Neutral Citation Number: [2022] EWHC 740 (Ch)

Case No. CR-2021-002359

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

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: Wednesday 30 March 2022

Before :

LORD JUSTICE SNOWDEN

(sitting as an additional Judge of the High Court)

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IN THE MATTER OF SMILE TELECOMS HOLDINGS LIMITED

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

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Felicity Toube QC and Charlotte Cooke (instructed by **Kirkland & Ellis International LLP**) for the **Applicant company**
Tom Smith QC (instructed by **Greenberg Traurig LLP**) for **966 Co. S.A.R.L.)**
Andrew Thornton QC (instructed by **Pallas Partners LLP**) for **Al Nahla Technology Co** and **Strong Techno Ventures Limited**)

Hearing date: 10 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 9.30 a.m. on Wednesday 30 March 2022.

Lord Justice Snowden

Introduction

1. This is an application by Smile Telecoms Holdings Limited ("the Company") for an order sanctioning a restructuring plan (the "Plan") under Part 26A of the Companies Act 2006 ("the Act").

2. The application raises questions, in particular, about the concept of a "compromise or arrangement" in Part 26A; the effect of an order made at the convening stage under section 901C(4) of the Act that classes of creditors who have no genuine economic interest in a plan company need not be summoned to meetings to consider a plan; and questions as to the approach of the court to the exercise of its jurisdiction to sanction a restructuring plan for a foreign company that applies to its members as well as its creditors.

The factual background

3. The factual background to the Plan was set out in some detail in paragraphs 4-50 of the convening judgment of Miles J given on 12 January 2022: see [2022] EWHC 387 (Ch) (the "Convening Judgment"). I gratefully adopt that narrative. What follows is only a brief (and necessarily incomplete) summary.

4. The Company is incorporated in Mauritius and has an establishment and is registered as an overseas company in England. It is the holding company for a group of operating companies (the "Operating Companies" and the "Group") that conduct an internet and telecommunications business in various countries in Africa, including in particular Nigeria, Tanzania, Uganda and the DRC.

5. In the Convening Judgment, Miles J accepted that the centre of main interests (COMI) of the Company is not in Mauritius, but that it had been moved to England and Wales by various steps including the giving of notices to creditors in early 2021 in connection with the promotion of a previous restructuring plan under Part 26A that was sanctioned by Trower J on 19 March 2021: see [2021] EWHC 685 (Ch) (the "First Plan").

6. The existing debt and capital structure of the Company essentially comprises:

   a. a US$63.6 million super senior loan facility ("the Super Senior Facility") with a single lender, 966 Co. S.à.r.l ("966") under which about US$68 million was due and owing at the end of 2021. 966 is a Luxembourg finance company that is owned by members of the same family, based in Saudi Arabia, who also own the Company's majority shareholder, Al Nahla Technology Co. ("Al Nahla");

   b. various senior facilities amounting in total to about US$ 315 million ("the Senior Facilities") of which about US$ 244 million was outstanding as at the end of 2021. The lenders under these facilities (the "Senior Lenders") include African Export-Import Bank ("Afreximbank") and Industrial Development Corporation of South Africa Limited ("IDC");

c. about US$ 20 million of preference shares (the "Preference Shares") issued pursuant to a subscription agreement with IDC (the "IDC Preference Share Subscription Agreement"); and

d. about 548 million A and B ordinary shares (the "Ordinary Shares"), of which about 57.74% are held by Al Nahla and one of its affiliate companies, Strong Techno Ventures Limited.

7. The Super Senior Facility, the Senior Facilities and IDC's rights in relation to the Preference Shares all benefit from various security rights granted by the Group. Afreximbank acts as agent and security agent in relation to the Senior Facilities and IDC's rights in relation to the Preference Shares. The rights of the lenders and IDC *inter se* are governed by an intercreditor agreement (the "Intercreditor Agreement"). Under that agreement, in the event of realisation of assets following a "Distress Event", which includes a formal insolvency, the proceeds are to be distributed pursuant to a "waterfall" under which 966 ranks ahead of the Senior Lenders, who in turn rank ahead of IDC in respect of the Preference Shares.

8. The Super Senior Facility, the Senior Facilities, and the Intercreditor Agreement are all governed by English law. The IDC Preference Share Subscription Agreement is governed by South African law.

9. The other relevant liabilities of the Company include,

a. a debt of about US$1.2 million owed to Afreximbank for acting as agent and security agent (in which capacity Afreximbank is referred to as the "Agent Creditor");

b. unsecured debts totalling about US$ 2.9 million to certain other creditors (the "Other Plan Creditors"), who include Beth Mandel as lender under a short-term loan agreement who is owed about US$470,000 and Darisami International Limited which is owed a little over US$1.3 million in respect of the provision of professional services; and

c. subordinated debts of about US$ 49 million owed to 966 and Al Nahla (in this capacity the "Subordinated Shareholder Creditors"). These debts include unsecured claims pursuant to various loan agreements entered into from about May 2021 in order to document amounts previously advanced to, or in respect of payments to be made by, the Company (the "Subordinated Shareholder Liabilities").

10. Various shareholders of the Company, including Al Nahla, have also provided a guarantee to IDC in respect of liabilities owing by the Company to it in relation to the Preference Shares. Those shareholders claim to be contingent creditors of the Company in respect of any amounts they may be required to pay to IDC pursuant to such guarantee (the "Contingent Claim Creditors").

The Group's financial difficulties and current position

11. The Group has encountered substantial financial difficulties over an extended

period. These resulted in the promotion and sanction of the First Plan in the first quarter of 2021. The purpose of the First Plan was to provide the Group with additional short-term funding in order to try and implement a sale process of the various Operating Companies or their assets (the "Sale Process"). The funding was provided to the Company by 966 under the Super Senior Facility, and the process was agreed in the Intercreditor Agreement with the aim of achieving binding offers by October 2021 and an ultimate repayment of 966 and the Senior Lenders.

12. The Sale Process was conducted with the assistance of FBNQuest Merchant Bank Limited ("FBNQuest") in respect of the main Nigerian Operating Company and business, and with the assistance of Standard Chartered Bank in respect of the Operating Companies and businesses in Tanzania, Uganda and the DRC.

13. The Sale Process, however, generated relatively little interest and, even with extended deadlines, did not yield offers that would be sufficient to repay the Group's existing financial indebtedness. The only offer received in respect of the Group's Nigerian business prior to 31 December 2021 was non-binding and below FBNQuest's low case valuation. Only highly conditional, non-binding offers were received in respect of the Group's assets in Tanzania and the DRC. No offers were received in respect of the Group's assets in Uganda.

14. The net result, according to the Company, was that it was unlikely that it would be possible to achieve a sale of the Group's main asset in Nigeria (a spectrum licence held by its Nigerian Operating Company) or any of the Operating Companies or their assets so as to realise sufficient monies to repay all of the Group's indebtedness. The Company also considered that it would become cashflow insolvent by the end of 2021 due to the need to repay the Senior Facility which fell due at the end of 2021 together with the debts due to various trade creditors.

15. The failure of the Sale Process and the imminent cashflow insolvency led to the Group conducting discussions with its lenders in early November 2021 and inviting proposals for further restructurings. The view of the Company, as set out in those discussions, was that in the absence of a further restructuring, the only option available to the Group was to enter into a formal insolvency process leading to a distressed sale of the Group's assets and a payment of the proceeds in accordance with the "waterfall" in the Intercreditor Agreement. The Company's view, supported by an estimated outcome statement from Grant Thornton, was that in such event, value would break in the Super Senior Facility such that only 966 would see any distribution and the lenders under the Senior Facilities, IDC and any unsecured creditors or members of the Company would be paid nothing at all.

16. By 30 November 2021, the only new proposal that had been received was one from 966. The board of the Company does not anticipate that any other proposals will be received. The terms of the offer made by 966 are reflected in the terms of the Plan.

The Plan

17. The Plan is, in itself, a relatively simple document, albeit that the suite of restructuring documents that it envisages being entered into is complex.

18. The Plan applies to the "Plan Participants" who comprise "Plan Creditors" and "Plan Members". The Plan Creditors are listed as 966 as lender under the Super Senior Facility; the Senior Lenders, the Agent Creditor, the Subordinated Shareholder Creditors; the Other Plan Creditors and the Contingent Claim Creditors. The Plan Members are defined as IDC in respect of its Preference Shares and its rights under the IDC Preference Share Subscription Agreement, and the holders of the Ordinary Shares.

19. There are certain liabilities of the Company which are not the subject of the Plan and will be paid in full. These include liabilities owed to trade creditors and certain finance and operational leases and have been excluded because they relate to suppliers, lessors, or other creditors whose continued support is critical to the Group's ability to continue to operate, or to professional advisers and auditors whose services are required on a continuing basis, or are less than a *de minimis* threshold of US$ 25,000 set by the Company.

20. In essence, and following a format that has become more common in recent years, the Plan provides for the appointment of the Company as attorney for each of the Plan Participants with authority to execute a complex suite of documents giving effect to a sequence of "Restructuring Steps" which are set out in a "Restructuring Implementation Deed". These include the execution of various releases of claims by the Plan Creditors against the Company and the Group, the passing of corporate resolutions to alter the share capital and constitution of the Company, various assignments and transfers of rights, and the payment to Plan Participants by the Company of the "Plan Consideration".

21. This efficacy of this type of structure, and in particular whether a scheme under Part 26 can validly confer authority upon an attorney to execute a deed of release as a matter of domestic law was confirmed in the Scottish case of Re Premier Oil plc [2020] CSOH 39. I agreed with that analysis in Re ColourOz Investment II LLC [2020] EWHC 1864 at paragraphs 74-75, and I see no reason why the same approach should not apply under Part 26A. I shall return to the significance of the use of this structure in the instant case later in this judgment.

22. In summary, the Restructuring Steps provide for the following,

    a. the amendment and restatement of the existing Super Senior Facility Agreement to enable 966 to make available a further US$35.6 million to the Company and to extend the maturity of the facility;

    b. the acquisition of 100% ownership and control of the Company by 966 through (i) the issue of new ordinary shares to 966, and (ii) the conversion of all of the existing Preference Shares and Ordinary Shares into redeemable deferred shares, which are liable to be redeemed for nominal consideration;

    c. the transfer of the Senior Facilities to 966 as the new lender for nominal consideration, and the amendment and restatement of such facilities into shareholder loans (and/or the conversion of such facilities to equity or their release);

d. the full compromise and release of any liability owed by the Company to (i) the Agent Creditor in its capacity as such, (ii) the Senior Lenders in respect of the Senior Facilities, (iii) IDC in respect of the IDC Preference Share Subscription Agreement; (iv) the Subordinated Shareholder Creditors in respect of the Subordinated Shareholder Liabilities; (v) the Contingent Claims Creditors in respect of any Contingent Claims; and (vi) the Other Plan Creditors;

e. the full and unconditional release of all security granted in respect of the Senior Facilities and the Preference Shares;

f. the payment of the Plan Consideration by the Company to the Plan Participants as follows (i) US$1.2 million to the Agent Creditor (i.e. payment in full); (ii) US$10 million to the Senior Lenders, to be allocated *pro rata* and *pari passu*; (iii) US$10,000 to the Subordinated Shareholder Creditors, to be allocated *pro rata* and *pari passu*; (iv) US$10,000 to the Contingent Claims Creditors, to be allocated *pro rata* and *pari passu*; (v) US$10,000 to the Other Plan Creditors, to be allocated *pro rata* and *pari passu*; (vi) US$10,000 to IDC in respect of the Preference Shares; and (vii) US$10,000 to the holders of the Ordinary Shares, to be allocated *pro rata* and *pari passu*; and

g. the execution of a "Disposal Proceeds Sharing Deed" with 966 and the Senior Lenders providing that the net proceeds from any actual or deemed realisation of value in the Operating Companies over and above the amount of the funding under the amended Super Senior Facility and any other debt incurred after the Plan becomes effective, will be paid 72.5% to 966 and 27.5% *pro rata* and *pari passu* to the Senior Lenders.

23. The result if the Plan is sanctioned and implemented, in short, is that 966 will become the owner of the Company, free of the existing debt owed to the other major creditors. Such an outcome is said to be justified because the likely alternative to the Plan is a formal insolvency of the Company and the Operating Companies in which value would "break" in the Super Senior Facility. That would mean that there would be no assets available to meet the claims of the Senior Lenders, IDC or the other Plan Creditors, or to make any return to the Plan Members, who would all be "out of the money".

Jurisdiction: a "compromise or arrangement"?

24. In the Convening Judgment, Miles J concluded that the Court has jurisdiction to entertain the Plan since the Company is a "company" for the purposes of Part 26A. He also held that the jurisdictional threshold conditions in section 901A of the Act are satisfied, namely that (a) the Company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern, and (b) a compromise or arrangement is proposed between the company and its creditors, or any class of them, or to its members or any class of them, and the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties.

25. I agree with those conclusions. The only observation that I would make is in relation to Miles J's reasoning at paragraph 70 of the Convening Judgment that the Plan constitutes a "compromise or arrangement" between the Company and its creditors or members, in essence because it shares a number of features with the First Plan which Trower J had held to be a compromise or arrangement for the purposes of Part 26A.

26. With respect, I do not think that this was a satisfactory approach, not least because the First Plan was on quite different terms and, in particular, did not purport to make changes to the rights of the Preference Shares and the Ordinary Shares held by the Plan Members. The point goes to the jurisdiction of the Court and requires some further analysis.

27. In the case of a scheme under Part 26 of the Act, the requirement that there be a "compromise or arrangement" has been given a broad interpretation. What is required is some element of "give and take" with each class of creditors or members who will be bound by the scheme. It is also clear that this requirement will not be satisfied by a scheme which effects a surrender or expropriation of rights of some creditors or members without compensating advantage: see NFU Development Trust Limited [1972] 1 WLR 1548 at 1555 per Brightman J, and Re Savoy Hotel Ltd [1981] Ch 351 at 359D-F per Nourse J. At least in general terms, the same principles have been said to apply to the requirement in section 901A of Part 26A that a restructuring plan must be a "compromise or arrangement": see Gategroup Guarantee Limited [2021] EWHC 304 (Ch) at paragraphs 141-142 and the other authorities cited there.

28. The point about expropriation of rights without compensating advantage potentially arises in the instant case because, in contrast to the First Plan, the documentation which the Plan authorises to be executed will provide for the conversion of the existing Preference Shares and Ordinary Shares into deferred shares which can simply be redeemed for nominal consideration. The claims of the Other Plan Creditors, the Subordinated Shareholder Creditors and the Contingent Claims Creditors are also to be released in their entirety, and the amount to be paid by the Company to those Plan Participants will be very small (US$10,000 to be shared between the members of the class). Moreover, in spite of being defined as "Plan Consideration", the payments are described in the Explanatory Statement as being "*ex gratia*" payments – i.e. as a gift.

29. Mr. Smith QC suggested that the principles as regards expropriation of rights without compensating advantage set out in the scheme cases to which I have referred might not be fully applicable without some modification in relation to restructuring plans under Part 26A. He submitted that, in contrast to a scheme under Part 26, section 901G permits the court to sanction a restructuring plan which is binding on a class of dissenting creditors under section 901G on the basis that none of the dissenting class would be any worse off than they would be in the event of the relevant alternative. Mr. Smith's argument was that if creditors or members in such a case would receive nothing in respect of their existing rights in the event of the relevant alternative, then it must follow that a plan could be sanctioned under section 901G which also provided them with nothing in exchange for the release or cancellation of their existing rights.

30. On the particular facts of this case, I do not think that I need to decide whether Mr. Smith's submission is correct as a matter of law. In my judgment, in spite of the rather confusing description of the amounts to be paid to the Plan Participants as *ex gratia* payments, it seems to me that they are properly to be characterized as payments in return for the modification or extinction of the rights of the relevant Plan Participants effected by the Current Plan. Accordingly, they can and should be taken into account in deciding whether the Current Plan offers some "compensating advantage" for the removal of the rights of the Plan Participants concerned.

31. As far as the amount of such payments is concerned, as I shall discuss below, Miles J held in the Convening Judgment, and I must also accept, that the Plan Creditors (other than 966 in respect of the Super Senior Facility) and all of the Plan Members would all be "out of the money" in the event of the relevant alternative, and that their existing rights thus give them no genuine economic interest in the Company. It must follow that, in commercial terms, their existing rights to be surrendered or compromised under the Plan must be regarded as worthless. As such, in my judgment, even the relatively small payments of (a share of) US$10,000 to the Other Plan Creditors, the Subordinated Shareholder Creditors, the Contingent Claims Creditors and the Plan Members must be sufficient to prevent the Plan being an expropriation of their rights without compensating advantage.

Class composition

32. Section 901C of the Act provides,

> "(1) The court may, on an application under this subsection, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.
>
> …
>
> (3) Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned under subsection (1).
>
> (4) But subsection (3) does not apply in relation to a class of creditors or members of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company."

33. In the Convening Judgment, Miles J explained why he had decided, in accordance with section 901C(4), that the Company was only required to summon a single meeting of 966 as the sole lender under the Super Senior Facility. Miles J referred to my judgment in re Virgin Active Holdings Limited [2021] EWHC 1246 (Ch) at paragraphs 226-249 which had in turn referred to the old scheme cases of Re Tea

Corporation [1904] 1 Ch 12 and Oceanic Steam Navigation Company [1939] Ch 41, and the more recent decisions of Mann J in My Travel Group plc [2005] 1 WLR 2365 and Re Bluebrook Limited [2009] EWHC 2114 (Ch). Those scheme cases were also considered and applied by Trower J in relation to the exercise of the cram-down power under section 901G in the plan case of re Deep Ocean 1 UK Limited [2021] EWHC 138 (Ch).

34. The essence of the decisions in all of the scheme cases was that it was not necessary for a scheme company to summon meetings of classes of creditors or members whose rights against the company were not directly varied, or who would be "out of the money" in a formal insolvency which was the alternative to the scheme. Such creditors or members could not have any right to veto or complain about a scheme which excluded them from benefitting from the business and assets of the scheme company in which they had no real remaining economic interest. In paragraph 77 of the Convening Judgment, Miles J summarised the principles and practical consequences which he derived from the authorities (citation omitted),

> "a. First, in considering whether a creditor or member, or class of creditors or members, has a genuine economic interest in the company, the court considers the position by reference to the relevant alternative for the company if the plan is not sanctioned.
>
> b. Second, the court should address the question by applying the civil standard of balance of probabilities.
>
> c. Third, at a convening hearing the court may in an appropriate case conclude that in assessing matters under section 901C(4), the evidence is not sufficiently complete or satisfactory to enable the court to reach a concluded view under the section. It may for instance be the case that inadequate notice has been given in relation to the relevant application. Or objections may have been raised by creditors or members which the court considers need further evidence or investigation. On the other hand, if the court is satisfied by the evidence at the convening stage that none of the members of the relevant class has a genuine economic interest in the company, then the court may properly conclude that there is no purpose to be gained from requiring any meeting of that class."

35. I respectfully agree with that summary, and I would in particular associate myself with the words of caution in sub-paragraph (c). Much attention has been focussed in the cases and academic commentaries on the new "cram-down" power to approve a plan against the wishes of a class of dissenting creditors or members under section 901G of the Act. However, the power in section 901C(4) to exclude classes of creditors or members from voting at all on the basis that their views are essentially irrelevant to the ultimate decision whether to sanction a plan, so that they do not even need to be summoned to a meeting, is even more draconian. It is therefore of very considerable importance that the court should be entirely satisfied that it is

appropriate to make an order under section 901C(4) at the convening stage.

36. In the instant case, although the Company had followed the 2020 Practice Statement (Companies Scheme of Arrangement under Part 26 and Part 26A of the Companies Act 2006) (the "Practice Statement") in notifying Plan Participants of the convening hearing and the intention to seek an order under section 901C(4), no Plan Participants appeared at the convening hearing to contend that the order under section 901C(4) should not be made. In paragraph 79 of the Convening Judgment, Miles J explained why, on the facts, he was satisfied that it was appropriate to make such an order,

> "On this issue the following features appear to me to be salient:
>
> a. First, a valuation has been prepared by FBN. FBN's appointment was accepted by the Senior Lenders as well as the Super Senior Lender. Its efforts in selling the assets were reviewed by PwC. Its valuation has been provided to all of the interested parties who have been prepared to give appropriate confidentiality undertakings.
>
> b. Second, the valuation has been interrogated and explored by the Senior Lenders and their advisers at length. FBN has provided answers to detailed questions raised by the Senior Lenders.
>
> c. Third, on the relevant comparator report, the Senior Lenders are clearly out of the money. Earlier versions of excerpts of the report prepared by Grant Thornton were provided to the Senior Lenders in November and December 2021, and the Senior Lenders have had ample time to consider them. I note in this regard that the evidence of Mr Sultan [on behalf of the Company] is that the Senior Lenders accepted at a number of meetings in November and December 2021 that they were out of the money. I was told in the course of the hearing that Afreximbank says that it does not accept that it was out of the money, and that it has made this position clear to the Company. However, Afreximbank has not put in any evidence contradicting that adduced by the Company.
>
> d. Fourth, the relevant comparator report by Grant Thornton, which was provided with the other evidence in support of the application, explained that they had applied a discount using their experience as insolvency practitioners for distressed sales. It is commonplace for some discount to be applied to reflect the fact that any sale out of an insolvency process would be likely to be discounted. That is in part because insolvency practitioners are unwilling or unable to give extensive warranties.

> e. Fifth, the application of the discount by Grant Thornton and the values given in the report are supported by the real world evidence of the marketing and sales process which has taken place. I agree with the Company that that is probably the best evidence of the actual valuation of the assets. As I have already explained, the non-binding offers which were made were lower than either of Grant Thornton's best or low case scenarios. The marketing and sales process was carried out by an experienced bank, and it was monitored by Grant Thornton and by PwC on behalf of the Senior Lenders.
>
> f. Sixth, the evidence establishes that, using the Grant Thornton analysis, the Senior Lenders and those below the Senior Lenders are well out of the money. This is not a marginal case.
>
> g. Seventh, as already noted, the application was made on 15 December 2021, supported by extensive evidence, including the valuations and the Grant Thornton report. It was served on all of the interested parties. They have had about a month's notice of this application. There were also earlier discussions going back at least into November 2021. In a case of this kind, notice of about a month is more than adequate to enable a party to decide whether to contest or oppose the application, and to put in contrary evidence, if only to explain to the court why it is suggested that some further investigations might be required. But nobody has turned up to oppose the application, and no party has put in any contrary evidence."

37. Miles J also noted that although solicitors for Afreximbank had written to the Company's lawyers in on 8 January 2022 contesting the conclusion that the Senior Lenders were out of the money, the Company had answered the points made by contending that the best evidence of the value capable of being realized for either the Operating Companies or their assets was the outcome of the Sales Process. Grant Thornton had also separately answered the points made by Afreximbank in its own letter of 11 January 2022, explaining why a sale of the Nigerian Operating Company was unlikely to be achieved. Those letters had not been answered by Afreximbank by the time of the convening hearing.

38. Afreximbank did not seek permission to appeal Miles J's decision under section 901C(4). The meeting of 966 as sole lender under the Super Senior Facility therefore went ahead on 10 February 2022 with the entirely predictable result that 966 voted in favour of the Plan. The sanction hearing was then listed for 28 February 2022.

39. On 23 February 2022, the Company's solicitors received a letter from solicitors for Afreximbank attaching a report prepared by Coleago Consulting Limited ("Coleago") which placed a valuation of between US$424 million and US$644

million on the spectrum licences held by the Operating Companies by a desktop comparison (benchmarking) to auction prices from spectrum licence sales in various markets. Afreximbank asserted that this led to a conclusion that the Senior Lenders would not, in fact, be out of the money in the event of the relevant alternative, contrary to the decision of Miles J. It therefore asserted that the Plan was unfair to Afreximbank and the other Senior Lenders.

40. The letter of 23 February 2022 did not indicate whether or not Afreximbank intended to appear at the sanction hearing, but the Company nevertheless applied for an adjournment of the sanction hearing to 10 March 2022. It also obtained directions from Edwin Johnson J on 28 February 2022 that set a timetable for the Company to file further evidence by 2 March 2022 and for Afreximbank to raise any further points that it contended were relevant to the Plan by 4 March 2022.

41. The Company filed additional evidence in accordance with that timetable, and in addition sent to Afreximbank's solicitors a letter dealing with the points raised in the Coleago Report, together with a response from FBNQuest. On the same date Grant Thornton also sent a letter directly to Afreximbank's solicitors, explaining the rationale behind the estimated outcome statement in connection with the Plan and supplementing the comments by FBNQuest on the Coleago Report.

42. In the early evening of 4 March 2022, the solicitors for Afreximbank wrote again to the Company's solicitors, enclosing a further response from Coleago and repeating the contention that the FBNQuest valuation was flawed and not indicative of the true value of the spectrum licence owned by the Nigerian Operating Company. The letter continued,

> "Based on its own consideration of the valuation material and its consultations with Coleago, Afreximbank continues to consider that the valuation evidence the Company relies on materially understates the value of the Company's principal assets and that, as a consequence, the terms of the Restructuring Plan are inherently unfair.
>
> Amongst Afreximbank's concerns is that, once the Restructuring Plan has been sanctioned and the transactions contained within it have completed, a significantly higher bid may be forthcoming either from the current prospective purchaser or another purchaser, especially considering the market value of the spectrum in Nigeria as confirmed in the Coleago valuation. This concern is particularly acute where the effect of the Restructuring Plan is to deliver the Company into the hands of 966 as Super Senior Lender free of all existing third-party debt. Afreximbank notes that 966 was a newly incorporated Luxembourg vehicle, incorporated for the purposes of the Company's first restructuring plan sanctioned in March 2021, and owned by various members of the Sharbatly family, including but not limited to some of the shareholders of Al Nahla Technology Co, which is the Company's majority shareholder. Therefore, there is a very

> close relationship between 966 and the Company through each company's shareholders, which creates the potential for conflicts of interest.
>
> Given these considerations, Afreximbank continues to consider the Restructuring Plan unfair as it allows the Company's majority shareholder to discharge the Senior Debt (including Afreximbank's facility) on the basis of an inaccurate valuation report (which goes against standard market practice for valuing spectrum), and enables the majority shareholder to benefit from significant value as the sole shareholder of the Company post the Restructuring Plan at the expense of the Senior Lenders (including Afreximbank).
>
> However, after due consideration, Afreximbank has decided to leave matters in relation to the sanction of the Restructuring Plan to the Company's directors and the court and not appear at the sanction hearing on 10 March 2022. Therefore, subject to this letter being before the judge at the sanction hearing and the Company not raising any further points that require a response prior to the sanction hearing, Afreximbank confirms that it will not raise any further points ahead of the sanction hearing, although it will continue to monitor events closely, both at the sanction hearing and after. Specifically, Afreximbank will take a keen interest in any future sale of the Company or its assets, including the Nigerian spectrum, and fully reserves all its rights in that regard."

The letter then made a further set of points in relation to questions of Mauritius law, to which I shall return below.

43. Afreximbank's points concerning the Company's valuation evidence and the rival report by Coleago were also supported in general terms by IDC in a letter sent to the Company on 7 March 2022, and by Ecobank (one of the Senior Lenders) in an email of the same date. These communications indicated (but without adding any further information) that IDC did not support the Plan and Ecobank was opposed to it.

44. The question arises as to what approach I should take to the points raised in correspondence by Afreximbank (as recently supported by IDC and Ecobank).

45. The starting point is the terms of the 2020 <u>Practice Statement</u>. Paragraph 6 of that <u>Practice Statement</u> identifies issues relevant to an application under Section 901C(4) as one of a number of matters that must be drawn to the attention of the court at a convening hearing. Paragraph 10 then provides,

> "While members and/or creditors will still be able to appear and raise objections based on an issue identified in paragraph

> 6 above at the sanction hearing, the court will expect them to show good reason why they did not raise the issue at an earlier stage."

46. Paragraph 10 reflects the general understanding that members or creditors cannot be prevented from attending a sanction hearing to raise points that go to the jurisdiction of the court to sanction a scheme or plan. That point was explained by Chadwick LJ in Hawk Insurance Co Ltd [2001] 2 BCLC 480, which was the case which led to the introduction of the previous version of the Practice Statement in relation to schemes under section 425 of the Companies Act 1985. At paragraphs 17 and 21, after setting out the three stages of a scheme process (convening, voting and sanction) Chadwick LJ stated,

> "17. If the correct decision is not made at the first stage, the court may find, at the third stage, that it is without jurisdiction. The reason is that the court's jurisdiction under section 425(2) of the Companies Act 1985 is limited to sanctioning a compromise or arrangement between the company and its creditors or any class of creditors (as the case may be) which has been approved by the requisite majority at a meeting of the creditors or that class of creditors (as the case may be). So, if what has been put forward at the first stage as a single compromise between the company and all its members, or all of a single class of members, is seen by the court, at the third stage, to be (on a true analysis) a number of linked compromises or arrangements with creditors whose rights put them in several and distinct classes, the court will find that the condition which gives rise to its power to sanction is absent; none of the linked compromises or arrangements will have been approved by the requisite majority at a relevant meeting because there have been no meetings of the distinct classes….
>
> …
>
> 21. In my view an applicant is entitled to feel aggrieved if, in the absence of opposition from any creditor, the court holds, at the third stage and on its own motion, that the order which it made at the first stage was pointless. It is, to my mind, no answer to say that that is a risk which the applicant must accept. It may be inevitable that an applicant must accept the risk that a dissentient creditor will persuade the court at the third stage that the order which it made at the first stage (without hearing that creditor) was the wrong order. But that is not to say that the applicant must be required to accept that, when exercising what is plainly a judicial discretion at the first stage, the court will not address the question whether the order which it makes serves any useful purpose; or that, if it has addressed that question at the first

stage, it will change its mind, of its own motion, at the third stage."

47. Questions of class composition have continued to be regarded as going to the jurisdiction of the court to sanction schemes under the revised wording of Part 26 of the 2006 Act. However, it must be an open question on the wording and structure of the new regime in Part 26A whether a decision under section 901C(4) to exclude various classes of creditors or members from being summoned to meetings to consider a restructuring plan similarly goes to the jurisdiction of the court to sanction the plan under section 901F, so that if a point were raised it would have to be reconsidered at sanction in the same way as the more conventional question of the composition of the classes that have actually voted.

48. In any event, however, it is plain that paragraph 10 of the 2020 Practice Statement is intended to discourage parties who disagree with a scheme or plan from playing a tactical game of keeping their powder dry at the convening stage and only appearing to raise jurisdictional points at the sanction hearing. That must be all the more so in a case in which the court has made an order under section 901C(4). In making such a decision, the court will not only have had to compare the existing and intended rights of creditors or members to determine the conventional question of class composition. The court will also have had to scrutinize carefully the factual evidence as to the prospects for a return to different stakeholder groups in the event of the relevant alternative, in order to decide whether any of them have no genuine economic interest in the plan company and so can be excluded from the plan meetings. As such, if a plan company has given proper notice of the convening hearing and of its intention to seek an order under section 901C(4), if those affected have had a proper opportunity to adduce evidence in opposition to such an order, if the court has been satisfied by the evidence adduced at the convening stage and there has been no material change of circumstance, in my judgment the court should not, absent some good reason, be required to conduct that evidential exercise again at the sanction hearing, with the attendant waste of time and expense that this would cause.

49. In the instant case, not only did Afreximbank not appear at the sanction hearing, but it has given no reason (still less a good reason) why it could not and did not raise the points in its letter of 4 March 2022 at the convening hearing. It has not, for example, sought to challenge Miles J's finding that it had had ample opportunity to do so or to indicate that it needed more time to prepare its evidence.

50. I also consider that it is unhelpful for Afreximbank to take the line, evident in the last paragraph of the extract from its letter of 4 March 2022 quoted above, that having sought to raise serious issues going to the fairness of the Plan, Afreximbank had then "decided to leave matters in relation to the sanction of the Restructuring Plan to the Company's directors and the court".

51. As I have said on numerous occasions, it is certainly the case that a company proposing a scheme or plan has a duty of utmost candour to bring all relevant matters to the attention of the court, including arguments that might properly be advanced against the sanction of the scheme or plan. However, that important obligation does not, in my view, extend to an obligation on the company to advance

full argument against itself of a case based upon an expert report which it did not commission, with which it and its professional advisers do not agree, and in relation to which it has filed evidence from its own experts explaining why the rival report is wrong.

52. Nor is it realistic, appropriate or fair to judges hearing complex scheme or plan cases, who already carry a heavy burden, to expect the court itself to descend into the fray. Whilst judges are of course entitled to ask questions to ensure that they understand what is proposed, and to probe into any areas of law or evidence which give them concern, they cannot be expected to conduct a detailed factual investigation into the merits or demerits of the company's valuation evidence in a highly specialist area without any assistance. Still less can they be expected to engage in some sort of vicarious challenge to that evidence on behalf of creditors or members, based upon a rival report, without help from the expert responsible for it or the benefit of cross-examination.

53. Put simply, if a creditor or member wishes to oppose a scheme or plan based upon a contention that the company's valuation evidence as to the outcome for creditors or members in the relevant alternative is wrong, they must stop shouting from the spectators' seats and step up to the plate. The creditor or member should obtain any financial information from the company that may be required, either on a voluntary basis or by making a timely disclosure application; file expert evidence of its own, instruct the expert to engage in the production of a joint report in the normal manner, and tender the expert for cross-examination. They should also attend the hearing and address argument for the assistance of the court at the appropriate stage in the process at which the point is to be determined. In the case of a restructuring plan where an order is sought under section 901C(4), that will be at the convening stage. In a case where the power under section 901G is sought to be used, that will be at the sanction hearing. The latter course was, as is well-known, what was done in Virgin Active Holdings Limited [2021] EWHC 1246 (Ch).

54. It is also worth repeating, in case there be any doubt about it, that creditors or members who follow such a course and advance reasonable arguments on genuine issues which assist the court in its scrutiny of the proposals are unlikely to be ordered to pay the company's costs of the exercise. Depending on the facts, they may also be able to recover their costs from the company, even if their opposition is unsuccessful. That appears from the principles established in scheme cases that I outlined in the interim costs judgment in Virgin Active Holdings Limited [2021] EWHC 911 (Ch).

55. In the absence of any such steps being taken by Afreximbank, IDC or Ecobank, I do not consider that I am required to (or could) attempt an analysis of the valuation points made in Afreximbank's letter of 4 March 2022 or the Coleago report. Accordingly there is no basis upon which I consider that I should re-evaluate or go behind the decision of Miles J that the Plan Participants other than 966 have no genuine economic interest in the Company, and that the only relevant class of Plan Participants which it was necessary to summon to a meeting to vote upon the Current Plan was 966 as the lender under the Super Senior Facility.

Discretion

General

56. Before turning to issues arising as a result of fact that the Company is incorporated in Mauritius and the other international elements of the Plan, I turn to the well-known general considerations in relation to the exercise of the court's discretion to sanction a scheme under Part 26 as outlined by David Richards J in Re Telewest Communications (No. 2) Ltd [2005] BCC 36 at paragraphs 20-22. The same structure has been used as a starting point for the exercise of discretion in plan cases under Part 26A to date.

57. In the instant case, the consequence of Miles J's decision under section 901C(4) is that these requirements require only a very short analysis. That is because it is plain that the statutory formalities have been complied with, it has been held that there is only one Plan Participant who has a genuine economic interest in the Company, and that creditor has voted in favour of the Plan which it devised and self-evidently considers to be in its best interests. There is also no basis upon which I could sensibly question 966's judgment as to how to allocate the Plan Consideration among those who are out of the money in the relevant alternative, in particular the division of any surplus realisations between the Super Senior Lender and the Senior Lenders in the Disposal Proceeds Sharing Deed.

58. As to whether the Plan contains any "blots" or defects, with the exception of the point relating to the alteration of the Company's constitution and share capital to which I shall return below, the Company has not sought to draw any particular matters of concern to my attention. I would also observe that the suite of restructuring documentation in this case is of fearsome complexity and far from easy to navigate. The bundles of evidence filed for the sanction hearing were also of inordinate length. As such, there could be no expectation that in the limited time for pre-reading I should attempt to verify that the restructuring documentation is drafted in a way that actually achieves what the Company intends. I therefore approach matters on the basis that the Company has engaged an international law firm with considerable experience in restructuring cases, and it must rely upon that firm to have produced documentation which works.

International elements

59. I therefore turn to consider the international elements. In my judgment these are four in number: (i) is there a sufficient connection to England to justify the court exercising its discretion to sanction the Plan; (ii) is it appropriate for the English court to sanction a Plan that will lead to the alteration of the constitution and share capital of a company incorporated in Mauritius; (iii) are the provisions of the Plan that are intended to result in the alteration of the constitution and share capital of the Company likely to achieve that result; and (iv) is there a sufficient prospect that the compromises of contractual rights under the Plan will be recognized in overseas jurisdictions such that the court will not be acting in vain if it sanctions the Plan? Although I have expressed these four elements separately for ease of analysis, in reality they are interconnected and to some extent overlap.

Sufficient connection

60. The question of sufficient connection is largely answered by considering two factors. The first is that, as Trower J held in relation to First Plan, and as I accept on the basis of the evidence filed on this Plan, the Company has moved its COMI to England. Although the concept of COMI under the EU Insolvency Regulation is no longer relevant to the exercise of the English court's winding-up jurisdiction, and COMI was not one of the bases for the exercise of scheme jurisdiction considered in Re Drax Holdings Limited [2004] 1 WLR 1049 ("Re Drax"), there can be little doubt that in the modern era the presence of a company's COMI in England gives a legitimate basis for a finding of sufficient connection for the purposes of entertaining a restructuring plan: see e.g. Gategroup Guarantee Limited [2021] EWHC 775 (Ch) at paragraph 21. That is not least because, to look on the other side of the coin, a restructuring plan under Part 26A for an insolvent company which involves the vast majority of creditors is likely to be regarded as a collective insolvency proceeding for the purposes of recognition in other jurisdictions which have adopted the UNCITRAL Model Law. Hence the location in England of a company's COMI as defined in that Model Law would be regarded in such other jurisdictions as an appropriate basis for the English court to exercise its jurisdiction under Part 26A.

61. The second factor supporting a finding of sufficient connection is that the overwhelming majority of the debts to be compromised under the Plan are governed by English law. At least so far as the English court is concerned, since the decision in Re Rodenstock GmbH [2012] BCC 459, that has been held to be a sufficient connection to warrant the exercise of the English court's scheme jurisdiction under Part 26. I see no reason to adopt any different approach in relation to restructuring plans under Part 26A.

Restructuring plans and the rights of members of overseas companies

62. The second issue going to the exercise of discretion is the question of whether it is appropriate for the English court to sanction a Plan that will lead to the alteration of the constitution and share capital of an overseas company incorporated in Mauritius.

63. This was an issue raised both as a matter going to jurisdiction and discretion by Afreximbank prior to the convening hearing. At paragraphs 63-67 of the Convening Judgment, Miles J explained the issue in the following terms,

> "63. In a letter written on 8 January 2022, Watson Farley & Williams, the solicitors for Afreximbank, contended that the court would not have jurisdiction in respect of the proposed restructuring plan because it also affected the rights of members and it is incorporated abroad. They relied on a passage in Re Drax at paragraph 29 where Lawrence Collins J said:
>
> > "It is almost impossible to envisage circumstances in which the English court could properly exercise jurisdiction in relation to a scheme of arrangement

> between a foreign company and its members which would essentially be a matter for the courts of the place of incorporation.".
>
> 64. I am not satisfied that the point is sufficiently clear as to constitute an insuperable roadblock for a number of reasons.
>
> 65. First, the comments of Lawrence Collins J in Re Drax concerned a scheme between a solvent company and its members. The same considerations may not apply to a restructuring plan concerning a company threatened with insolvency where the members do not have a realistic economic interest.
>
> 66. Secondly, it is arguable that where the restructuring plan involves both the rights and interests of creditors and members, it is necessary to take a broader, more holistic view of the connections between the company and this jurisdiction than the passage from Re Drax might suggest. In such a case, while the position of the members as members of an overseas company may be a factor to be taken into account, it may not be decisive if the connections between the creditors and this jurisdiction are sufficiently strong.
>
> 67. Thirdly, it may be material that, although the relevant company is incorporated abroad, its COMI is within this jurisdiction. As has been explained in a number of cases, there is a close relationship between the concept of sufficient connection and the question of the effectiveness of a scheme or restructuring plan. Moreover, considerations which might lead the court to conclude that the COMI was located in England may well be material to the likelihood of the Restructuring Plan being effective in the place of the Company's incorporation. It seems to me that the answer to this issue may depend to some extent on further evidence which the Company proposes to serve, including Mauritian expert evidence, as to the effectiveness of the Restructuring Plan in the place of incorporation. It would be better dealt with at the sanction stage rather than the convening stage."

64. Putting aside, for a moment, the question of mechanics, it is, I think, tolerably clear that, as a matter of concept, the jurisdiction exists for the English court to sanction a scheme or plan that involves the alteration of the constitution and share capital of an overseas company. That conclusion is in line with the very broad definition of "company" in the Act, and the lack of any express limitations on the content of what might constitute a "compromise or arrangement" with members of that company in Part 26 and Part 26A.

65. The point that the jurisdiction exists as a matter of concept is also supported, at least as a matter of linguistics, by the provisions of sections 901F(6)(b) and 901K(2)(a)(i)

to which Ms. Toube referred. Those provisions appear, by inference, to apply to overseas companies which are required to register particulars under section 1046 of the Act, and require a copy of an order of the court sanctioning a plan which "amends the company's articles" to be delivered to the registrar of companies.

66. That conclusion is also consistent with the general approach taken by Lawrence Collins J in Re Drax. In paragraphs 26-27 of his judgment, Lawrence Collins J took the view that there are few limitations on the *existence* of the scheme jurisdiction under Part 26, and the real issue in most cases is whether, in all the circumstances, the English court will think it appropriate, in its discretion, to *exercise* that jurisdiction.

67. In that respect, I would agree with the comments of Lawrence Collins J in Re Drax that it is not easy to conceive of the circumstances in which the English court would think it appropriate to exercise its discretion to sanction a standalone English scheme which involved an alteration to the constitution and share capital of a solvent overseas company and its members. That is because companies are fictional creatures of the particular legal system under which they are incorporated and registered, and alterations to their constitution and share capital must essentially be a matter to be carried out in accordance with the law and procedure of that legal system: see e.g. *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., at Rule 175(2) ("All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.").

68. I would also accept that if, in addition to altering the constitution and share capital of a foreign company, it was necessary to alter ancillary rights under a shareholders' agreement governed by English law, then it might well be appropriate to promote parallel schemes in England and in the place of incorporation of the company. The English scheme would be designed to achieve an effective compromise of the contractual rights governed by English law, and the scheme in the place of incorporation would achieve an effective alteration of the constitution and capital structure of the overseas company: see e.g. Re West African Gas Pipeline Company [2021] EWHC 3360 (Ch) at paragraph 18 per Miles J.

69. A similar logic must, in my view, also apply to a restructuring scheme or plan for an overseas company in financial difficulty in which it is sought to compromise or capitalise debts governed by English law, and to alter the constitution or share capital of the company. As Lawrence Collins J explained in Re Drax at paragraph 30, it is entirely legitimate in such cases to have parallel schemes in England and in the place of incorporation of the company. The English scheme would be designed to achieve an effective compromise or arrangement in relation to the debts or other obligations governed by English law, and the scheme in the place of incorporation would achieve an effective alteration of the constitution and share capital of the overseas company.

70. The novel issue that arises in the instant case is that there is no parallel scheme or plan for the Company in Mauritius. The question is whether that fact ought, as a matter of principle, cause me to decline to exercise the jurisdiction to sanction the Plan. I do not think that it should. The essential reason is that, as Lawrence Collins J noted in paragraph 30 of Re Drax, the use of a parallel scheme or plan is an aspect

of ensuring the international effectiveness of the English restructuring proceedings, rather than a strict legal requirement under the Act. Accordingly, if the court can be satisfied on evidence that the necessary alterations to the constitution and share capital of an overseas company can be satisfactorily achieved in the overseas jurisdiction by an alternative process that is compliant with local laws and acceptable to the local courts without any need for a parallel scheme or plan, then the absence of such a parallel proceeding should not deter the English court from sanctioning the plan.

Giving effect to the Plan in Mauritius

71. That brings me to the third point: how can the Plan be given effect in Mauritius? Ms. Toube submitted that this would be either (i) because my order sanctioning the Plan would have direct effect to alter the Company's constitution and share capital in Mauritius, or (ii) because those aspects of the Plan requiring changes to the Company's constitution and share capital could validly be implemented in Mauritius by the Company itself, using the power of attorney conferred under the Plan to act on behalf of the Plan Members.

72. I reject Ms. Toube's first submission for (at least) two reasons. The first reason is that neither the Plan, nor the draft order sanctioning it, actually envisages that my order should directly alter the constitution of the Company or its share capital. The draft order simply sanctions the Plan in accordance with its terms, and as indicated above, the Restructuring Steps provide that the changes to the constitution and share capital of the Company will be implemented in Mauritius by use of the power of attorney given to the Company to pass special resolutions in accordance with the companies law of Mauritius.

73. The second reason is that Ms. Toube had no expert evidence to suggest that, even if I were to make such an order purporting to alter the Company's constitution and share capital, it would be regarded as directly effective in Mauritius. I also see no reason whatever to assume that this conclusion would be reached under Mauritius law. The point can be tested by asking the question in reverse, on the assumption (in the absence of any expert evidence), that the law of Mauritius is the same as English law. Would English law accept that the order of a Mauritius court, sanctioning a scheme of arrangement under the laws of Mauritius and purporting to alter the articles of association of an English company, had direct effect in England? The answer must plainly be "no". Having regard to Rule 175(2) in *Dicey, Morris & Collins* (above), and given that the English common law does not accept that it is possible for debts governed by English law to be discharged other than in accordance with English law (see e.g. Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399), it would be astonishing if English law took the view that alterations to the constitution of a company incorporated and registered under the English Companies Act 2006 could be achieved, without more, by the order of a foreign court.

74. The real question, therefore, is whether I can be sufficiently satisfied that the procedure envisaged under the Plan for altering the constitution and share capital of the Company using the power of attorney conferred under the Plan, will be acceptable and effective in Mauritius. This is essentially a matter for expert

evidence as to the law of Mauritius.

75. As a preliminary issue in that respect, I would observe that although the Company relied upon three letters written to it by an independent law firm in Mauritius, none of them were compliant with the requirements of the Civil Procedure Rules (CPR) as to the provision of expert evidence in court proceedings in England. In particular, I had no indication of the qualifications or expertise of the author of the letters, and although paragraph 5.2.7 of the main letter of 21 February 2022 at least stated that the opinion letter could be relied upon by the court for the purposes of the sanction hearing, there was no acknowledgment of the author's overriding duty to the court as set out in CPR 35.3, or any attempt to comply with CPR PD35. Similar defects are apparent in the other letters setting out opinions on the laws of Nigeria and South Africa to which I shall refer below.

76. In a matter such as the instant case, which raises novel points of international restructuring practice, which involves an overseas company, and in which there has been dissent expressed by some Plan Participants, it is important that the English court receives expert evidence of foreign law which complies with the requirements of the CPR. As such, the remainder of my analysis in this judgment proceeds on the basis that, prior to deciding finally whether to sanction the Plan, I will be provided with confirmatory reports from each of those sources which comply with CPR PD35 and explain any further qualifications to the opinions previously given.

77. The materials relating to Mauritius law commenced with a letter from Dentons (Mauritius) LLP ("Dentons") to the Company dated 21 February 2022. Subject to many caveats and assumptions, that letter expressed the opinion that the Plan would be recognised as a foreign main proceeding in Mauritius if an application were made under the UNCITRAL Model Law (as adopted in Mauritius in the Mauritius Insolvency Act 2009 (as amended)).

78. In one sense, that is an important factor relevant to the exercise of discretion, as the letter explains that a court in Mauritius is not likely to regard the exercise of jurisdiction by this court to sanction the Plan, which is designed to address the financial difficulties of a company with its COMI in England, as exorbitant or otherwise offensive to Mauritius public policy.

79. That evidence is, however, of no real help in dealing with the more granular and specific issue of whether the use of the power of attorney granted under the Plan would be effective in Mauritius. That is especially so in circumstances in which, as Ms. Toube confirmed to me at the sanction hearing, the Company has no current intention of seeking recognition of the Plan in Mauritius under the Mauritius Insolvency Act.

80. The only part of the first letter from Dentons that might be thought to address the use of the power of attorney was the following narrative in paragraphs 5.1.9 and 5.1.10. Those paragraphs simply stated, without further elaboration,

> "5.1.9 In relation to the adoption of the New Constitution of the Company, which shall occur in accordance with

> Restructuring Step 8 of the Restructuring Implementation Deed …, the following procedure shall be followed:
>
> 5.1.9.1 The Company shall revoke its existing constitution and adopt the New Constitution in accordance with the Restructuring Plan;
>
> 5.1.9.2 The Company, in accordance with section 114 of the Mauritius Companies Act 2001 ("CA"), shall by way of a special resolution, which shall become effective in accordance with the terms of the Restructuring Plan, approve (i) the adoption of the New Constitution, (ii) the conversion of the Ordinary Shares and IDC Preference Shares into redeemable deferred shares, and (iii) the issuance of the New Ordinary Shares to 966. For the purposes of the CA, a special resolution means a resolution approved by a majority of 75 per cent of the votes of those shareholders entitled to vote and voting on the question;
>
> 5.1.9.3 The company secretary of the Company shall then:
>
> > 5.1.9.3.1 in accordance with section 44(5) of the CA, notify the Mauritius Registrar of Companies, within 14 days of the adoption of the new constitution of the Company; and
> >
> > 5.1.9.3.2 in accordance with section 114(5) CA, file within 1 month from the date of the special resolution, a copy of the signed and dated special resolution with the Mauritius Registrar of Companies.
>
> 5.1.10 As a matter of Mauritian law, the Restructuring Plan would likely be recognised in Mauritius on the basis that the same steps under the Restructuring Plan required to effect the changes to the rights attached to the shares of the Company, would be applicable, if such changes were to be made outside of the Restructuring Plan."

81. Unsurprisingly, Afreximbank's solicitors' letter of 4 March 2022 (to which I have referred above), took issue with the adequacy of this letter from Dentons. In that letter, Afreximbank's solicitors stated,

> "Insofar as the Mauritius law evidence specifically addresses the purported variation of shareholder rights under the Restructuring Plan at all, it does so in short descriptive terms primarily by reference to the steps contemplated in Restructuring Implementation Deed (specifically, Restructuring Step 8). However, we understand that the Company's ability to take those steps on behalf of shareholders (including through the passing of the "Company Special Resolution") is premised on it being

> granted a valid and effective power of attorney under the terms of [the] Plan. We are surprised, therefore, that the Mauritius law evidence does not address whether (and if so, on what basis) Mauritius law would recognise and give effect to that power of attorney, in a manner which would entitle a Mauritius company to pass a special resolution on behalf of its shareholders, without their express consent or participation. In short, the evidence contained in paragraphs 5.1.9 and 5.1.10 of the Mauritius law evidence is descriptive, unconvincing and incomplete on its face."

I note that Afreximbank's solicitors' letter does not actually assert in positive terms that the power of attorney granted under the Plan could not be used in Mauritius as envisaged. However, I consider that its criticisms of the letter from Dentons were well-made.

82. The criticisms from Afreximbank drew a response by way of a supplemental letter from Dentons dated 7 March 2022. Much of the letter dealt with Afreximbank's other comments concerning recognition under the UNCITRAL Model Law as adopted in Mauritius if (contrary to the Company's current intention) an application for recognition were to be made. However, the letter also dealt with the use of the power of attorney. It said,

> "The effect of the Power of Attorney (the "POA") is a matter of English law. Therefore, whether the [Plan] sanctioned by the Court would give effect to a valid and binding POA which would be recognized in Mauritius as a matter of Mauritian law, is a matter to be determined in accordance with English law. The fact that the POA is granted by all Plan Participants to the Company (including by its shareholders) (those Plan Participants being incorporated and/or domiciled in various jurisdictions) does not make a difference to that conclusion. As we understand as a matter of English law once the [Plan] is sanctioned by the court, the POA granted in the [Plan] by the Plan Participants will be effective, it follows that as a matter of Mauritius law the special resolution which will be executed under the POA which is granted under the [Plan] will also be effective, subject to the legalization process in Mauritius (which is a step which is procedural only). Further, if there is any formal challenge as to the validity of the POA or [Plan] in Mauritius, the Company can formally pursue a recognition order, which in our view (and for the reasons stated in our Legal Opinion) will likely be granted."

83. As I pointed out at the hearing, that is not a cogent analysis. In particular, I do not think that the first two sentences are coherent. Of course the first question is whether the power of attorney conferred under the Plan is valid and binding on the Plan Participants as a matter of English law (as to which see the Re Premier Oil plc and Re ColourOz Investment II LLC cases referred to in paragraph 21 above). I

would also accept that the question of what can be done under the power of attorney (i.e. its scope) is a matter of interpretation to be governed by English law as the law under which the power was created.

84. However, I see no reason (and none is offered) as to why the question of whether that authority to act on behalf of Plan Members would be effective in Mauritius would also be a matter to be determined in accordance with English law rather than Mauritius law, as the law of the place where the relevant use of the power of attorney is to occur (the *lex loci actus*) in relation to the internal affairs of a Mauritius company. The fourth sentence of Dentons' analysis contains a similar unexplained non-sequitur. Assuming that the power of attorney is validly granted under the Plan when sanctioned as a matter of English law, it does not follow (and no explanation is given) as to why such a power would necessarily be recognised as effective to pass special resolutions under the company law of Mauritius. There is, moreover, no explanation of the "legalization process" in Mauritius.

85. When I pointed these defects out at the hearing, Ms. Toube readily offered that the Company would seek to obtain further evidence to remedy them. After the hearing I was sent a second supplemental letter from Dentons dated 11 March 2022, the relevant parts of which were as follows,

> "7. As a matter of Mauritian law, the validity and scope of a power of attorney is to be determined by the law which governs the power of attorney. Accordingly, in the present case as a matter of Mauritian private international law the validity and scope of the POA is a matter of English law.
>
> 8. We understand as a matter of English law that once the [Plan] is sanctioned by the court, the POA granted in the Plan Document will take effect as a matter of English law. Assuming that the Plan (and the POA granted under it) are valid and effective as a matter of English law to grant the powers under that POA, then the POA will be effective as a matter of Mauritius law provided that the legalisation process set out in step 2 below is complied with.
>
> a. Step 1 - the English High Court sanctions the Plan, which approves and gives effect to the Plan Document. The Plan Document grants the POA.
>
> b. Step 2 - a foreign law power of attorney drawn up outside Mauritius (which, for the avoidance of doubt, can be governed by foreign law) must follow the process provided for in Section 3 of the Deposit of Power of Attorney Act in Mauritius (and relevant case law on its interpretation). In the case of the POA, which as stated above is to be given effect to by the Sanction Order, this would involve depositing the relevant power of attorney together with a copy of the sealed court order with a notary in Mauritius (the "Mauritius Notary"). The Mauritius

> Notary would then draw up a deed of deposit, which will need to be registered and filed with the Mauritius Supreme Court. Accordingly, the Plan Company will need to follow the steps required by this procedure under the Deposit of Power of Attorney Act once the Restructuring Plan is sanctioned, and the relevant Plan Document and POA become effective after being sanctioned by the Court. The Mauritian law process is procedural only, and takes approximately 7 - 10 days to complete. In our view, there is no reason why the Mauritius Supreme Court would not accept this filing and registration.
>
> c. Step 3 - once the process above is complied with, and pursuant to that process the Mauritius Supreme Court accepts the filing and registers the POA, the POA will then be able to be used by the Plan Company to execute and give effect to the relevant Restructuring Documents as a matter of Mauritius law, including the Company signing the special resolutions of the Plan Company's shareholders, which will give effect to the New Constitution of the Plan Company and the relevant changes to the Plan Company's capital structure.
>
> d. Step 4 - the process set out in paragraph 5.1.9 of our Legal Opinion would then need to be complied with, including the filing of the special resolutions with the Mauritius Registrar of Companies.
>
> The opinion we express above as to the manner in which the POA takes effect is not altered by the fact that the POA is not entered into (and/or executed by) by the individual Plan Participants but instead originates from the terms of the Plan and which comes into full force and effect upon the order of an English Court sanctioning the Restructuring Plan. In particular there is, in our view, nothing that the Mauritian court would consider illegitimate or against Mauritian public policy or as amounting to the exercise of an exorbitant jurisdiction by the English Court. In other words, the POA takes effect under the Plan, as sanctioned by the English Court in exactly the same way as would any individually entered into POA.
>
> If for any reason the validity of the POA is challenged in Mauritius, the Company can then seek recognition in Mauritius on the basis set out in our Legal Opinion and the First Supplemental Letter to it and we remain of the view that the Mauritius Supreme Court is in any event likely to recognise the Plan for the reasons set out therein."

86. That is a fuller and more coherent explanation of the position under the law of Mauritius. Although the letter from Dentons provides minimal references to any

materials in support of its conclusions, it does at least confirm the details of the procedure which the Company can follow in Mauritius formally to register the power of attorney conferred under the Plan. The letter also confirms, albeit by indicating that the author sees no reasons to the contrary, that once registered with the court in Mauritius, the power of attorney should be able to be used in the way envisaged by the Plan to alter the Company's constitution and share capital.

87. Although far from impressed by the process by which this opinion needed to be extracted and its lack of supporting materials or detail, I nonetheless accept that (subject to the point concerning CPR compliance made above), it shows that the provisions of the Plan as regards alteration to the Company's constitution and share capital are likely to be capable of being implemented in Mauritius by the use of the power of attorney granted under the Plan.

88. Three further points give me additional comfort in this regard. The first is the one made above, namely that although Afreximbank's solicitors were (rightly) critical of the opinion initially given by Dentons and reserved their client's rights, they did not actually suggest that the power of attorney could not be used in Mauritius on behalf of the Plan Members as intended, or identify any particular basis upon which its use could be challenged.

89. The second is that even if I were to make the assumption that Plan Members might seek to raise some complaint in Mauritius to the effect that their rights as shareholders were being unfairly altered or expropriated by the Plan, it is at least reasonable to assume that when considering arguments on fairness and what relief (if any) it might be appropriate to grant, a highly relevant factor for a court in Mauritius would be that such rights are, on the valuation evidence as to the financial position of the Company, worthless. I say that because on the Company's evidence, the only creditor which is in the money in the event of the relevant alternative is 966 as Super Senior Lender; and even on the basis of the Coleago report, Afreximbank's contention is that value breaks in the Senior Facility. On any footing, therefore, the Plan Members are well out of the money.

90. Thirdly, as the letter of 11 March 2022 from Dentons states, in the event of challenge to the use of the power of attorney as envisaged in the Plan, it is open to the Company to apply to the court in Mauritius for recognition of the Plan under the UNCITRAL Model Law as enacted in Mauritius. Dentons also express the opinion that, if sought, such recognition would be likely to be granted on the basis that the Plan was a foreign main insolvency proceeding. Although the letters from Dentons do not descend into the detail of the ancillary orders that the Company might seek so as to be able to implement the Plan, I can see that it is at least likely that such orders would extend to validating, for the purposes of the law of Mauritius, the use of the power of attorney in the manner envisaged in the Plan.

The international effectiveness of the Plan as regards Plan Creditors

91. The final matter to which I should refer is the question of whether the Plan is likely to be recognised and given effect as against dissenting Plan Creditors in those jurisdictions in which the Company has its main assets and business interests. As I indicated in Re KCA Deutag UK Finance plc [2020] EWHC 2977 (Ch) at paragraph

32, the court does not require certainty in this respect, but there must at least be a reasonable prospect that the scheme will be recognised and given effect in those jurisdictions, so as not to be capable of being undermined by action by dissenting creditors against the business and assets. In the instant case, in essence this involves the question of whether the Plan is likely to be recognised and given effect in Nigeria where the main Operating Company is based.

92. In addition, since the point has been raised by IDC in correspondence, I should also briefly consider whether the Plan would be regarded as effective in South Africa to compromise the rights of IDC under the IDC Preference Share Subscription Agreement which is governed by South African law.

93. In relation to the position in Nigeria, I was shown a letter opinion dated 21 February 2022 addressed to the Company from SPA Ajibade & Co, a firm of lawyers in Lagos, Nigeria. That letter consented to it being used in court in the current proceedings but only on a non-reliance basis. I reiterate the point which I made above concerning the need for proper (CPR compliant) expert evidence in this case.

94. The opinion from the Nigerian lawyers is to the effect that the order sanctioning the Plan would not be recognised as a foreign judgment in Nigeria, because it was not a monetary judgment and Nigeria has not adopted any international agreements or the UNCITRAL Model Law providing for recognition of foreign insolvency proceedings. The opinion continued, however, to express the view that if a Plan Creditor was to sue the Company in Nigeria on the basis of a debt compromised by the Plan, it would be likely that a Nigerian court would regard any such Plan Creditor who had had the opportunity to participate in the process under Part 26A as being bound by the result *res judicata*.

95. I have no contrary evidence to suggest that this view is misconceived. It also seems to me that all Plan Creditors, in particular, Afreximbank, Ecobank and IDC who have made points in correspondence concerning the Plan, have had ample opportunity to participate in the Part 26A process for the reasons that Miles J outlined in the Convening Judgment and to which I have referred above.

96. In my judgment, subject to the point as regards compliance with the CPR, that opinion gives me sufficient basis upon which to conclude that the Plan would be likely to be recognised and given effect against such Plan Creditors in Nigeria.

97. As regards the position in South Africa, I have received a letter opinion from a Mr. Riza Moosa, a lawyer with CMS RMPartners Proprietary Limited in Johannesburg. Mr. Moosa explains his prior relationship with the Company in respect of the First Plan, and concludes his opinion with a statement of truth. His opinion is in full and analytical terms and concludes that recognition of the Plan in South Africa would depend upon the application of South African common law, and in particular the doctrine of comity. He opines that the Plan would be likely to be recognised in South Africa as a matter of comity, as compromising the claims of IDC. He gives a number of reasons. These include that similar proceedings for the compromise of claims exist under South African law, that IDC had the opportunity to participate in the Plan proceedings under Part 26A and in particular to attend the convening hearing and contest the order being made under section 901C(4); that IDC's rights

in relation to the Company were not solely governed solely by South African law, but were also governed by other laws (i.e. the law of Mauritius as regards the Preference Shares themselves, and English law as regards the Intercreditor Agreement); and that IDC would not be worse off under the Plan than it would have been in the event of the relevant alternative in which it would be out of the money.

98. In paragraph 7.13.30, Mr. Moosa's opinion states his understanding that even if 966 voted in favour, the Plan would only be sanctioned if the court was satisfied that it offers a better outcome than the relevant alternative to each Plan Participant. There is some possible confusion in that paragraph as to whether Mr. Moosa envisaged that the court would be applying the same test as when exercising a cram-down power under section 901G. For the reasons that I have explained, that is not the test that I have applied in this case, but as it is, I am satisfied that Plan Participants (other than 966 which voted in favour) will be no worse off under the Plan than in the relevant alternative in which they would be out of the money. I would therefore expect Mr. Moosa to confirm that this nuance makes no difference to his opinion, but would ask that he expressly confirms that this is so.

99. Subject to that point and confirmation in a form compliant with the CPR, I consider that Mr. Moosa's opinion gives me sufficient basis upon which to conclude that the Plan would be likely to be recognised and given effect against IDC in South Africa.

Conclusion

100. After sending this judgment in draft to the parties, I was provided with CPR-compliant confirmatory reports from each of the experts in relation to foreign law. Those reports confirmed, in a satisfactory form, the opinions that the experts had previously expressed, and, in the case of Mr. Moosa, that the point made in paragraph 98 above made no difference to his opinion. The reports also confirmed, in particular, that the experts had understood and had complied with their overriding duty to the court in accordance with CPR 35.3.

101. In these circumstances, and for the reasons that I have given, I consider that I have the necessary jurisdiction and that it is appropriate, in my discretion, to sanction the Plan.