Neutral Citation Number: [2022] EWHC 1633 (Ch)

Case No: CR-2019-005614

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

IN THE MATTER OF GALAPAGOS S.A.
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

7 Rolls Building
Fetter Lane
London, EC4A 1NL

30 June 2022

Before :

MRS JUSTICE BACON

- -

Between :

(1) BARINGS (UK) LIMITED
(2) BARING ASSET MANAGEMENT LIMITED
(3) BARING INTERNATIONAL INVESTMENT LIMITED
(4) GOLDMAN SACHS INTERNATIONAL **Applicants**
- and -
GALAPAGOS S.A. **Respondent**

- -
- -

David Alexander QC (instructed by **Akin Gump LLP**) for the **Applicants**
Peter Head (instructed by **Stewarts LLP**) for the **Respondent**
Ryan Perkins (instructed by **Kirkland & Ellis LLP**) for **Galapagos Bidco S.A.R.L.**
Daniel Bayfield QC and **Ben Griffiths** (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for **Signal Credit Opportunities (Lux) Investco II S.A.R.L.**

Hearing dates: 24–25 May 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MRS JUSTICE BACON:

Introduction

1. This is an application by various Barings companies and Goldman Sachs (together **the Applicants**) for the making of a winding up order in respect of the Respondent, Galapagos S.A. (**GSA**). It is supported by Galapagos Bidco (**Bidco**) but opposed by Signal Credit Opportunities (**Signal**). GSA is ostensibly neutral as regards this application, save for submissions as to the basis for its representation in these and related proceedings.

2. Signal's opposition to the application turns on a long-running dispute between GSA's senior creditors (the Applicants) and junior creditors (of which Signal is one). The present application was originally made in 2019. While it was pending before the English courts, a group of high yield noteholders, of which Signal was a member, procured the replacement of GSA's English directors with a German director, and the new German director and two creditors brought separate *ex parte* applications before the Düsseldorf Amtsgericht (District Court) for the opening of insolvency proceedings there. Following the opening of insolvency proceedings by the Düsseldorf court, the English proceedings were stayed.

3. The German proceedings eventually resulted in a reference to the CJEU made by the Bundesgerichtshof (Federal Court of Justice), judgment on which was handed down on 24 March 2022: Case C-723/20 *Galapagos* EU:C:2022:209 (the ***Galapagos* CJEU judgment**). The Applicants and Bidco say that the effect of the *Galapagos* CJEU judgment is that GSA's winding up can and should now proceed in this jurisdiction. Signal, however, contends that the English insolvency proceedings should remain stayed or should be dismissed. The arguments on both sides are complicated by the fact that the Brexit transition period ended on 31 December 2020, as a result of which it is necessary to consider the effect of the transitional provisions in the Withdrawal Agreement ([2019] OJ C384/1).

The parties and factual background

4. GSA is a company incorporated in Luxembourg, and was a member of a group of companies whose principal business was the manufacture of heat-exchangers. The ultimate owners of the group are a consortium of private equity funds managed by Triton Investment Management Limited (**Triton**).

5. GSA itself was not an operating company within the group, but was formed to facilitate financing transactions for the group which were implemented in May 2014. In that capacity, GSA was the borrower of group debt under a revolving credit facility, a guarantee facility and senior secured notes. It was also the guarantor of high yield notes issued by its immediate parent company Galapagos Holding S.A. (**GHSA**). The credit and guarantee facilities were agreed on 18 May 2014; the notes indentures were issued on 30 May 2014. Under an Intercreditor Agreement dated 30 May 2014 the claims of the lenders under the credit and guarantee facilities were ranked first, followed by the senior secured noteholders, and lastly the high yield noteholders.

6. The first to third Applicants are the managers or advisers to funds which are the beneficial holders of the senior secured notes. The fourth applicant is a beneficial holder of the senior secured notes. Signal is one of the ultimate beneficial owners of the high yield notes (with a face value amounting to around 29% of the notes issued in May 2014).

7. Bidco was a wholly-owned subsidiary of GSA, and a creditor of the company for the sum of €6.5 million under a loan agreement executed on 26 June 2019 (which ranks below the May 2014 debt). In a restructuring of the company implemented on 9 October 2019, the share capital of Bidco was transferred to Mangrove IV Luxco SARL (**Mangrove**), a subsidiary of Triton, for the sum of around €424.6 million. The restructuring transaction enabled the discharge of GSA's liabilities under the credit and guarantee facilities, and also discharged 90% of the company's liabilities under the senior secured notes.

8. The restructuring left outstanding, however, 10% of the company's liabilities under the senior secured notes (amounting to around €33.35 million), all of the liability under the guarantee of the high yield notes (amounting to around €250 million) and the liability under the Bidco loan agreement.

Procedural background

9. The present insolvency proceedings were commenced by an application by GSA itself on 22 August 2019 (i.e. before the restructuring transaction was implemented) for an administration order on the basis that GSA was or was likely to become unable to pay its debts. The application was supported by a witness statement from one of GSA's then directors, Mr John Keen. He had been appointed in June 2019, together with another director Mr Matthew Turner, as part of a series of actions designed to shift the company's centre of main interests (**COMI**) from Luxembourg to England. (As discussed further below, Signal disputes that there was in fact an effective shift of the company's COMI to England.)

10. The administration application was listed to be heard by Fancourt J on 23 August 2019. Shortly before the commencement of the hearing, the high yield noteholders exercised their voting rights pursuant to a pledge over GSA's shares, so as to remove the company's English directors, appointing in their place a German director, Mr Jan Bayer, as the company's sole director. Mr Bayer then instructed GSA's solicitors to withdraw support for, and in fact to oppose the making of, the administration order.

11. In order for the hearing to proceed the Applicants applied to be substituted as the applicants in the administration order. That substitution application was granted by Fancourt J in the afternoon of 23 August 2019. In the meantime, however, Mr Bayer had made an *ex parte* application to the Düsseldorf court for a preliminary insolvency order, which was granted at 1.15pm UK time on the same day. The order appointed Dr Frank Kebekus as the insolvency administrator and designated the Düsseldorf proceedings as the "main proceedings" for the purposes of the Regulation (EU) 2015/848 on insolvency proceedings [2015] OJ L141/9 (the **Recast EIR**), on the basis that GSA had its COMI in Germany. As a result of that order, Fancourt J adjourned the substance of the hearing to the following week,

for the court to consider whether the amended administration application could proceed.

12. On 29 August 2019 Norris J stayed the English administration application on the basis that the court had to recognise and give effect to the German insolvency proceedings under Article 19 of the Recast EIR: [2019] EWHC 2355 (Ch). He rejected Dr Kebekus' submission that the application should be dismissed altogether, expressing concern as to whether the Düsseldorf court had been told that there was already a pending application before the English courts for an administration order, and questioning whether GSA's COMI had in fact been transferred to Germany. He noted that there was therefore a possibility that the German order would be set aside or revoked, and concluded at §29 of his judgment that:

> "There were undoubtedly some very smart moves by the high yield note holders. They have an understandable concern that the present proposed process does not yield them sufficient. They acknowledge that the prosecution of insolvency proceedings in Germany does not completely jeopardise the restructuring, or at least does not completely jeopardise a sale of the BidCo shares since that could take place within the German insolvency proceedings. But it seems to me they should not procure the advantage of managing to dispose of the English administration application in its entirety if there is the possibility that the German court takes the view that it should have been told about the English administration proceedings (in the event that it proves it was not told)."

13. On 9 September 2019 the Düsseldorf court did indeed set aside its preliminary insolvency order, on the basis that GSA's COMI was not located in Germany when the proceedings were commenced, i.e. on 23 August 2019. (The court order was dated 5 September 2019, but this appears to have been an error.) The Applicants then immediately applied to lift the stay of the English application, and a hearing was listed for the same day before Falk J. On 6 September 2019, however, renewed *ex parte* applications had been made to the Düsseldorf court, which resulted in a second preliminary insolvency order being made by that court on 9 September 2019 before the matter came before Falk J. Falk J therefore adjourned the application to lift the stay.

14. There were then appeals against the second order of the Düsseldorf court, which resulted in the preliminary reference made by the Bundesgerichtshof to the CJEU, received by the CJEU on 29 December 2020. As recorded above, the *Galapagos* CJEU judgment was handed down on 24 March 2022.

15. Once that judgment had been handed down, the Applicants applied for the stay of these proceedings to be lifted, and for their administration application to be converted into a winding up application, the purpose of the administration of the company having by then fallen away with the restructuring that had taken place in October 2019. At a hearing on 5 April 2022 Fancourt J lifted the stay and listed the administration application to be heard on an expedited basis, with a timetable for further evidence to be served. That is the basis on which the matter has come before me now.

Part 7 declaratory relief claim and other proceedings

16. On 15 September 2019 Bidco commenced a Part 7 claim seeking declarations that the (at that time proposed) restructuring of the Galapagos group complied with the provisions of the Intercreditor Agreement. The defendants to those proceedings include Dr Kebekus, Signal, and GSA. Dr Kebekus and Signal challenged the jurisdiction of the English court to hear that claim; that challenge was rejected by Zacaroli J on 19 January 2021: *Galapagos Bidco v Kebekus and others* [2021] EWHC 68 (Ch) (the **Jurisdiction judgment**).

17. The declaratory relief claim has now been set down for trial in March 2023. Signal disputes the lawfulness of the restructuring, and contends that it and the other high yield noteholders have been deprived of value to which they were and are entitled under the Intercreditor Agreement. Accordingly, it opposes the declaratory relief sought by Bidco, and has filed a counterclaim in those proceedings seeking declarations that restructuring was implemented in breach of the Intercreditor Agreement. Dr Kebekus and GSA have filed a joint defence contending that the issues arising in the German Clawback Action (described below) should not be determined in the Part 7 claim, and on that basis oppose certain of the declarations sought, but are neutral to or do not oppose the remaining declarations.

18. As set out in more detail at §§34–43 of the Jurisdiction judgment, following the issue of the Part 7 claim form proceedings challenging the restructuring were commenced by Signal, Dr Kebekus and/or GSA in three other jurisdictions:

    i) On 25 September 2019 Signal filed a complaint in the State Court of New York. As later amended, the complaint asserted that the restructuring did not comply with the Intercreditor Agreement, and asserted various causes of action against (among others) GSA, Bidco, Triton and Mangrove. Those proceedings were stayed in July 2020 pending the determination of the Part 7 claim.

    ii) On 24 December 2019 GSA and Dr Kebekus commenced proceedings in Luxembourg against (among others) Bidco and Mangrove, alleging that the restructuring constituted a fraud, and seeking rescission of the transfer of shares to Mangrove, as well as damages.

    iii) On 11 September 2020 Dr Kebekus brought proceedings in Germany against Mangrove (among others), seeking an order that Mangrove transfer its shares in Bidco back to GSA pursuant to provisions of the German insolvency code (the **German Clawback Action**).

The issues

19. The case advanced by the Applicants/Bidco before me is that the effect of the *Galapagos* CJEU judgment is that the German insolvency proceedings are not to be regarded by this court as the "main proceedings" within the meaning of Article 3 of the Recast EIR. Accordingly, for the purposes of Article 67(3) of the Withdrawal Agreement, no "main proceedings" were opened prior to the end of

the transition period on 31 December 2020, with the consequence that the Recast EIR is no longer applicable to these proceedings.

20. Accordingly, the Applicants/Bidco submit that any application to wind up GSA must be based on the jurisdiction of the English court either under the version of the Insolvency Regulation which now applies in the UK (which for domestic purposes has replaced the Recast EIR, and which I will refer to as the **UK IR**) or under s. 221 of the Insolvency Act 1986. The Applicants/Bidco say that the court has jurisdiction on both bases and should exercise its discretion to make the order sought.

21. Signal's position is that unless and until the German courts have given effect to the *Galapagos* CJEU ruling by setting aside or otherwise the Düsseldorf insolvency proceedings, the German insolvency proceedings remain the "main proceedings" for the purposes of the Recast EIR. Accordingly, under Article 67(3) of the Withdrawal Agreement the Recast EIR remains applicable and the German proceedings have to be recognised by this court, precluding the making of a winding up order.

22. If that is wrong, and the Recast EIR does not apply, Signal says that GSA's COMI is not in England, such that the UK IR does not apply, leaving s. 221 as the only jurisdictional basis for a winding up order. In addition, whether under the UK IR or s. 221, Signal contends that the circumstances are such that the court should not exercise its discretion to make the order.

23. These contentions raise essentially the following issues:

    i) The first issue is whether the Recast EIR remains applicable to these proceedings, as Signal contends. That in turn depends on whether the German proceedings are to be characterised as "main proceedings" for the purposes of Article 67(3)(c) of the Withdrawal Agreement.

    ii) If the German proceedings are *not* "main proceedings", such that the Recast EIR no longer governs the question of jurisdiction of the UK courts in the present case, the next question is whether there is jurisdiction to make a winding up order under the UK IR on the basis that GSA's COMI is in England.

    iii) The final issue is whether the court should exercise its discretion to make a winding up order under either the UK IR if that is applicable, or alternatively under s. 221 of the Insolvency Act 1986.

Relevant legislation

24. The interpretation and application of the Recast EIR is the starting point for consideration of the issues in this case. In essence, the Regulation provides that "main insolvency proceedings" may be opened by the courts of the Member State in which the centre of the debtor's main interests is located, and courts in other Member States are required to recognise those proceedings. Accordingly, courts in other Member States may not themselves open main insolvency proceedings, but are permitted to open "secondary insolvency proceedings".

25. The following provisions of the Regulation are particularly relevant:

> "*Article 3*
>
> 1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
>
> In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.
>
> …
>
> 2. Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
>
> 3. Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.
>
> …
>
> *Article 19*
>
> 1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.
>
> …
>
> 2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.
>
> …

> *Article 21*
>
> 1. The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another Member State, as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. ..."

26. The considerations relevant to the determination of the debtor's centre of main interests are explained in recitals (28)–(30) of the Regulation:

> "(28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.
>
> (29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.
>
> (30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. …"

27. The principle of recognition of insolvency proceedings opened in a Member State, and judgments given in connection with those proceedings, is underscored by recital (65) to the Regulation, which provides:

> "This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The recognition of

> judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court's decision."

28. Article 67(3) of the Withdrawal Agreement sets out the extent to which the Recast EIR continues to have effect on a transitional basis, in proceedings involving the UK:

> "In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following provisions shall apply as follows:
>
> (c) Regulation (EU) 2015/848 of the European Parliament and of the Council shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period."

29. If there are no relevant main proceedings opened before the end of the transition period, the Recast EIR in the form set out above will not apply to the UK. The Regulation has, however, been nominally retained in UK law, significantly modified by the Insolvency (Amendment) (EU Exit) Regulations 2019, to produce what I am referring to as the UK IR.

30. The UK IR omits the provisions on recognition of proceedings and judgments set out in the Recast EIR, including the provisions of Article 3(2)–(4) and Articles 19 and 21 set out above. The concept of COMI is, however, retained in the Regulation as a jurisdictional basis for the opening of insolvency proceedings in the UK. For present purposes the key provisions are Articles 1 and 3(1), which in their amended form provide:

> "*Article 1*
>
> 1. The grounds for jurisdiction to open insolvency proceedings set out in paragraph 1B are in addition to any grounds for jurisdiction to open such proceedings which apply in the laws of any part of the United Kingdom.
>
> 1A. There is jurisdiction to open insolvency proceedings listed in paragraph 1B where the proceedings are opened for the purposes of rescue, adjustment of debt, reorganisation or liquidation and –
>
> (a) The centre of the debtor's main interests is in the United Kingdom; or
> (b) The centre of the debtor's main interests is in a Member State and there is an establishment in the United Kingdom.

> 1B. The proceedings referred to in paragraph 1 are –
>
> (a) winding up by or subject to the supervision of the court;
> (b) …
> (c) administration …
>
> …
>
> *Article 3*
>
> 1. The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
>
> In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved from the United Kingdom to a Member State or to the United Kingdom from a Member State within the 3-month period prior to the request for the opening of insolvency proceedings. …"

31. To the extent that jurisdiction to open insolvency proceedings cannot be based on the UK IR, the residual basis for jurisdiction in the present case is s. 221 of the Insolvency Act 1986, which permits an unregistered company to be wound up in the circumstances set out in s. 221(5):

> "(5) The circumstances in which an unregistered company may be wound up are as follows:
>
> (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
>
> (b) if the company is unable to pay its debts;
>
> (c) if the court is of opinion that it is just and equitable that the company should be wound up."

32. Before turning to the application of these provisions in the present case, it is necessary to set out the way in which the CJEU has interpreted the relevant provisions of the Recast EIR and Article 67(3) of the Withdrawal Agreement in its judgment in the *Galapagos* case. That in turn requires reference to the CJEU's judgment in an earlier case also referred by the German Bundesgerichtshof, Case C-1/04 *Staubitz-Schreiber* EU:C:2006:39.

The *Staubitz-Schreiber* judgment

33. The *Staubitz-Schreiber* case was the first reference on the interpretation of EU Regulation 1346/2000, which was the predecessor to the Recast EIR. Mrs

Staubitz-Schreiber was resident in Germany, where she operated a business as a sole trader. After ceasing to operate the business, she requested the opening of insolvency proceedings before the Amtsgericht Wuppertal. Before her request had been determined, she moved to Spain to live and work there. Shortly thereafter, the Amtsgericht dismissed her request on the grounds that there were no assets. Her appeal was dismissed by the appeal court on the basis that her move to Spain meant that jurisdiction to open insolvency proceedings had been transferred to Spain.

34. Mrs Staubitz-Schreiber appealed to the Bundesgerichtshof, which referred to the CJEU the question of whether the court of a Member State had jurisdiction to open insolvency proceedings, under Article 3(1) of the Regulation, where the debtor had filed a request to open proceedings in that Member State but had then moved their COMI to another Member State before that request was determined.

35. The CJEU answered that question in the affirmative. It noted that a transfer of jurisdiction from the court originally seised to a court of another Member State, where the debtor had moved their COMI after the request to open proceedings but before judgment was given on the request, would be contrary to the objectives pursued by the Regulation (§24). In particular:

> "25. In the fourth recital in the preamble to the Regulation, the Community legislature records its intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.
>
> 26. Such a transfer of jurisdiction would also be contrary to the objective, stated in the second and eighth recitals in the preamble to the Regulation, of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged."

36. The Court went on to note that retaining the jurisdiction of the court first seised would ensure greater judicial certainty and protection for creditors (§§27–28). It concluded:

> "29. The answer to be given to the national court must therefore be that Article 3(1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened."

The *Galapagos* CJEU judgment

37. On its face, the ruling given in *Staubitz-Schreiber* should have been determinative of the jurisdiction of the Düsseldorf court in the present case. The Bundesgerichtshof had noted that it had to proceed on the basis that when the request to open insolvency proceedings was originally brought before the High Court, GSA's COMI was situated in the UK (§§22 and 25 of the CJEU judgment). The referring court had also noted the effect of the *Staubitz-Schreiber* judgment. It appears, however, that the court was uncertain as to whether that case-law was still relevant following the replacement of the original Regulation 1346/2000 with the Recast EIR.

38. The CJEU, in its judgment, was in no doubt that *Staubitz-Schreiber* remained applicable to the Recast EIR, noting the continued objective of avoiding forum shopping by transferring assets or judicial proceedings from one Member State to another, and also noting that Article 3(1) of the Regulation continued to provide for jurisdiction to be established in the courts of the Member State within the territory of which the debtor's COMI was situated (§§27–28).

39. Accordingly, as the Court had held in *Staubitz-Schreiber*, the CJEU in *Galapagos* held that the court of the Member State within the territory of which the debtor's COMI is situated at the time of the initial request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor subsequently moves its COMI to another Member State after lodging the request but before the proceedings are opened (§§31–32).

40. The Court then considered whether that had the effect of excluding the jurisdiction of the courts of other Member States to hear new requests to open main insolvency proceedings, noting in particular that under Article 3 of the Regulation "only one set of main proceedings may be opened and that those proceedings have effects in all the Member States in which that regulation is applicable" (§33). In addition, the Court noted that under Article 19(1) and recital (65), a judgment opening main insolvency proceedings under Article 3 is to be recognised in all other Member States, "based … on the principle of mutual trust, which requires that the courts of the other Member States recognise the decision opening such proceedings, without being able to review the assessment made by the first court as to its jurisdiction" (§35).

41. The Court concluded on this point that:

> "36. It follows from all those findings that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is moved to another Member State after that request is lodged, but before that court has delivered a decision on that request, and that, consequently, where a request is lodged subsequently for the same purpose before a court of another Member State, that court cannot, in principle, declare that it has jurisdiction to open such proceedings until the first court has delivered its decision and declined jurisdiction.

> 37. In the case in the main proceedings, it appears to be common ground that, before the request was lodged with the Amtsgericht Düsseldorf (Local Court, Düsseldorf), a request to open main insolvency proceedings in respect of Galapagos had been lodged before the High Court. Therefore, in order to assess the validity of the decision of the Amtsgericht Düsseldorf (Local Court, Düsseldorf) to accept that it has international jurisdiction, the referring court will have to take account of the effects of the lodging of that request before the High Court, in the light of the findings set out in the present judgment."

42. That was not, however, necessarily the end of the matter, because the Court also had to take account of the fact that by the time it delivered judgment the transition period under the Withdrawal Agreement had ended. As the Court noted at §38, under Article 67(3)(c) of the Withdrawal Agreement the Recast EIR only applies to situations involving the UK if the main proceedings were opened before the end of the transition period.

43. The Court concluded:

> "39. Consequently, if it were to be held, in the present case, that, on the date on which that transition period ends, namely 31 December 2020, the High Court was still yet to deliver its decision on the request to open main insolvency proceedings, it would follow that Regulation No 2015/848 would no longer require that, as a result of that request, a court of a Member State, within the territory of which the centre of Galapagos's main interests was situated, refrain from declaring that it has jurisdiction to open such proceedings."

44. The answer to the relevant question referred to it by the Düsseldorf court was therefore that:

> "40. … Article 3(1) of Regulation 2015/848 must be interpreted as meaning that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is moved to another Member State after that request has been lodged, but before that court has delivered a decision on it. Consequently, in so far as that regulation is still applicable to that request, the court of another Member State with which another request is lodged subsequently for the same purpose cannot, in principle, declare that it has jurisdiction to open main insolvency proceedings until the first court has delivered its decision and declined jurisdiction."

45. The effect of these paragraphs of the decision of the CJEU was therefore twofold.

46. First, at the time when the Düsseldorf court had purported to open main proceedings, the High Court retained exclusive jurisdiction to do so, since there was already a pending request to open main insolvency proceedings before the High Court. The Düsseldorf court could not therefore validly declare that it had

jurisdiction to open main proceedings unless and until the High Court had delivered its decision and declined jurisdiction (§§25–37).

47. Secondly, however, since the High Court had not delivered its decision before the end of the transition period, the effect of Article 67(3)(c) of the Withdrawal Agreement was that the Recast EIR no longer applied to the situation, and therefore no longer prevented the court of any Member State, within the territory of which GSA's COMI was located, from declaring jurisdiction to open main proceedings (§§38–39).

48. Put shortly: up to and until 31 December 2020, the combined effect of the pending application before the High Court and the Recast EIR was to prohibit the German courts from declaring jurisdiction to open main insolvency proceedings. After that date, however, they could quite validly do so, if GSA's COMI was by then situated in German territory.

49. Those conclusions are central to the issues before the court in these proceedings, to which I now turn.

Issue (i): application of the Recast EIR: whether the German proceedings were "main proceedings"

50. The first question that I need to decide is whether the Recast EIR remains applicable to these proceedings, under the transitional provisions in Article 67(3)(c) of the Withdrawal Agreement. That will only be the case if "main proceedings" under the Regulation were opened before the end of the transition period.

51. It is common ground that insolvency proceedings in the High Court were not opened before the end of the transition period. Any proceedings to be opened now would therefore not be "main proceedings" under Article 67(3)(c). The question is therefore whether the German proceedings, which by contrast *were* undoubtedly opened before the end of the transition period, are to be characterised as "main proceedings" for the purposes of Article 67(3)(c).

52. Mr Alexander QC for the Applicants, and Mr Perkins for Bidco, said that it followed from the *Galapagos* ruling of the CJEU that the German insolvency proceedings were not validly opened and therefore cannot be characterised as "main proceedings" under Article 67(3)(c). Accordingly, they said, the present proceedings now fall outside the scope of the Recast EIR.

53. Mr Bayfield QC for Signal disagreed. He submitted that once the Düsseldorf court had opened proceedings on the ostensible basis that those were main insolvency proceedings within the meaning of Article 3 of the Recast EIR, that was not something that can be called into question by this court, under the principle of mutual trust set out in recital (65) to the Regulation. Even if the effect of the *Galapagos* ruling is to indicate that the Düsseldorf court did not, at the time, have jurisdiction to open main proceedings, his submission was that this court cannot itself determine that the German proceedings were invalid, but has to wait for the German courts to give effect to the ruling of the CJEU. Unless and until the German courts have set aside the decision of the Düsseldorf court to

open proceedings, his submission was that those proceedings remain "main proceedings" under Article 67(3)(c), with the result that the Recast EIR remains applicable such that this court is bound to recognise the German proceedings and refrain from proceeding with winding up proceedings in this jurisdiction.

54. I do not accept Mr Bayfield's submissions on this point, for several reasons.

55. First, it is right to say that under the scheme of the Recast EIR, the decision of a court that opens main proceedings under Article 3 must in principle be recognised by the courts of the other Member States, who are not permitted to call into question that decision even if they consider, for example, that the debtor's COMI should properly be regarded as falling outside the territory of the first Member State.

56. Equally, however, it follows from the CJEU's judgments in both the *Staubitz-Schreiber* and *Galapagos* cases that where a request to open main insolvency proceedings has been lodged with the court of a Member State, that court retains exclusive jurisdiction to open such proceedings, and again that jurisdiction cannot be called into question by the court of the other Member States.

57. In a situation in which a request to open main insolvency proceedings has been lodged with the courts of one Member State but not yet determined, and the courts of a second Member State have subsequently purported to open main insolvency proceedings, the question arises as to which Member State retains jurisdiction to proceed such that its jurisdiction must be recognised by the courts of the other Member States: self-evidently, it cannot be both. That question has unambiguously been answered by the CJEU in *Staubitz-Schreiber* and *Galapagos*: the court of the first Member State retains exclusive jurisdiction to open main proceedings, and the court of another Member State cannot subsequently declare jurisdiction to open main proceedings unless and until the first court has delivered its decision and declined jurisdiction.

58. If the courts of a second Member State could procure a transfer of jurisdiction (requiring recognition by the other Member States) simply by opening insolvency proceedings and declaring them to be "main insolvency proceedings", that would squarely contradict the judgments in *Staubitz-Schreiber* and *Galapagos*, and would also be contrary to the objectives of avoiding forum-shopping given effect in those judgments (*Staubitz-Schreiber* §§25–26, *Galapagos* §27).

59. Secondly, while it is of course for the German courts to apply the *Galapagos* ruling to the proceedings pending before those courts (as recognised by the last sentence of *Galapagos* §37), it is long established that the preliminary ruling procedure is aimed at ensuring a uniform interpretation of EU law (see e.g. Case 66/80 *ICI* [1981] ECR 1191, §11). The interpretation of the Recast EIR set out by the CJEU in *Galapagos* cannot, therefore, simply be ignored by this court on the basis that it has not yet been given effect by the German courts. That is particularly the case where, as explained above, the CJEU in *Galapagos* did not break new ground but effectively repeated the interpretation already set out in its *Staubitz-Schreiber* judgment, and confirmed that its ruling there continues to apply to the Recast EIR.

60. Thirdly, the fact that the German courts may *now*, following the expiry of the transition period, no longer be required to refrain from declaring jurisdiction to open main insolvency proceedings for the reasons given at §§38–39 of the *Galapagos* CJEU judgment, does not change the nature of the question before this court, which is whether main proceedings were opened *before* the expiry of the transition period.

61. As to that question, the CJEU's comments at §39 of the judgment indicate that the Court could not have contemplated that the German proceedings were to be characterised as main proceedings within the meaning of Article 67(3)(c) of the Withdrawal Agreement, because if that was the case then the Recast EIR would have continued to apply irrespective of whether the High Court had reached a decision on the application before it by 31 December 2020. The contention that the German proceedings remain (at least for now) main proceedings is therefore irreconcilable with the terms of §39 of the judgment.

62. Finally, the high point of Mr Bayfield's case to the contrary was the judgment of Mann J in *Re Eurodis Electron* [2011] EWHC 1025 (Ch), [2012] BCC 57. That was a case in which the relevant company had been placed into administration in England, as main insolvency proceedings under the Recast EIR, on the basis that its COMI was in England, and insolvency proceedings were subsequently commenced in Belgium ostensibly on the basis that they were also main insolvency proceedings. Under the Belgian proceedings the company was then dissolved, and the question for the English court was whether that dissolution order had to be recognised in this jurisdiction.

63. The primary argument for the administrators, at an unopposed hearing before the judge, was that the effect of the Belgian orders should be ignored, such that the judge should treat the company as still having a corporate existence. On that basis the administrators sought an order that they were entitled to continue in their role notwithstanding the Belgian dissolution of the company. Their alternative request was for a winding up order in respect of the company.

64. Mann J rejected the primary argument, finding that even if the order of the Belgian court should not have been made, it had to stand until set aside, and could not be treated by the courts of other Member States as if it was a nullity (§17), or as if it "never happened for all purposes of Belgian law" (§18). The judge therefore refused the declaration sought. He nevertheless clearly did not take the view that this precluded him from exercising jurisdiction, since he proceeded to grant the administrators' alternative request for a winding up order under s. 221(5)(a) of the Insolvency Act 1986 (§28).

65. Mr Bayfield placed weight on the judge's comments at §§17–18, and argued that this court likewise could not treat the decision of the Düsseldorf court as having been invalidly made, unless and until that decision was set aside in Germany.

66. I do not consider that the *Eurodis* judgment has the effect contended for by Mr Bayfield. It is apparent from the judgment that the issue that the judge was addressing at §§17–18 was the argument of counsel for the administrators that the Belgian court order should be entirely ignored, or (as the judge put it at §16), treated as having "no force at all", with the effect that the company should be

regarded as *not* having been dissolved for the purposes of the administrators' primary case. He was not addressing the question of whether the Belgian proceedings were to be regarded as the main proceedings under the Recast EIR.

67. In fact, the judge appears to have agreed with the administrators that notwithstanding the Belgian order the English proceedings were still to be regarded as the main proceedings (hence his comment at §17 that the Belgian courts should have "declined to make an order whose effect would be a dissolution contrary to the requirements of the main proceedings"). That was presumably the basis on which the judge proceeded to make a winding up order. Had he taken the contrary view – as Mr Bayfield suggested – that the Belgian proceedings were to be recognised as the main proceedings under the Regulation, then – as Mr Perkins pointed out – he could not logically have made that order.

68. *Eurodis* is not, therefore, authority for the proposition that the Recast EIR requires recognition of the opening of insolvency proceedings by the courts of a Member State as being "main proceedings" if declared to be so by the courts of that Member State, even if main insolvency proceedings have *already* been opened by the courts of another Member State. Indeed, that would be an absurd proposition, since it would imply an obligation, under the Recast EIR, to recognise two sets of proceedings in different Member States as being both "main proceedings". The Recast EIR cannot be construed to have such a result.

69. A court that is faced with two sets of proceedings which both purport to be "main proceedings" under the Recast EIR must therefore decide which of the proceedings is properly to be characterised as such, applying the provisions of the Regulation and any relevant case-law of the CJEU. The same must apply where, as in this case, main proceedings are opened in one Member State in circumstances where there is already a pending request to open main proceedings in another Member State.

70. For the reasons set out above, it follows from the *Staubitz-Schreiber* and *Galapagos* judgments that the High Court retained exclusive jurisdiction to open main proceedings when the Düsseldorf court purported to do so on 9 September 2019. The proceedings in the Düsseldorf court cannot, therefore, be characterised as "main proceedings" under the Recast EIR and Article 67(3)(c) of the Withdrawal Agreement.

71. It follows that the transitional provisions in Article 67(3)(c) are not engaged, and – as the CJEU envisaged at §§38–39 of the *Galapagos* judgment – the Recast EIR therefore no longer governs the jurisdiction of the High Court in these proceedings.

72. There are two further points to record for completeness on this issue. First, if I had concluded that the German proceedings were to be characterised as "main proceedings" such that the Recast EIR applied, Mr Perkins advanced an alternative submission that this court should nevertheless refuse to recognise the German proceedings as a matter of public policy, pursuant to Article 33 of the Recast EIR. It follows from my conclusions above that I do not need to consider that alternative argument.

73. Secondly, Signal sought to rely on the evidence of an expert witness on matters of German law, in particular on the question of what steps the German courts might now take in the insolvency proceedings opened by the Düsseldorf court. Signal considered this to be relevant to the issue of whether the German proceedings should be regarded as "main proceedings" notwithstanding the *Galapagos* ruling. Bidco disputed the relevance of that evidence, but proffered evidence from its own expert on German law in the event that I were to admit the evidence of Signal's expert.

74. It will be apparent from the analysis set out above that I do not consider the German law evidence to have any bearing on the determination of this issue. The question of whether "main proceedings" were opened in Germany before the expiry of the transition period, for the purposes of Article 67(3)(c) of the Withdrawal Agreement, is a matter of EU law and turns on the interpretation of the Recast EIR as considered in the *Staubitz-Schreiber* and *Galapagos* judgments. It is not relevant, for those purposes, to consider the course that the German courts might now take, under the different legal framework which now prevails following the expiry of the transition period and in light of the CJEU's comments at §§38–39 of the *Galapagos* judgment.

Issue (ii): jurisdiction under the UK IR: whether GSA's COMI is in England

75. If the jurisdiction of this court is not governed by the Recast EIR, the next question is whether this court has jurisdiction to make a winding up order under the UK IR. That in turn depends on whether GSA's COMI continues to be in this jurisdiction.

76. It was common ground before me that although the UK IR is a substantially rewritten version of the Recast EIR, the policy considerations underpinning the judgments in *Staubitz-Schreiber* and *Galapagos* (i.e. the need to avoid forum-shopping) remain applicable to the UK IR. The parties were therefore in agreement that the location of GSA's COMI should be assessed by reference to the position as it stood at the time of the request to commence insolvency proceedings, i.e. on 22 August 2019.

77. Mr Alexander and Mr Perkins submitted that by that point GSA's COMI had shifted from Luxembourg to England. Mr Bayfield disagreed, and contended that the actions taken to shift GSA's COMI were ineffective, such that it remained in Luxembourg when the English proceedings were commenced.

78. Under Article 3(1) of the UK IR (which on this point mirrors the same provision in the Recast EIR) there is a presumption that the COMI of a company is located at the place of its registered office. It is, however, well-established under the case-law of the CJEU that the presumption may be rebutted where, from the viewpoint of third parties, the company's central administration is located in a different place: Case C-396/09 *Interedil* EU:C:2011:671, [2012] Bus LR 1582, §51, reflected in recitals (28)–(30) of the Recast EIR. It was not suggested that any different test should be applied for the purposes of the UK IR.

79. The principles to be applied in that regard were helpfully summarised by Trower J in *Re Swissport Holding International* [2020] EWHC 3556 (Ch), as follows:

"15. For present purposes, it is not necessary to describe in detail the law in relation to the ascertainment of a company's COMI. I draw the following principles from the terms of the Recast Insolvency Regulation and its recitals together with the relevant jurisprudence, including in particular, *Eurofood IFSC Limited* (Case C-341/04) [2006] Ch 508, *Interedil Srl v Fallimento Interedil Srl* [2012] Bus LR 1582 and *Shierson v Vlieland-Boddy* [2005] BCC 949:

i) there is a rebuttable presumption that a company's COMI is located in the Member State of its registered office;

ii) the factual question for the court is to identify where the debtor conducts the administration of its interests on a regular basis, making a comprehensive assessment of all the relevant factors;

iii) the location of the COMI must be objectively ascertainable by third parties;

iv) in carrying out the exercise of ascertaining the COMI, special consideration is to be given to the creditors and their perception as to where a debtor conducts the administration of its interests;

v) where there has been a shift in a debtor's COMI this may require the debtor to inform its creditors of the new location from which it is carrying out its activities;

vi) a debtor's COMI is to be determined at the time the court is required to decide whether to open insolvency proceedings having regard to the facts as they are at the relevant time, but including historical facts and the need for an element of permanence looking forward;

vii) there is no principle of immutability: a debtor is free to choose where it carries on the administration of its interests and it may do so for what has been called a self-serving purpose, more particularly where insolvency threatens (as to which see also *Re Noble Group Ltd* [2019] BCC 349).

16. By way of development of the last point, there is no objection per se to a debtor moving its COMI to England and Wales for the purpose of promulgating a restructuring in this jurisdiction. This has been done on many occasions: *Re Hellas Telecommunications (Luxembourg) II SCA* [2010] BCC 295, *Re European Directories (DH6) BV* [2012] BCC 46, *Re Magyar Telecom BV* [2013] EWHC 2295 (Ch), *Re Zlomrex International Finance SA* [2014] BCC 440, *Re ARM Asset Backed Securities SA* [2014] BCC 252, *Re DTEK Finance BV* [2015] EWHC 1164 (Ch), and *Re Noble Group Ltd* [2019] BCC 34, are all examples of cases in which this has been done."

80. As Snowden J had noted in *Re Videology* [2018] EWHC 2186 (Ch), [2019] BCC 195, §35, the reason for the emphasis on the perception of third parties was given at §75 of the 1996 Virgós/Schmit *Report on the Convention on Insolvency Proceedings*, which preceded the original Recast EIR:

> "Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."

81. In *Swissport*, a company incorporated in Luxembourg was found to have shifted its COMI to England by taking various steps including replacing the Luxembourg manager/directors with English resident manager/directors constituting a majority of the board; operating the company's central management and control from the group's English offices, including the holding of board meetings from those offices; erecting signage reflecting the company's presence at the English offices; accessing administration and technological services in England; notifying third parties of the change in headquarters and principal place of business; providing contact details in England including English telephone numbers; and registering as a foreign company with Companies House (*Swissport* §18).

82. Trower J was accordingly satisfied that the "core of the Company's third party interface" was with the group's English office (§20), and that taking all the factors into account, including the nature of the company's activities as an intermediate group holding company, "which may find it inherently easier to shift its COMI than an operating company", together with the transparent way in which the COMI shift was carried out and the permanence of its nature, the company had rebutted the presumption that its COMI was still in Luxembourg, and had established that its actual centre of management and supervision and of the management of its interests was located in England and Wales (§§22–23).

83. In the present case, similar to the position in *Swissport*, GSA is not an operating company, but is a group holding and finance company. The key steps taken to effect the COMI shift from Luxembourg to England were set out in a witness statement from of one of its directors Mr Keen, dated 22 August 2019 (for the purposes of the hearing of the administration application before Fancourt J on 23 August 2019), as follows:

    i) In June 2019, GSA's existing directors (all based in Luxembourg) were removed from the board, and Mr Keen and Mr Turner, both based in England, were appointed to the board.

    ii) Thereafter, weekly or twice-weekly board meetings were held to discuss the restructuring of GSA. These took place either in person in England or by conference call opened in England, and were attended by the two directors.

    iii) GSA established an office in Fareham, Hampshire, shared with another group company (Kelvion Limited) and its occupation of the office was

reflected in the signage at the property. The Fareham office was expressly identified as GSA's business address in correspondence, including emails. A telephone line was established for the company's exclusive use at the Fareham office, and that telephone number was prominently identified on GSA's website.

iv) Mr Luke Davies, the CFO of Kelvion Limited, was formally seconded to the company to conduct its day-to-day administrative affairs (including answering the phone and receiving invoices sent to the company), and he was permanently based in the Fareham office. Mr Davies was briefed on various points by GSA's legal advisors Kirkland & Ellis LLP, who were also based in England.

v) Companies House was notified that the Fareham office had become GSA's head office address and principal place of business from 13 June 2019.

vi) On 13 June 2019 GSA sent a notice announcing the relocation of its head office functions to England, to (among others) all contractual counterparties of the company, the senior secured noteholders, and the high yield noteholders. Further notices relating to the restructuring and operation of the group identified the Fareham office as GSA's effective place of management.

vii) On 13 June 2019 there was also an investor call to which all holders of the senior secured notes and high yield notes were invited, at which Mr Keen and Mr Turner were introduced as the new directors of GSA, and the investors were told that the company had moved its principal place of business to England.

viii) Accordingly, Mr Keen's evidence was that all of the principal activities of GSA were (following the steps taken above) conducted from England, and the company was not conducting any meaningful activities in Luxembourg or indeed any other jurisdiction outside of England. There was no suggestion in the evidence that this was intended to be anything other than a permanent move.

84. Mr Bayfield relied on the fact that GSA's main asset was (at the time) its equity interest in Bidco, which is a Luxembourg company. I do not consider that to be of decisive significance. What is of primary relevance is the objectively ascertainable location of the centre of management and administration of GSA's interests. That was conducted by the UK-based directors of the company from England, and by Mr Davies in the Fareham office, as set out above.

85. Mr Bayfield also pointed to the fact that GSA's bank account remained in Luxembourg. Mr Keen's evidence was, however, that the company was actively seeking to set up a UK bank account, and that in the meantime he and his fellow director Mr Turner approved payments out of the Luxembourg account either at board meetings held in England or (for remote meetings) operated from England, or by emails predominantly sent from England. In any event, as Trower J commented at §21 of his judgment in *Swissport*, where the company is a holding

company rather than an operating company, the location of its bank account is not likely to be a factor of material significance.

86. Mr Bayfield also said that no board meetings took place at the Fareham office, and the meetings that took place remotely were deemed (under GSA's Articles of Association) to have taken place at GSA's registered office. Those factors do not, however, in my judgment undermine the conclusion that the company management activities were as a matter of fact conducted predominantly from England, even if not always from the Fareham office. In particular, as Mr Keen's evidence explained, he and Mr Turner were permanently based in the UK and were presented to the creditors on 13 June 2019 as such, and they attended the board meetings from England except when their personal or professional commitments required them to travel abroad. I do not consider it realistic to suggest that third parties would have perceived the management of GSA to be conducted from Luxembourg, simply because GSA's Articles of Association provided that remote meetings were deemed to have taken place at the registered office.

87. Finally, Mr Bayfield referred to a decision of the District Court of Luxembourg dated 15 November 2019, declaring that the COMI of GSA's parent company GHSA was located in Luxembourg, such that the Luxembourg court had jurisdiction to open main insolvency proceedings under Article 3 of the Recast EIR, and going on to declare the company bankrupt under the relevant provisions of the Luxembourg Commercial Code. Mr Bayfield noted that GHSA had attempted to shift its COMI from Luxembourg to England at the same time as the COMI-shift for GSA, and in very similar ways, but that these were dismissed by the Luxembourg court as being ineffective to transfer GHSA's COMI to England. While he accepted that this court was not bound by the Luxembourg decision in any way, he submitted that the approach taken there was the right one.

88. The Luxembourg decision undoubtedly supports Mr Bayfield's submissions, but that is as far as it goes: it is not admissible as evidence of fact in these proceedings (since GSA was not party to the Luxembourg proceedings) and it does not set out any proposition of law that differs from the legal test that I have summarised above. I therefore have to reach my own decision on the evidence before me, and taking account of the guidance in the case-law applicable in this jurisdiction.

89. In my judgment, an assessment of the factors set out above establishes that by 22 August 2019 the administration of GSA's interests had moved from Luxembourg to England. The core management team had been relocated to England, the meetings were either physically based in England or organised remotely from England; the office headquarters had moved to Fareham, where Mr Davies worked; and those changes were clearly notified to third parties including creditors. Bearing in mind the importance of the perception of third parties, including creditors, I consider it highly improbable that third parties would in the present case have taken the view that GSA's COMI remained in Luxembourg, notwithstanding the information provided to them as set out above.

90. GSA's COMI was therefore located in England as at 22 August 2019, and this court has jurisdiction to make a winding up order under the UK IR.

Issue (iii): discretion

91. The remaining question is whether the court should exercise its discretion to make a winding up order.

92. If the UK IR had not applied, and the basis for jurisdiction had been s. 221 of the Insolvency Act 1986, it would have been necessary to consider the three conditions set out in (among others) *Re Latreefers* [2001] 2 BCLC 116 (CA), namely that (i) there must be a sufficient connection with England; (ii) there must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the order; and (iii) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.

93. It was common ground that the court may also consider those factors when deciding whether to exercise its discretion to make an order under the UK IR, albeit that there will inevitably be a significant overlap between the question of a sufficient connection with England and the question of whether the company's COMI is in England for the purposes of the UK IR.

94. Mr Bayfield submitted that the court should not exercise its discretion to make a winding up order, on the basis that there was insufficient subsisting connection with England. He also disputed that there would be any practical benefit to the Applicants in making such an order.

95. As to the first of those points, Mr Bayfield said that even if GSA's COMI was in England on 22 August 2019, it had since moved to Germany such that there was no longer a sufficient connection with England. The difficulty with that submission is that if it is recognised that the court should have jurisdiction to make a winding up order under the UK IR on the basis of the location of the relevant company's COMI when the request to commence insolvency proceedings was first filed, on the basis of the policy considerations discussed in *Staubitz-Schreiber* and *Galapagos*, it would be wholly incongruous for the court nevertheless to decline to exercise that jurisdiction on the basis that the company's COMI had subsequently been shifted.

96. In any event, even leaving aside the location of GSA's COMI, in my judgment a sufficient connection with England is established on the basis of the pending Part 7 proceedings brought by Bidco, seeking declarations of compliance with the provisions of the Intercreditor Agreement (which is an agreement governed by English law and subject to the exclusive jurisdiction of the English courts). The validity of the restructuring transaction which is in issue in those proceedings is at the heart of the dispute between the parties. I note the similar comments of Zacaroli J at §120 of the Jurisdiction judgment.

97. Mr Bayfield contended that GSA has taken a largely neutral position in those proceedings, the main opposing litigants being Bidco and Signal. That does not, however, diminish the importance of the proceedings to GSA's connection with England, in circumstances where the central issue in the proceedings is the restructuring of GSA itself. As Zacaroli J noted at §121:

> "[GSA] is a party to the [Intercreditor Agreement] and clearly affected by the declarations sought (given that a key step in the Restructuring was the sale of shares in Bidco held by GSA). It is bound by the agreement in the [Intercreditor Agreement] as to choice of English law and as to the choice of England as an *exclusive* jurisdiction."

98. Moreover, as I have set out above, while GSA and Dr Kebekus are neutral in relation to some of the substantive issues in the Part 7 proceedings, their position is that the German courts have exclusive jurisdiction to determine the issues arising in the Clawback Action, including the substantive question of whether the consideration for the sale of the Bidco shares to Mangrove was fair and the optimal method of maximising recovery for GSA's creditors. On that basis they oppose several of the declarations sought by Bidco. I do not, therefore, accept Mr Bayfield's submission that GSA is to be regarded as only "formally" a party to the Part 7 claim, such that those proceedings should be given little weight in determining GSA's connection with this jurisdiction.

99. Turning to the practical benefit to the Applicants of a winding up order, the starting point is that the making of a winding up order will bring to an end the protracted period during which this application has been pending. GSA is plainly unable to pay its substantial debts, and has no source of income. It is, as the Applicants have said, hopelessly insolvent, and the Applicants' evidence is that they wish the company to be placed into liquidation in order to bring to an end these long-running, time consuming and expensive proceedings. There is an obvious benefit to the Applicants in the court taking that course.

100. There is also in my judgment a benefit to the Applicants in bringing GSA under the control of the Official Receiver or an appointed liquidator, in either case being an independent party. At present, GSA's participation in the Part 7 proceedings is being directed by Dr Kebekus, who was appointed on the application of GSA's then-director Mr Bayer, who was in turn appointed by the high yield noteholders without consultation with any other creditors. It appears that Dr Kebekus continues to be funded by Signal (since GSA itself has no liquid assets), and both Dr Kebekus and GSA have played an active role in opposing the restructuring transaction, not only in the Part 7 proceedings in this jurisdiction as I have just described, but also in the proceedings in Luxembourg and the German Clawback Action.

101. Bidco contended that Dr Kebekus' appointment by the Düsseldorf court was in itself invalid, since that court did not have jurisdiction to open main proceedings for the purposes of Article 21 of the Recast EIR. In consequence, Mr Perkins said, Dr Kebekus had no authority to instruct Stewarts, the solicitors representing GSA in the Part 7 claim. Mr Head for GSA disputed that suggestion, and contended that Stewarts had been duly instructed on behalf of GSA.

102. I do not need to determine that issue; for the purposes of the present question of the exercise of the court's discretion, it is sufficient to say that there would be a clear practical benefit to the Applicants if GSA's involvement in the Part 7 proceedings were to be directed by an independent liquidator, by contrast with

the current state of affairs in which GSA is being represented by an insolvency practitioner whose interests are opposed to those of the Applicants.

103. The position taken by GSA at the hearing before me reinforced that conclusion. On 20 May 2022, after the skeleton arguments for this hearing had been filed, GSA obtained a witness statement from Mr Frank Walenta, who had been appointed as the sole director of GSA on 11 June 2020 as the successor to Mr Bayer. Mr Walenta noted that Dr Kebekus' authority to engage Stewarts in the Part 7 claim had been called into question in these proceedings. On that basis, he said that even if Dr Kebekus did not have such authority, he authorised Stewarts to continue to act for GSA, and ratified what Stewarts had done to date in both the Part 7 proceedings (and these proceedings). He did not, however, provide any explanation as to his reasoning for doing so, or who he had consulted, and it was apparent that there had certainly not been any consultation with the Applicants.

104. That witness statement was not, however, sent to the Applicants and Bidco until the evening of the first day of the hearing (24 May 2022), and it was not forwarded to the court until the following morning, before the start of the second day of the hearing. As a result, Mr Perkins was not able to address the new evidence until his reply on the afternoon of the second day. Mr Head was not able to offer any plausible explanation as to why this statement was withheld until that time, if GSA intended to rely on it.

105. Irrespective of whether Mr Walenta's retrospective validation of Stewarts' actions in the Part 7 proceeding is necessary or not (which as I have said I do not need to determine), the fact that GSA quite evidently took a tactical decision as to whether to inform the Applicants/Bidco and the court that this had occurred underscores GSA's lack of neutrality in these proceedings, and supports the contention of the Applicants and Bidco that it would be of benefit to the Applicants for an independent liquidator to be put in place.

106. For the purposes of the exercise of my discretion, therefore, I am satisfied both that GSA has a sufficient connection to England, and that there is not only a reasonable possibility of benefit to the Applicants if a winding up order is made, but in fact a clear and obvious likelihood of such benefit.

Conclusion

107. I will therefore make a winding up order in respect of GSA as sought by the Applicants. I will hear further submissions from the parties as to the precise terms of that order.