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Case No: CR-2023-003062

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

7 Rolls Buildings,
Fetter Lane,
London,
EC4A 1NL

Date: 15 June 2023

Before:

THE HONOURABLE MR. JUSTICE MILES

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In the matter of Chaptre Finance plc
and in the matter of the Companies Act 2006

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- -

David Allison KC and **Ryan Perkins (**instructed by **Allen & Overy LLP)**
for **the Applicant**

- -

APPROVED JUDGMENT

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

Mr Justice Miles:

1. This is an application by Chaptre Finance plc (**the Plan Company**) for permission to convene three meetings for certain of its creditors (**the Plan Creditors**) to consider and if thought fit, approve a restructuring plan (**the Plan**) under part 26A of the Companies Act 2006 (**the 2006 Act**).

2. The Plan Company was incorporated for the purpose of financing the construction of a biomass power plant in Teesside (**the power plant**) which is designed to produce electricity by burning wood pellets and chips. Once it becomes operational the power plant will be the largest of its kind in the world.

3. The power plant is owned by a special purpose vehicle called MGT Teesside Limited (**MGT**). MGT and the Plan Company are subsidiaries of Chaptre Holdings Limited (**HoldCo**). These three companies comprise what is called **the Group** for present purposes.

4. The construction of the power plant was contracted to a third party contractor which agreed to ensure that the power plant became operational by January 2020. However, there were a number of delays and alleged defects in the work carried out by the contractor. Further delays were caused by the COVID-19 global pandemic. The power plant is now projected to become fully operational in July 2023. Once it becomes operational, the power plant will produce very substantial cash flows through the sale of electricity under a long-term contract with guaranteed prices backed by the UK government.

5. The delays and defects in the construction of the power plant have severely adversely affected the Group's liquidity and the Group now faces an imminent cash flow crisis. On current projections, without new capital the Group will run out of liquidity and become cash flow negative in late September 2023. It will fall below its usual minimum liquidity requirement of £15 million earlier than that; indeed on current projections in July 2023. In these circumstances the Group urgently requires an injection of new money in order to avoid formal insolvency proceedings.

6. The Group's shareholders and some of the Group's financial creditors have agreed to provide a new £80 million super senior loan facility (**the super senior facility)** to bolster its capital.

7. The proposed Plan is part of this wider restructuring of the Group's capital. The purpose of the Plan is to enable the Group to make various amendments to the existing contractual arrangements between the Group and the Plan Creditors so that the Super Senior Facility can be put in place. The power plant will then become operational shortly after the Plan is sanctioned and the directors, with the assistance of financial advisers, anticipate that the Group will then be able to carry on business as a solvent going concern and that all of the Plan Creditors will be held whole at least in respect of principal and in respect of some of their interest.

8. The Plan Company now seeks an order convening three class meetings of creditors (**the Plan Meetings**). There is a lock-up agreement by which a large proportion of the stakeholders have agreed to support the restructuring, including the Plan. I shall return to this below.

9. The factual background is set out in the first witness of Mr. Matthew Booth, a director of each of the Group Companies. I have also been assisted by the clear and comprehensive skeleton argument produced by counsel for the Plan Company on which I heavily draw in setting out the background.

The Plan Company and the Group

10. As already noted, the Group consists of HoldCo, the Plan Company and MGT. All are incorporated in England. The power plant is owned by MGT. The basic corporate structure of the group is that HoldCo owns the entirety of the Plan Company and MGT. 50 per cent of the share capital of HoldCo is owned by a company controlled by Macquarie and the other 50 per cent is owned by a company controlled by PKA. Macquarie is an Australian infrastructure investor and PKA is owned by certain Danish pension funds.

Finance Structure

11. The Group has four key groups of creditors. They have been defined in the evidence as, one, the Funder Creditors; two, the Hedging Bank Creditors; three, the Pellet Supplier and four, the shareholders in their capacity as creditors. The first three of these groups comprise the proposed classes of creditors under the Plan and together constitute the Plan Creditors. The shareholders are not parties to the Plan but they have signed the lock-up agreement and will be responsible for funding at least half and likely more of the Super Senior Facility.

12. First, the Funder Creditors comprise lenders (**the Funders**) under seven facilities with an aggregate drawn principal amount of approximately £652.2 million (the Senior Facilities). These are subject to a common terms agreement which sets out a common package of covenants, events of default and so forth. Second, there are export credit agencies of Finland and Korea which have provided guarantees or credit insurance to the lenders under certain of the Senior Facilities. These export credit agencies (**the ECAs**) will have counter-indemnity claims against the Group and be subrogated to the rights of the lenders if they are required to make any payments to the lenders under the relevant Senior Facilities. They are contingent creditors at the moment.

13. Third, there is one bank which has a liquidated claim against the Group for approximately £4.1 million in respect of certain terminated swaps (**the Closed-Out Hedging Bank).**

14. The Plan Company is a borrower under two of the Senior Facilities and a guarantor of the other five, for which MGT is the principal obligor. MGT is the counter-party to the swap documentation with the Closed-Out Hedging Bank and the Plan Company is a guarantor of those liabilities. All of these claims are governed by English law.

15. The second key group of creditors is the Hedging Bank Creditors. These comprise four banks which have entered into various swaps with the Group that remain open and have not been closed out. They are designed to hedge exposure to inflation, interest rates and foreign exchange rates. They are all governed by ISDA Master Agreements, governed by English law and are subject to the Common Terms Agreement.

16. MGT and/or the Plan Company are the counter-parties to the relevant agreements and/or MGT's obligations are guaranteed by the Plan Company. The Hedging Bank Creditors are contingent creditors of MGT and the Company because the swaps have not been closed out.

17. The third of the groups of creditors is **the Pellet Supplier**. This is an American company called Enviva Wilmington Holdings, LLC. It is the supplier of wood pellets to be used as fuel in the power plant. The key contractual document is a biomass supply agreement between the Pellet Supplier as seller and MGT as buyer (**the Pellet Supply Agreement**). There are various other contracts between those parties, including certain working capital arrangements. They are all governed by English law. The Pellet Supplier has agreed to defer MGT's obligation to pay for the wood pellets until they are actually burnt in the power plant.

18. In the event of a termination of the Pellet Supply Agreement, MGT would have a contractual obligation to compensate the Pellet Supplier for its loss of profit, to be determined in accordance with an agreed contractual formula. The Pellet Supplier is therefore a contingent creditor of MGT for the amount of any future termination payment.

19. The Plan Company is not itself a party to the Pellet Supply Agreement. It is party to a security agreement executed in 2016 (**the Issuer Debenture**) and under that it gave a covenant in favour of the Security Trustee to pay any sums owing to MGT under the Pellet Supply Agreement. However, that covenant is enforceable by the Security Trustee. The Plan Company has more recently assumed a direct liability to the Pellet Supplier pursuant to a Deed Poll, to which I shall return.

20. Finally, there are loans which have been advanced by the shareholders to HoldCo with an aggregate drawn down principal amount of approximately £355 million (**the Shareholder Loans**). There are downstream loans from HoldCo to its subsidiaries. These were required to provide the Group with initial financing for the project and with liquidity in response to the delays and defects in the construction of the power plant.

The Ranking of the Existing Debt

21. The Plan Creditors have a common security package over the assets of the Group. The ranking of the existing debt is governed by an Intercreditor Agreement. In outline, the current ranking is as follows:

    (1) The claims of the Funder Creditors and the Hedging Bank Creditors rank first (and *pari passu* among themselves);

    (2) The claims of the Pellet Supplier rank second; and

    (3) The shareholder loans (and the on-loans of the proceeds from HoldCo to MGT) rank last.

The Plan Company's Financial Difficulties

22. As already mentioned, the construction of the power plant was scheduled to be completed and the power plant was to be fully operational by January 2020. However,

as a result of the construction delays already mentioned, the completion date for construction was delayed until 15 February 2021. The COVID-19 pandemic then struck.

23. In May 2021, MGT terminated the construction contract with the contractor. Arbitral proceedings between MGT and the contractor are currently under way. Following termination of that contract, MGT took responsibility for managing the construction of the power plant leading to significant additional costs and delays. In addition, a number of technical defects in the design and construction of the power plant were identified, which required remediation.

24. The power plant began operating in July 2022. However, management decided to carry out a programme of design and modification works from January 2023 to resolve various problems that had been encountered. The Group and its technical advisers believe that the technical issues will be sufficiently resolved to allow operations to recommence in July 2023. At that point MGT will be able to benefit from a contract with a government-backed agency called the Low Carbon Contracts Company which will guarantee a 15-year fixed power price until December 2035 indexed to the CPI. This will provide the Group with a significant and stable source of revenue.

25. Mr. Booth has explained that the various delays and operating problems have strained the Group's liquidity. Loans of approximately £140 million were provided by the shareholders in 2020 to 2022 to save the Group from running out of money. By December 2022, these loans had been fully utilised. In October 2022, MGT engaged Cantor Fitzgerald Europe (**Cantor**) to lead a process for the purpose of raising new money from third parties and/or selling the Group's assets. Cantor contacted a large number of prospective bidders of which some 25 signed non-disclosure agreements and were sent initial information.

26. Many bidders were concerned that the transaction was simply too challenging and there were only two near-final offers on the table by the start of April 2023. These both required material concessions from the Funders in relation to the existing debt, including the writing off of substantial parts of the funding. The Funders were unwilling to accept those terms and negotiations with the relevant bidders came to an end in May 2023.

27. It therefore became clear that the Funders and Shareholders themselves were the only realistic source of new money, and starting in late April 2023 a series of proposals were put forward by the Funders and Shareholders. The Funders had been reluctant to lend a significant amount of new money. Of the £80 million required, the Shareholders have agreed to fund up to £53 million of the facility with the balance being provided by the Funders who have already committed to lend approximately £27 million.

28. The new money, that is to say, the intended Super Senior Facility, will only be made available if various amendments are made to the Intercreditor Agreement and other documents, essentially to confer priority on the Super Senior Facility and allow for the enhancement of some of the existing debt. Such amendments would require the unanimous consent of the Plan Creditors in order to be implemented contractually.

Absent such consent, the amendments are being sought to be implemented through the Plan.

29. Mr. Booth explains that the Group has continued to be in regular contact with the Pellet Supplier since the second half of 2022, when a payment deferral arrangement was put in place. On 17May 2023 the Group provided the Pellet Supplier with a copy of the term sheet agreed by the Funders and Shareholders and there have continued to be communications with the Pellet Supplier and its legal advisers.

30. On 14June 2023 MGT received a letter from the Pellet Supplier raising various concerns about the Plan and requesting further information. The letter also raised concerns that the proposed Plan would materially and adversely affect the rights of the Pellet Supplier, and the Pellet Supplier also stated that it would be concerned by any suggestion that it as a class of creditors should at any stage be crammed down in the event that it does not approve the Plan. The letter also raised an allegation that there may have been events of default under the Pellet Supply Agreement and contained a reservation of the Pellet Supplier's rights.

31. The Pellet Supplier indicated in the letter that it was considering whether to appear at this hearing, but in the event chose not to do so. It has not, therefore, been represented at the hearing and no further representations or submissions have been made by it to the court on this occasion.

The Lock-Up Agreement

32. On 31May 2023 a Lock-Up Agreement was signed by the Plan Company, MGT, HoldCo, the Shareholders, Finnvera one of the ECAs, the Hedging Bank Creditors and certain of the Funder Creditors. The Lock-Up Agreement requires the signatories to commit to supporting the Plan. As at today's date, the Lock-Up Agreement has been entered into by the following Plan Creditors:

    (1) Funders holding in excess of 87 per cent of the lending commitments under the Senior Facilities;

    (2) The Closed-Out Hedging Bank;

    (3) All of the Hedging Bank Creditors, and

    (4) Finnvera.

The Deed Poll and the Deed of Contribution

33. On 1 June 2023 the Plan Company executed two deeds, namely a Deed Poll and a Deed of Contribution. By the Deed Poll, the Plan Company has undertaken to pay the Pellet Supplier any amounts owing by MGT to the Pellet Supplier. I have already mentioned the Issuer Debenture under which the Plan Company is liable in respect of such amounts, but the Deed Poll ensures that the Pellet Supplier is a direct creditor of the Plan Company.

34. Under the Deed of Contribution, MGT has been given a right of contribution against the Plan Company for an equal proportion of any payments that MGT may make in

respect of the sums owing to the Plan Creditors so that the liabilities are borne between MGT and the Plan Company *inter se* as if they were joint principal debtors.

Summary of the Plan

35. The Plan will make a number of amendments to the Intercreditor Agreement, Common Terms Agreement and certain other contractual documents. The principal purpose of these amendments is to introduce the Super Senior Facility into the finance structure. As already mentioned, the principal amount of the Super Senior Facility is £80 million. That will be repayable on a date falling three years after it was first advanced.

36. Throughout the negotiations the Funders have been given opportunities to participate in £40 million of the Super Senior Facility and to date the Funders have committed to lend a total of just under £27 million. The Funders continue to have the right to elect to participate in the Super Senior Facility as the participation deadline falls two days after the date of the intended Plan Meetings.

37. The balance of the Super Senior Facility will be provided by the Shareholders who are therefore in effect backstopping the facility. In mechanical terms, the Plan will authorise the Plan Company to execute a number of restructuring documents as agent and attorney on behalf of the Plan Creditors. A detailed summary of the amendments is given in the explanatory statement, a draft of which I have read. For present purposes the key amendments to be effected by the Plan may be summarised as follows.

38. First, the Intercreditor Agreement will be amended so that the new Super Senior Facility ranks ahead of the other liabilities.

39. Second, in return for participating in the Super Senior Facility, a proportion of the participating Funders' existing claims under the Senior Facilities will be elevated in ranking (the elevated debt). The elevated debt will rank behind the Super Senior Facility but ahead of the other debt, pursuant to both of the waterfalls set out in the Intercreditor Agreement and the Common Terms Agreement.

40. The proportions of elevated debt depend on the date when the Funder committed under the proposed Super Senior Facility. In short terms, the default position is that for every £1 committed, £2 of the relevant Funders' claims under the Senior Facilities will be classified as elevated debt. However, where Funders committed to lend in excess of their pro rata share of the Senior Facilities in the Super Senior Facility before 31 May 2022, there is a six to one elevation in respect of the excess as elevated debt. I was told that some six Senior Creditors had committed in that way in respect of sums in excess of a pro rata share.

41. Third, no payments will be made in respect of the existing debt owing to the Funder Creditors until the Super Senior Facility and the elevated debt have been repaid in full. There is a cash sweep mechanism in that regard and there are also provisions in relation to the post-enforcement waterfall. I do not need to go into the details of those at this stage.

42. Fourth, if the sums owing to the Funder Creditors are not repaid by their maturity date, the Funder Creditors will forbear from taking any enforcement action for a period of 18 months, provided the Group is actively pursuing the refinancing of the unpaid sums.

43. Fifth, there will be a form of "springing" priority for Hedging Bank Creditors. In short, in the post-enforcement waterfall, if the Super Senior Facility has not yet been repaid in full, any realised losses payable to the Hedging Bank Creditors will be paid immediately after the elevated debt is paid. Otherwise, any realised losses payable to the Hedging Bank Creditors will rank *pari passu* with the debt owing to the Funder Creditors in the post-enforcement waterfall. This, therefore, represents a change in that the Hedging Bank Creditors will not simply rank *pari passu* for all purposes with the Senior Funders.

44. Sixth, there is a revised treatment of the Pellet Supplier. Under the amended Intercreditor Agreement and the amended Common Terms Agreement, prior to enforcement any sums owing to the Pellet Supplier will be paid in full. I was taken through the terms relating to the cash sweep and it was explained that the cash sweep only comes into operation in respect of cash sums in excess of ordinary operating activities, including payments to be made in the usual course of things to the Pellet Supplier under the Pellet Supply Agreement.

45. In the event of enforcement of the claims security under the new amended Intercreditor Agreement, the claims of the Pellet Supplier will be subordinated to the Super Senior Facility. The Pellet Supplier is, as already explained, already subordinated to the Funder Creditors and the Hedging Bank Creditors and this will remain the case.

46. The new Intercreditor Agreement has, however, been drafted so as to ensure that the Pellet Supplier is not prejudiced by the enhanced ranking of the Shareholders' loans. In broad outline this is achieved by limiting the secured liabilities ranking in priority to the Pellet Supplier to an amount equal to the sums owing to the lenders of the Super Senior Facility, the Funder Creditors and the Hedging Bank Creditors less the debt owed to the Pellet Supplier. As it was explained to me, this operates so that if the Plan is sanctioned, the quantum of debt to which the Pellet Supplier will be subordinated will only increase by the amount of the Super Senior Facility.

47. This particular element of the structure was introduced following the issue of the practice statement letter (**the Practice Statement Letter**) on 1 June 2023. The letter from the Pellet Supplier, which I have already referred to, states that the Pellet Supplier is concerned that the Plan will operate to subordinate any liabilities owed to it under the Pellet Supply Agreement to a substantial amount of additional liabilities and pre-existing funding which currently ranks junior to the Pellet Supplier. As it was explained to me by counsel for the Plan Company, the second of these concerns is not correct. It will, it seems to me, be a matter for further communication between the parties to see whether agreement can be reached on this point, but the documents that I was taken to appear to make good the submission of counsel for the Plan Company.

The Relevant Alternative

48. By section 901G of the 2006 Act, the relevant alternative is to find as whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned. On the evidence I have considered, I am satisfied that if the Plan is not sanctioned, the Plan Company and the Group will run out of money in a short period.

49. Specifically, I was taken to the Group's most recent cash flow forecasts which show that it will be operating with very little available cash throughout August and will run out of money entirely by mid-September 2023, absent the Super Senior Facility. I also accept the evidence of Mr. Booth that it is likely that the Group would drop below its minimum liquidity threshold of £15 million by mid-July and would thereby be operating with very little head-room throughout August and early September 2023, and would in fact collapse some weeks before mid-September, as it considers it needs a minimum liquidity threshold of some £15 million in order to operate and this will be breached by late July 2023.

50. The Plan Company has been informed that the Shareholders and the Funders would be unwilling to lend any new money unless the Plan is sanctioned and there is no other realistic source of new money to cover the cash flow shortfall. I am also satisfied that the most likely alternative if the Plan is not sanctioned are formal insolvency proceedings. These will probably be an administration in respect of MGT and a creditors' voluntary liquidation with respect to the Plan Company. The administrators would most probably attempt to obtain funding from the Funders to run a sales process for the business as a whole rather than breaking it up and selling it piecemeal. This scenario is, in my judgment, the most likely relevant alternative to the Plan.

51. The Plan Company has obtained a report from Alvarez & Marsal (the A & M report) to assess the likely returns to the Plan Creditors in the relevant alternative. According to that report, the Funder Creditors and the Hedging Bank Creditors would be likely to obtain a recovery in the range of 13 to 29 per cent of the sums owing to them. The Pellet Supplier would receive nothing as it is subordinated to the Funder Creditors and Hedging Bank Creditors under the Intercreditor Agreement.

52. A & M's opinion is that if the Plan is sanctioned, all of the Funder Creditors are likely to recover 100 per cent of the principal amounts owing to them plus some additional interest. This is the case regardless of how much of the Funder Creditors' claims are converted into elevated debt. Second, the Hedging Bank Creditors would likewise be paid in full if and when any sums fall due under the relevant swaps. Thirdly, the Pellet Supplier will be paid any sums that fall due under the Pellet Supply Agreement from time to time.

53. This forecast is based on management's expectation that once operational, the power plant will produce substantial and secure cash flows over a long period of time.

The Convening Hearing

54. I turn to the issues to be determined at this hearing. The application is made under section 901C(1) of the 2006 Act. The procedure for convening a hearing under part

26A is governed by the Practice Statement of 26 June 2020. In short summary, the court's function of a convening hearing is to consider:

(1) Whether the relevant creditors or members have been given sufficient notice of the hearing;

(2) Whether the jurisdictional conditions are satisfied and whether there is any jurisdictional roadblock, and

(3) Whether the class meetings proposed by the company are properly constituted.

(4) The function of the court at the convening hearing is emphatically not to consider the merits or fairness of the Plan. That is a matter for any sanction hearing, depending on the outcome of the Plan Meetings.

Notice of the Convening Hearing

55. The Practice Statement contemplates that the scheme or plan creditors will be given notice of the convening hearing. The appropriate period of notice is a fact-sensitive matter, it depends on the complexity of the scheme or plan, the urgency of the Company's financial position, the sophistication of the scheme/plan creditors and the extent of prior consultation with them, and any other relevant factors.

56. In the present case the Practice Statement Letter was circulated to the Plan Creditors on 1 June 2023, 14 days before this hearing. As to this, the Funder Creditors and the Hedging Bank Creditors have been negotiating with the Group for months. Indeed, the essential features of the Plan are derived from the term sheet put forward by the Funder Creditors and the Hedging Bank Creditors in April 2023. Moreover, the Funder Creditors and Hedging Bank Creditors are represented by a single legal team (Linklaters) and a single financial adviser (EY). They are clearly sophisticated creditors.

57. The Plan Company has been liaising with the Pellet Supplier and its legal representatives since mid-May 2023. Moreover, since the proposal is that the Pellet Supplier will be placed into a class of its own, there are no issues of class composition that affect the Pellet Supplier. I have already referred to the letter of 14 June from the Pellet Supplier. That letter raises issues about the time it has had to consider the proposed Plan since it was launched and says that it does not accept that there have been constructive communications with the Pellet Supplier throughout the period since December 2022, when there appear to have been negotiations with the lenders. It says that the only real communication was the presentation of a Restructuring Support Agreement on 18 May 2023, only 14 days before the proposed Plan was launched. The letter, as I have already said, goes on to ask for certain further information.

58. I am satisfied that the Plan is urgent, given the Group's liquidity position and the nature of the relevant alternative. I have explained that on the evidence there is a real risk that the Group's business would collapse by late July 2023, and of course further steps need to be taken in order for relevant meetings to be held and the court's sanction sought, depending on the outcome of those meetings. In the circumstances, I am satisfied that sufficient notice of this hearing has been given. None of the Plan

Creditors has actually objected to the orders being sought and none has suggested that they need more time before being able to make representations for the purposes of this hearing.

59. I also take account of the matter I have already mentioned, namely that the one party which has raised some concerns, namely the Pellet Supplier, is to be placed into a class of its own.

Jurisdiction

60. I turn to issues of jurisdiction. Section 901A of the 2006 Act contains two conditions, A and B, which must be met.

61. As to condition A, I am satisfied that the company has encountered or is likely to encounter financial difficulties that will or may affect its ability to carry on business as a going concern. I have already set out the nature of the Group's liquidity crisis and the reasons for it. I have also concluded that the likely alternative to the Plan being sanctioned is imminent insolvency.

62. As to condition B, I am satisfied that what is proposed between the Company and the Plan Creditors is a compromise or arrangement the purpose of which is to eliminate, reduce, prevent or mitigate the effects of the financial difficulties of the Plan Company. The purpose of the Plan, as I have already explained, is to introduce substantial new capital into the Group, which is, on the evidence before me, obviously needed in order to enable it to survive as a going concern.

63. At the convening hearing, the court may also refuse an order if it concludes that there are obvious roadblocks to sanction. There are no difficulties here with international jurisdiction. The relevant companies are English and all of the claims to be compromised by the Plan are governed by English law. I am satisfied that the use of the Deed Poll and the Deed of Contribution as part of the Plan are not roadblocks to sanction. The Deed Poll is designed to ensure that the Pellet Supplier is a direct creditor of the Plan Company so that the Pellet Supplier can be included as a Plan Creditor and compromised by the terms of the Plan.

64. The Pellet Supplier is already a creditor of MGT under the Pellet Supply Agreement. I have also referred to the Issuer Debenture under which the Plan Company is liable to the Security Trustee for any sums owing by MGT under the Pellet Supply Agreement. However, the effect of the Deed Poll is to make the Plan Company itself a direct obligor to the Pellet Supplier.

65. Similar Deed Polls have been used in a large number of previous schemes and plans sanctioned by the court and I need not refer to them. The present case is considerably less artificial than some of the previous cases involving the use of a Deed Poll. The Plan Company is not a newly-incorporated SPV, rather it is already a guarantor or obligor in the Group and is already liable for the vast majority of the Group's debt. Moreover, as I have already said, the Plan Company is already liable to the Security Trustee for any amount owing by MGT to the Pellet Supplier.

66. As to the Deed of Contribution, the Plan Company has always been liable as a guarantor or borrower of all of the debt owing to the Funder Creditors and the

Hedging Bank Creditors. The Deed of Contribution does not create a new creditor relationship with any of the Plan Creditors, that is concerned with the relationship between the Plan Company and MGT *inter se*. Such deeds have again often been used in schemes and plans and I see no reason to think that its use in this case represents a reason why the Plan will not be sanctioned in due course.

Class Composition

67. The principles of class composition are very well-known. The basic rule is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. As already explained, the Plan Company proposes three Plan Meetings, namely a meeting of the Funder Creditors, a meeting of the Hedging Bank Creditors and a meeting of the Pellet Supplier alone. The first meeting will also include the Closed-Out Hedging Bank in respect of its claim.

68. I am satisfied that this proposal is appropriate. The Funder Creditors have the same or substantially the same existing rights against the Plan Company. Their claims rank equally under the existing Intercreditor Agreement and are subject to the Common Terms Agreement. In the relevant alternative, they would have the same right to share in the proceeds, enforcing the security and sharing in any shortfall in the insolvency proceedings. Under the Plan they will receive the same commercial deal. I will come back to the position of the Closed-Out Hedging Bank in a moment, as there may be an argument that it has different rights.

69. The Hedging Bank Creditors have the same or substantially the same rights as one another against the Plan Company. They have contingent claims which will differ in quantum depending on the nature of the asset or index which underlies the relevant swap, but their claims are of the same nature. Their claims rank equally under the existing Intercreditor Agreement and are subject to the Common Terms Agreement. In the relevant alternative they would have the same right to share in the proceeds of enforcing security and prove for the shortfall. Under the Plan they will receive the same commercial deal, albeit one which is slightly different from that offered to the Funder Creditors in relation to the post-enforcement waterfall, which also does not include any right to participate in the Super Senior Facility.

70. It is proposed that the Pellet Supplier will vote in a class of its own, given that it is subordinated to the other classes of Plan Creditors under the existing Intercreditor Agreement. The usual rule is that a valid meeting requires the attendance of two persons in the class, but this does not apply to a class containing only one creditor or shareholder (see *Altitude Scaffolding Limited* [2006] BCC 904 at 18).

71. The Plan Company also contends that if the Pellet Supplier does not attend its Plan Meeting so that a valid Plan Meeting does not take place in respect of that class, the court retains a power under section 26A of the 2006 Act to cram down the Pellet Supplier at the sanction hearing. That is not a matter that need be addressed further today.

72. Counsel for the Plan Company have properly raised three possible issues in relation to these classes. The first arises from the imposition of the new Super Senior debt. There are many schemes or plans where new Super Senior Facilities have been introduced in

order to prevent the collapse of a company. Where all of the relevant creditors in the class have been invited to participate in the new money, the class is not fractured by this alone. Moreover, there are a number of cases of schemes or plans where a company has offered various benefits to creditors who agree to participate in lending the new money, including the elevation in the ranking of those creditors' existing claims. Again, it has been held that such benefits do not fracture the class provided they are available to any creditors who agree to participate in lending the new money by the relevant deadline. (See e.g. *Re Primacom Holding GmbH* [2013] BCC 201; *Re Noble Group Limited* [2019] BCC 349; *Re ED&F Man Treasury Management plc* [2022] EWHC 2290 (Ch) and *Re ED&F Man Holdings Limited* [2020] EWHC 433 (Ch)).

73. In the present case, all of the Funders have been informed that they are entitled to participate in the Super Senior Facility up to £40 million on a pro rata basis. They will also be eligible to do so until two business days after the Plan Meetings. The benefits associated with the Super Senior Facility are open to all Funders who choose to participate. It is correct that the six to one elevation was only available to Funders who signed the Lock-Up Agreement by 31 May 2023 in respect of any lending commitments exceeding the relevant Funder's pro rata share. However, that was available to all Funders.

74. I come back to the position of the Closed-Out Hedging Bank, which is in a different position. It has not been and will not be permitted to participate in the Super Senior Facility and to that extent it can be regarded as having rights which are different under the Plan from those of the Funder Creditors. On the other hand, I note the following points. An affiliate of the Closed-Out Hedging Bank was given the opportunity to participate in the Super Senior Facility. It is also to be noted that the amount owing to the Closed-Out Hedging Bank is comparatively small, being about £4.1 million, and the Closed-Out Hedging Bank has already signed the Lock-Up Agreement.

75. I had some hesitation about whether the Closed-Out Hedging Bank should be placed into a separate class. However, counsel persuaded me that the rights of the Closed-Out Hedging Bank are not so dissimilar of those of the Funder Creditors as to make it impossible for them to consult together with a view to their common interest. The principal question that will have to be considered by the creditors in that class is whether to support the plan under which the Super Senior Facility will be interposed above all existing debt. The choices for the creditors are fairly stark ones, where recoveries in the alternative scenario of a formal liquidation or administration of the Group Companies would yield relatively small returns and where on the projection supported by A & M, recoveries for creditors in the event of the Plan succeeding are to hold them whole.

76. I also take into account pragmatically the fact that the Closed-Out Hedging Bank has already agreed to support the Plan by signing the Lock-Up Agreement and that it does not appear at this hearing in order to contend that it should be placed into a separate class.

77. A second point that has properly been raised is that there are certain differences between the interest rates and maturity dates of the claims of the class of Funder Creditors. However, I consider that is irrelevant to class composition, given the nature of the relevant alternative, which is a formal insolvency proceeding in which the

expected recoveries under the four creditors Senior Facilities and closed-out hedging arrangement would leave them with a substantial shortfall, even as regards principal. Similar points apply to the Hedging Bank Creditors. Their claims involve a variety of different swaps including interest rate swaps, currency swaps and inflation swaps. However, these differences would be irrelevant in the relevant alternative, namely a formal insolvency.

78. A third potential issue arises from the fact that certain of the Funders benefit from guarantees for credit insurance provided by the ECAs. If the Group defaults, then those Funders paid by the ECAs will be subrogated to the Funders' rights. I am satisfied this is not a reason to fracture the class of Funder Creditors. It is well-established that class composition is determined by the rights of the creditors against the company and not their rights *inter se* or against third parties, including guarantees. I am also satisfied it makes sense to the ECAs themselves to be in the same class as the Funders whose debts they guarantee. This is because in the relevant alternative, the ECAs would simply stand in the shoes of the relevant Funders under their rights of subrogation and indemnity.

Timetable

79. The proposed directions as for summoning and conduct of the Plan Meeting are set out in the draft convening order. In broad terms the timetable is as follows. The relevant Plan documentation, including the explanatory statement, notice of Plan Meetings and proxy forms will be circulated to the Plan Creditors as soon as reasonably practicable after this hearing. The deadline for the submission of the proxy forms by Plan Creditors is to be 5 p.m. London time on 3 July 2023. The Plan Meetings are to take place on 6 July at 2 p.m. London time and the sanction hearing is to take place on 13 July 2023. I am satisfied that this is an appropriate timetable.

80. I have read the draft explanatory statement and I am satisfied with its contents as a matter of form and language used.

81. In the circumstances I shall make an order convening the three Plan Meetings in the terms of the draft put before the court.

(This Judgment has been approved by Mr Justice Miles.)

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com