Neutral Citation Number: [2022] EWHC 2097 (Ch)

Case No: CR-2022-002121

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

5 August 2022

Before :

Jonathan Hilliard QC sitting as a Deputy Judge of the High Court

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In the matter of Petropavlovsk plc (in administration)

And in the matter of the Insolvency Act 1986

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Peter Arden QC, Jim Sturman QC and Joseph Wigley (instructed by **Joseph Hage Aaronson LLP**) for the **Applicants**

Hearing date: 29 July 2022

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JUDGMENT

JONATHAN HILLIARD QC sitting as a Deputy Judge of the High Court:

Introduction

1. By Application Notice dated 27 July 2022, Allister Jonathan Manson, Trevor Binyon and Joanne Rolls (together **"the Administrators"**), the joint administrators of Petrapavlovsk plc (**"the Company"**), seek a direction pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (the **"1986 Act"**) providing them with liberty to proceed with the sale of the Company's business to UMMC-INVEST (**"UMMC"**) (the **"Proposed Transaction"**).

2. As I explained in a short judgment handed down on Monday 1 August 2022, reported as [2022] EWHC 2074 (Ch), my decision is to grant the application and make the order appended to that judgment. I stated in that judgment that I would set out the reasons for this in a further written judgment. This is the further written judgment.

3. The Company is an English holding company that owns a group of gold mining and exploration companies operating in eastern Russia (the **"Group"**). The Administrators are partners of Opus Restructuring LLP (**"Opus"**) and were appointed by order of HHJ Jarman QC sitting as a Judge of the High Court dated 18 July 2022.

4. The Group's ability to operate its business was substantially impaired by the international sanctions and other restrictions applied in response to the Russian Federation's invasion of Ukraine earlier this year. In the absence of being able to obtain refinancing, the Company was rendered unable to pay its debts as they fell due.

5. Mr Arden QC, appearing with Mr Sturman QC and Mr Wigley, put forward the following principal reasons for the Administrators choosing to seek a Court direction:

   (1) The Proposed Transaction involves the sale of a substantial undertaking, is complex and effectively disposes of almost all of the Company's assets.

   (2) While the envisaged sale proceeds of US$619m are expected to be sufficient to pay off creditors and are towards the top end of Kroll's valuation of the Company's operating assets at between US$458m and US$621m, they leave nothing for shareholders and the sale price is substantially below the Company's book value of US$1,619m.

   (3) The Proposed Transaction appears to be opposed by a number of the Company's shareholders, including the Company's largest shareholder, 'Uzhuralzoloto Group of Companies' JSC (**"UGC"**), which at 30 June 2022 reportedly held approximately 29.18% of the Company's share capital, and Prosperity Capital Management (RF) Limited (**"Prosperity"**). The Company understands that UGC is controlled by Konstantin Strukov, a successful Russian businessman.

(4) While the Administrators' settled view, with the benefit of advice from specialist leading counsel, Mr Sturman QC, is that proceeding with the Proposed Transaction would not give rise to a breach of any sanctions, they appreciate that there is nevertheless a risk in that regard. While it does not represent their view, the Administrators are concerned that given the sanctions regime, it may be said that the Proposed Transaction is not something that they should proceed with. They are acutely conscious of their position as officers of the Court and of the fact, that pursuant to the principle derived from *ex p. James* the Court will not permit its officers to act in a way that would be clearly improper or dishonourable. Therefore, they wish to invite the Court to give appropriate directions.

6. In my judgment, the Administrators were amply justified in bringing the matter before the Court in these circumstances.

7. The application was brought on an extremely urgent basis. The Administrators consider that the Company's business is in a very serious and deteriorating state. At the time of the hearing before me, the deadline for acceptance of the offer from UMMC was 12pm on Friday 29 July. Further, it is feared that if the sale does not go through quickly, UMMC could proceed with enforcement action and insolvency proceedings against the Company's subsidiaries in Russia. Therefore, I heard the matter for a little over half a day on 29 July, and handed down a short judgment giving my decision on Monday 1 August, the Administrators having indicated through Counsel that they did not push for a decision on 29 July and hoped that UMMC would be willing to accept a response the following week. Mr Arden QC and Mr Wigley dealt with the insolvency law and commercial elements of the application, and Mr Sturman QC with the application of the sanctions regime and related restrictions.

8. I make two points clear at the outset.

9. The first relates to the Office of Financial Sanctions Implementation (**"OFSI"**), which is the authority responsible for implementing the UK's financial sanctions on behalf of HM Treasury. I am not seeking to determine the correct construction of the relevant UK sanctions legislation- the Russia (Sanction) (EU Exit) Regulations 2019 as amended (**"the Regulations"**)- in a manner that binds OFSI. OFSI is not before me. As explained below, while I need to consider the Administrators' submissions on the application of the Regulations to determine whether to grant the Administrators the liberty they seek, I do not need to grant declarations as to the meaning of the Regulations in order to do so.

10. Secondly, the order granted is, as the application was, limited to proceeding with the Proposed Transaction itself. Neither the Company nor any of its directors are designated persons for the purposes of the Regulations, so they are free to receive payment so long as the payment is not made by a designated person. UMMC is a Russian entity but is not a designated person or controlled by one. Nevertheless, Mr Arden's skeleton made clear that the Administrators recognise that sanctions may be relevant to the Company's ability to make any

distribution of those incoming sale proceeds to creditors and shareholders, because the identity of such stakeholders is not clear and it is therefore possible that the class may include designated persons.

11. The Administrators intend that repayment of creditors will include cancellation of the US$500m notes guaranteed by the Company which are due on 14 November 2022 (the **"2022 Notes"**). The Administrators envisage that such cancellation may require them to return to Court to approve a scheme of arrangement in that regard. More generally, they also envisage that they may apply for a licence from OFSI if the Administrators consider there to be a risk that any creditors are designated persons. They would also intend to apply for a licence from the authorities of the relevant EU member state if the Administrators were to be advised that this was required to deal with EU-based intermediaries in relation to the 2022 Notes. A licence allows an act that would otherwise breach prohibitions imposed by financial sanctions.

Background

12. In order to explain the issues that arise on the present application, it is necessary first to set out the key elements of the factual background. The backdrop is set out in some detail in the witness statements of Mr Manson, who has filed witness statements in support of the original administration application and now the present application, and two witness statements of Charlotte Philipps, an independent non-executive director of the Company, in support of the administration application. I draw on those statements in the account below.

13. The Company is the parent of the Group and has seven employees, all of whom are based in London. Its operating subsidiaries are based near its assets in Russia, and it sells almost all of its gold domestically in Russia. The Group consists of 38 entities, 24 of which are incorporated and based in Russia. Of the remaining 14, one is dormant and the others are based in the UK, Jersey, Cyprus and the Cayman Islands. The Group has three main gold exploration and production entities in Russia: JSC Pokrovskiy Mine, LLC Malomysrkiy Rudnik and LLC Albynskiy Rudink. The rest of the Group's Russian entities support these mines by providing exploration, research, engineering, construction, maintenance, transportation and other ancillary services.

14. The Group's last annual report made up to 31 December 2020 states that the Group has assets of US$1,1731m and liabilities of US$1,059m, giving net assets of US$672m, and that the Company had assets of US$1,540m and liabilities of US$1,640m, giving net liabilities of US$100m.

15. The Company has the following preferential and unsecured creditors, and no secured creditors:

    (1) The main preferential creditor is HRMC, which is owed VAT estimated to be between £10,618,223 and £14,854,913.

    (2) The Company has the following unsecured debts:

(a) The Company is the borrower under a term loan facility of US$200m (the **"Term Loan"**). The original lender was Gazprombank, also known as Bank GPB JSC (**"GPB"**). GPB became a sanctioned person – known as a "designated person"- for the purposes for the Regulations on 24 March 2022. On 18 April 2022, GPB gave notice to accelerate the Term Loan as a result of failure by the Company to meet an interest payment. The reason for the failure was that the Company was unwilling to make the payment in light of the financial sanctions by HM Government against GPB. On 19 April 2022, GPB gave notice that it had assigned its rights under the facility agreement to UMMC pursuant to an assignment agreement. UMMC is not an entity subject to sanctions and has confirmed that it paid full value for the debt.

(b) The Company is a guarantor in respect of US$500m 2022 Notes issued by one of the Company's Jersey subsidiaries, of which c.US$304m remains outstanding.

(c) The Company is a guarantor in respect of US$125m convertible bonds (the **"Bonds"**), of which c.US$33m plus interest remains outstanding, due in 2024.

(d) A number of other, far smaller, unsecured debts, including debts under intergroup arrangements, contractual entitlements due to existing employees, and trade creditors.

16. There is one other liability that I need to mention at this point. GPB provided c.US$86.7m in credit facilities (the **"Facilities"**) to some of the Company's Russian subsidiaries. Any sale would be subject to the subsidiaries' liabilities in respect of the Facilities, which included an option given to the lender to purchase the Group's gold production. On 18 April 2022, GBP sent 3 pre-term payment demands in respect of the sums due under the Facilities, and on 12 May 2022, the relevant subsidiaries were notified by GPB that it had assigned the Facilities to Nordic LLC (**"Nordic"**).

17. I shall briefly set out the key events relevant to the Company's position since February 2022.

18. On 21 February 2022, President Putin signed decrees recognising two Russian-backed regions in eastern Ukraine as independent and ordering forces to the region. Three days later, on 24 February 2022, Russia invaded Ukraine.

19. The decrees and the subsequent invasion led to a significant set of economic sanctions against Russia.

20. Although the Company and its subsidiaries were not themselves sanctioned, such sanctions restricted the ability of the Company's subsidiaries to transfer cash to the Company, made it impossible for the Company to access at least some of its own cash, and made it more difficult for the operating subsidiaries to maintain their production operations in circumstances where some parts and equipment are manufactured by western companies or to sell the gold that the subsidiaries produced.

21. The Company announced on 25 March 2022 that it was unable to service its debt due to sanctions. From March 2022, when it became clear that its position was likely to be unsustainable, the Company has explored refinancing its debt and has marketed its assets for sale. It sought in late March to engage advisors to explore such a sale. On 14 April the Company issued a press release explaining that the Company was exploring its options, that such options included a sale of the Company's entire interests in its operating subsidiaries as soon as practically possible, and that it was not currently clear what return if any, might be secured for shareholders or the holders of the Bonds or 2022 Notes as a result of this process.

22. The Company engaged AlixPartners UK LLP (**"AlixPartners"**) to advise on restructuring options and insolvency, and Hannam & Partners (**"Hannam"**), an independent investment bank, to undertake a marketing process in respect of the Company's assets. As a preliminary step, Hannam contacted 29 prospective purchasers between 14 and 22 April to invite expressions of interest. While this resulted in several indicative bids for the Company's assets, only the bid from UMMC was expressed as a binding offer.

23. UMMC had expressed an interest in purchasing the Company or its business in late 2021, but negotiations were interrupted by the Russian invasion of Ukraine. The immediate background to the UMMC bid was that, as explained above, on 18 April, GPB gave notice to accelerate the Term Loan and sent 3 pre-term payment demands in respect of the sums due under the Facilities. On 19 April GPB gave notice that it had assigned its rights under the Term Loan facility agreement to UMMC, and on the same day, UMMC expressed an interest in buying certain of the Company's subsidiaries. Thereafter the Company's legal representatives and AlixPartners engaged with UMMC to negotiate a potential transaction.

24. The acceleration of the Term Loan caused a cross-default under the terms of the Notes and Bonds, so the Company sent default notices to the trustees of the Notes and Bonds on 21 April 2022.

25. In tandem with the negotiations mentioned, Kroll Advisory Ltd (**"Kroll"**) carried out an independent valuation of the Company's subsidiaries. Kroll's 2 May 2022 valuation report concluded that those assets had a fair market value of between US$458m and US$621m.

26. On 3 May 2022, UGC's nominee director to the Company board, Mr Potapov, e-mailed the Company board stating that he understood that the board meeting scheduled later that day would be deciding on whether to apply for an administration order, and setting out various concerns about a decision to apply for such an order.

27. On 16 May 2022, UMMC made a binding offer for the Company's shares and participatory interests in the operating and holding companies of the Group. The offer letter enclosed a draft sale and purchase agreement.

28. The Company provided UGC at the time with a copy of the draft agreement.

29. Following exchanges of letters and e-mails with the Company, UGC proposed resolutions removing the Company's existing directors, with the exception of Mr Potapov, and reiterating UGC's opposition to putting the Company into administration.

30. On 17 June 2022, the Company engaged Opus to provide insolvency advice and to act as proposed administrators should the Company be placed into administration, AlixPartners having felt unable to continue acting due to risk considerations arising from the Company's Russian business and international, particularly, US sanctions. Opus does not have an American office. By this point, the attempts to refinance the Company's debt had proved unsuccessful. None of the Western banks approached were willing to provide significant financing in circumstances where the Group's assets were located in Russia, and no Russian bank was willing to refinance a non-resident entity that was located in the UK.

31. On 26 June 2022, the UK, US, Japan and Canada announced a ban on new imports of Russian gold. This makes it more difficult for the Group to seek to export its gold and therefore to achieve a better price than is available on the Russian market.

32. The cumulative result of the above factors was that the Company was, or was likely to become, unable to pay its debts. GBP had declared that all amounts outstanding under the Term Loan, amounting to c.US$200m, were immediately due and payable and had also accelerated the liabilities of the Company's subsidiaries under the Facilities. The Company and its subsidiaries did not have close to sufficient funds to pay these sums and nor was the Company in a position to pay interest falling due on the 2022 Notes or to pay the principal on maturity.

33. On 29 June 2022, the Company's solicitors, Joseph Hage Aaronson LLP (**"JHA"**), wrote a detailed letter to OFSI informing them of the intended administration application, an intended application by the Administrators for Court directions to be issued following the Administrators' appointment, and of the intended sale to UMMC. The primary purpose of the letter was to bring certain aspects of the Proposed Transaction to OFSI's attention in the context of the Regulations. The letter stated that while neither the Company's directors nor the Administrators considered that a licence was required, if OFSI was of a different view then JHA would welcome the opportunity to discuss this with OFSI as a matter of urgency, given that the Company's directors and Administrators wished to ensure that they complied with any applicable requirements under the Regulations.

34. When it became clear that the administration application would not be filed until 11 July 2022, the Company sought confirmation from UMMC that it would be willing to allow some further time for the Administrators to take office and consider their offer further. In response to this, UMMC sent a 30 June 2022 letter granting what it described as "*the final extension*" of their offer until 12 July 2022 and explaining their concerns about the continuing deterioration of the business.

35. Following further correspondence from Mr Potapov of UGC on 1 and 5 July 2022, the chairman of the Company wrote to Mr Potapov on 7 July 2022 to suggest that UGC's proposals be discussed at the meeting already scheduled for 11 July 2022, but reiterated that the Company's directors did not see an alternative to administration given the Company's insolvency. The same day, shortly after sending that letter, the Company received a proposal from UGC (the **"UGC Proposal"**). That proposal was, in outline, to procure repayment of the Term Loan and Facilities, to buy out other shareholders at "*a current…trading price*", and to procure the "*transfer and subsequent restructuring and repayment*" of the 2022 Notes and the Bonds. The offer was expressed to be subject to several conditions, including the resignation of all non-Russian members of the Company board.

36. The Company chairman responded to UGC's letter the same day, seeking further detail on UGC's offer and stating that if, as appeared likely, the Company board was to resolve to apply to Court for the appointment of administrators, then UGC would be free to continue discussions with the administrators once appointed.

37. I return below to the position of UGC. In short, Opus requested in writing on 12 July 2022 further information from UGC about the UGC Proposal by 4pm on 15 July. The request was repeated by 19 July 2022 letter from the Administrators, with the deadline for a response being put back to 12pm on 22 July 2022. The Administrators stated that failing a substantive response to the queries by that time, the Administrators would have to conclude that UGC's proposal was not viable in the time available. No response from UGC has been received.

38. In early July, the Administrators corresponded with Hannam to satisfy themselves that the marketing process had been reasonable and that further marketing was unlikely to yield any better offer. Hannam confirmed that its opinion was that the universe of purchasers was limited, that it believed that the appetite to acquire a Russian gold producer remained low and that it considered that, given the degree of publicity that had been given to the Company's financial difficulties and its efforts to sell its assets, any entity likely to be interested in purchasing the business had been provided with ample opportunity to come forward.

39. On 11 July 2022, following a Company resolution that day, four of the Company's directors applied for the Company to be placed into administration and the Administrators to be appointed.

40. The Administrators' views at that stage, as set out in Mr Manson's witness statement in support of the administration application, were that the Proposed Transaction appeared to represent good value for the Company's stakeholders as a whole, given that it was at the top of the valuation range given by Kroll and was likely to result in full recovery for the Company's creditors, although with no surplus remaining for shareholders. The Administrators considered that the UGC Proposal, if it turned out to be viable, might similarly represent good value in that, on its face, it appeared to envisage full recovery for creditors together with some recovery for shareholders. The Administrators did not consider that

it was practical to rescue the Company as a going concern. Rather the applicants for the administration order sought to place the Company into administration so that it could implement a sale of the business quickly and efficiently while it was still a viable option, otherwise the Company would have to be wound up.

41. In the period between the making of the administration application on 11 July and it being heard on 18 July, UMMC in its capacity as lender under the Term Loan sent notices to each of the four subsidiaries who are guarantors of the Term Loan demanding payment of the debt within five days, and Nordic, as lender under the Facilities, sent notices to the same four subsidiaries demanding immediate repayment of the outstanding amounts under the Facilities. UMMC also wrote to the Company expressing its disappointment that there had, in its view, been no serious progress with the offer since 30 June, and stating that it would proceed with enforcement actions aimed at recovering the debt due under the Term Loan, but expressing a willingness to make a renewed time-limited offer to acquire assets on the terms previously agreed as long as UMMC was granted exclusivity in negotiations and the value of the operating subsidiaries did not deteriorate further. Nordic, like UMMC, has given notice of its intention to initiate insolvency proceedings against the Company's operating subsidiaries.

42. The administration order was made by HHJ Jarman QC on 18 July. The order expressly states that the powers of the Administrators shall not extend to the management of affairs, business and property of any of the subsidiaries of the Company, so the Administrators are not given power to manage the Russian subsidiaries.

43. Another of the Company's significant shareholders, Prosperity, attended the hearing of the administration application but did not participate. However, Mr Manson did discuss the matter with Mr Sonosvskiy of Prosperity after the hearing, and Mr Sonsovskiy indicated that Prosperity wished to make proposals to the Administrators in relation to the potential refinancing of the Company's debt.

44. On 19 July 2022, Opus issued a press release dealing with the appointment of the Administrators. The release explained in outline the marketing process that had been conducted, that this had resulted in three indicative offers, of which one, from UMMC, was then expressed as a final binding offer, and that negotiations with UMMC were ongoing. The release also mentioned that initial discussions in relation to a potential sale had taken place between the Company's board of directors and UGC, following UGC having expressed interest after the completion of the marketing process. The release went on to express the hope that a timely sale to one of these parties could be completed, but made clear that as a consequence of the administration and potential asset sale, it was unlikely that there would be any return to the Company's shareholders, albeit that it was not impossible. The release invited any party interested in making a proposal in respect of the Company to contact the Administrators as soon as possible. The Company has not received any such approaches.

45. The same day, the Administrators wrote to UGC in the terms set out above. They also wrote to Prosperity, inviting it to make any proposals for the refinancing of the Company's debt by 12pm on 22 July 2022. However, no response has been received.

46. On 20 July 2022, (1) the Financial Conduct Authority (**"FCA"**) confirmed that the Company's shares had been removed from the Official List of the FCA and the London Stock Exchange following the making of the administration order, (2) the Moscow Exchange (**"MOEX"**) confirmed that the Company's shares had been removed from the list of securities admitted to trading on MOEX, and (3) Citibank wrote to the Company to give notice of its resignation as paying agent in respect of the Bonds in 60 days. This was followed five days later by Citibank giving notice of its resignation as trustee of the 2022 Notes in three months.

47. On 21 July 2022 the EU designated Mr Kozitsyn, the General Director of UMMC and a minority indirect shareholder in UMMC, as an individual subject to the relevant EU sanction regulation, Council Regulation (EU) No 269/2014 as amended (the **"EU Regulation"**). As a result, Mr Kozitsyn stood down as General Director.

48. The Administrators have liaised with management, and in particular the Group CFO Stanislav Ploschenko, to obtain up to date information regarding the Group's assets, liabilities and trading conditions. The Administrators' updated estimate of the Company's liabilities, dated 22 July 2022, shows total liabilities of US$604,954,125 exclusive of VAT and US$618,675,979 inclusive of VAT. Mr Ploschenko explained in his written response the continuing and critical deterioration of the financial position of the Russian assets. He concluded that if the situation does not improve then the Russian operating companies are likely to consider themselves bound to file for their own insolvency under Russian corporate law.

49. Prior to their appointment, the Administrators asked Kroll to update their 2 May 2022 valuation. The Administrators renewed their request following their appointment, but Kroll informed them that it would take a significant amount of time, perhaps weeks, to do so, and cost £187,000. Kroll had previously indicated informally to the Administrators that the valuation would only decrease if updated. In order to obtain further comfort as to the valuation position without waiting for Kroll formally to update their report, the Administrators instructed Opus Pear Tree, Opus's forensic accounting division, to produce a standalone opinion in relation to the valuation of the Company's assets, taking Kroll's valuation as their starting point. Opus Pear Tree's report, which was finalised after Mr Manson's 27 July 2022 witness statement, concludes that due to, among other things, the continuing deterioration of market conditions, the value of the assets would likely be lower today than as at the date of the Kroll report.

50. Returning finally to the current position of UMMC, the Administrators responded by 22 July 2022 letter to UMMC's 13 July 2022 letter referred to above. The letter explained among other things that the Company was bound to give other interested parties a fair opportunity to make competing offers, so it

was not appropriate to offer UMMC exclusivity as requested, but that they hoped to continue to work with UMMC to reach agreement in principle on the terms of a sale.

51. UMMC responded on 25 July 2022, issuing what it described as a "*final binding offer*", expressed to expire at 12pm on 29 July 2022. UMMC has made clear in conversation with the Administrators and their advisers that it is not willing to wait indefinitely for the Administrators to agree to conclude the Proposed Transaction, with the risk that the underlying assets will lose value in the meantime. Therefore, its expressed position is that if it does not receive certainty that it will be able to purchase the Company's assets in the very near future, and the sale and purchase agreement (the **"SPA"**) is not signed by the middle of the week commencing 1 August 2022 or shortly after that, it intends to press ahead with the enforcement and bankruptcy proceedings that it has already initiated against the Group's assets in Russia.

Interaction with stakeholders and OFSI

52. I have mentioned above a number of ways that the Company and Administrators have sought to keep stakeholders informed, and the dialogue with UMMC, UGC and Prosperity.

53. According to the monthly notice of significant shareholdings in the Company as at 30 June 2022, the shareholders with the largest shareholdings after UGC and Prosperity are Everest Alliance Limited with a 5.36% shareholding, The Russian Prosperity Fund with a 4.86% shareholding, Norges Bank with a 3.74% shareholding and Societe Generale SA with a 0.56% shareholding. One of the footnotes to the table of shareholdings in the monthly notice provides that Prosperity's holding of 9.97% includes the disclosure of The Russian Prosperity Fund of 5.99%, and that on 9 December 2021 the Company received the notification of reduction in holding of The Russian Prosperity Fund to 4.86%, so that the holding of Prosperity should reduce accordingly.

54. In addition to attending the 18 July administration hearing, Prosperity had exchanged correspondence with the Company in April to June 2022, including expressing in its 6 June 2022 letter opposition to the proposed sale of the Company's assets and the proposed administration.

55. The Company has also exchanged correspondence in April and May 2022 with Mr Singh on behalf of Match Liquidity DMCC, who Mr Singh explained owned 2.5% of the Company's shares. Mr Singh's 17 May 2022 e-mail explained that Match's view was that the Group and its subsidiaries had sufficient resources to cover the interest payments. I note that Match Liquidity DMCC is not included in the 30 June 2022 monthly notice of significant shareholdings referred to above.

56. The Company also received a short e-mail on 16 May 2022 from Carlo Jimenez who identified himself as representing the Pavel Shareholders Group and threatened legal action against the board of directors. The Company has no knowledge of the Pavel Shareholders Group or Mr Jimenez.

57. Following the Administrators' appointment, the Administrators' staff have received numerous e-mails from persons identifying themselves as shareholders or creditors of the Company. Mr Manson explains in his fourth witness statement, provided to me on 30 July 2022 in order to confirm and formally put into evidence material provided to me during the 29 July hearing, that the Administrators' team has endeavoured to respond to such communications in a consistent manner. In general, they have provided a standard response to queries, stating that the Administrators intend to sell the assets of the Company for the benefit of stakeholders in the priority set by the UK insolvency legislation, so that creditors will be paid before shareholders, and that the Administrators' expectation was that there would be no return to shareholders. The Administrators' staff also explained that the Administrators intend to issue proposals to creditors in due course.

58. Mr Manson also explains that on the night before the 29 July hearing, the Administrators' colleague received an e-mail in Russian from the "*legal decisions committee"*. The sender stated that they were writing on behalf of shareholders and requested a link to the website of the High Court and a case number. The Administrators' solicitiors, JHA, e-mailed the Court on the morning of 29 July, to arrange for that e-mail address to be provided with a link to access the hearing remotely, and Mr Manson understands that someone using that e-mail address did then attend at least part of the hearing.

59. Mr Manson also explains in that statement that the Administrators became aware on 28 July of a template letter circulating online which was intended to be sent by Russian shareholders of the Company to various Russian authorities and President Putin. The template letter makes complaints about the Company's conduct since the imposition of international sanctions relating to Russian's invasion of Ukraine, including that the Company had complied with sanctions in failing to make payments to GPB following GPB being designated under the sanctions regime. The Administrators were made aware of this template letter by one of the Group's employees, who had found it on a Russian internet forum used by shareholders, and the Administrators were also informed that a Telegram instant messaging group had been set up for use by Russian shareholders of the Company, which appeared to be original source of the draft.

60. Finally, during the course of finalising this judgment in draft, I received an e-mail from a Mr Solanki stating that he was a shareholder and had concerns about the Proposed Transaction. The e-mail suggested that the Administrators had not sought out the best possible solution. In my judgment, they have sought to consider what the best solution is, and formed a rational view about this. Mr Solanki also suggested that UMMC was linked to criminal organisations, and provided a link to a Russian website. The Administrators submit in response that they are aware of many similar articles published on the internet in respect of many Russian companies, that it is not possible for the Administrators to investigate the veracity of all such allegations, and that in the course of their investigations, no-one has been able to identify anything improper or unlawful about the Proposed Transaction. In my judgment, the Administrators have investigated the Proposed Transaction sufficiently. Finally, the e-mail stated that the Company is more than able to pay its debts. I understand the concern of

shareholders that they will receive nothing from the Proposed Transaction. However, the Company is not able to pay its debts as they fall due.

61. Turning to OFSI, since the 29 June 2022 letter referred to above, JHA (1) wrote to OFSI on 5 July to provide an update on the intended administration application and repeated the request for a response as soon as possible, (2) wrote to OFSI on 14 July to inform them that the administration application had been issued and was listed to be heard on 18 July, stating that if OFSI considered that the Proposed Transaction might involve a breach of the Regulations the Company would wish to engage with OFSI in that regard in advance of the hearing of the application to the extent possible or to raise the matter with the Court, (3) e-mailed OFSI on 15 July to inform them of the time and place of the hearing on 18 July, (4) wrote on behalf of the Administrators to OFSI on 25 July, enclosing a copy of the administration order, providing an update on recent developments, and requesting OFSI to confirm its position as a matter of urgency in a manner that could be placed before the Court, (5) telephoned OFSI on 26 July and 27 July, leaving voicemails asking for an urgent response to the correspondence, (6) e-mailed OFSI on 27 July attaching a copy of the application documents filed that day and notifying OFSI that the hearing would take place on 29 July, and (7) e-mailed OFSI on 28 July informing them of the time and location of the hearing on 29 July.

62. OFSI responded by letter in the evening of 28 July. The letter expressed the view, among other things, that "*the appropriate way to proceed would be for the Administrators to take their own view on whether a Licence is required, and if appropriate to apply to HM Treasury as the competent authority for financial sanctions and/or the Department for International Trade as the competent authority for trade sanctions. The High Court is not the competent authority*." The letter noted that the third witness statement of Mr Manson explained that while some advisers, including leading counsel, had taken the view that the Proposed Transaction does not involve any breach of sanctions, and therefore that no licence from OFSI was required to enable the Proposed Transaction to proceed, other advisers had taken a different or more qualified view. OFSI noted the concern about the potential lead time for the issuing of a licence once it has been applied for and stated that where genuine urgency exists, HM Treasury may be able to consider urgent licence applications on a shorter timescale. The letter concluded by confirming that HM Treasury saw no basis for intervening in the proceedings, unless specifically requested by the Court, but that they would be content for the Administrators to bring the contents of this letter to the attention of the Court.

63. JHA also wrote to the Central Bank of Cyprus on 25 July to inform the bank of the Proposed Transaction, including the proposed transfer of the shares in two Cypriot subsidiaries of the Company to UMMC in light of the EU's designation of Mr Kozitsyn on 21 July. The letter stated that the Administrators intended to issue the present application shortly, explained the Administrators' view that the Proposed Transaction would not involve a breach of the EU Regulation and sought the bank's views in that regard as soon as possible. No response has been received to date. As at the time of the hearing, no substantive response had been received. Following the hearing, I was informed that a response was received by email dated 2 August 2022 from Marios L Neoptolemou, an Assistant Director at

the Central Bank of Cyprus, and I was provided with a copy thereof. Mr Neoptolemou informed JHA that the matter did not fall under the remit of the Central Bank of Cyprus and advised JHA to raise the matter directly with the Financial Sector Sanctions Enforcement Unit operating under the auspices of the Ministry of Finance of the Republic of Cyprus. Accordingly, JHA on 3 August 2022 wrote to the Financial Sector Sanctions Enforcement Unit, a copy of which I was also provided with. No response has been received to date.

The Administrators' evaluation of the options

64. The Administrators consider that it is not reasonably practicable to achieve the objective of rescuing the Company as a going concern. Their view is that the Proposed Transaction with UMMC represents the best outcome for the Company's stakeholders, would achieve a better result for the Company's creditors as a whole than would be likely if the Company were wound up, and would realise property in order to make a distribution to one or more preferential creditors.

65. In slightly more detail, as Mr Manson explains in his 27 July 2022 witness statement:

(1) They do not consider there to be any realistic prospect of a financial institution providing finance to the Company at a level sufficient to restructure its debt and thus avoid insolvency.

(2) They consider that the Proposed Transaction with UMMC is the only viable option available to the Company other than a winding-up, and consider that a winding-up would result in a very significantly worse return for creditors.

(3) They do not consider that any further or better offer is likely to emerge as a result of further marketing of the Company's assets.

(4) Their view is that the time available to conclude the Proposed Transaction with UMMC is limited, given (i) UMMC's statements to this effect in circumstances where the value of the assets is deteriorating, and (ii) the very real risk that Russian creditors of the Group, most notably UMMC itself, as the lender under the Term Loan, will choose to enforce their rights against the Group's assets in Russia in the near future, resulting in significant prejudice to non-Russian creditors, who would naturally be at a disadvantage in Russian enforcement or bankruptcy proceedings.

The Proposed Transaction in outline and next steps if it proceeds

66. As Mr Manson explains, under the Proposed Transaction, as set out in the draft SPA:

(1) The Company would sell to UMMC the Company's subsidiaries other than Petropavlovsk 2010 Limited and Petropavlovsk 2016 Limited. Petropavlovsk 2010 Limited was the issuer of the Bonds and Petropavlovsk 2016 Limited the issuer of the 2022 Notes.

(2) The consideration is approximately US$619m, comprising:

(a) Cash consideration of approximately US$380.5m, to be reduced dollar for dollar at completion against the face value and unpaid interest on any 2022 Notes acquired by UMMC and transferred to the Company, or the amount due on such 2022 Notes if higher. That in effect allows UMMC to be able to either pay cash of US$380.5m or to reduce that amount by the Company being released from the liability to pay bonds at completion.

(b) Consideration of US$203m, being equal to the amount outstanding on the Term Loan, to be discharged by way of set-off or similar against UMMC's claims under the Term Loan.

(c) Administration funding of up to US$29m to fund the remuneration and expenses of the administration and the estimated amount of contingent and uncertain liabilities, with any residual funds being returned to UMMC.

(d) Contingency funding of US$6m for the purpose of dealing with any challenges brought in relation to the Proposed Transaction, again with any residual funds being returned to UMMC.

67. Mr Manson explains in his witness statement that should the Court accede to the present application, the Administrators propose to enter into the Proposed Transaction as soon as practicable.

68. The Administrators would then seek to take the steps required to complete the Proposed Transaction in the coming weeks. That would involve taking steps to execute documents in the UK and to perfect the relevant transfers in the jurisdictions of each of the transferring subsidiaries. To the extent necessary, the Administrators envisage that they may cause the Company to appoint the Administrators as its representatives in the relevant jurisdictions in order to take these steps. It is hoped that the Proposed Transaction will be completed within two months of signing of the SPA.

The correct legal test to apply

69. Paragraph 63 of Schedule B1 to the 1986 Act provides that "*[t]he administrator of a company may apply to the court for directions in connection with his functions*" but necessarily does not set out the test for the Court to apply in determining whether to make the direction in question.

70. The Administrators seek liberty to enter into the SPA and to perform, and to procure that the Company performs, that agreement. Accordingly, the first question is what test applies to determine whether the Administrators should be granted this relief. The Administrators submit, and I accept, that they have power to enter into the Proposed Transaction because paragraph 60 of Schedule B1 to the 1986 Act and paragraph 2 of Schedule 1 to the Act, as recorded in the Administration Order, expressly provide that the Administrators have power to sell or otherwise dispose of the property of the Company by private contract.

71. As explained below, the test for whether the Court should bless a decision of an administrator is based on the test applicable to a trustee. Where it is clear that a trustee has a particular power, proposes to exercise it in a particular manner and there is proper justification for bringing the matter to Court, the trustee may ask the Court to bless the proposed exercise of discretion. The Court applies the well-known test set out in *Public Trustee v Cooper* [2001] WTLR 901 at 922-924. Such a situation falls into the second of the three categories identified by Robert Walker J in the judgment quoted in *Public Trustee v Cooper*, namely:

> "*The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.*"

72. As Snowden J explained in *In re Nortel Networks (UK) Ltd* [2017] Bus LR 590 at [48], by reference to the quotation from the 18th edition of *Lewin on Trusts* cited by David Richards J in *In re MF Global UK Ltd (No 5)* [2014] Bus LR 1156 at [32],

> "*The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as*

prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

Similar observations appear in the current edition of *Lewin on Trusts* (20th ed, 2020) at [39-095] to [39-096], in slightly expanded form.

73. The rationale for this test is that the trustee has been vested with the power to take the decision in relation to the property placed under its control, so the Court should respect the trustee's role as primary decision-maker but check that the proposed exercise of the power would be a proper one. Therefore, the Court does not ask whether it would have chosen to exercise the power in the manner that the trustee proposes but rather whether the proposed exercise of the power would be for one or more proper purposes, the trustee has taken into account relevant considerations and no irrelevant ones and reached a rational conclusion, and that the trustee's proposed exercise of discretion is not vitiated by conflict.

74. As Snowden J explained in the *Nortel Networks* case at [49]-[50], the well-known test that applies to trustees should apply equally to administrators. The rationale set out above applies equally in this context. Therefore, "*the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view*": [49].

75. The test applies equally to the exercise of dispositive and administrative powers. The leading English trusts case on blessing, *Cotton v Earl of Cardigan* [2014] EWCA Civ 52, is an example of the latter, as is the present case.

76. In a typical *Public Trustee* category 2 case, it is clear that the trustee has the power in question and that the proposed exercise of the power does not stray beyond its limits. For example, in a typical trusts case, it is clear that the trust instrument in question vests the trustee with a broad dispositive or administrative power, and the question is how the trustee should exercise the power rather than whether it possesses it in the first place. Similarly, in the context of administration, normally it is clear that the administrator has the power to take a particular step, but the question is whether it would be acting properly in exercising the power in a particular way, such as by selling to X rather than Y, to take an example close to the facts of the present case.

77. Where a question arises as to whether (1) the trustee or administrator has the power to take the step in question or (2) a particular prohibition should prevent the step being taken, such as a prohibition imposed by the criminal law of the jurisdiction in question, the rationale set out above for the *Public Trustee* category 2 test does not apply. The wording of category 2 quoted above recognises that, because it limits its application to a case where there is no real

doubt as to whether the trustee possesses the power in question, and category 1 is stated in Robert Walker J's judgment to deal with cases

> "*…where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides…*".

78. While one must be careful not to read the *Public Trustee* categories as if they were contained in a statute, and one must be careful not to be too prescriptive about the precise circumstances in which a trustee or administrator will fall into category 2, in my judgment the "no real doubt" touchstone referred to in Robert Walker J's description of category 2 is a useful one to evaluate this.

79. The trustee is under a strict duty to act within the limits of the powers conferred on it, at least absent Court authorisation to do otherwise. The trustee must inform itself correctly as to the extent of the power it has. Therefore, where it is not completely clear whether a particular power allows the trustee to take the step in question, it is not sufficient that the trustee reaches a rational conclusion as to whether it has the power or not. That would amount to giving the trustee a power to decide on the limits of its own powers. In my judgment, similar logic applies where there is a possibility that the trustee would by taking the step in question breach an important prohibition found outside the trust instrument in question. That prohibition mandates that the trustee comply with it. The same points apply to the administrator. The administrator is given particular powers by the Insolvency Act 1986. The administrator must not stray beyond them and nor- particularly as an officer of the Court- should the administrator breach prohibitions found outside the 1986 Act, such as prohibitions imposed by criminal law. If the trustee or administrator proposes to exercise a power, the Court must still ask itself whether- if there is no bar or prohibition on exercising the power- the exercise of the power would satisfy the *Public Trustee* category 2 test. However, that is not the limit of the Court's enquiry.

80. If the Court's conclusion is that there is a real doubt as to whether the trustee or administrator has the power in question or would be breaching an analogous prohibition on taking the step in question, the Court will need to consider particularly carefully whether it is right to authorise the trustee or administrator to act in the manner proposed and thereby give the trustee insulation from suit in respect of the step proposed. It will often be appropriate for the Court to withhold the imprimatur of authorising the trustee to act in the manner proposed. For example, in such a situation the Court will often consider that the trustee or administrator should be seeking to resolve the uncertainty through an application for a declaration as to the limits of the power in question or the other potential restriction imposed on the exercise of the power.

81. The corollary of this is that where the risk of the trustee or administrator violating the limits of the power or breaching the other prohibition in question is insubstantial, in my judgment the Court should normally grant authorisation as long as it considers that the trustee or administrator was justified in putting the matter before the Court and- if applicable- the ordinary blessing test is met.

The presence of such an outside risk should not deter the trustee or administrator from acting in accordance with its duties, or the Court from endorsing the proposed course of action. As Hayton AJ explained in the decision of the Supreme Court of the Bahamas in *C v M* (2001) 4 ITELR 548 at 553a, "*suspicions arising from unsubstantiated claims are far from sufficient to prevent a banker or trustee carrying out its contractual or equitable duties to a client or beneficiary*". An example of this in relation to the money laundering legislation is the decision of the decision of the Gibraltar Supreme Court in *Fiduciary Trust Limited & another v None Named* [2018] Gib LR 187. In that case, having heard submissions as to why the trust assets did not constitute criminal property for the purposes of the Gibraltar proceeds of crime legislation, and being satisfied on the basis of the evidence before him that the trustees' belief that the trust assets were not the proceeds of criminal conduct was correct, Dudley CJ granted liberty to the trustees to continue to consider exercising their dispositive discretions under the trust: [24]. Similarly, in *C v M* itself, the Judge considered that the relevant provisions of the Bahamian anti-money laundering legislation were unlikely to be engaged on the facts: 553d-554a.

82. The fact that the Court declines to authorise the trustee or administrator to take the step in question because of the risk that the trustee or administrator would be straying beyond the limits of its power or breaching another relevant prohibition does not mean that it would be wrong for the trustee or administrator to take the step in question. It may be that the trustee or administrator does have the power in question. What the withholding of authorisation reflects is simply that it would not be appropriate for the Court to give the trustee immunity from suit in advance of taking the step in question.

83. As explained below, it does not appear to me that the Administrators would be breaching the relevant sanctions legislation by entering into the Proposed Transaction and having it performed by the Company. I consider that there is little practical risk to the contrary. Therefore, put into *Public Trustee v Cooper* category 2 language, I consider that this a case where there is no real doubt as to whether the Administrators would be complying with the sanctions legislation.

84. Accordingly, it is not necessary for me to deal definitively with the position if the level of doubt was higher. In my judgment there can be difficult situations where the Court might authorise a trustee or administrator to act in a particular manner even if there is a real doubt as to whether it would be within the terms of the power in question or in breach of another relevant prohibition. Given the flexibility of the Court's supervisory jurisdiction over trustees and statutory power to give guidance to administrators on an application under paragraph 63 of Schedule B1 to the 1986 Act, it will necessarily weigh in the balance all relevant factors in determining whether it is sufficiently comfortable that the course of action is in the interests of the trust or company and creditors in question and that it is otherwise appropriate to give its imprimatur to it. These will include the urgency of taking a decision as to whether to take the step in question, whether it is feasible and appropriate to seek to resolve the uncertainty through another route such as through a claim for a declaration, and the extent to which the immunity from suit that authorisation provides deprives those

potentially disadvantaged by the step in question of any practical remedy on the facts in question.

85. The final point of law to deal with is the consequences of granting authorisation. By giving liberty to take a particular step, the Court gives the trustee insulation from suit at the instance of the beneficiaries in respect of that step. As explained by Fancourt J in *Dexacre v Cooper* [2022] 4 WLR 52 at [78]-[86], a ruling that an office holder in an insolvency has liberty to take a particular step insulates the office holder from suit at the instance of a creditor. Mr Arden also drew my attention to the earlier decision of Lewison J in *Re Hellas Telecommunications (Luxembourg) II SCA* [2010] B.C.C. 295. To the extent that the second half of [8] of that decision could be read as suggesting that an authorisation confirms the rationality of a discretionary decision by an administrator but leaves the administrator open to a possible claim for a breach of the duty of care in taking the decision, I consider that the more recent decision in *Dexacre* is to be preferred on the point. It tallies with the approach taken to the blessing of decisions in the trust context in the leading case of *Cotton v Earl of Cardigan* at [87].

86. However, the effect of authorisation does not go further than giving the trustee or administrator insulation from suit (1) in respect of the step in question (2) against those internal to the trust (namely the beneficiaries or objects of the relevant powers) or the company in question (namely the creditors and shareholders). Therefore, it does not give insulation in respect of prior failures that may have led to a situation where the trustee or administrator needed to take the step in question. Equally, and importantly for present purposes, it does not necessarily give the trustee or administrator insulation from outsiders taking legal action against them. Therefore, it does not for example stop trustees or administrators being prosecuted for the step in question. That last point is relevant here in determining whether it is appropriate to grant the relief sought.

87. In reaching my decision, I have taken into account the insulation from suit that authorisation offers. I do not consider that this is an appropriate occasion to go any further than the above into the precise limits of insulation from suit.

Application to the present case

88. Applying the above, in the present case I need to be satisfied that the Administrators' proposed course of action would satisfy the *Public Trustee* category (2) test. However, I also need to consider the level of risk on the material before me that this course of action would breach the relevant sanctions legislation. If I have no real doubt on the material and submissions put to me that the action is compliant with that legislation and I consider that the *Public Trustee* category 2 blessing test is satisfied in respect of the proposed exercise of the power, then I should give the Administrators liberty to take the steps in question.

89. Mr Arden addressed me orally on the possible types of relief that could be sought and the test that could be applied to obtain such relief. He set out three possibilities.

90. The first was the possibility that the Administrators seek a *declaration* that the steps would not breach the relevant sanctions legislation. He considered that was not an appropriate course on the present facts. I agree, for the following reasons:

(1) I have not heard contrary argument on the interpretation of the sanctions legislation from OFSI and they are not a party to the proceedings. I note that, in contrast, in *Bowman v Fels* [2005] 1 WLR 3083, where the Court ruled on the correct interpretation of an important provisions of the anti-money laundering legislation- section 328 of the Proceeds of Crime Act 2002- and its application to civil litigation, the National Criminal Intelligence Service intervened and was represented by leading and junior counsel.

(2) The present matter arises in a situation of extreme urgency, so while I have been addressed on the interpretation of the sanctions legislation by leading criminal counsel, and tested to the extent practicable the points put to me, this is not a substitute for hearing contrary argument on the point.

(3) OFSI has expressed the view that the Court is not a competent authority to deal with the matter. While I would not myself put the point quite that way, I consider that the Court should be reluctant to determine such points of criminal legislation unless it is necessary to do so, particularly in the absence of OFSI. As the 5 July letter referred to the Administrators seeking confirmation from the Court that the Proposed Transaction did not breach the relevant sanctions legislation and the 25 July letter referred to a declarations application, it appears to me that OFSI may well have been concerned that the Court was going to go as far as granting declarations as to the meaning of the legislation. I do not consider that it would be appropriate to grant such declarations.

91. I note that in *Bank of Scotland v A* [2001] 1 WLR 751, the Court of Appeal considered the possibility of granting an *interim* declaration under CPR rule 25.1(b) to deal with a bank's concerns that it might breach its duty to customers by placing internal freezes on accounts to comply with anti-money laundering legislation in circumstances where such legislation prohibited them from explaining to the customer the reason for such internal freezes. The Court of Appeal in that case confirmed that in the right case such a declaration could be granted. However, in the present case an interim declaration would not do the work that the Administrators would need it to do, as such a declaration would only be a temporary measure. In any event, it would not be appropriate to grant such a declaration, for the reasons set out above.

92. Therefore, in my judgment, it would not be proper for me to make a decision that seeks to bind OFSI as to the construction of the sanctions legislation, particularly in circumstances where I have not heard full contrary argument, OFSI is not represented before me and it is not necessary to make such a decision in order to give the Administrators the relief they seek.

93. This also supplies the answer to the point raised by OFSI in its letter. Granting liberty to the Administrators to take the steps in question does not seek to bind OFSI in any way. I emphasise that point, so that there is no misunderstanding as to what I am and am not deciding, which I consider particularly important given the importance of the sanctions regime and that the Administrators have in the present case been seeking to ensure that they comply with it.

94. Equally, the fact that a question arises as to a possible breach of the criminal law does not prevent the Court exercising its jurisdiction to give directions to the Administrators as to the conduct of the administration, any more than it would prevent the Court exercising its supervisory jurisdiction over trusts in an analogous case concerning a trust, as the *Fiduciary Trusts Limited* and *C v M* cases illustrate. In the first instance, it is, as OFSI states, for an insolvency practitioner in the position of the Administrators to form their own view on the application of the sanctions legislation. However, that does not prevent in an appropriate case the practitioner from seeking Court guidance as to whether it would be acting appropriately in taking a particular step. The jurisdiction to seek directions is there to assist the practitioner in difficult cases if there is a good reason for applying to Court, and therefore the fact that the case is made particularly difficult by the possibility of breach of the criminal law is not a factor that should deter the Court from making the directions sought.

95. The second possibility floated by Mr Arden was that the Court could apply the *Public Trustee* category 2 test, and treat the Administrators' consideration of the application of the sanctions legislation to the present case as being a relevant consideration that the Administrators have taken into account, so that the Court need only be satisfied that it had factored the advice obtained on it into its decision-making process. For the reasons set out above, I do not consider this to be a sufficiently stringent test.

96. Mr Arden's third possibility was that the Court apply a more stringent test in relation to the Administrators' consideration of the sanctions legislation. In my judgment, that is the correct approach and the detail of that approach is as I have set out above.

97. Having set out the relevant test to apply, I need to deal with *ex p James* before setting out my conclusions on how the relevant authorisation test applies on the facts.

The principle in *Ex p James; in re Condon* (1874) LR 9 Ch App 69, CA

98. The leading authority on the principle in *ex p James* is the decision of the Court of Appeal in *Lehman Bros Australia v MacNamara* [2021] Ch 1. As explained by David Richards LJ, giving the lead judgment,

> "*the principle…is that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers*": [35].

99. Having conducted a detailed review of the relevant case-law, David Richards LJ concluded that the test was one of unfairness rather than unconscionability, and that its application in any case would turn critically on the particular facts of the case: [64]-[69].

100. In *MacNamara* itself, the principle applied to prevent an administrator relying on his strict legal rights against a particular creditor in circumstances where through an error the creditors' claim was agreed at too low a figure.

101. Mr Arden submitted that the application of the principle in *In re T&N Ltd* [2004] PLR 351 was a particularly relevant illustration of the limits of the principle. In that case, David Richards J held that an administrator was not prevented by the principle from terminating a company's participation in an occupational pension scheme in order to keep to a minimum the size of the statutory exit debt that arose on withdrawal from the scheme. That was in circumstances where absent withdrawal the trustees of the scheme could have taken steps to increase the company's liability. The Judge held that:

> "*For the principle to apply there must be dishonourable behaviour or a threat of dishonourable behaviour on the part of the court officer, by taking unfair advantage of someone: Re TH Knitwear (Wholesale) Ltd (supra) at 290 per Slade LJ. In my judgment there is nothing dishonourable in the administrators taking lawful steps to prevent a possible liability arising in the future, in order to protect the position of existing creditors.*" ([17])

102. As Mr Arden pointed out, the Judge considered the effect of provisions that were at the time of the judgment included in the Pensions Bill then before Parliament that entitled the Pensions Regulator to require a company to make a payment to scheme trustees if- paraphrasing- it took steps in bad faith to prevent a statutory exit debt arising: [19]. The Judge considered that even if it had been in force at the time, the situation before him would not be caught by the legislation as the trustees were acting in good faith: [20].

103. Mr Arden's submission was that as in *T&N* there is nothing dishonourable here in the Administrators entering into the SPA. He explained that given the sanctions legislation, and the Administrators' concern that they not take any step that could be taken to be improper, they wished to have a ruling on the *ex p James* point to ensure that their view on its application was the correct one.

104. I accept Mr Arden's submission. In my judgment:

(1) There is nothing dishonourable in the Proposed Transaction. On the contrary, the Administrators wish to discharge their duties by entering into a transaction that they consider would be in the interests of the Company's creditors.

(2) The conclusion in (1) is not disturbed by the presence of the sanctions legislation. The Administrators have taken that legislation seriously and considered carefully with specialist advice the application of the legislation to the present case, and concluded that it does not bar the step.

The position might be different if they had been cavalier about the legislation, but they have not been.

(3) Acting unfairly or dishonourably often involves acting in an inappropriate manner *towards someone*. I cannot see how the Administrators are acting dishonourably or unfairly towards anyone by entering into the transaction.

Conclusions

105. Turning in light of that to the Administrators' consideration of whether to enter into the Proposed Transaction, in my judgment on the material before me the Administrators have carefully considered the different options with the benefit of expert advice. It is plain that they hold the view that the Proposed Transaction is the best course in the interests of all stakeholders. In my judgment, it is equally plain that this view is a rational one, and that the Administrators have taken into account relevant factors (and no irrelevant ones), for the following reasons:

(1) The price to be paid by UMMC under the Proposed Transaction is at the top end of the range put forward by Kroll in their 2 May 2022 report.

(2) Both Opus Pear Tree and Kroll have indicated that the value of the Company has only decreased since then, and the Group's CFO is concerned about the continued deterioration of the Company's assets.

(3) There is no obvious alternative option, in circumstances where UGC have not put forward an alternative proposal.

(4) Waiting to see if a better proposal comes along risks enforcement action and insolvency proceedings being taken in Russia by creditors, in circumstances where such creditors will naturally be concerned that as time passes the value of the Company's assets will decrease if something is not done. One can see from the UMMC correspondence and the dialogue with Nordic the concern they have about further time passing.

(5) More generally, the presence of sanctions places significant practical restrictions on the Company's options, and the risks to what is a UK company are compounded by its operating assets being in Russia in the present geopolitical situation, so a bird in the hand is of particular worth in the present case.

106. I have been presented with written and oral submissions on the application of the relevant sanctions legislation. Mr Sturman submitted that there was no risk of breach of the sanctions legislation or, failing that, the level of such risk was negligible. He contended that where there were any risks, the Administrators had dealt with them.

107. On the basis of the material and submissions put before me, it does not appear to me that the entry into or performance by the Company and Administrators of the Proposed Transaction would breach the relevant sanctions legislation in the

five respects identified by the Administrators, and there appears to me to be little practical risk of the contrary. I set out the detail of my views on those in an Appendix to this judgment. I do note, as OFSI did, that the Company's previous advisers appear to have taken a more cautious view. I do not consider that it is possible to go as far as saying that there is no practical risk at all, particularly in circumstances where the analysis turns in part on various factual understandings and predictions as to how UMMC will act. I note that Mr Manson realistically accepts in his 27 July 2022 witness statement that it is not possible to eliminate completely legal risk here. But in my judgment the level of risk is not such as to make it inappropriate for the Administrators to enter into the Proposed Transaction, in circumstances where there is no obvious alternative, the value is at the top end of the Kroll 2 May 2022 valuation and there are serious risks in not proceeding with the Proposed Transaction rapidly.

108. I have considered as part of that whether the possibility of the Administrators to put the matter beyond doubt by applying for a licence should cause me to withhold the relief the Administrators seek. The evidence and submissions put to me are that a licence application would be expected to take of the order of six to eight weeks or more to resolve in the ordinary case. OFSI mentions in its letter the Administrators' concern over the potential lead time for issuing a licence and states that HM Treasury may be able to consider urgent licence applications on a shorter timescale where genuine urgency exists. OFSI states that the reasons for urgency should be set out in any licence application that is made and its prioritisation will be considered in the context of OFSI's other licence applications. Mr Arden's submission on this was that the decision on whether to enter into the Proposed Transaction was time-critical and that I should be realistic as to the time that it would take a licence application to be dealt with, in circumstances where OFSI were no doubt extremely busy. Further, Mr Sturman submitted in his skeleton that the process can be extremely slow and that even with an expedited process can take many months.

109. In many situations, I would hope that there would be time to apply for a licence where there is any doubt over whether the course of action complies with the Regulations. That is the desirable course in such a case given the importance of the sanctions regime. However, even if the licence application could be expected to take significantly less than six to eight weeks to resolve, in my judgment waiting for that period may well still imperil entry into the Proposed Transaction. Absent a very swift decision on the Proposed Transaction indeed, the opportunity to enter into it could well be lost, in circumstances where the consequences of that could be dire. While I do not have before me specific evidence about how long similar urgent licence applications have taken to resolve in other cases, in my judgment the material before me suggests that it would take some time for a licence application to be resolved in this case given that it has taken a month to receive a response to the Administrators' 29 June letter.

110. Therefore, in my judgment, I should not withhold relief until the Administrators have made a licence application and that application has been determined.

111. I raised with Mr Arden at the hearing why shareholders and creditors had not been given notice of the hearing. I had in mind the consideration of Snowden J

in *Nortel Networks* at [39]-[43] as to whether creditors had been notified of the global settlement in that case and given the opportunity to object to it, and the reasoning of Fancourt J in *Dexacre* at [92] that where beneficiaries or interested parties are identifiable, the application will be on notice to them or a representative of them, so that they have the opportunity to object.

112. In respect of creditors, Mr Arden submitted that they are likely to be paid in full, so that it was not necessary to give them notice. I accept that is a distinguishing feature from the *Nortel Networks* decision. I also take into account that the Company's and Administrators' press releases have also given creditors a chance to raise objections to the Proposed Transaction.

113. In relation to shareholders, Mr Arden took me to the dialogue that had been had with a number of shareholders, which I have set out above. He submitted that:

(1) The matter was extremely urgent and was listed on an extremely urgent basis.

(2) Among other things, that meant that it was not worthwhile to provide notification even if there had been relevant interested parties who might wish to appear at the hearing to oppose the present application.

(3) In any case, I was entitled to take into account the lack of engagement on the part of UGC and Prosperity with the Administrators' 19 July 2022 letters, coupled with the opportunities provided for previous engagement to shareholders more generally by the press releases put forward by the Company, so that realistically there were no relevant interested parties who might wish to make representations at the hearing.

(4) More generally, he submitted that there were no hard and fast rules as to who should be given notice of such a hearing, and the Administrators were entitled to reach the view that there was no-one realistically who would wish to appear to oppose the present application.

114. Given that OFSI was notified of the application and provided with the documents, I do consider that it would have been possible to provide notification to UGC for example. However, I take into account:

(1) the extreme urgency of the application and the limited opportunity that would realistically give anyone to turn up and make substantive representations;

(2) that UGC and Prosperity have- as Mr Arden submitted- not responded to the 19 July 2022 letters, and no other shareholders have engaged with the invitation in the Administrators' 19 July 2022 press release to come forward with proposals or views if they had any;

(3) that in UGC's case they have been provided with and given comments on the SPA previously;

(4) on the material before me, the Proposed Transaction appears to me to be clearly the best option and the Administrators' consideration of it to have been careful; and

(5) there is a serious danger than if approval is not given, the Proposed Transaction will be lost.

115. Therefore, in the circumstances I consider that is appropriate to make the order sought without notice having been given to creditors or shareholders.

116. Borrowing a final time from the trusts context, Vos LJ warned in *Cotton v Earl of Cardigan* against excessive caution in blessing a trustee decision:

> "*The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees in the position of those before this Court. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Caution cuts both ways.*" ([87])

117. In my judgment, recognising that the context there was slightly different, the same sentiment applies here. The Administrators are in a difficult position, on the evidence before me they appear to have considered the matter carefully and thoroughly, including the application of the sanctions regime. Therefore, I give the administrators liberty to enter into the transaction in the terms sought.

118. Turning to the terms of the order sought, the principal order is that the Administrators be a liberty to enter into the SPA. A specific order is also sought that they be at liberty to receive the sale proceeds into the bank account of an English commercial bank. I understand from Mr Arden that the reason for this is that it is hoped that this may assist in persuading an English commercial bank to accept the sale proceeds. I am content to make an order that the Administrators be at liberty to receive the sale proceeds in this manner. This appears to me to be ancillary to the main order.

119. I was invited to include a recital in the order stating that the order was being made upon my being satisfied that the sanctions regime was not breached. In my judgment, it would not be appropriate for me to include such a recital:

(1) Recitals set out matters prior to the judgment and order.

(2) This would be seeking to set out one strand of the Court's reasoning in the judgment.

(3) That is better left to the judgment.

(4) It is important to be clear that I am not granting a declaration.

120. However, as indicated to the parties during oral argument, I have included in the judgment my views on the submissions made to me on the application of the relevant sanctions legislation.

Appendix: the application of the relevant sanctions legislation to the present case

The relevant UK sanctions legislation

1. The primary legislation for the current UK Russian sanctions regime is set out in The Sanctions and Anti-Money Laundering Act 2018 (**"SAMLA"**). Section 1(1) provides that an appropriate Minister may make sanctions regulations where the Minister considers that is appropriate to make the regulations for one of a number of purposes, including any purpose set out in section 1(2). Section 1(2) provides that a purpose falls within it if the appropriate Minister making the regulations considers that carrying out the purpose would fulfil any of regulations 1(2)(a) to (i), which include that it would "*(b) be in the interests of national security, (c) be in the interests of international peace and security, (d) further a foreign policy objective of the government of the United Kingdom, (e) promote the resolution of armed conflicts or the protection of civilians in conflict zones, (f) provide accountability for or be a deterrent to gross violations of human rights, or otherwise promote (i) compliance with international human rights law, or (ii) respect for human rights*. The relevant regulations here are made under the power in section 1(1).

2. Sanctions regulations include regulations imposing financial sanctions: section1(5)(a). Section 3 explains when regulations will impose financial sanctions for the purpose of section 1(5)(a).

3. Section 15(2)(b) provides that the regulations may provide for a prohibition imposed by the regulations not to apply to anything done under the authority of a licence issued by an appropriate Minister specified in the regulations. The licensing regime referred to below was made under this power.

4. The relevant regulations made under the section 1(1) power are the Russian (Sanctions) (EU Exit) Regulations 2019 (the Regulations). The Regulations have been frequently amended since the conflict in the Ukraine began in February 2022. The lists of designated persons, both individuals and corporations, are regularly updated and are far more extensive than they were in February 2022. As recently as 19 July 2022, very substantial changes to the Regulations were made.

5. As OFSI explains in its December 2020 general guidance, the Regulations apply to all individuals and entities who are within or undertake activities within the UK, and all UK nationals and entities established under UK law, irrespective of where their activities take place.

6. Regulations 11 to 15 of the Regulations impose a number of prohibitions on dealing with funds and economic resources in relation to a designated person. The Secretary of State is given power to designate persons by regulation 5. Regulation 6 sets out a number of requirements that must be fulfilled if the Secretary of State is to designate a person. These requirements include that the Secretary of State has reasonable grounds to suspect that the person is an "involved person": section 6(1)(a). By section 6(2), which I set out in full for convenience, an involved means a person who-

"*(a) is or has been involved in-*

(i) destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, or

(ii) obtaining a benefit from or supporting the Government of Russia,

(b) is owned or controlled directly or indirectly (within the meaning of regulation 7) by a person who is or has been so involved,

(c) is acting on behalf of or at the direction of a person who is or has been so involved, or

(d) is a member of, or associated with, a person who is or has been so involved."

7. The prohibitions in regulations 11 to 15 of the Regulations do not apply to acts done under the authority of a licence issued by HM Treasury: regulation 64(1).

8. Section 146(1) of the Policing and Crime Act 2017 gives the Treasury power to impose a monetary penalty on a person if it is satisfied on the balance of probabilities that the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation. Such legislation includes regulations made under section 1 of SAMLA that contain a prohibition or requirement imposed for a purpose mentioned in section 3(1) or (2) of that Act: section 143(4)(f).

9. Section 146(1) as originally enacted contained a requirement that the person knew, or had reasonable cause to suspect, that the person was in breach of the prohibition or (as the case may be) had failed to comply with the legislation. That requirement was removed by section 54 of the Economic Crime (Transparency and Enforcement) Act 2022 with effect from 15 June 2022. That section also added a sub-section (1A) into section 146 which provides that in determining for the purposes of section 146(1) whether a person has breached a prohibition, or failed to comply with an obligation, imposed by or under financial sanctions legislation, any requirement imposed by or under that legislation for the person to have known, suspected or believed any matter is to be ignored.

10. A breach of sanctions is potentially a serious criminal offence, or can be pursued- by virtue of section 146- as a strict liability offence attracting a civil penalty. I asked Mr Sturman during his submissions whether a breach of the sanctions regime could lead to enforcement action against the sale proceeds of the Proposed Transaction. His response was that it was difficult to see that it could in any way. Therefore, the Administrators' focus for present purposes is on the Administrators breaching the relevant prohibitions.

The relevant EU sanctions regime

11. The relevant EU legislation is Council Regulation (EU) No 269/2014 as amended (the EU Regulation).

12. Article 2(1) provides that "*[a]ll funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen*" and article 2(2) provides that "*[n]o funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I*".

The five areas of the sanctions legislation identified as relevant by the Administrators

The Company's past relationship with GPB

13. The first area is the Company's past relationship with GPB, which was until April 2022 a major creditor of the Group and the largest purchaser of the Group's gold.

14. As explained in the main body of my judgment: (1) GBP was the original lender under the Term Loan; (2) GBP also made the Facilities available to certain Company subsidiaries; (3) on 24 March 2022 GPB became a designated person for the purposes of the Regulations; (4) on 18 April 2022, GBP gave notice to accelerate the Term Loan and the Facilities; (5) on 19 April 2022, GBP gave notice that it had assigned its rights under the Term Loan to UMMC; and (6) on 12 May 2022, GBP assigned the Facilities to Nordic.

15. The question that the Administrators have considered in relation to the Regulations is whether there would be any risk of breach of regulations 11 to 15 of the Regulations by benefit flowing to GBP from the Proposed Transaction notwithstanding the assignment of the rights under the Term Loan and Facilities.

16. Regulation 11 prohibits a person from dealing with funds or economic resources owned, held or controlled by a designated person, and regulations 12 to 15 prohibit a person from making funds or economic resources available to or available for the benefit of a designated person. Regulation 19 prohibits circumvention of, among other provisions, regulations 11 to 15.

17. Here, the Company has requested and received confirmation on 28 June 2022 from GPB that the assignments to UMMC and Nordic have extinguished any indebtedness to GPB.

18. GPB has no remaining rights under the Term Loan or Facilities. Mr Manson states in his 27 July 2022 witness statement that the Administrators have no reason to doubt the veracity of these confirmations. The Administrators note in this regard that GPB is one of Russia's largest commercial banks, for whom the Term Loan and Facilities would have been relatively insignificant debt investments, and the Administrators consider it unsurprising that GPB would

seek to sell the debt as soon as it became apparent that the Company was not put in a position to repay it as a result of GPB's designation. They consider it inherently unlikely that GPB would engage in an elaborate and illegal deception in order to maintain a secret interest in the Company's debt. Further, UMMC has confirmed that GPB's rights under the Term Loan have been extinguished. The Administrators do not have regular contact with Nordic, but it appears to the Administrators from public sources that Nordic is a distressed debt investor and the Company understands that it purchased the Facilities from GPB for a significant discount to face value. The Administrators do not consider that they have any reason to think that this was other than a genuine commercial transaction.

19. In these circumstances, it is submitted that no funds or economic benefit should flow to GPB directly or indirectly, and it is therefore difficult to see how the Company's past relationship with GPB can give rise to a breach of the Regulations. I agree. The Administrators and Court cannot be completely certain as to the facts behind the two assignments, but on the material before me, the entry into and performance of the SPA by the Administrators and Company does not appear to me to give rise to a breach of the Regulations.

Mr Bokarev

20. Andrei Bokarev is understood hold an indirect shareholding in the Company of less than 5%. He became a designated person on 13 April 2022.

21. The first question is whether UMMC could be considered to be owned or controlled by Mr Bokarev such that UMMC is a designated person. Regulation 7(1) provides that a person who is not an individual- "C"- is owned or controlled directly or indirectly by another person- "P"- if either of two conditions are met. The first condition requires P to hold directly or indirectly more than 50% of the shares or voting rights in C or hold the right directly or indirectly to appoint or remove the majority of the board of directors of C. The second condition is that it would be reasonable to expect that P would be able in most cases or in significant respects to achieve the result that the affairs of C are conducted in accordance with P's wishes.

22. It is submitted that Mr Bokarev's small shareholding would not give him control, and that there is nothing to suggest that he satisfies the first or second condition above. I agree: I cannot see anything on the evidence before me to suggest that he would satisfy either condition.

23. This leaves the question of whether assets could be made available through the Proposed Transaction to Mr Bokarev in breach of regulations 12 to 15. The Administrators understand that Mr Bokarev has no automatic right to receive any proceeds of the transaction merely because he is a shareholder. Further, in order to seek to ensure that no benefit from the Proposed Transaction flows to Mr Bokarev, the SPA contains a warranty that UMMC shall use its best endeavours and take all possible steps to ensure that as a result of the sale of the shares, no funds or economic resources are made available directly or indirectly to or for the benefit of any sanctioned person.

24. Therefore, it is submitted that there is no prospect of regulations 11 to 15 being breached either. In my judgment, the combination of the two points in the last paragraph means that- while one cannot rule it out entirely- there is limited practical risk of a breach. The Administrators cannot rule out the possibility that the SPA is breached in this regard, but the Administrators appear to have done everything they can to ensure that the Regulations will not be breached in this regard.

25. I have asked myself whether it could be argued that if the Proposed Transaction is regarded as beneficial to UMMC, then it provides economic resources to all of UMMC's shareholders, including any who are designated persons, by virtue of enhancing the value of their shares. However, while this might be beneficial to the shareholder, this benefit does not appear to me to arise through making funds or economic resources available to the designated person.

Mr Kozitsyn

26. Mr Kozitsyn held the position of General Director of UMMC, which the Administrators understand to be the equivalent of a CEO.

27. On 21 July 2022, Mr Kozitsyn was added to Annex I of the EU Regulation. The Administrators and their advisors are not aware of any proposal or announcement that Mr Kozitsyn be sanctioned by the UK.

28. When the Administrators became aware of Mr Kozitsyn's designation, they wrote to UMMC on 25 July to seek information and confirmation regarding his shareholding and degree of control over UMMC. UMMC responded on 25 July, confirming that Mr Kozitsyn was no longer a director or officer of UMMC, which the Administrators consider is consistent with press reports and UMMC's press release of 22 July 2022. UMMC also confirmed that Mr Kozitsyn's total shareholding was 17.3%, that he was not able to exercise any control over or direct the activities of UMMC, that he has no other relationship with any other shareholder of UMMC, with whom he might be considered to exercise control over a greater proportion of UMMC shares than those he holds in his own name, and that there is no contractual or other arrangement in place whereby Mr Kozitysn may derive any benefit from the Proposed Transaction. UMMC also provided minutes of a 19 July 2022 board meeting showing the appointment of a new general director of UMMC to replace Mr Kozitsyn, and other documents reflecting this. His replacement, Mr Ismagilov, is stated in UMMC's press release to have formerly been the chairman of the board of directors.

29. Mr Manson states in his third witness statement that in light of these confirmations and documents, the Administrators are reasonably satisfied that Mr Kozitsyn is no longer a director of UMMC and does not appear to exercise any control over UMMC within the meaning of the Regulations. The Administrators do not consider that any further independent investigations to gain further comfort would be feasible in the time available or likely to uncover any genuine deceit in this regard. They consider that they have no reason to suspect that UMMC's confirmation is inaccurate and are therefore content to rely on what UMMC has told the Administrators and announced to the market.

30. Further, the Administrators place reliance on the provision in the SPA requiring UMMC to use its best endeavours and best efforts to ensure that no benefit flows to Mr Kozitsyn as a result of the Proposed Transaction.

31. Mr Sturman also submits in his skeleton argument on sanctions that as UMMC is an enormous concern with interests in coal, other minerals, and precious metals, which conducts substantial business with the EU and is not itself a designated entity, that it is entirely understandable that UMMC would have felt the EU's decision to impose sanctions on Mr Kozitsyn would have left it no choice but to replace him, as he would have been unable to have any dealings with the EU and was under an asset freeze and travel ban. I understand that the fact that Mr Kotizsyn is a 17.3% shareholder does not itself mean that article 2(2) of the EU Regulation bars payments to UMMC, given that UMMC is not itself a designated entity and free to deal with the EU, and I proceed on that basis.

32. Further, it is submitted that even if Mr Kozitysn was made a designated person for the purposes of the (UK) Regulations, he would not own or control UMMC since his replacement as General Director for the purposes of regulation 7, whatever the position before his replacement.

33. Taken at face value, the material from UMMC coupled with the protection in the SPA suggests that there would be no breach of the EU Regulation or- even if Mr Kozitsyn was made a designated person for the purpose of the Regulations- a breach of the Regulations. As Mr Manson states, there is a limit to how certain one can be about Mr Kozitysn no longer having any role in relation to UMMC, and there is always the possibility of breach of the SPA, but again the Administrators appear to me to have done what they can to seek to ensure that the Regulations will not be breached, such that the practical risk of breach is low.

The export of luxury goods and gold

34. Starting with the export of luxury goods, regulation 46B(1) of the Regulations prohibits the export of luxury goods to, or for use in, Russian. Regulation 46B(2) provides that "*a person must not directly or indirectly- (a) supply or deliver luxury goods from a third country to a place in Russia; (b) make luxury goods available to a person connected with Russia; (c) make luxury goods available for use in Russia*".

35. Luxury goods are defined in regulation 21 as anything specified in Schedule 3A, subject to exceptions that are not material for present purposes.

36. Paragraph 11 of Schedule A comprises "*[p]earls, precious and semi-precious stones, articles of pearls, jewellery, gold- or silversmith articles falling with the commodity codes set out in the following table…*". The table then lists a number of commodity codes with descriptions beside them. To take an example, the first commodity code is 7101 00 00 and the description alongside it "*[p]earls, natural or cultured, whether or not worked or graded but not strung, mounted or set; pearls, natural or cultured, temporarily strung for convenience of transport*". The relevant code for present purposes is 7108 00 00. The

description alongside it is "*[g]old (including gold plated with platinum), unwrought or in semi-manufactured forms, or in powder form*".

37. The Company's subsidiaries produce, among other things, doré, a metallic mix containing copper, gold, silver and other metals, and consisting of more than 75% by weight of gold. The doré is smelted to remove impurities and then melted into the form requested by the customer and/or formed into gold bars. An explanatory note adopted by the World Customs Organisation in respect of the International Convention on the Harmonised Commodity Description and Coding System states that doré falls within commodity code 7108 as long as it contains more than 2% by weight of gold, which the doré does here. Therefore, both in respect of the doré and the gold bars, the question arises whether the transfer of such subsidiaries to UMMC, a Russian company, would constitute the export of luxury goods in contravention of regulation 46.

38. The Administrators make two submissions as to why this would not the case:

    (1) The Proposed Transaction does not move the doré or gold bars into Russia, so it cannot constitute the export of luxury goods to Russia. The doré and gold bars are made in Russia and at no point are they transferred *into* Russia. The Proposed Transaction simply transfers the shares of the Company's subsidiaries from a UK company to a Russian one. That is not the same as transferring the goods themselves.

    (2) In any event, the Administrators submit that the doré and gold bars are not luxury goods, because they contend that to fall within paragraph 11 of Schedule 3A, the item must both (1) fall within the category of "*[p]earls, precious and semi-precious stones, articles of pearls, jewellery, gold- or silversmith articles*" and (2) also fall within commodity code 7108 00 00. Doré is an industrial product and the large gold bars that the Company subsidiaries produce are not of the sort that a goldsmith would use to produce jewellery, so neither of them satisfy the test in (1).

39. The Administrators appear to me to be correct that the Proposed Transaction would not involve the export of luxury goods to Russia for the purposes of regulation 46(1) of the Regulations. The purpose of the ban on luxury goods is to stop luxury items being moved to Russia to be enjoyed by those there. Therefore, the literal meaning of regulation 46(1), namely that the goods themselves must be moved to Russia to engage that provision, appears to me to be the correct one. The Administrators also appear to be correct that such items would in any event not constitute luxury goods. If luxury goods were intended to mean any item falling into the commodity codes set out in the table to paragraph 11 of Schedule 3A, one would have expected paragraph 11 to say that. Instead, the natural meaning of the words is that the item must satisfy the tests in both (1) and (2) above, and by treating the definition as including the test in (1), the definition only applies to what one would expect to be luxury goods.

The 2022 Notes

40. As explained in the main body of my judgment, one element of the consideration payable by UMMC to the Company for the shares under the terms of the Proposed Transaction is cash consideration of c.US$375m, but the SPA recognises the possibility that UMMC may choose to acquire 2022 Notes, and provides for the cash consideration to be reduced accordingly on a dollar for dollar basis at completion.

41. The Administrators' reasoning is that if the 2022 Notes are held by a designated person, they will constitute funds or economic resources of the designated person, and pursuant to regulation 11 of the Regulations, a person who is within the jurisdictional scope of the Regulations must not deal with those notes. Accordingly, the purchase by UMMC of the 2022 Notes from a designated person would be in breach of the Regulations *if* any of the activity takes place within the jurisdictional scope of the Regulations, given that it would involve dealing with a designated person's funds contrary to regulation 11 and making funds available to a designated person contrary to one of regulations 12 to 15. However, Mr Manson explains in his 27 July 2022 witness statement that the Administrators consider it very unlikely that any such purchase would be within the jurisdictional scope of the Regulations, since any relevant activity would likely take place in Russia and involve Russian individuals or entities.

42. The Administrators submit that *even if* UMMC purchased 2022 Notes from a designated person, the Company and Administrators would not be in a position of dealing with a designated person's assets contrary to regulation 11 and would not be making funds available indirectly to a designated person contrary to one or more of regulations 12 to 15, since the Company and Administrators would be receiving 2022 Notes from UMMC without any knowledge of the identities of the previous holders of the 2022 Notes.

43. Nevertheless, the Administrators have sought to minimise through clauses 7.1 to 7.6 and 7.13 of the SPA any risk that any designated person could obtain an economic benefit in contravention of regulations 12 to 15 of the Regulations by selling 2022 Notes to UMMC which are then used to fund, even in part, the Proposed Transaction:

    (1) Clause 7.1 requires UMMC to provide to the Company six business days before completion "*such evidence as the [Company] may reasonably require of: (i) (A) the identity of the immediately prior legal beneficial owner(s) of any Buyer 2022 Notes it intends to deliver to the [Company] pursuant to clause 7.7 (the* ***"Proposed Buyer 2022 Notes"****); and (B) proof of such identity; and (ii) to the extent available following [UMMC's] best endeavours to procure such information: (A) the identity of all previous legal and beneficial owner(s) of any Proposed Buyer 2022 Notes it intends to deliver to the [Company] pursuant to clause 7.7 since 19 April 2022; and (B) proof of such identity*".

    (2) Clause 7.2 acknowledges that it may not be possible for UMMC to provide the Company with details and/or proof of the identity of the prior legal or beneficial owners(s) of any 2022 Notes acquired by UMMC via an

exchange, and provides that UMMC shall provide the Company with details of when UMMC acquired the notes and from which exchange.

(3) UMMC agrees and undertakes under clause 7.3 that it will not, directly or indirectly, seek to acquire any 2022 Notes from a sanctioned person and will take all reasonable steps to ensure that it does not do so.

(4) Clause 7.4 entitles the Company to refuse to accept from UMMC any 2022 Notes that UMMC has acquired in breach of clause 7.3 and/or from a sanctioned person and/or if following a Court application for directions by the Administrators, the Court declares that the acceptance of the 2022 Notes in question gives rise to a breach of sanctions and/or any other liability on the part of the Company and/or the Administrators.

(5) UMMC warrants under clause 7.13 that to the best of its knowledge none of the 2022 Notes are acquired or will be acquired by it directly or indirectly from sanctioned persons.

44. The Administrators submit that while no protection from deception is entirely flawless, these clauses ensure so far as possible that no economic benefit can flow to a designated person in breach of regulations 12 to 15, so that the Proposed Transaction can proceed without anything more than a de minimis risk of a breach of the Regulations.

45. I find it difficult to see how the receipt of 2022 Notes by the Company from UMMC could constitute dealing with a designated person's assets contrary to regulation 11, because that would be receipt of UMMC's assets rather than those of a designated person. Similarly, I find it difficult to see how the Company transferring shares to UMMC- who is not a designated person- could involve making funds or economic resources available to a designated person contrary to regulations 12 to 15. Moreover, in my judgment, the protections devised by the Administrators in this respect do reduce the practical risk further in this respect. Therefore, in my view the practical risk that this element of the Proposed Transaction relating to the 2022 Notes would breach the Regulations is very low.