Neutral Citation Number: [2021] EWHC 685 (Ch)

Claim No: CR-2021-000079

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: 19 March 2021

Before:

Mr Justice Trower

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In the Matter of Smile Telecoms Holdings Limited

and

In the Matter of The Companies Act 2006

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Felicity Toube QC and Charlotte Cooke (instructed by Latham & Watkins) for the Claimant

Hearing date: 19th March 2021

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JUDGMENT APPROVED

Mr Justice Trower:

1. This is an application by Smile Telecoms Holdings Limited ("the company") for an order pursuant to section 901F of the Companies Act 2006 ("the 2006 Act") sanctioning a restructuring plan in respect of the company ("the plan").
2. On 19 February, I made an order convening three separate meetings of creditors: super senior lenders, senior lenders and a subordinated lender for the purposes of considering and, if thought fit, approving the plan. In the judgment I gave before making that order, the neutral citation number for which is **[2021] EWHC 395 (Ch)**, I described in summary form the company and the group of which it is part. I also explained the nature and extent of the liabilities, the terms of which were sought to be varied by the plan. I shall assume that anyone reading or listening to this judgment is familiar with that description.
3. For today's purposes, it is necessary for me to say a little more about the terms of the plan itself for reasons which will become apparent. The essence of the arrangement is to amend the existing group facility agreements in order to facilitate a managed sale process as part of a wider restructuring. This will involve an immediate sale of the group's assets in Tanzania, Uganda and the Democratic Republic of Congo, which are referred to in the papers as the minor assets, on a going concern basis and the provision of sufficient funding to implement a business plan for the group's Nigerian business with a view to it being sold in the medium term in an orderly manner.
4. This strategy required funding in order to enable the businesses to continue to 3operate without falling into immediate insolvency proceedings. For that purpose, c.US$50 million is required and has in principle been obtained. The source of that funding is a newly incorporated Luxembourg entity ("LuxCo") which is owned by members of a family some of who are also shareholders in the company's majority shareholder, Al Nahla Technology Co ("Al Nahla"). This funding will only be made available if what are called the Al Nahla Funding Conditions are satisfied. There are two of those conditions.
5. The first is that the subordinated creditor should abandon its proposal to call on its guarantee and to convert its preference shares under the Preference Share Subscription Agreement. This condition has or will be satisfied. Nothing turns on it for today's purposes.

6. The second of these two conditions is that the Government Employees Pension Fund of South Africa ("GEPF"), which is also one of the six senior lender plan creditors, should agree to a year-long extension of a put option by which it is entitled to require shares to be purchased by various other parties, including Al Nahla, at a price of $1.28 per share.
7. Option notices under the put option agreement have already been served and are required to be complied with on or before 24 March 2021. The current put option period expires on 31 March 2021.
8. I will have to come back to the position in relation to the second of these two conditions but for present purposes, it suffices that GEPF has appeared at this hearing by counsel and, amongst other matters, has made clear by its skeleton argument that it will not agree to an extension of its put option agreement to 31 March 2022. In a letter dated 12 March 2021 from its representative, Public 4Investment Corporation SOC Limited ("PIC"), to Latham & Watkins, solicitors to the company, it explained its position as follows:

> "5. The Company's Restructuring Plan was presented to the PIC investment committee on the 11th March 2021. The outcome of the PIC investment committee meeting was to support the implementation of the Restructuring Plan, subject to the specific condition that it will not waive and/or withdraw and/or extend any of its rights and/or the terms of the Option Agreement as required in paragraph 9.1(a) of the Explanatory Statement ("PIC Approval Condition").
> 6. The purpose of this letter is to confirm and communicate the outcome of the PIC Approval Condition and to record that the PIC remains interested in supporting and approving the restructure contemplated in the Explanatory Statement, however, it will only do so if it has assurance from the Company and the Grantors confirming that the condition relating to the PIC extending its Option Agreement to the 31st March 2022 will be removed and/or waived as a condition to the implementation of the restructure."

9. I should add that the rights which GEPF has under the put option agreement are secured by letters of credit under which it also says that it will claim. Ms Toube QC, who appears for the company, draws my attention to the fact that GEPF's ability to take this course means that it will be able to effect a recovery in respect of the put option agreement in any event.

10. The meetings convened pursuant to the February convening order were held on 12 March 2021. At each of the three meetings, all of the members of the relevant class were present and voting. There was therefore a full turnout. At the super senior lender meeting and the subordinated creditor meeting, the vote in favour of 5the plan was 100 per cent. There were two super senior lender plan creditors with claims totalling in excess of US$16 million, and a single subordinated plan creditor with a claim totalling in excess of US$33 million.
11. At the senior lender meeting, the aggregate amount of all claims was just in excess of US$230 million. Five of the six creditors voted in favour, but GEPF voted against. As well as its rights under the put option agreement, GEPF is also a creditor of the company with a claim admitted to vote in the sum of just in excess of US$65 million. This amounted to 28.29 per cent of the total senior lender claims. It follows that, at the senior lenders plan meeting, the majority which voted in favour of the plan was only 71.71 per cent, therefore falling short of the statutory majority of 75 per cent required by section 901F(1) of the 2006 Act.
12. Nonetheless, the company seeks the court's sanction of the plan by relying on section 901G of the 2006 Act. This defines a class of creditor which does not agree a plan by a number representing at least 75 per cent in value of creditors present and voting as a “dissenting class” and provides that the fact that a dissenting class has not agreed the arrangement does not prevent the court from sanctioning it if two statutory conditions are fulfilled.
13. The first is Condition A, and is defined by section 901G(3). The court must be satisfied that, if the arrangement were to be sanctioned under section 901F, none of members of the dissenting class would be any worse off than they would be in the event of the relevant alternative. The relevant alternative is whatever the court considers would be most like to occur in relation to the company if the arrangement were not sanctioned (section 901G(4)).
14. The second is Condition B and is defined in section 901G(5). The compromise or 6arrangement must have been agreed by the statutory majority at another class meeting whose members would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.
15. In Re Deep Ocean 1 UK Limited [2021] EWHC 8138 (Ch), building on the decision of Snowden J in Virgin Atlantic Airways Limited [2020] EWHC 2376 (Ch), I explained that several aspects of the approach the court adopts to the

sanctioning of a scheme of arrangement under part 26 of the 2006 Act and the sanction of a restructuring plan under part 26A of the 2006 Act where section 901G is not engaged, remain applicable in a case where section 901G is relied on. There are, however, some differences.

16. In Re Telewest Communications No 2 Limited [2005] BCC **36** at [20], David Richards J explained the general principles as follows:

> "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 All ER 1006** at 1012, **[1966] 1 WLR 819** at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:
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>> 'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, 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 7interest, 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.'"

17. The first question, therefore, is whether there has been compliance with the statutory requirements. The first of these is that the relevant company must be a company within the meaning of part 26A. In the convening judgment, I explained why I was satisfied that it is. Nothing that has occurred since causes me to change my view.

18. The next aspect of the statutory requirements is that the Conditions A and B referred to in section 901A of the 2006 Act must be met in relation to the company. These are of course different from the Conditions A and B referred to in section 901G. The section 901A Conditions A and B require it to be established that the company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going

concern and that a compromise or arrangement is proposed between the company and its creditors, the purpose of which is to eliminate, reduce or prevent or mitigate the effect of any of the financial difficulties.

19. At the convening hearing, I took the view that it was appropriate for me to be satisfied that both of these conditions were met before making the convening order. I outlined the evidence in the convening judgment and explained why I was 8satisfied that they had indeed been met. In particular, I discussed the nature of the financial difficulties to which the company was subject and explained why I was satisfied that the plan amounted to a compromise or arrangement, the purpose of which was to mitigate the effect of the financial difficulties. I do not think it is appropriate for me to re-examine any of those questions in detail at this stage because nobody seeks to challenge the conclusions I reached. I remain satisfied that those conditions have been met.

20. The next requirement is the question of whether or not the class meetings were correctly constituted. I explained in the convening judgment why I had concluded that it was appropriate for three separate class meetings to be convened. Like Snowden J in Re Global Garden Products Italy SpA [2017] BCC 637 at [43] and [44], I do not think that it is appropriate for that issue to be revisited at this hearing. Nobody appears to say that the answer I gave was wrong. Indeed it is difficult to see that there was any other available conclusion.

21. The plan meetings were summoned and held in accordance with the terms of the convening order. Subject only to the questions which arise in relation to the senior lender class where the statutory 75 per cent majority was not achieved, I am satisfied both that these aspects of the convening order and the other provisions of the statute have been complied with.

22. The next question for the court is whether the classes were fairly represented by those who attended the meeting and whether the statutory majority were acting bona fide and were not coercing the minority in order to promote interests adverse to those of the class they purport to represent.

23. In this case, there was 100 per cent turnout so that that extent, it is clear that there 9was a fair representation of the class memberships. So far as the senior lender class (in which the full 75 per cent statutory majority was not achieved) is concerned, there is no indication that those who voted in favour were seeking to coerce a minority in order to promote interests adverse to those of their class. The

position of the possible collateral interest of GEPF as the single creditor voting against is, however, a slightly different matter and one to which I will return in a slightly different context.

24. The third requirement is whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve. This remains a material consideration, even though it is necessary to take a slightly different approach to the circumstances in which the court will be slow to differ from the meeting when considering a plan in respect of which reliance is placed on section 901G.

25. It seems to me when considering this third requirement that there are two particular elements to be taken into account. The first is an assessment of the benefits of the restructuring to the creditors concerned by way of comparison to what is likely to happen if the plan is not sanctioned. I will come back to this when considering the cross class cram down provisions. But in summary, the acceptance of an arrangement that achieves the potential uplifts and recoveries, which I will explain, is one that would be open to an intelligent and honest man acting in respect of his own interest to approve. Even applying a significant discount for uncertainty as to what will occur going forward, the potential benefits appear to be significant. Nothing I have seen indicates that these conclusions are not credible and reasonably reached, and nobody attends today to say that they are not.

26. The second element is that all but one of the creditors voted in favour of the plan. In my judgment, this is a significant factor pointing in favour of the conclusion that the plan is one which an intelligent and honest man acting in respect of his own interest might reasonably approve. This is all the more so in circumstances in which GEPF, as the single creditor who voted against, gave some indications at the time of the meeting, which have subsequently been repeated, that it supports the plan in principle, but was voting against it because it had concerns about the extension of the option agreement; a point to which I will return.

27. So far as the application of condition A as described in section 901G and the cross class cram down provisions is concerned, it is first necessary to identify the relevant alternative. There is detailed evidence which explains the most likely outcome if the plan does not come into effect. It involves the immediate liquidation of the company and the relevant operating companies. Evidence from

Mr Osman Sultan, one of the company's directors, explains why that is the case. There are three factors which seem to me to be compelling as to why the company is likely to have reached the end of the road if the plan does not come into effect.

28. The first is that there is a pressing need for new money to inject necessary liquidity into the group and there is no prospect of that new liquidity being provided in the absence of the plan. The second is that this lack of liquidity will and may already have led to defaults in a number of jurisdictions which will themselves render the operating licences exceptionally vulnerable. The third is that any revocation of the licences caused by the illiquidity would lead inevitably to a disorderly liquidation in the relevant jurisdictions because of the financial position in which each operating company would then find itself.

29. In other words, in the absence of the plan, the US$52 million which is required to fund operational expenditure and provide a stable platform from which to deliver a successful exit for plan creditors will not be available. This is likely to precipitate insolvent liquidations of companies across the group with the consequential threat of an immediate revocation of the licences in each jurisdiction in which they operate. In my judgment, the company has established that a formal insolvency of each relevant member of the group is the relevant alternative.

30. The next question in relation to condition A is whether I am satisfied that, if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than they would in the event of the relevant alternative. In my view, the description of the persons whose position the court is required to consider as "members of the dissenting class" confirms that this condition is concerned with, and only with, those persons in their capacity as members of that class. If they might be worse off in some other capacity as a result of the sanctioning of the plan, that is capable of having an impact on the exercise of the court's discretion, but does not of itself mean that condition A is not satisfied.

31. There is detailed evidence which confirms a range of indicative financial outcomes in the event of formal insolvencies. The first low case scenario reflects an immediate closure of the business, triggering an immediate revocation of licences in every jurisdiction. The second is a high case scenario, reflecting a longer but still limited period of time within which there may be opportunities to negotiate with local regulators for the transfer of the licences.

32. Whether a share sale or an asset sale occurs, the effect of these outcomes would be that in the low case scenario, there would be no return to any creditor, while in the 12high case insolvency scenario the super senior lenders would make a full recovery and there would be a return to the senior lenders of some 4.8 per cent.
33. This is to be compared with what is said to be likely to happen in the event that the plan is sanctioned and comes into effect. It is anticipated that there will be a controlled disposal of the minor assets with sufficient time to manage the process and a medium-term disposal of the Nigerian business on certain assumptions that are thought to be reasonable. If all goes according to plan, there will then be a potential recovery to the senior lenders of in excess of 90 per cent with the super senior lenders being paid in full.
34. In my judgment, the evidence establishes that none of the members of the senior lender dissenting class would be any worse off than would be the case in the event of the relevant alternative, if and insofar as the plan as sanctioned comes into effect. It follows that to that extent condition A is met.
35. As to condition B, the super senior class would receive a payment and have a genuine economic interest in the company in the event of the relevant alternative; namely, an insolvency. This class agreed to the plan unanimously. In my view, condition B is therefore met.
36. This does not mean however that the court will necessarily make an order cramming down the dissenting class. While I adhere to the view I expressed in Deep Ocean that an applicant will have a fair wind behind it if it seeks an order sanctioning a restructuring plan notwithstanding the existence of a dissenting class where the section 901G conditions A and B are met, it remains the case that the court has a discretion. There are a number of factors which may be relevant depending on the circumstances of each case.
37. The most obvious circumstance would be one in which the members of the dissenting class who voted against the plan changed their minds after the meeting had concluded. The statutory majority would not have been achieved in accordance with the directions given by the convening order, but there is no reason why the court could not make use of the cross class cram down provisions rather than requiring the applicant company to start again.
38. In the present case, another factor is of real significance. The vote against the plan came from a single creditor who has not asserted that there is any specific

aspect of the plan which treated it unfairly. In particular, it was not said that the plan itself provides for a difference in treatment of creditors inter se which is unjustified. There is no suggestion that the benefits of the restructuring are not fairly distributed between those classes who agreed the restructuring plan and those who have not. A conventional application of the principle of horizontal comparison would not lead to the conclusion that the differential treatment of the classes was unfair or in any way inappropriate; it simply reflected in a proper manner the difference in ranking between the super senior, senior and subordinated creditors.

39. The way that Mr Robins summarised GEPF's position in the short skeleton argument he prepared on their behalf was as follows:

> “Instead, GEPF adopts a neutral position in respect of the sanctioning of the new money restructuring plan by the court whilst fully reserving its rights in respect of the put option agreement which it intends to enforce separately in due course.”

40. This reference to the reservation of rights in relation to the put option agreement is a reference to what in my view is a more fundamental potential objection to the sanctioning of the restructuring plan today. It highlights one of the discretionary 14considerations which is capable of causing the court to refuse to sanction a plan under part 26A of the 2006 Act, a scheme of arrangement under part 26, and indeed a number of other categories of relief under the 2006 Act, such as an application to approve a cross-border merger. Does the conditionality to the effectiveness of the plan (in this case the existence of the Al Nahla Funding Conditions) mean that the court ought in the exercise of its discretion to refuse to sanction it?

41. This requires consideration of a number of principles, the first of which is that the court will not act in vain. But it also raises questions as to whether it is appropriate for one member of one class (or indeed a third party), rather than the court, to have vested in it what amounts to a discretion to determine whether or not the plan should come into effect.

42. In the present case, GEPF has throughout made clear that it will not agree to an extension of its put option agreement to the 31 March 2022. At the same time, LuxCo has made clear that it will not advance the new monies, without which the

objectives of the restructuring will not be fulfilled unless the put option is extended. The overall effect is that, if both parties maintain their positions, the Al Nahla Funding Conditions will not be satisfied and the plan, even if sanctioned, will never come into effect.

43. Against that background, it seems to me that the starting point is to identify the circumstances in which the court may be prepared to sanction a restructuring plan, the effectiveness of which is subject to conditions which have not yet been satisfied. As far as I am aware, there is no law which deals with this point in the context of a plan proposed under part 26A of the 2006 Act, and none was drawn to my attention by Ms Toube or Mr Robins.

44. However, there is quite lot of law which touches on the point in the context of proceedings to sanction a scheme of arrangement under part 26 and other applications under the companies legislation, including proceedings for the approval of a cross-border merger.

45. In Re Lombard Medical Technologies Plc **[2014] EWHC 2457 (Ch)**, which was a members scheme, Henderson J said the following at paragraph 24 of his judgment:

> "I can see no reason in principle, however, why the court may not in an appropriate case sanction a scheme when there is an outstanding condition which still needs to be satisfied and direct that the order should not be sealed (or, as in the present case, that the order should not be delivered to the Registrar) until the condition has been satisfied."

46. He said that there may not be an absolute requirement to defer sealing pending satisfaction of the condition. But the kinds of example that Henderson J gave of acceptable conditionality were outstanding requirements for foreign regulatory approval, "which there is no reason to suppose will not be granted."

47. Henderson J then went on to give more detail in paragraph 26 of his judgment of the types of condition which it may or may not be acceptable to have outstanding at the time of sealing of the order as follows:

> "Examples of the kind of condition which the court may be willing to sanction, even if they are unsatisfied at the date of the hearing are outstanding requirements for foreign regulatory approval which there is no reason to suppose will not be granted. Further, the terms of the scheme itself may provide that it will cease to have effect in certain circumstances, for example if

> the steps contemplated are not 16taken before a specified long-stop date. By contrast, the court would be most unlikely to sanction a scheme if the outstanding condition was one which in effect conferred on a third party the right to decide whether or when the scheme should come into operation or which enabled the terms of the scheme to be varied in some material respect. The objection then would be that the court was not truly in a position to consider the merits of the scheme so that it could not properly exercise the jurisdiction conferred of on it by Parliament to approve the scheme on behalf of all members of the relevant class or classes of shareholders."

48. There are two parts of that citation on which it seems to me that it is relevant to focus. The first is that Henderson J described the outstanding condition as being one which "in effect" conferred on the third party the right to decide. The second is the emphasis towards the end of the citation on the interrelationship between the empowerment of the relevant third party to determine whether or not the scheme would come into effect and the statutory duty conferred by Parliament on the court to exercise that discretion.

49. In Re Equitable Life Assurance Society [2019] EWHC 3336 (Ch), an application for the sanction of a scheme of arrangement between a life insurance company and its policyholders, Zacaroli J considered questions of conditionality in paragraph 141ff at his judgment. He cited passages from the decision of Henderson J in Lombard Medical with approval at paragraph 145 to 148 of his judgment, and at paragraph 150 gave a number of reasons why he did not regarded the conditionality in that case as an impediment to sanction:

> "Nevertheless, I am satisfied that it is appropriate to sanction the Scheme notwithstanding the Capitalisation Requirement has yet to be satisfied, for the 17following reasons. First, it is a practical necessity (as a result of the lenders imposing a condition, that the Scheme and Transfer be sanctioned, on the drawdown of the funding required to make a substantial part of the capital contribution) that the sanction of the court must predate the satisfaction of the Capitalisation Requirement. Second, this is a case which (in the words of Santow J) is self-executing, in the sense that certain results follow from certain defined events. Third, although the condition is substantively different from the approval of a foreign court or regulator, in light of the evidence I have seen it is highly unlikely that it will not be complied with. Fourth, this is not a case where the ultimate effectiveness of the Scheme and Transfer is dependent on the decision of a third party. On the contrary, the relevant third parties (being Utmost's parent company and its ultimate owners) are

> contractually bound, under arrangements that that can be enforced by Equitable, to satisfy the Capitalisation Requirement. Fifth, the PRA has obtained undertakings from two of the companies in the Utmost Group … to the effect that the relevant funds will be applied towards satisfaction of the Capitalisation Requirement."

50. Equitable Life, therefore, was not a case in which there was an unfettered discretion in the hands of the third party to determine whether or not it should act in a way which caused the scheme to come into effect. Zacaroli J's judgment is consistent with the principle explained in Lombard Medical that, where the relevant condition is to that effect, the court will be unlikely to sanction the scheme.
51. Both Lombard Medical and Equitable Life were very different types of case to the case with which I am concerned. Nonetheless, they both discuss and confirm three important principles which are of more general application.
52. The first is that the court will always wish to ensure that it does not act in vain. This is reflected in the third point made in paragraph 150 of the judgment in Equitable Life.
53. That is not to say that the court requires certainty that a condition will be satisfied, a principle which is illustrated by Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) in which the court was prepared to sanction a business transfer scheme even though David Richards J was, as he put it at paragraph 26 of his judgment "less than convinced" that the scheme once sanctioned will definitely be effective. The degree of assurance the court requires will depend on all the circumstances of the case. Thus, it is relevant that in Sompo the scheme was in any event going to be effective in part, because the question that arose related to its recognition in another jurisdiction, not whether it might be ineffective more generally.
54. The second principle is that the court will be unlikely to sanction a scheme if the condition is one which gives a discretion to a third party as to whether or not they will take some step necessary to render the scheme effective. Henderson J made this clear in the passage from Lombard Medical that I have already cited. In my view what he said was consistent with sound principle. If the satisfaction of a condition to the effectiveness of the scheme as a whole is left to the ultimate discretion of a third party, it is capable of cutting across the requirements of

creditor approval, court sanction (in which the court not any other person is required to exercise a discretion) and registration, which are the three steps for plan effectiveness for which the statute provides.

55. In a slightly different context (an application for the approval of a cross-border 19merger in Re Nielsen Holdings Plc [2015] EWHC 2966 (Ch)), Norris J made the same point in paragraph 3 of his judgment. He gave a helpful summary of the principles in relation to conditionality which is worth citing in full, but in which his sixth point is most relevant to this issue:

> "First, the discretion is unfettered. Secondly, the order approving the merger may be made subject to the satisfaction of conditions as to the date upon the merger may take effect. Thirdly, the nature of those conditions as a factor to be taken into account in the exercise of the discretion (alongside the more conventional factors relating to the protection of creditors and employees). Fourthly, the court will normally expect a condition to have as its object the need to ensure that the transaction which is rendered effective is that which the shareholders approved at an earlier stage of the process and has the consequence they intended. Fifthly, because the court will not make an order that is futile the court must be provided with sound grounds for thinking the condition will be satisfied and there is no known obstacle to completion and that the scheme addresses the possibility of non-satisfaction of the conditions. Sixthly, because the discretion is conferred on the court and no one else the court must be satisfied that the condition is not such as to confer some separate decision-making power on a third party whether to implement the transaction or not. An example of the condition which is acceptable is the need to secure a regulatory approval (which may depend upon the decision of a regulator or authority as to whether regulatory requirements are satisfied but is not a freestanding decision whether or not to implement the transaction)."

56. This passage also addresses the question of whether the court might be acting in 20vain in point five. The test suggested by Norris J, which seems to me to have much to recommend it in most cases, is that the court must be provided with sound grounds for thinking the condition will be satisfied and there is no known obstacle to completion.

57. The third important principle of more general application is one of clarity and certainty. Provided that clarity and certainty are present on the face of the scheme or plan and no further decision-making process is required, in other words it is

self-executing without the further intervention of an interested third party, there is much less likely to be a problem.

58. Ms Toube submitted, and in broad terms I agree, that questions of clarity and certainty are not issues in the present case. The reason for this is that there was a full turnout at the plan meetings and everyone knew at the time of the voting what was in issue and that there remained uncertainty in relation to whether or not the Al Nahla Funding Conditions would be satisfied.

59. Nonetheless, it seems to me that there are real difficulties in making an order to sanction the plan today. They flow from the attitude of GEPF and LuxCo in relation to the satisfaction of the Al Nahla Funding Conditions. While I can see (not least from the fact that I am satisfied that no senior lender would be worse off than in the relevant alternative if the plan becomes effective) that it is in GEPF's interests in its capacity as a senior lender that the plan should become effective, this does not necessarily mean that its overall commercial best interests may not be to refuse to extend the put option and allow the plan to fail. I am simply not in a position to form a view on that point, and I received little comfort from Mr Robins' submissions that his clients might change their mind.

60. The latest evidence adduced by the company confirms that, in light of the ongoing discusses between GEPF's representatives and Al Nahla the directors continue to believe that it will be possible for a commercially sensible solution to be achievable such that the Al Nahla Funding Conditions will both be capable of being satisfied.

61. However, this evidence goes on to explain that there is a real lack of clarity on the point and it is of some relevance that these negotiations have been going on for some considerable time already. Mr Sultan says in his latest witness statement that the position will become clear over the next week. It is self-evident to me, both from this evidence and from the correspondence to which I have been taken during the course of submissions, that the commercial discussions are ongoing and that there can be no certainty as to their outcome.

62. Accordingly, I have real doubts that there is sufficient evidence to justify a conclusion that it can properly be said that there are sounds grounds for thinking that the condition will be met and I cannot be satisfied that there is no known obstacle to completion. That being the case, it does not seem to me to be a

complete answer to say that, at the time they voted at their respective class meetings, the members of the three classes knew of the extent of the uncertainty.

63. In circumstances in which the position remains as uncertain as it is, the nature of the condition is of particular significance. It is clear that GEPF retains an unfettered discretion to decide whether or not the Al Nahla Funding Conditions can be satisfied so as to enable the plan to become effective. In practice the same can be said about the ability of LuxCo to no longer insist on an extension of the option period. Having regard to the principles that I have already explained, I consider that this means that the court is not yet in a position to exercise its 22discretion to sanction the plan.

64. In reaching that conclusion I bear in mind that this is a condition which is extraneous to the plan itself in the sense that it is not a condition which has to be satisfied under the terms of the plan itself in order for it to come into effect. It is simply a condition to the funding being made available without which the plan will have no sufficient commercial purpose.

65. I do not think, however, that this is a significant factor in the application of the relevant principle as explained by Henderson J in Lombard Medical. The important question, which seems to me to be correct as a matter of principle, is whether in substance the court is abrogating its responsibility to exercise its discretion in determining whether or not to sanction the plan, by leaving its effectiveness to the discretion a third party. In my judgment that would be the effect of the making of a sanction order at this stage prior to the satisfaction of the Al Nahla Funding Conditions.

66. Before describing the way forward I should address briefly a number of further matters to which I alluded in the convening judgment. The first of these is whether there is a sufficient connection to this jurisdiction. This requirement was explained in the judgment of Lawrence Collins J in Re Drax Holdings [2004] 1 WLR 1049.

67. At the convening hearing I was satisfied that there was no obvious roadblock on this issue. I am now satisfied that there is a sufficient connection and so hold. The rights of plan creditors which will be varied by the arrangement are almost all governed by English law and are contained in facility agreements in respect of which the English courts have exclusive jurisdiction. The sole exception is the rights of the subordinated creditor under the IDC Preference Share

Subscription 23Agreement, but it is a party to an Intercreditor Agreement in respect of those rights which is itself governed by English law.

68. These considerations, without more, should give rise to a sufficient connection to this jurisdiction to justify the sanction of a restructuring plan of the type and issue in the present case. In my view, the law is now settled on this point: see In Re Vietnam Shipbuilding Industry Groups [2013] EWHC 2476 (Ch).

69. However, the position is bolstered by the steps the company has taken to shift its centre of main interests to England. There is detailed evidence which supports the company's case on this point. I do not need to go through it for the purposes of this judgment but I am satisfied from that evidence that, despite the continuing conduct of its subsidiaries' operations outside this jurisdiction, the COMI of the company itself is here in England.

70. It is also necessary for the court to be satisfied that the plan will have substantial effect in each of the jurisdictions in which it may be necessary for the company to defend any proceedings against it on the basis of the varied rights rather than the rights the creditors had prior to the sanction and coming into effect of the plan. In that context, the company has obtained expert evidence from lawyers in South Africa and Mauritius with respect to the law of those two jurisdictions.

71. The legal opinion from the South African law expert includes a detailed analysis and the opinion from the Mauritian lawyers also contains a reasoned analysis although in more abbreviated form. I am satisfied from that evidence that the company has proved that the courts in both South Africa and Mauritius are more likely than not to recognise the effectiveness of the plan and I so hold.

72. In reaching that conclusion I take into account the fact that the rights which are 24being rearranged by the plan are all governed by English law, and most jurisdictions' principles of conflicts of laws will recognise the ability of the law governing the contractual right to vary or extinguish that right. This is quite apart from any independent principles of the local law which recognise any sanction order that may be made by the English court.

73. In those circumstances, subject to the questions relating to conditionality which I have already considered earlier on in this judgment, this is a case in which I am satisfied that there are sound reasons to exercise the court's discretion to sanction the plan. It does not, however, seem to me for the reasons that I have indicated

that it is appropriate or indeed possible applying established principles for me to make an order sanctioning the plan at this stage.

74. Ms Toube submitted that the appropriate way forward is for me to make a conditional order, with the order lying on the file and not being sealed or submitted for registration with the Registrar of Companies pending greater clarity as to whether or not the Al Nahla Funding Conditions were going to be satisfied or had in fact been satisfied.

75. With some hesitation I have decided that that is not the appropriate way forward in this case, despite the fact that it may have the effect of saving costs. I do not think that the court can or should make the order at all, until it is satisfied that there are sound grounds for thinking that the condition will be met and that its coming into effect can properly be said to be as a result of the exercise of its discretion, rather than the discretionary decision of somebody else.

76. I am, however, receptive to the submission made by Ms Toube that, if there is to be an adjournment, there is very considerable urgency in this matter being determined. 25I will adjourn the application to a date to be discussed with counsel and will reserve the matter to myself, with the intention that, when the matter comes back, only a short hearing will be required to determine whether the plan should be sanctioned or the application should be dismissed. I will be in a position to make that determination in light of the conclusions that I have already expressed in this judgment.