be an insolvency of the Company is also said to be supported by an "Insolvency Analysis" prepared by two insolvency practitioners from James Cowper Kreston LLP ("JCK"). The Scheme Document summarises the view expressed in the Insolvency Analysis that if the Company were to be wound up, Scheme Creditors could expect to receive a dividend of between 0 and 1% on their debts.

17. It is, however, apparent from the introduction to the Insolvency Analysis that the role of JCK in preparing the Insolvency Analysis was limited. In particular, the firm did not conduct a full verification exercise or audit of the financial information provided by management upon which the analysis was based. The introduction to the Insolvency Analysis said,

> "In preparing our report our prime source of information has been management information provided by the Company and responses to queries we have raised. We have not generally sought to establish the reliability of information provided to us although we have sought to confirm certain information by reference to Companies House. Our work does not constitute an audit and we will not issue an opinion relating to the financial statements, tax or internal control systems of the Company."

18. In addition, the Scheme Document contained an enlarged section describing the methodology adopted by the board in valuing the Company for the purposes of setting the conversion ratio for the debt to equity Conversion under the Scheme and the pricing of the Rights Issue. Again, in contrast to documentation for the previous scheme, this section in the revised Scheme Document is said to be supported by reference to an independent review of the methodology and key assumptions of the board which has been conducted by the corporate finance arm of JCK (the "Valuation Review Report").

19. As well as being summarised in the Scheme Document, and in contrast to the approach adopted on the Original Scheme (for which JCK had not conducted an insolvency analysis and had not agreed to publication of its original review of the board's valuation methodology), both the Insolvency Analysis and the Valuation Review Report by JCK

were made available on request for inspection by Scheme Creditors prior to the Scheme meeting.

20. The Scheme Document also contained, in each of the sections relating to the Insolvency Analysis and the Valuation Review Report, a bold and underlined disclaimer in the following terms,

> "The [Insolvency Analysis and Valuation Review Report] was prepared for the information and benefit of the Board of [the Company], [the Company] and the Court (for the purpose of considering whether to sanction the Scheme) and JCK does not accept responsibility to any other party who may be shown a copy of the documents including Scheme Creditors."

21. Further, the Scheme Document included, for the first time, full detail in relation to the Rights Issue in the form of a draft offer letter and application form. The Scheme Document also contained a section illustrating, in a number of scenarios, the effect for Scheme Creditors by way of the dilution of their new A1 Ordinary Shares if they did not take up their rights under the Rights Issue. Again, this was in contrast to the Original Scheme (where there was no such information in the scheme documentation, and illustrations had been provided informally to some, but not all, Scheme Creditors).

22. Finally, the Scheme Document contained a new section summarising projections made by the board of the Company in June 2020, which were reviewed at the time by JCK, of the trading results and resultant financial position of the Company and the group for the period to April 2021 assuming sanction of the Scheme and implementation of the Rights Issue. The section also contained a narrative providing an update of the view of the board as to their projections and the prospects for the group, taking into account the delay in implementation of the restructuring caused by the failure of the Original Scheme.

Written objections to the Scheme and the Scheme Meeting

23. Following the convening hearing, the Scheme Document was sent to Scheme Creditors on 29 October 2020 and the date of the Scheme Meeting was fixed for 20 November 2020.

24. After receipt of the Scheme Document, solicitors acting for the Opposing Creditors (Shoosmiths LLP) wrote to the Company's solicitors on 6 November 2020 raising a number of detailed questions in relation to the information provided. The Company answered those questions on 14 November 2020 and followed that up on 16 November 2020 with a letter calling for any further questions, or confirmation that there were no further issues in respect of the Scheme.

25. On 19 November 2020, the day before the Scheme Meeting, Shoosmiths sent a further letter maintaining that the Scheme Document continued to lack relevant information. The letter should have included a lengthy schedule of questions prepared by the Opposing Creditors on the basis of a detailed analysis of the financial information, but in error did not do so. That document was only provided to the Company's solicitors by email after the Scheme Meeting had been concluded. Curiously, however,

Shoosmiths' letter only called for an answer to the questions raised in the schedule by 26 November 2020 in any event.

26. Further, although Mr. Bains attended the Scheme Meeting on 20 November 2020, he did not ask the Chairman to adjourn the Scheme Meeting in order for the questions which had been raised by his solicitors to be answered. He was clearly aware of the possibility of doing so, since such a course had been followed by the Company when questions had been raised in relation to the adequacy of the documentation provided for the Original Scheme.

27. Nor did Mr. Bains ask questions at the Scheme Meeting or otherwise seek to suggest to other Scheme Creditors (before or at the meeting) that the information with which they had been provided was insufficient to enable them to form a view on the merits of the Scheme.

28. Instead, on Friday 27 November 2020, one clear business day before the sanction hearing, Shoosmiths wrote a long letter to the Company which was then copied to the court. The letter explained that the Opposing Creditors had chosen not to instruct solicitors and counsel for the sanction hearing (as they had for each of the earlier two hearings), claiming that the costs of represented opposition at the hearing would be "prohibitive".

29. Shoosmiths' letter then went on to raise a large number of points of opposition to the Scheme, and stated that in the absence of representation,

> "[The Opposing Creditors] expect your client to bring this letter to the Court's attention and address the points raised therein at the sanction hearing listed for 1 December 2020; your client is doubtless aware of its duties to the Court in that regard."

In addition, however, Shoosmiths indicated that their clients would be available at the hearing "to answer any questions the Court may have". In the event, Mr. Bains appeared in person.

The Sanction Hearing

30. At the sanction hearing, Mr. Thornton QC objected to the course of action taken by the Opposing Creditors. He submitted that it sought to place an inappropriate burden upon the Company to argue the case against itself based upon the Shoosmiths' letter, and that the Opposing Creditors' reluctance to instruct an advocate to appear at the hearing could not be justified by concerns over costs. In that latter regard he pointed out that (i) at least one of the Opposing Creditors (BRIL) was an apparently substantial company and the other Opposing Creditors were sophisticated investors, and (ii) Shoosmiths and their clients would undoubtedly be aware of the general practice of the court to award costs to creditors who appear on schemes, even if they do not succeed in their opposition (not least because I had made orders in their favour on each of the previous occasions that they had appeared, notwithstanding that on the second occasion I rejected their arguments on the class point).

31. In Stronghold Insurance Company Limited [2018] EWHC 2909 (Ch), Hildyard J dealt with arguments on class composition at a convening hearing. He also had the following

comments on the conduct of a substantial creditor which had instructed its lawyers (Covington & Burling) to send a letter to the company a few days before the convening hearing, raising a number of points on the class issue, but then chose not to be represented at the hearing,

> "142. I have experienced a growing tendency for creditors to purport to reserve their position by floating or trailing generic points without proper explanation, elaboration or evidential base, often with the expressed expectation of returning to their points (or some of them) in the future (usually the Sanction stage). It seems to me that the Covington Letter is an example of this tendency.
>
> 143. This developing tendency places a growing burden, not only on the Company (which has an obligation to do its best to address and deal candidly with points of substance going to the court's jurisdiction or likely to affect its proper exercise), but also on the court, which is obliged to sift through disparate and sometimes undeveloped points without proper assistance.
>
> 144. Furthermore, even in the case of creditors with comfortably the financial wherewithal to fund appropriate representation (such as the Covington-Represented Creditors in this case which include some of the largest corporations in the world), this tendency is accompanied by an apparent reluctance or disinclination to arrange to be represented at the Convening Hearing. That tends to increase, not decrease, the burden on the court, which will often (almost invariably, in my own experience) be assisted by properly focused oral argument.
>
> 145. In case this reluctance or disinclination is the result of concerns that attendance may trigger some exposure to costs, I would wish to make clear my understanding (and certainly my own usual practice) that, unless the objections are wholly improper or irrelevant, obviously collaterally motivated, or sprung on the scheme company without affording a proper opportunity for their discussion, there is very little likelihood of any adverse order for costs at that stage; and indeed there will usually be a real prospect of the relevant creditor recovering its reasonable costs of helpful and focused representation, fairly outlined in good time before the convening hearing to enable their proper consideration, on the class issues raised."

32. I entirely echo and endorse those observations, and in case there be any doubt about it, I would add that they also apply to the hearing at the sanction stage: see my comments in Re Ophir Energy plc [2019] EWHC 1278 (Ch) in which I declined to give any weight to points made in correspondence, without proper particularisation, by an opposing shareholder which then chose not to turn up to the sanction hearing.

33. I consider that Mr. Thornton QC was justified in his criticism of the approach of the Opposing Creditors. The net result of that approach was as predicted by Hildyard J in

paragraph [143] of Stronghold. Mr. Thornton QC felt obliged to try to assist me to pick my way through the arguments made in the Shoosmiths' letter. Inevitably, this meant that I had questions for Mr. Bains, who ended up making detailed submissions to me which overlapped with the matters that had been raised by Shoosmiths. For good measure, Mr. Bains then also sought to pick up some of the issues which had been raised in the document which had been sent to the Company on 20 November 2020. This had the further consequence that Hildyard J predicted in paragraph [144] of Stronghold: the burden on the court was increased, the hearing was lengthened, and Mr. Thornton QC was forced to make reply submissions in writing.

34. Irrespective of the merits or otherwise of the underlying points, I do not regard the approach adopted by the Opposing Creditors as helpful.

The Law

35. I set out the relevant law in my first judgment refusing to sanction the Original Scheme: see [2020] EWHC 2493 (Ch) at [49]-[65]. For convenience I shall summarise it here.

36. The classic approach of the court to the exercise of this discretion was described by David Richards J in Re Telewest Communications plc (No.2) [2005] 1 BCLC 772 at [20]-[22] as follows,

> "20. The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Ltd [1966] 1 WLR 819 by reference to a passage in *Buckley on the Companies Acts*, which has been approved and applied by the courts on many subsequent occasions:
>
>> "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
>>
>> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been 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."

> 21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under section 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve". That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> 22. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court "will be slow to differ from the meeting"."

37. The reference by David Richards J to the qualifications set out in the second paragraph of the extract from *Buckley on the Companies Acts* relevantly include, for present purposes, the requirement that the class of creditors must have been "properly consulted". In this respect, the origins of the text in *Buckley* are to be found in the judgment of Lindley LJ in the Court of Appeal in Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385 at page 408-409,

> "Now, it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the Court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.
>
> While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage."

38. In determining what amounts to "proper consultation", the starting point is section 897(1) CA 2006 which provides that every notice summoning a meeting of creditors

convened by the court under section 896 must be accompanied by a statement complying with section 897. Section 897(2) then provides,

> "The statement must—
>
> (a) explain the effect of the compromise or arrangement, and
>
> (b) in particular, state—
>
> (i) any material interests of the directors of the company (whether as directors or as members or as creditors of the company or otherwise), and
>
> (ii) the effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons."

39. These provisions are supplemented by paragraph 14 of the new Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) which provides as follows,

> "14. Explanatory statements should be in a form and style appropriate to the circumstances of the case, including the nature of the member and/or creditor constituency, and should be as concise as the circumstances admit. In addition to complying with the provisions of section 897 … the commercial impact of the scheme must be explained and members and/or creditors must be provided with such information as is reasonably necessary to enable them to make an informed decision as to whether or not the scheme is in their interests, and on how to vote on the scheme. Where a document is incorporated into the explanatory statement by reference, readers should be directed to the material part(s) of the document."

40. The references in the new Practice Statement to the need for an explanatory statement to provide creditors with an explanation of the commercial impact of the scheme and "such information as is reasonably necessary to enable them to make an informed decision as to whether or not the scheme is in their interests" reflect existing case law: see e.g. Re Heron International NV [1994] 1 BCLC 667 at 672g-i, and Re Ophir Energy plc [2019] EWHC 1278 (Ch) at [22].

41. In the context of a scheme for creditors which is put forward as an alternative to a formal insolvency process, it is certainly conventional for the scheme company to seek to fulfil these information requirements by putting forward a detailed analysis which estimates the likely returns for scheme creditors in such an insolvency and under the scheme, together with the likely timescales for such recoveries. That is because the reasonable creditor deciding how to vote, and the court which is asked to exercise its discretion to sanction the scheme in the interests of all creditors, will at the very least require to be satisfied that all creditors are being offered a realistic prospect of receiving a greater or

faster return under the scheme than they are likely to receive in the alternative if the scheme is not sanctioned: see per David Richards J in Re T&N Limited [2005] 2 BCLC 488 at [82] and my own observations to similar effect in Re Noble Group [2019] BCC 349 at [90].

42. It is also self-evident that to enable a reasonable creditor to assess the fairness of a scheme devised by the directors and the reliability of their recommendation of it, the creditor must have a full understanding of the relevant financial and commercial interests of the directors. That is particularly so in a case in which the directors are interested, whether personally or through third parties with which they are connected, in a number of different capacities, e.g. by being creditors, shareholders, employees or the providers of interim or further finance to the restructured company. These factors are the obvious basis for the statutory requirement that the explanatory statement circulated with the notice of the scheme meeting(s) must include a statement of the interests of the directors.

43. In addition, if directors who are personally interested seek to buttress their proposals and recommendations of a scheme by reference to the views of an independent person, including in particular a professional adviser or expert, the explanatory statement should be open and transparent about the identity of that person, the terms and basis upon which he has given his advice or opinion, and whether or not he is prepared to accept responsibility (and hence owe a duty of care) for the opinion to scheme creditors.

44. Provided that the defect does not go to the jurisdiction of the court to sanction the scheme, it is also clear that the court has a discretion as to whether to sanction a scheme notwithstanding an inaccuracy or omission in the information provided to scheme creditors. In exercising that discretion, the court will naturally have regard to the materiality of the inaccuracy or omission. This will ordinarily involve asking whether the inaccuracy or omitted matter is likely to have affected the way in which a creditor would have voted on the scheme – e.g. whether an assenting creditor would have changed their view or an abstaining creditor would have voted against the scheme: see Re Heron International NV [1994] 1 BCLC 667 at 673a.

The Objections to the information in the Scheme Document

45. The Opposing Creditors did not seek to suggest that my decision on the composition of the single class of Scheme Creditors was wrong, or that the vote at the Scheme Meeting was not representative or that the majority were actuated by some bad faith or personal or collateral interests in voting for the Scheme. Nor was it suggested that there was some "blot" or technical defect in the Scheme.

46. As I have indicated, the focus of the attack by the Opposing Creditors and Mr. Bains was on the accuracy and adequacy of the information in the Scheme Document. Mr. Bains' submissions to some extent followed the content of the letter from Shoosmiths which had been sent on 27 November 2020, but also drew on the analysis in the Schedule which had been provided by Shoosmiths after the Scheme Meeting had taken place. I shall deal with those submissions under a number of broad headings.

Disclosure of interests

47. Mr. Bains contended that the Company failed to make full disclosure of the interests of persons closely related to its directors. The Scheme Document included a table setting out the interests which it was said that "the Directors and their immediate families and related trusts and companies" would have in the shares in the Company following the Rights Issue, assuming that they and all existing investors elected to take up their rights in full. It showed that such persons would hold 48.21% of the total shares in issue. However, this table omitted the interests that four of the Scheme Creditors (Mr. Aldridge's sister, his mother-in-law and her new husband, and Mr. Sykes' father) would have in shares following conversion of their debt and subscription for new A1 Ordinary Shares under the Scheme and Rights Issue.

48. That omission did not amount to a failure to make disclosure of the interests of the directors contrary to section 897 CA 2006, because the persons omitted from the table were not themselves directors.

49. I also do not consider that this omission would have had any material impact upon the decision of Scheme Creditors. If the persons omitted had been included, the table would have shown that the directors and connected persons would hold 50.59% rather than 48.21% of the issued shares in the Company. If only Mr. Aldridge's sister and Mr. Sykes' father had been included, the number would have risen to 49.92%. These are very small increases which do not in any way change the point that was made clear to Scheme Creditors by the Scheme Document, namely that the directors who are the proponents of the Scheme have, together with a variety of persons associated with them, significant personal interests in the outcome, both as existing shareholders and Scheme Creditors.

Inaccuracies in the Financial Information and Insolvency Analysis

50. Mr. Bains drew attention to what he said were a number of material inaccuracies and inconsistencies in the financial information provided to Scheme Creditors, including in the Insolvency Analysis. I shall deal with some of these matters individually to illustrate the points made, and then return to deal with them collectively at the end of the judgment.

51. One such alleged inconsistency was the amount of the Kenya Leasing Facility owing from Sunbird Kenya to NIC. Although not a Scheme Debt, for some reason this was defined in the Scheme itself as a facility with US$936,468 outstanding as at 14 October 2020. In the Company's evidence this was described as a facility of US$992,000, and in the Insolvency Analysis of Sunbird Kenya the amount of this liability was given as US$771,000. These figures are indeed impossible to reconcile on the basis of the limited information in the documentation.

52. However, Mr. Aldridge filed additional evidence - which I accept - to explain the different bases upon which these figures had been calculated. The differences are attributable to whether the figure included the amounts which would fall due to the end of the facility in two years' time, whether they took into account upfront deposits paid, and to the use of different Kenyan shilling/US$ conversion rates.

53. It would undoubtedly have been preferrable if a consistent approach had been taken, or a better explanation had been given in the documentation. However, I do not consider these inconsistencies would, of themselves, have been material to the decision of Scheme Creditors. The Kenya Leasing Facility debt is not a Scheme Debt, and what appears to be an understatement of the amount that might be claimed by the counterparty in an insolvency of Sunbird Kenya would simply increase the already significant deficiency predicted as regards unsecured creditors of that company in such insolvency. That would simply reinforce the view expressed in the Insolvency Analysis that there would be a minimal return in a formal insolvency of that company.

54. Mr. Bains also drew attention to the fact that the Insolvency Analysis of Sunbird Kenya assumed that there would be no recovery in an insolvency in respect of a number of assets shown on the balance sheet. These included what was described as a loan of US$392,000 to a company called Terra Firma Africa Kenya ("TFA Kenya"). TFA Kenya is a company that was previously owned by the Company and which carried out construction work. When the Company switched the focus of its business to the provision of flexible office space in 2018, TFA Kenya was sold to Mr. Sykes for US$1 on the basis that he would run down that company's construction contract to completion. In the Insolvency Analysis, JCK stated that it had been "advised" TFA Kenya is not in a position to pay its debt to Sunbird Kenya.

55. In supplemental evidence, Mr. Aldridge sought to attribute this reference to an accounting error made when the group's new head of finance "began the process of rebuilding the books and records" after the auditors had made audit adjustments and had difficulties reconciling balances in the audit process for 2017 and 2018. Although, bizarrely, Mr. Aldridge first sought to suggest that the statement in the Insolvency Analysis that such loan was not recoverable was correct, in fact his evidence was that there was no loan and no amount due at all. Mr. Aldridge then stated that,

> "The Company had explained the background of the TFA Kenya loan during the insolvency analysis carried out by JCK, however, I accept that the language in the Insolvency Analysis is not a satisfactory description of the position."

56. In his supplemental evidence, Mr. Aldridge made a similar revelation in relation to an asset of US$126,000 shown in the Insolvency Analysis relating to the Company as comprising loans to Sunbird Mauritius and to "TFA companies". The Insolvency Analysis estimated that these loans would realise no value in the event of a formal insolvency. Mr. Aldridge stated that these were also non-existent loans arising from the same type of accounting error as in relation to the non-existent loan from Sunbird Kenya to TFA Africa.

57. Although manifestly unsatisfactory, I do not consider that these errors are material in themselves. Although misdescribed in the Insolvency Analysis, the net result is that there would still be no recovery from an asset and hence no change in the likely outcome for creditors in a formal insolvency of the Company.

58. Mr. Bains also drew attention to a note to two entries in the Insolvency Analysis in relation to the Company. The first was "Trade Receivables" which was mysteriously shown in the balance sheet as a liability of the Company of US$42,000. The second

was "Current Liabilities" which was shown in the balance sheet as a liability of US$1,093,000. The note to both entries stated that,

> "The Company balance sheet includes creditor balances relating to trade receivables ($42k) and other current assets ($273k). We have been informed that these balances relate to accounting anomalies and do not reflect either an asset or liability of the Company."

59. There was no further explanation of why these items were included in the balance sheet as liabilities but described in the note as assets. Nor was it explained what view was taken as to the realisable value or amount of liability of the remaining US$820,000 (i.e. US$1,093,000 – US$273,000) of Current Liabilities. The "estimated to realise" column in the Insolvency Analysis simply attributed no value (or liability) to the entire amount.

60. As I see it, if it turned out that these amounts were real liabilities, this would indicate that the position of Scheme Creditors in a formal insolvency would be worse, and would not change the view of any creditor on the merits of the Scheme. These amounts could only conceivably have any bearing on the decision to be made by Scheme Creditors if they represented real assets which could be realised for full value in a liquidation, potentially turning a dividend of a fraction of 1% into one approaching 5%. Although Mr. Bains was right to point to the discrepancies, he did not suggest that there was any realistic likelihood of an undisclosed asset being found having such realisable value.

61. Mr. Bains also used the Insolvency Analysis to question the accuracy of the pro forma balance sheets included in the Scheme Document to show the effect on the Company of the Scheme and Rights Issue. The exercise which Mr. Bains conducted involved adjusting those pro forma balance sheets to take account of the comments in the Insolvency Analysis as regards some of the supposed assets of the Company.

62. So, for example, Mr Bains contended that the entry in the pro forma balance sheet for trade and other receivables in the sum of US$3,727,000 was overstated, because according to the breakdown of that figure in the Insolvency Analysis, the same number included an item for "Prepayments" in the sum of US$255,000, and the relevant note to the Insolvency Analysis stated,

> "Prepayments include some amounts prepaid in respect of, for example, medical and PI insurance which we would not expect to be refundable. We [JCK] have been informed that the greater part of this balance relates to entries which remain unknown – having not been identified as part of or since the audit of the 31 July 2018 financial statements – and, therefore, we have assumed that there will [not] be any realisation."

63. Mr. Bains submitted that this rationale suggests that the same item – which related to "entries which remain unknown" in the Company's accounting records - should have been written down to zero in the pro forma balance sheet, even on a going concern basis, since the valuation of the asset as worthless did not depend upon the insolvency of the Company.

64. Mr. Bains made a similar point in relation to a debt of US$440,000 shown in the balance sheet in the Insolvency Analysis as being owed to the Company by Sunbird Facilities. The notes to the Insolvency Analysis stated that Sunbird Facilities has been dissolved and there is thus no prospect of any realisation. He submitted that on this basis, the debt should have been written down in the pro forma (going concern) balance sheet of the Company, since it will be irrecoverable even if the Company continues as a going concern.

65. I accept that these were valid points on the accuracy of the pro forma balance sheet of the Company as at 31 July 2020 in the Scheme Document. Although that balance sheet suggested that the effect of the Scheme and Rights Issue would be to turn a net deficiency of US$10.777 million into net equity of US$10.874 million, the true balance sheet position is likely to be less than that.

66. However, not all of Mr. Bains' criticisms of the information were well founded. For example, in the pro forma balance sheets, the value of the Company's investment in its subsidiaries was shown as US$5,952,000, which was the same value attributed to intangible assets in the balance sheet in the Insolvency Analysis. However, the notes to the Insolvency Analysis stated,

> "The Company's balance sheet as at 31 July 2020 shows intangible assets of $5,952m. This comprises acquired goodwill. The acquisition included the trading name and customer agreements We have been informed that there is no formal registration of the Company trading style. We do not consider that there will be any significant value in these intangible assets."

67. Mr. Bains suggested that since the Company had recently changed its trading style to "Kofisi" there could no longer be any value in the goodwill and hence there should be a reduction in the value attributed to the investments in the Company's pro forma balance sheet.

68. I do not accept that submission. The suggestion that there would be no value in the trading name and customer agreements if the group were to descend into formal insolvency proceedings is hardly surprising, but it does not follow that those items have no value if the group continues to trade, or that the change of trading style should have resulted in a write-down of goodwill. Moreover, the Insolvency Analysis indicates that the acquired goodwill of the Company merely included the trading name – it did not suggest that the value of the goodwill was entirely attributable to its trading name and style.

69. Mr. Bains also submitted that the pro forma balance sheet showing the effect of the Scheme was incorrect as it showed a reduction in the trade and other payables of US$4,318,000 to US$1,604,000 as a result of the Scheme, in addition to the reduction of about US$15.9 million of borrowings and convertible loan notes. Mr. Bains asserted that the reduction in trade and other payables was unexplained. It was, however, explained by Mr. Thornton QC in reply, and I accept, that the reduction in this amount is due to the conversion to equity of the interest element of the Scheme Debt.

70. Pulling these threads together, I agree with Mr. Bains that collectively the errors and anomalies in the financial information provided to Scheme Creditors to which I have

referred are unsatisfactory. The overall impression given by the documentation is that the state of the underlying accounting records of the Company and its subsidiaries is profoundly unsatisfactory, and that the figures and explanations put forward by the directors in the Scheme Document are not of the accuracy and quality normally seen in explanatory statements provided to scheme creditors under Part 26 CA 2006. As a consequence, there are also inevitable defects in JCK's Insolvency Analysis which, as indicated above, was based upon the information provided by management without a full independent verification exercise.

Matters of Opinion

71. On a different tack, Mr. Bains also criticised the Insolvency Analysis for failing to take into account the possibility that, as an alternative to a liquidation of Sunbird Kenya and Sunbird Tanzania, a liquidator of the group's intermediate holding company (Sunbird Africa) might seek to sell the shares in the two trading subsidiaries and thereby realise significant value which would be paid to the Company either as a creditor or shareholder of Sunbird Africa.

72. The basis for Mr. Bains' contentions in this respect was that Sunbird Kenya and Sunbird Tanzania had been historically profitable, and that their presentation in the Insolvency Analysis as loss-making appeared to have been formed on the basis of a one-month snapshot in July 2020, and was misleading.

73. In this regard, Mr. Bains also took issue with the evidence from the Company which had stated,

> "The inference made that certain subsidiaries are in fact currently profitable is incorrect and substantially out of date. The July 2020 trading numbers of the Company are clearly outlined in paragraph 5.3.3 of the Scheme Document. During the period that Mr Bains was chief financial officer of the Company, the central office of the Group was moved to Kenya, leaving the Kenyan subsidiary loss-making. The Group lost a major contract in Tanzania that left the Tanzanian subsidiary of the Company loss-making. Both of these circumstances were previously communicated to the Opposing Creditors."

74. Mr. Bains' contention was that a purchaser would be willing to pay a substantial price for Sunbird Kenya and Sunbird Tanzania on the basis of a valuation of the companies based upon a multiple applied to the number of desks that were active or in the course of introduction to the businesses of those companies, and that this would be so even though a purchaser would have to fund or reach an agreement with the companies in the remainder of the group to release the inter-company debts owed by the two companies. Mr. Bains therefore disputed JCK's view in the Insolvency Analysis that,

> "There is a remote possibility that a buyer could be found for the shares in one of the trading subsidiaries. The motivation for purchasing the shares would be to enable the continuation of the subsidiary's lease and rental agreement which would otherwise terminate on insolvency. The purchaser would, however, need to provide significant working capital in order to fund ongoing

> trading and would have to meet the outstanding liabilities, including the inter-company liabilities, and, as a result, the consideration is likely to be nominal. The Company would not directly benefit from such a share sale because the trading subsidiary shares are owed by Sunbird Africa, however, the Company would be in a position to call in its inter-company debts. It is difficult to envisage why a purchaser would wish to take on the burden of indebted, loss making entities without an agreement in respect of writing off of inter-company loans – which would be unlikely if Sunbird South Africa were in an insolvency procedure."

75. The question of whether it might be possible to find a buyer prepared to provide working capital for the companies in short order, and to achieve a sale of Sunbird Kenya or Sunbird Tanzania for a substantial price is necessarily a matter of some speculation, and depends upon a detailed knowledge of the underlying businesses. This is not a difference of opinion that I can resolve on the basis of the very limited information before me, and it is also a matter upon which genuine opinions might reasonably differ. I must therefore conclude that Mr. Bains has failed to satisfy me that the material placed before Scheme Creditors in this respect was obviously incomplete or inaccurate in a material respect.

The Directors' Valuation of the Company and the Valuation Review Report

76. Mr. Bains criticised the (going concern) valuation of the Company by the directors that formed the basis for both the debt to equity conversion price under the Scheme and the subscription price under the Rights Issue. Mr. Bains launched a detailed critique of that valuation and contended, in particular, that the industry comparables used by the directors in their calculation of a "value per desk" of flexible office space were not the most recent available. He contended that if more up-to-date figures had been deployed, it would have shown that the value attributed to the existing equity of the Company was significantly less than assumed by the directors, or even zero.

77. As with the question of whether a purchaser might be found for Sunbird Kenya or Sunbird Tanzania (supra), I regard this as essentially a matter of opinion which I cannot resolve on the very limited material before me. Although Mr. Bains might disagree with the suitability of the comparables used, I cannot conclude that there was a material misstatement or omission in the information provided to Scheme Creditors.

The viability of the Company

78. Mr. Bains contended that Scheme Creditors and the court could not be satisfied on the information in the Scheme Document that there was a reasonable prospect that the result of the Scheme and Rights Issue would be the survival of the Company and the group as a going concern. He pointed out that this was the central predicate upon which the Scheme was based, without which it would make little or no sense for Scheme Creditors to agree to the conversion of their debt to equity. This submission essentially raised two points: the first related to the accuracy of the Scheme Document, and the second related to whether the Scheme would serve its intended purpose.

Accuracy of the information

79. The first point raised by Mr. Bains was that the Scheme Document contained a table and summary of two profit and loss forecasts for the future business of the group Company (Scenario A and Scenario B). These had been prepared by the management in June 2020 for the purposes of the Original Scheme. Although the title to the relevant subsection of the Scheme Document ("Management forecasts and JCK review performed in June 2020") clearly indicated when these projections had been prepared, there was also a statement in the text (paragraph 11.3) of the Scheme Document that,

> "JCK in its Valuation Review Report viewed that the Scenario B assumptions, on balance, provided a lower risk view of forecast earnings and cash flow while Scenario A could be regarded as higher risk."

80. After a table setting out the assumptions for Scenario A and Scenario B, paragraph 11.4 of the Scheme Document then stated,

> "As set out above at paragraph 8.2 of this Part 1, in JCK's view, if Scenario B is regarded as the more likely forecast scenario, then the minimum high priority funding requirement of [the Company] would be $2,700,000 immediately following the Scheme."

The reference to paragraph 8.2 was to a sentence that simply stated,

> "Following the review by JCK, the Board considered the [Company/group] required an urgent minimum cash requirement of US$2,700,000."

81. Mr. Bains pointed out that JCK's Valuation Review Report in fact made no mention of the directors' forecasts, or of the cash requirement of the Company immediately following the Scheme. Still less did JCK indicate any agreement with the view of the board that the cash requirement of the Company after the Scheme would be US$2.7 million. Indeed, JCK's terms of engagement for the Valuation Review Report made no mention of it reviewing the directors' projections at all.

82. I agree that the reference to the Valuation Review Report in paragraph 11.3 was inaccurate. However, I consider that Scheme Creditors who read the statement in context would be likely to have understood, correctly, that the review of the directors' projections had been performed by JCK in June 2020 and not more recently. That is because, in addition to the fact that the heading to the subsection containing paragraph 11.3 referred to a review carried out by JCK in June 2020, the next subsection was entitled "Updated forecast / management approach" and set out the management's updated view of the Company's prospects without making any reference to JCK.

Would the Scheme serve any purpose?

83. The lack of a recent review by JCK led Mr. Bains' second point - that the Scheme Creditors and the court could not reasonably be satisfied that in light of all that had occurred since June 2020 and the failure of the Original Scheme, the same amount of

US$3 million to be raised pursuant to the Rights Issue would still provide enough working capital for the group if the current Scheme was sanctioned.

84. In that regard, the Scheme Document explained in fairly high-level terms the board's view of the Company's current business and prospects. It also explained how the Company proposed to spend the US$3 million Rights Issue proceeds as follows,

> "8.10 The proceeds of the Rights Issue will be used by [the Company] to fund the [group] in order to: (i) pay down circa US$1,500,000 of certain aged payables of the [group] including amounts of overdue rent payable to landlords; (ii) fund circa US $300,000 of working capital requirements of the [group] including the funding of cash losses until the business turns cash positive; (iii) discharge circa US$300,000 of liabilities of [the group]; (iv) US$250,000 on capital expenditure in existing workspace centres on the basis that the business starts to meet performance targets set by the Board; and (v) a provision of paying US$500,000 of costs as described … below.
>
> …
>
> 8.13 Any outstanding costs of the Scheme, the Rights Issue and the restructuring will be paid out of the proceeds of the Rights Issue. The total cost of the Scheme and the Previous Scheme, Rights Issue and restructuring, including professional fees and legal fees of Opposing Scheme Creditors, is estimated to be approximately US$500,000. The Board will work with the advisers to agree a suitable payment plan. Given the costs presented by the Opposing Scheme Creditors for the Previous Scheme and the likelihood of further costs for this Scheme, it is likely that the costs of implementing the Scheme will increase."

85. The up-to-date position was set out in Mr. Aldridge's evidence for the sanction hearing as follows,

> "Trading update
>
> 4.7 Despite the significant distraction of the Scheme and restructure, the Company has delivered good growth in private offices sales of approximately 7% quarter on quarter, (approximately US$21,000 per month) and has a number of sales closing and in-process amounting to an incremental amount of US$40,000 per month. Incrementally, the Company has over $73,000 per month in available space that can be sold before any capital expenditure is required. In addition, the Company has moved clients to higher yielding space and carried out further cost rationalisation to reduce its overheads. The ability of the Company to win new clients and manage costs gives management confidence the Group will achieve breakeven in the coming months. The completion of the Scheme and Rights Issue

> will free up significant management time for the Group to work towards its profit targets.
>
> Use of proceeds of the Rights Issue
>
> 4.8 As set out in the Scheme Document, the proceeds of the Rights Issue will be used by the Company to fund the Group for the following purposes: (i) to pay down circa US$1,500,000 of certain aged payables of the Group including amounts of overdue rent payable to landlords; (ii) to fund circa US $300,000 of working capital requirements of the Group including the funding of cash losses until the business turns cash positive; (iii) to discharge circa US$300,000 of liabilities of the Group; (iv) US$250,000 on capital expenditure in existing workspace centres on the basis that the business starts to meet performance targets set by the Board; and (v) a provision of paying US$750,000 of costs. The Company previously made provisions for US$500,000 of costs. It was noted in … the Scheme Document that the costs of the Scheme were likely to increase. The Company has provided for such increase in costs by (i) having headroom after deducting the amounts set out in paragraph 8.10 of Part 1 of the Scheme Document from the total amount of the Rights Issue proceeds; and (ii) having elements of discretionary spend in the allocations of the Rights Issue proceeds which can be managed by the Company to ensure that it can meet the additional costs of the Scheme."

86. Mr. Bains submitted that on the basis that the total of the items of expenditure listed came to US$3.1 million – i.e. more than the US$3 million proceeds of the Rights Issue – together with the table of Company trading results from July 2020 which showed a total EBITDA loss across the group of US$194,000, it was likely that the Company and the group would be unable to pay its debts even after the Rights Issue.

87. It is important to appreciate that Mr. Bains' fundamental objection in this second respect was not one of a lack of full disclosure. The intentions of the directors as to what they intended to do with the proceeds of the Rights Issue, and the possibility of an increase in the costs of the Scheme were set out clearly enough in the Scheme Document. Mr. Bains' objection was whether the Scheme and Right Issue would, in reality, provide the Company and its group with enough money to survive, which he said (rightly) was essential to fulfil the purpose of the Scheme.

88. In so far as Mr. Bains suggested that this was a matter of which the court needed to be satisfied, his submission had echoes of the language of David Richards J in re Magyar Telecom BV [2014] BCC 448 at [16] to the effect that,

> "The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose."

89. I do not think that this dictum should be taken out of context. The background to David Richards J's observation in Magyar was very different from the instant case. Magyar raised the issue of whether there would be sufficient prospect of recognition of the order sanctioning a scheme by courts in overseas jurisdictions in which the scheme company had assets or the creditors were located so as to prevent the commercial purpose of the scheme being undermined by action by dissentient creditors. In that regard, as David Richards J indicated in Sompo Japan Insurance [2007] EWHC 146 (Ch) at [19]-[20], and I reiterated in Van Gansewinkel Groep BV [2015] Bus LR 1046 at [71], the court does not need certainty as to the position. The question is whether the court order sanctioning the scheme would serve no discernible purpose at all, and the court generally only requires some credible evidence to the effect that it will not be acting in vain.

90. In the instant context, the point raised by Mr. Bains is, in my judgment, more appropriately to be answered by asking whether the Scheme is one "that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve" under the test outlined by David Richards J in Re Telewest Communications (supra). That is not least because there is no doubt that, if sanctioned, the Scheme will be effective to convert the Scheme Creditors' debts to equity. The question of whether there is a sufficient prospect of the Company surviving as a going concern once the Scheme and associated Rights Issue are implemented, so as to make the debt to equity swap more attractive than an immediate liquidation, is essentially a question of commercial judgment and assessment of risk. In this respect, as David Richards J pointed out in Telewest Communications at [22], provided that the information provided is adequate and all other things are equal, the court generally recognises that creditors are likely to be in a better position than the court in determining whether it is in their commercial interests to take that risk.

91. Applying that approach, I have had regard to the statements in the Scheme Document and in the evidence to which I have referred. The cash position of the Company and the group will undoubtedly be tight after the Right Issue, and its survival will continue to depend upon improvement in its trading prospects. However, I do not consider that anything in those documents leads me to think that the US$3 million to be raised by the Rights Issue is manifestly inadequate, such that an intelligent Scheme Creditor could not honestly hold the opinion that taking a calculated risk on the Scheme and Rights Issue would be in its interests. I therefore do not consider that I have any sufficient justification to differ from the result of the Scheme Meeting.

General

92. This is a most unusual, if not unique, case. The Original Scheme failed in large measure because of the manifest deficiencies in the information provided to Scheme Creditors. As I have indicated in paragraph 70 above, the financial information provided in the Scheme Document, whilst substantially better, is still very far from perfect. In several potentially material respects, it is inaccurate and unreliable; and in spite of the renewed efforts of the Company's advisers and JCK, there are still rough edges in the drafting of the Scheme Document. This is undoubtedly a product of the underlying deficiencies in the accounting records of the Company and its subsidiaries, together with the haste with which the Scheme documents have been assembled.

93. Such defects might, in another case, have led me seriously to doubt whether it would be appropriate to sanction the Scheme. The requirement for accuracy and completeness of the documents explaining a scheme to creditors is an essential safeguard for all creditors under Part 26 CA 2006. But that said, if the scheme jurisdiction is to serve a useful purpose for companies of all shapes and sizes, and in particular if it is to be a useful tool to smaller and medium sized companies whose financial affairs may not be entirely in order, but who may legitimately be seeking a means of restructuring with limited resources, the court must take a practical approach.

94. In that regard, the new Practice Statement explicitly recognises that explanatory statements "should be in a form and style appropriate to the circumstances of the case, including the nature of the member and/or creditor constituency, and should be as concise as the circumstances admit". It is also necessary to recognise that perfection is not always attainable.

95. For similar reasons, it cannot be an absolute requirement of sanction that the financial information provided to scheme creditors must always have been audited or to have been subject to a full independent review. Each case will turn on its own facts and, as the Practice Statement indicates, on the nature of the creditor constituency. Where scheme creditors are sophisticated, provided that their attention is fairly drawn to the limitations in the financial information and the scope of any review of it by a third party, those creditors may well be able to form their own view on whether what they have been given is adequate.

96. At the end of the day, the question for the court must be whether any defects that have been shown to exist in the scheme documentation would be likely to have made any difference to the particular scheme creditors affected by the scheme. In the instant case I have concluded that the answer to that question is in the negative. I reaching that view I have been assisted by two unusual features of the case.

97. The first feature is that this is the second time that the company has sought to promote essentially the same scheme to the same creditors.

98. On the first occasion, it was reasonable to suppose that the manifest deficiencies in the scheme documentation might have had a bearing upon the decision of the Scheme Creditors as to how to vote. I therefore could not possibly be satisfied (and was not satisfied) that those defects would have made no difference to the result.

99. On the second occasion, Scheme Creditors were told (if they were not already well aware) in the Scheme Document that the Original Scheme had been refused sanction (with costs) on the basis of the inadequacy of the information provided. Of itself, that unique circumstance would have alerted them to the need to scrutinise the deal that they were being offered for a second time with care. If the Scheme Creditors had gone so far as to read my judgment on the Original Scheme - which was also referred to in the Scheme Document - they certainly could not have been in any doubt about the risks inherent in the Scheme, the vested interests of those who were proposing it, and the potential inherent defects in the financial information with which they might be provided.

100. Against that background, and importantly, the nature and scope of the reports that the board received from JCK was clarified; JCK's work product was made available to the

Scheme Creditors; and Scheme Creditors were clearly told that JCK was not prepared to accept any responsibility to them for the contents of the Insolvency Analysis or Valuation Review Report.

101. Equally importantly, the Company also released the Scheme Creditors from any obligation under the lock-up agreements that they entered into in connection with the Original Scheme.

102. The result on the second occasion is that the Scheme has been freely supported by the affirmative votes of precisely the same Scheme Creditors as before - including those “pure” Scheme Creditors who are not connected or associated with the board and who do not hold existing shares in the Company.

103. The fact that the Scheme Creditors, who are sophisticated investors, chose again to support the Scheme, and by a clear majority, suggests clearly to me that they believed that they were in a position to take a view on its commercial merits on the basis of what they had been given in the Scheme Document.

104. In these circumstances, I simply do not think that any of the defects in the Scheme Document identified by Mr. Bains are of sufficient magnitude that they would have deflected any of the Scheme Creditors who voted in favour of the Scheme from their chosen course.

105. The second feature which is unusual is that the Opposing Creditors had carried the battle to the Company in relation to the Original Scheme, forcing an adjournment of the scheme meeting and succeeding in opposing sanction on the basis of the inadequacy of the information that had been provided. They were also prepared to lock horns with the Company again on the class point at the convening hearing for the current Scheme.

106. But in spite of this, and in spite of knowing that the other Scheme Creditors were no longer subject to any lock-up agreements compelling them to vote in favour of the Scheme, the Opposing Creditors chose not to raise with those other Scheme Creditors the points that they now contend were essential for a Scheme Creditor to reach an informed decision on the merits of the Scheme. They did not do so in any communications with other Scheme Creditors prior to the Scheme Meeting. Nor did they seek to do so at the Scheme Meeting itself.

107. The Opposing Creditors therefore passed up the opportunity to seek to persuade the other Scheme Creditors of the importance of the points that they were making and to vote against the Scheme. They chose instead to try to persuade the court, after the event, to surmise how those other Scheme Creditors might have responded to their arguments and to second guess the result of the Scheme Meeting.

108. In my judgment, that approach necessarily diminishes by a significant amount the force of the points made by the Opposing Creditors as to the adequacy of the information provided to Scheme Creditors in the Scheme Document.

Conclusion

109. Taking all these points together, notwithstanding the defects that have been identified in the Scheme Document, I am satisfied that it would be appropriate for me to sanction

the Scheme and thereby give effect to the wishes of the significant majority of Scheme Creditors.