THE HIGH COURT

[2024] IEHC 738

[Record No. 2024/247 COS]

IN THE MATTER OF BARCLAYS BANK IRELAND PLC

AND

IN THE MATTER OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF SECTIONS 450 & 455 OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF A PROPOSAL FOR A SCHEME OF ARRANGEMENT BY WAY OF RECONSTRUCTION

BETWEEN

BARCLAYS BANK IRELAND PLC

APPLICANT

AND

BARCLAYS ADMINISTRATION GERMANY LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Michael Quinn delivered on the 20th day of December 2024

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PART 1: BACKGROUND

1. The applicant, Barclays Bank Ireland Plc is a subsidiary of Barclays Bank plc, of which Barclays Plc is the ultimate parent. It is an Irish licensed credit institution regulated by the Central Bank of Ireland ("CBI") and European Central Bank ("ECB"). It conducts business throughout Europe directly from its headquarters in Ireland and through branches in nine jurisdictions within the EU. It is one of the principal operating entities in the Barclays Group and conducts the majority of the group's cross-border banking and investment services in the EU and European economic area. As at 31 December 2023 it reported holding assets worth €143 billion.

2. Each branch is subject to supervision for the local conduct of business by national supervisory authorities.

3. The business of the applicant is corporate and investment banking, global market services, private banking and wealth management and retail banking which comprises personal

credit card services, loans, deposits, instalment purchase financing, and electric point of sale financing.

4. One of the branches which conducts retail and consumer business operates from Hamburg, Germany. That branch has 2.3 million customers and €4.6 billion in deposits, including credit balances in current accounts, and €4.3 billion in net loans and advances to customers. It employs 650 persons fulltime. Its operations account for 3% of the business activity of the applicant.

5. In 2022 a decision was made by Barclays to sell the business of the Hamburg branch. The decision was made for strategic reasons. The group had decided to discontinue consumer services in that region.

6. A competitive sales process was undertaken and in 2023 a buyer was located, BAWAG PSK. ("BAWAG"). BAWAG is a credit institution registered in Vienna, Austria. It is a wholly owned subsidiary of BAWAG Group AG. The BAWAG Group is a regulated financial institution providing savings, payment, lending, leasing, investment, building society and other such services to retail and business customers in Austria, Germany, Switzerland, The Netherlands and elsewhere in western Europe and the U.S.A. It already has a presence in the German retail banking market through a branch registered in Stuttgart.

4 July 2024 Agreement

7. On 4 July 2024 the applicant and BAWAG signed an agreement (the "4 July 2024 Agreement") for the transfer and acquisition by BAWAG of the European consumer bank business of the applicant ("the Target Business").

8. The Agreement provides (clause 4) that the Target Business be transferred to BAWAG by two steps as follows:-

(a) The applicant would first transfer the Target Business to a NewCo, which became the respondent in this application, Barclays Administration Germany Limited

(BAGL) pursuant to an Irish law governed scheme of arrangement pursuant to Part 9 of the Companies Act, 2014; and

(b) By a second step, to occur one minute later, the NewCo would merge into BAWAG by a cross boarder merger by acquisition. BAWAG would acquire by "universal succession" the Target Business pursuant to the provisions of Directive 2019/2121 of 27 November 2019 as regards cross border conversions, mergers and divisions ("the Mobility Directive"), as transposed in the State by S.I. no. 233 of 2023, the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations, 2023 (the "Cross Border Regulations") and as transposed correspondingly in Austria.

9. Each of these steps is subject to approvals by this court, by the European Central Bank and by regulators in Germany and Austria. This judgment relates to the applications for orders which are required to implement the first step. Those are an order pursuant to s.453 of the Act for sanction of the scheme of arrangement and an order pursuant to s.455 of the Act providing for the transfer of certain assets, liabilities and contracts of the applicant to BAGL. I have decided to make those orders.

10. The court was informed that the consideration is a price calculated in accordance with a formula which will yield a small premium over net assets of the Target Business. The principal benefits for the applicant are wider commercial advantages, notably the ability to focus on corporate and investment banking.

11. The structure of the transaction established by the Agreement is that at 23:59 hrs CET on the day on which the scheme becomes effective the assets, liabilities and contracts, with some exceptions, of the Target Business will transfer to BAGL. One minute later BAGL will merge with BAWAG. In this manner, the Target Business will be separated from the remainder of the applicant's activity. The merger of BAGL with BAWAG will achieve a seamless transfer

of the Target Business to BAWAG. The applicant says that the purpose of this structure is to ensure a minimum of disruption or other effects on customers, employees, suppliers, creditors and other contract counterparties.

12. The grounding affidavits demonstrate that if the applicant were to follow a conventional sale process it would encounter numerous challenges all of which would be disruptive of the business itself and disruptive to customers, employees, creditors and others. The concept of 'universal succession' is common in merger transactions. The structure proposed in this case is best described as 'partial universal succession', the part being only the assets, liabilities and contracts associated with the Hamburg branch of the applicant. The applicant submits that this route is particularly appropriate having regard to the following:-

(1) The necessity to transfer customer deposits and other liabilities with clarity and certainty.

(2) The practical and administrative challenges of obtaining consent from at least 2.3 million customers and other third parties.

(3) The seamless transfer of a complex contractual framework which supports the information technology infrastructure associated with the Target Business.

(4) The expectations of regulators that the transfer can be achieved with certainty and finality at a nominated fixed point in time.

13. A better understanding of the complexities associated with a sale transaction can be gained by describing the assets, liabilities and contracts intended to be transferred. The "Target Assets" are described in para. 4 of the proposed scheme as comprising the following:-

(a) Financial assets, being receivables due by customers located in Germany and Austria.

(b) Goodwill.

(c) Tangible assets comprising equipment, office furniture, fixtures and other operational assets.

(d) Intellectual property rights.

(e) Financial models.

(f) Customer data.

(g) Books, records, electronic files and documents.

(h) All rights associated with the assets.

14. The scheme identifies categories of assets which will be retained by the applicant ("Retained Assets") and are therefore excluded from the transfer including the following:-

(a) Cash and cash equivalents.

(b) Claims for VAT and other tax refunds relating to periods ending prior to the scheme effective date.

(c) Tax returns and books and records relating thereto.

(d) Certain retained trademarks and other intellectual property.

(e) Receivables due from any affiliate of the applicant.

(f) Receivables due under a securitisation programme.

(g) Certain other assets which are not used for the operation of the Target Business.

15. The Target Liabilities are liabilities arising from consumer customer contracts including obligations to depositors, and other creditors providing services to the Hamburg branch.

16. The Target Agreements are detailed in an extensive schedule to the scheme. They comprise a variety of agreements with counter parties both external and within the Barclays Group. They include 104 framework agreements relating to shared services, 122 other framework agreements, 125 "single order" agreements and "change orders" relating to a variety of services shared with Barclays Group, 11 sets of general terms and conditions with external counterparties, 39 standalone agreements with individual counterparties for the provision of

services, 2 licence agreements, and 20 other agreements governing such matters as data processing and privacy, customer authentication, electricity contracts, outsourcing, insurance and a Google payment service agreement.

17. In the grounding affidavit for orders convening the scheme meeting sworn 5 September 2024 Mr. Francesco Ceccato, Chief Executive of the applicant describes the challenges which would be encountered if the business were to be sold otherwise than by the method proposed through the intended transaction of a scheme and scheme orders transferring assets and liabilities, followed by the proposed merger.

18. The most significant challenge in terms of volume would be the requirement to obtain consent of counterparties including customers. Those complexities and risks were evaluated carefully and were considered to be disproportionate from a legal, regulatory, commercial and practical prospective.

19. The applicant describes alternatives which it had considered, apart from an asset sale. These included a direct merger under the Cross-Border Regulations, a transfer pursuant to Part 3 of the Central Bank Act, 1971, in which case the transfer could only be made to another Irish banking license holder, which the buyer is not, and a division under the Mobility Directive. Consideration was also given to proceeding by way of a creditors scheme of arrangement.

20. By contrast the applicant has explained that if orders can be made by this Court pursuant to s. 455 of the Act for the transfer of the Target Assets, Liabilities and Contracts firstly to the respondent, which would then merge with BAWAG, this will enhance the legal certainty associated with the transaction to the benefit of all interested parties.

Employees

21. Neither the scheme or the merger will of themselves effect any transfer of employment contracts. Once BAWAG becomes the operator of the Target Business, employees in the branch will automatically transfer to BAWAG by operation of s. 613A of the German Civil Code,

which is the German transposition of the Directive on the protection of employees on transfer of undertakings ("the TUPE Directive"). BAWAG will assume all rights and obligations in connection with the employment of transferred employees with effect from the merger effective time. They will therefore "bypass" BAGL. Employees have the right to object, in which case the employment relationship will not transfer. The applicant says that any such persons will be redeployed. I return later to communications with employees, but the court was informed that approximately seven employees have stated their objection.

Other approvals

22. Apart from the orders applied for in this application a series of other regulatory approvals is required as follows.

The relevant ECB exemption for BAGL

23. If this court makes the orders sought, and if the subsequent merger of BAGL and BAWAG is approved, BAGL will for one minute be deemed to be carrying on "banking business" for the purpose of the Central Bank Act, 1971 for which it would require a licence. Therefore an application was made to and granted by the European Central Bank for an exemption from the requirement that BAGL obtain a banking license, under the "temporary credit institution exemption". This is an exception to the requirement to hold a banking licence where the institution concerned which will hold the regulated business only for a very short period of time, and where doing so is necessary to formally complete a series of legal transactions which are required to merge such an institution with a regulated entity.

24. On 22 November 2024 the respondent received confirmation that no authorisation to take up the business of a credit institution is required. Therefore, it now holds the exemption required.

ECB approval of merger

25. Under the Austrian Banking Act, a merger of an Austrian credit institution with another entity requires regulatory approval. Since BAWAG qualifies as a significant credit institution directly supervised by the ECB the ECB is the competent authority for such an authorisation. An application for approval of the merger was made by BAWAG on 25 July 2024 and at the time of hearing this application the necessary approval was still awaited.

Competition law

26. The transaction triggered a requirement for a merger control notification to the German Federal Competition Office. Notice was given to that office on 24 July 2024 and clearance was received on 9 August 2024.

Austrian merger approval process

27. Under the Austrian transposition of the Mobility Directive the merger between the respondent and BAWAG would become effective by operation of law at 00:00 CET (Central European Time) at the beginning of the day after the Vienna Commercial Court enters registration of the merger in the Commercial Register. This will be the final step in the process. A filing has been made by the respondent and BAWAG with the Vienna Commercial Court. That application process can only be completed after the approvals described above have all been issued.

28. At the conclusion of the hearing of the application for scheme sanction and related orders this Court heard, in separate proceedings (2024 No. 248 COS), an application for a pre-merger certificate pursuant to the Cross-Border Regulations. The court performed the required examination of the proposed merger and determined that the respondent had complied with the pre-merger requirements of the Regulations. The court declared its intention to order the issue of a certificate pursuant to Regulation 39 of the Regulations that the respondent BAGL has complied with and has properly completed the pre-merger requirements of those Regulations.

At the request of the applicant and BAGL, the court has deferred making this order pending the final stage of the ECB process for the merger.

PART 2: THIS APPLICATION

29. The applicant has applied for three orders as follows:-

(1) An order pursuant to s. 453(2) of the Companies Act, 2014 that the scheme is sanctioned by the court.

(2) That the scheme become effective at a time which is defined by reference to the completion of all the steps described above.

(3) An order pursuant to s. 455(2) of the Companies Act, 2014 that certain assets and liabilities of the transferor, namely the Target Assets, the Target Agreements, and the Target Liabilities shall at the scheme effective time be transferred from the applicant to the respondent BAGL.

30. Section 453 provides as follows:-

"453(1). If the following conditions are satisfied, a compromise or arrangement shall be binding, with effect from the date of delivery referred to in s. 454(1) [that is delivery to the Registrar of Companies of the sanction order] *on all the creditors or class of creditors referred to in s. 450(1)(a), or all the members or class of members referred to in s. 450 (or both as the case may be) and also on*

(a) the company, or

(b) in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(2) The conditions referred to in subsection 1 are:-

(a) a special majority of the scheme meeting, or where more than one scheme meeting is held at each of the scheme meetings, votes in favour of a resolution agreeing to the compromise or arrangement

(b) notice –

(i) of the passing of such resolution or resolutions at the scheme meeting or scheme meetings, and

(ii) that an application will be made under para. (c) to the court in relation to the compromise or arrangement, is advertised once in at least two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated, and

(c) The court, on application to it, sanctions the compromise or arrangement."

31. Section 455 provides as follows:-

"455(1) Where:-

(a) an application is made to the court for the sanctioning of a comprise or arrangement under s. 453(2)(c); and

(b) it is shown to the court that:

(i) the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies (emphasis added)*, and*

(ii) under the scheme the whole or any part of the undertaking, assets or liabilities of any company concerned in the scheme (in this section referred to an "old company") *is to be transferred to another company* (in this section referred to as the "new company"),

the court may, either by the scheme order or by any subsequent order, make provision for all or any of the matters set out in subsection (2).

(2) The matters for which the court may make such provision are:-

(a) the transfer to the new company of the whole or any part of the undertaking, assets or liabilities of any old company;

(b) the allotting or appropriation by the new company of any shares, debentures, policies or other like interests in that company which, under the comprise or arrangement, are to be allotted or appropriated by that company to or for any person.

(c) the continuation by or against the new company of any legal proceedings pending by or against any old company.

(d) the dissolution, with or without winding up, of any old company;

(e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement

(3) where the scheme order or a subsequent order made under this section provides for the transfer of assets or liabilities, those assets shall, by virtue of the order, be transferred to and vest in and those liabilities shall by virtue of the order, be transferred to and become the liabilities of the new company, and in the case of any assets, if the order so directs, freed from any charge which is, by virtue of the comprise or arrangement, to cease to have effect."

32. If this transaction is to proceed by the structure proposed in the 4 July 2024 Agreement, an order for transfer of part of the undertaking, assets and liabilities of the applicant is required. The power to make such an order is discretionary. Before the court can consider the exercise of the power it must be satisfied that the two conditions identified in s. 455(1)(b) are met. The

first of these in 455(1)(b)(i) is that the scheme is "for the reconstruction of any company or companies or the amalgamation of any two or more companies". It is not suggested that any companies be amalgamated. One of the issues raised before this court is whether the scheme is one for "reconstruction" of the applicant.

33. The second precondition is that under the scheme the whole or any part of the undertaking assets or liabilities of the scheme company are to be transferred to another company.

Legitimus Contradictor

34. When these proceedings first came before court on an application for directions three questions were identified in respect of which McDonald J. directed that the court hear submissions by an independent legitimus contradictor, having regard to the fact that the only respondent to the application is BAGL, a wholly owned subsidiary of the applicant.

35. The issues identified may be summarised as follows.

36. Firstly, orders under s. 455 can only be made where the scheme is a scheme for reconstruction or amalgamation. The traditional approach to the meaning of the word "reconstruction" is that before and after the reconstruction the reconstructed entity is owned and controlled by the same or substantially the same shareholders. That test will be satisfied once the Target Assets are transferred to BAGL. But one minute later BAGL will merge with BAWAG, which will become the full owner. By that immediate second step the substantial continuity, or identity, of ownership will be lost. A question arises as to whether, with knowledge of this pre-agreed second step occurring so immediately, this court can properly treat the scheme as a scheme of reconstruction. For the reasons stated later I concluded that the scheme is for reconstruction of the applicant. (See Part 7).

37. Secondly, although the scheme is not intended to impair the rights of creditors, it will effect a unilateral novation of third party contracts and liabilities to the respondent, followed

by the transfer of the contracts and liabilities by universal succession pursuant to the merger. The issue identified was whether in those circumstances it is appropriate to proceed, as is being done in this case, by way of a members scheme and not a creditors scheme. I have concluded that a members scheme is appropriate in this case. (See paragraphs 45-70).

38. Thirdly, questions were identified by reference to EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels Regulation). In particular, Article 18.2 provides that proceedings against a consumer may only be commenced in the state of the consumer's domicile. If these proceedings were treated as proceedings against the applicant's customers, who are consumers domiciled predominantly in Germany, this court would not have jurisdiction under the Regulation. I have concluded that these proceedings are not commenced against the customers, although related questions concerning the application of the Brussels Regulation required consideration. (See Parts 5 and 6).

39. McDonald J. made it clear that the court was not necessarily expecting that the appointed legitimus contradictor would oppose the application, but that the court would be assisted on those questions by submissions researched independently of the applicant.

40. Following the directions hearing contact was made with the Bar of Ireland. The Council of the Bar agreed to the appointment of counsel and solicitors to appear and nominated Ms. Geoghegan S.C. and Mr. Murphy B.L. (instructed by William Fry Solicitors). I am grateful to those counsel and solicitors, and to the applicant's counsel and solicitors Ms. Smith S.C. and Mr. Lavelle B.L. (instructed by Arthur Cox Solicitors), for the comprehensive and informative research and constructive submissions on the issues raised.

41. As described by counsel themselves, the role of the legitimus contradictor was to research and identify case law and legal principles relevant to the questions identified, analyse differing arguments or conclusions which may be open to the court in relation to the questions

raised and to express their preferred conclusions. While differing on certain aspects of the analysis, the legitimus contradictor did not disagree with the fundamentals of the applicant's submissions. In truth therefore they served more as an amicus curiae than a legitmus contradictor, although I shall retain the latter description.

42. The first of the three questions, namely whether the scheme is a scheme of "reconstruction" arises in relation to s. 455. It is a precondition to the making of orders under s. 455 that the scheme be a scheme for reconstruction or amalgamation. Whilst the making of such orders is a fundamental feature of the structure proposed by the applicant, I shall examine the "reconstruction" question after I have considered the substance of the proposed transaction and scheme and whether to sanction it pursuant to s. 453.

The scheme

43. The scheme was approved by a meeting of the sole member held on 27 September 2024.

44. The essential features of the scheme are as follows:-

A. The Target Assets, Target Agreements and Target Liabilities of the applicant, which comprise the undertaking of the Hamburg branch will be transferred to the respondent Barclays Administration Germany Limited (BAGL). No new shares will be issued by BAGL.

B. The scheme will become effective on the "Scheme Effective Date" which is the earliest on which each of the following preconditions are satisfied.

   (a) This court having made an order pursuant to s. 453 of the Act sanctioning the scheme.

   (b) This court having made an order or orders under s. 455 of the Act providing for the transfer of the Target Assets, Target Agreements and Target Liabilities to BAGL.

(c) A copy of the order sanctioning the scheme has been delivered to the Registrar of Companies pursuant to s. 454 of the Act.

(d) That the Scheme Condition has been satisfied.

C. The Scheme Condition is that the Vienna Commercial Court enters into its Commercial Register the registration of the merger between the respondent BAGL and BAWAG.

D. If the Scheme Condition is not satisfied by 4 January 2026 at 23:59 CET, or such later date as the parties agree, the scheme and scheme orders shall terminate and all of the agreements provided for in the scheme shall be of no effect.

E. Employee relationships are not affected directly by the scheme, or the scheme orders. Employee contracts will transfer automatically to BAWAG by operation of law pursuant to s. 613a of the German Civil Code at the merger effective time, to the extent that employees do not object to their transfer.

A members' scheme

45. Although its title suggests that the scheme is between the applicant and the respondent, in fact it is a scheme made between the applicant and its sole member Barclays Bank Plc, the "Scheme Shareholder".

46. The respondent was joined in these proceedings to the intent that it will be bound by the scheme and any order made. It was not separately represented at the sanction hearing.

47. The first requirement under s. 453 is that the scheme is a "comprise or arrangement". As between the applicant and the Scheme Shareholder, the arrangement is summarised as follows:-

(1) The Scheme Shareholder will be bound by the effect of the transfer of Target Assets and liabilities from the applicant to BAGL.

(2) The Scheme Shareholder foregoes any entitlement to receive shares in BAGL, although of course it is the indirect shareholder of BAGL through the applicant.

(3) The applicant and the Scheme Shareholder will receive the wider commercial benefits of the scheme. The grounding affidavits describe how the disposal of the consumer business of the applicant is a value enhancing exercise from the perspective of the Barclays Group as a whole.

48. The applicant submits that there is no compromise or arrangement with its creditors. The orders sought pursuant to s. 455 affect creditors in that they will be bound by the novation by operation of law of of their contracts to BAGL which will later merge with BAWAG.

49. The applicant made the decision that there was no requirement to convene meetings of creditors. All creditors were put on notice of and were entitled to be represented at the sanction hearing. None appeared. The question is whether the convening of a meeting only of members was an appropriate course in circumstances where the intended orders will have binding effect on creditors although their rights will not be written down or otherwise impaired.

50. The main creditors of the Target Business are 2.3 million retail customer with deposits of circa. €4.6 billion. The Target Business also had circa €9 million in trade and other creditors, including employees for accrued entitlements, professional services providers and others.

51. The scheme orders if granted will effect a transfer of these liabilities to BAGL.

52. The grounding affidavits describe how the interests of creditors are protected by key features of the overall transaction and the solvency status of all the parties.

53. The ultimate parent of the applicant is Barclays Group plc, which as of 30 June 2024 had total equity value of £71.8bn. As of 30 June 2024, the applicant had a total equity value of €7bn and a common equity tier 1 (CET1) capital of €5.8 billion, which exceeds its minimum regulatory requirement. It has a liquidity pool of €37.2 billion. It is supervised by the European Central Bank and the Central Bank of Ireland and has strong credit ratings.

54. BAWAG is a member of the BAWAG Group, which has a common equity tier 1 capital in excess of its regulatory minimum requirements, representing excess capital of €770 million as at 30 June 2024. It also has strong liquidity and credit ratings.

55. Due to growth in the level of deposits during the course of 2024 arising from new levels of business it is possible that on the date when the transfer and merger occur the liabilities of the Target Business may exceed its assets, although the solvency position of the applicant as a whole is more significant for this purpose. The applicant has granted an "Asset Gap Undertaking" to cover any such eventuality. The undertaking will crystalize as an obligation of the applicant on the coming into effect of the scheme. To secure that obligation the applicant will be required to deposit the estimated amount of that gap with BAWAG.

Deposit Guarantee Schemes

56. The applicant is subject to the deposit guarantee scheme operating in Ireland pursuant to the European Union (Deposit Guarantee Schemes) Regulations 2015 (S.I. No. 516/2015). Under that scheme deposits of eligible depositors are protected up to €100,000 per depositor per institution.

57. The applicant's German branch participates in a Voluntary Deposit Protection Fund established by the association of German banks. This provides "add on" protection in relation to deposits of participating banks, includes the Hamburg branch, beyond the statutory ceiling of the Irish deposit guarantee scheme.

58. BAWAG is a member of the Austrian statutory deposit guarantee scheme which extends to the protection of deposits taken through a branch in another member state, in this case Germany, again protecting deposits up to €100,000 per eligible investor per institution.

59. The applicant described what it characterised as a small risk for customers who hold deposits both in the German branch of BAWAG and in the Hamburg branch of the applicant. It is said that those "overlapping depositors" may benefit only from one protection ceiling

applicable to individual depositors at the German branch following completion of the transaction. The risk of a decrease in the combined deposit protection level due to such overlap would only affect depositors who maintain accounts at branches of both the applicant and BAWAG and who held credit balances in aggregate above the maximum possible compensation amount. Limited information was provided as to the likely number of such cases. Importantly, the applicant pointed out that all customers have been notified of the transaction and remain free to withdraw their deposits on demand at any time without any penalties or charges which they could do if they had concerns about any loss of deposit protection cover.

60. BAGL is not party to any deposit guarantee scheme. Therefore, there will be a period of one minute prior to the merger coming into effect when deposits will be held without deposit protection. This period of one minute will be outside ordinary business hours and is not perceived as creating any risk for depositors.

61. As far as concerns other creditors the applicant refers to the strong solvency and liquidity position of both the applicant and BAWAG as evidence that there is no increased risk to third party creditors arising from the transaction.

62. The question of whether it is appropriate to proceed by way of a members scheme or a creditors scheme in circumstances where no impairment is proposed as regards creditors, but where the effect of the scheme will be to unilaterally novate their claims to a successor entity, has been considered in a number of cases.

63. In re Clydesdale Bank, 950 SC, the Scottish Court of Session was asked to sanction a scheme of arrangement to implement an amalgamation of two subsidiaries of a bank. The scheme provided that all of the assets, liabilities and undertaking of one subsidiary would be transferred to the second subsidiary by order of the court, in consideration for new shares in the second subsidiary being issued to the parent company. The scheme was approved by meetings of the members of both subsidiaries. Since the liabilities were transferring to a

different entity a question arose as to whether the scheme constituted an arrangement between the companies and their creditors and as to whether it was necessary to hold creditors meetings. Lord Keith found that there was no requirement to hold such meetings and stated the following:-

> *"Our decision is that an arrangement of the kind that is proposed here is not an arrangement between the company and its creditors. That point does not seem to have been expressly decided in any reported case, but the two authorities that were cited to us suggest that that may have been the view taken by the English courts. Be that as it may, in view of our decision meetings of creditors are unnecessary under s. 206. In this case I appreciate that there may be no prejudice to creditors. It does not follow that in other cases of a similar arrangement creditors may not be prejudiced by the proposed arrangement, if carried out and in such a case creditors will be entitled to appear in response to the advertisement of the petition and object to the proposed arrangement. Apart from that I agree with your lordships that the position of creditors may have to be considered at a later stage in this petition under s. 208, if in response to further advertisement creditors appear and dissent. In such an event consideration will have to be given as to what, if any, provision should be made in their favour."*

64. I consider later the extent of notification to creditors which in this case was not only by advertisement but also by direct emails and letters.

65. In re TSB Nuclear Energy Investment U.K. Limited [2014] EWHC 1272 the court considered the effect on creditors of the statutory novation provided for in s. 900 of the Companies Act, 2006 (which corresponds to s. 455 of the Act). Henderson J. had the following to say:-

> *"The protection for creditors and other interested third parties is, I think, twofold. Firstly, any transfer of assets making use of s. 900 is subject to the approval of the*

court, so the court has a discretion to withhold approval in any case where it is not satisfied that creditors will be adequately protected. Secondly, and this is really the other side of the same coin, the court has jurisdiction under s. 900(2)(e) to make provision for dissenters which could include insisting upon any relevant form of protection of their interests. These aspects of the statutory scheme appear to me to give adequate protection to the interests of creditors and others, and make it clear that as a matter of jurisdiction the court is not precluded from approving a scheme under s. 900 if it includes what might otherwise be an unlawful distribution of the relevant companies assets."

66. The protection for dissenters referred to by Henderson J. namely s. 900(2)(e) appears also in s. 455(2)(e) of the Act which enables the court to make "provision for any persons who, within such time and in such manner as the court directs, dissent from the comprise or arrangement."

67. The question of whether a members scheme is appropriate where creditors may be affected by the scheme but where it does not impair or limit their rights was considered by the Federal Court of Australia in re Stork ICM Australia Pty Limited [2006] FCA 1849.

68. This case concerned a common form of scheme by which assets and liabilities of the scheme company would be transferred to other companies, in the same group, to be followed by a deregistration or dissolution of the transferor company without any consideration passing between the two and without any change in shareholdings. The transferring company had a range of ongoing expenses in connection with its operations which were typical trading and professional suppliers

69. Lindgren J. stated the position concisely as follows:-

"It is settled that in such circumstances the scheme is a members scheme only: in re Sandwell Park Colliery Limited [1914] 1 CH 589, in re Star T Company Limited [1930]

WN 4; re Clydesdale Bank Limited [1950] SC 30; re AGL Sydney Limited [1994] 13 ACSR 597; Royal Victorian Institute for the Blind Limited v RBS RVIB [2004] 206 ALR 581; SGIC Insurance Limited v Insurance Australia Limited [2004] 51 ACSR 470. The position of creditors is appropriately addressed on the second court hearing as a consideration relevant to the discretion whether to approve the scheme."

70. I adopt the analysis from those cases. The terms of the scheme and orders sought in this case do not impair or comprise the claims of creditors. The comprehensive advertisement and direct notification to creditors of the sanction hearing, detailed below, provide the necessary and adequate protection for dissenting creditors. This was an appropriate case in which to proceed by way of a members scheme and to hold a meeting of the scheme shareholder only.

PART 3: SANCTION OF THE SCHEME

71. Section 453 provides that a scheme of compromise or arrangement shall be binding where the conditions identified in subsection 2 are satisfied. Those conditions are:-

(a) That a special majority at the relevant scheme meeting has voted in favour of a resolution agreeing to the comprise or arrangement.

(b) Notice of the passing of the resolution and that an application will be made to the court in relation to the scheme is advertised once in at least two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated, and

(c) Where the court sanctions the scheme.

The scheme meeting and resolution

72. The applicant is a single member company in which the shareholder is Barclays Bank Plc.

73. Notwithstanding that the company is a single member company, a meeting of the shareholder was duly convened and held on 27 September 2024. Accompanying the notice of the meeting was an Explanatory Statement as required by s. 452 of the Act.

74. The Explanatory Statement described in detail the background to and purpose of the scheme, a description of the parties to the proposed transaction, details of the scheme itself, details of alternative structures considered, advantages of the scheme and a description of the consents of regulators and others required.

75. The Explanatory Statement contains all of the information required by s. 452 of the Act.

76. The meeting was attended by Mr. Ceccato, a director of the applicant and by a proxy duly appointed by the scheme shareholder.

77. A resolution was passed that the scheme be approved subject to any modifications, additions or conditions approved or imposed by this Court.

78. In TSB Nuclear Energy Investments, Henderson J. considered the position in relation to single member companies and the requirement in s. 453(2) that a resolution agreeing to the comprise or arrangement has been passed "at the scheme meeting".

79. Henderson J. had the following to say:-

> *"A point which I should deal with at this stage is whether there can be valid court meeting for the purposes of part 26 where there is only one member of the relevant class of shareholders. That point has been considered in a number of earlier cases, and it is now well established that where there is only a single member of the relevant class there can still be a valid meeting within the meaning of the relevant legislation, even though as a matter of normal usage, and in other statutory contexts, a meeting normally connotes that there are at least two people who are in a position to communicate with each other. This point was established by the judgment by Morritt J. (as he then was) in re RMCA Reinsurance Limited [1994] BCC 378. In a more recent case re Altitude*

Scaffolding Limited [2006] EWHC 1401 (CH); [2006] BCC 904 David Richards J. affirmed that proposition, while drawing the distinction of cases where there is more than one member of the relevant class but only one of them in fact attends the meeting. In those circumstances he held there is not a meeting within the normal meaning of the statutory provisions, the distinction being that there is at least a possibility of two or more members meeting together. That possibility does not, of course, arise where there is only a single member of the class. Indeed, as the judge pointed out a meeting can in fact be dispensed with in those circumstances, because it will established that a member or creditor may by his individual consent agree to be bound by a scheme."

80. The resolution was duly passed as required by s. 453(2).

Advertisement of the resolution and of this application

81. The provisions of s. 453(2)(b) were complied with by the publication of a notice of the passing of the resolution approving the scheme and of the intended application to this Court for sanction. The advertisements were published in the Irish Times, the Financial Times and Iris Oifigiúil in Ireland, in Borsen Zietung, a daily newspaper published in Germany, and in Der Standard, a daily newspaper published in Austria.

82. The form of the advertisement, was approved by the order of this Court (McDonald J.) made on 19 October 2024. It was a composite advertisement which gave notice not only of the scheme matters identified in s. 453, but also of the intention to apply to this Court on the same day for an order under Regulation 39 of the Cross-Border Regulations confirming compliance by BAGL with the pre-merger requirements identified in the Regulations.

83. The advertisements stipulated that any interested party wishing to appear at the hearing of the applications should give notice in writing to the applicant's solicitors on or before 28 November 2024. No such notice was received and no third party appeared at the hearing of this application.

PART 4: THE APPLICATION FOR SANCTION AND THE 'COLONIA INSURANCE' CRITERIA

84. In Re Colonia Insurance (Ireland) Limited and the Companies Acts [2005] IEHC 115 Kelly J. (as he then was) identified five matters in respect of which the court should be satisfied on an application for sanction of a scheme pursuant to s. 201 of the Act (the predecessor of s. 453), as follows:-

> " (1) The court must be satisfied that sufficient steps have been taken to identify and notify all interested parties.
>
> (2) The court must be satisfied that the statutory requirements and all directions of the court have been complied with.
>
> (3) The court must be satisfied that the classes of creditors are properly constituted.
>
> (4) The court must be satisfied that no issue of coercion arises in connection with the holding of the scheme meetings and voting.
>
> (5) The court must be satisfied that the scheme of arrangement is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interest might reasonably approve."

85. In this case none of these criteria have presented any difficulties. It is nonetheless important to summarise the evidence and conclusions, before moving to the more challenging questions arising.

(1) Identification and notification of interested parties

86. The order made on 14 October 2024 directed the applicant to use reasonable endeavours to notify the date and time fixed for the hearing to the following categories of parties:-

(1) Depositors of the Target Business

(2) Counterparties in respect of Target Agreements.

(3) Counterparties in respect of shared contracts and group agreements.

(4) Transferring employees.

87. At the time of obtaining those directions the company had 2.3 million depositors. All these customers were notified by email of the date and time of the sanction hearing, for the most part in the German language because the majority of the customers are based in Germany.

88. The notifications met the requirement of informing interested parties of the intended application for sanction of the scheme. They went further in that they described to customers the intended effect of the scheme orders that assets and liabilities would be transferred to BAGL, and of the intended merger with BAWAG and of the intended operation of the Target Business after the merger.

89. Mr. Ceccato swore a supplemental affidavit on 25 November 2024 stating that of the 2.3 million emails issued to customers there was a very low bounce back rate of approximately 1.47%. 37 telephone enquiries and 38 written enquiries were received from customers. Mr. Ceccato said that the primary reason for the enquiries was a concern by enquirers as to whether the emails were a scam or "phishing attempt".

90. No complaints or objections were received from any customers.

91. Separate communications were issued to appropriate representatives in the case of deceased customers and customers the subject of insolvency procedures.

92. Information communications were also issued to what were described as "prospective or intending customers". These were persons who had proceeded beyond the initial account application stage at the branch and had become customers of the applicant although they had not yet made deposits.

93. Communications were issued to all third party suppliers. At the time of hearing of the application two queries were received and responded to but no objections were received.

94. In respect of the counterparties to a number of shared contracts and group agreements, some of which are excluded from the effect of the intended transaction, the applicant entered negotiations with a view to securing continuity of service and making appropriate arrangements with BAWAG. Again, no complaints or objections were received in response these communications.

95. The applicant was party to two contracts with electronic payment platforms and related services in respect of which concern arose that because the contracts contained English governing law clauses the transfer may not be recognised in England. Therefore, they were excluded from the application for transfer orders. In an abundance of caution the applicant decided to treat those suppliers as creditors and they were given notice of the proposed transaction and of the scheme. No complaints or objections were received from those suppliers.

96. The company was a party also to contracts with nine counterparties where the contract provides for termination in the event of a change of control of the Target Business.The counterparties were in each case notified of the intended transaction and application to this court. At the time of the hearing eight of these nine had consented to waive the change of control termination right. Negotiations were ongoing with the final such party. Even if the final counterparty were not to waive the change of control condition, that contract could be terminated and the applicant says that any contractual rights accrued in favour of the counterparty would be honoured.

Employees

97. The applicant wrote to all employees explaining the effect of the proposed transaction. Although the scheme will not of itself have a direct effect on employees, whose position is protected by the German Civil Code, they were notified of the date and time of the sanction hearing.

98. The applicant employs 650 persons as "operational employees". It is also the employer of 45 "non operational" employees, being persons on various forms of extended leave. Those persons were given notice by ordinary post. At the time of the hearing of the application seven of the employed persons has stated their objection to transferring to BAWAG. There is no obligation on employees to give reasons for such objection. The applicant has stated that any person still objecting when the transaction comes into effect will be redeployed in the employment of the applicant.

99. I have detailed those communications because they evidence a comprehensive information campaign, beyond the statutory and court directed requirements, which enabled any party potentially concerned by the effects of the scheme and the merger to make an informed decision as to whether to object, which no party did. Therefore, all interested parties have been identified and notified.

(2) Statutory requirements and directions of the court

100. Statutory requirements and directions of the court concerning notification and consultation have all been complied with. (See paragraphs 81-83 and 86-99).

(3) Were classes properly constituted?

101. The only scheme meeting which was required to be held in this case was the meeting of the single member of the company. Therefore, no question arises as to the due and proper classification of the members of that class.

(4) Absence of improper coercion

102. This criterion is only relevant when considering the due conduct of scheme meetings attended by multiple parties at which a vote is taken and resolution passed by the required majority. In re Ballantyne Re [2019] IEHC 407 Barniville J. explained the meaning of this requirement as follows:-

"Such coercion must involve improper coercion or pressure by one creditor or group of creditors in a class on another creditor or group of creditors where it is sought to promote interests adverse to the class which the alleged coercing creditor or group is purporting to represent. So the concept of improper coercion is what is relevant and that is what Mr. Justice Kelly was talking about. All schemes involve an element of coercion, in the sense of a dissenting member being rendered bound by the scheme, notwithstanding its disagreement with the scheme, and it seems to me that that is not the sort of coercion that Mr. Justice Kelly was referring in the fourth criteria which he identified which the Court had to be satisfied with before it could sanction a scheme."

103. Clearly in the case of single member company where the scheme has been duly approved based on a comprehensive and compliant Explanatory Statement no question of improper coercion arises.

(5) An intelligent and honest person

104. The court must be satisfied that the scheme is one which an intelligent and honest person, a member of the class concerned, acting in respect of his interest might reasonably approve.

105. The court's function is not to "rubber stamp" a scheme. Equally it is no function of the court to second guess the judgment and decision made by the stakeholders in a properly conducted meeting of the relevant classes of members of creditors as the case may be.

106. These principles has been stated numerously and repeatedly in all of the cases, and have their origin in the judgment of Lindley L.J. in *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385 where he stated:-

"Now, it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on

sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to be their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.

While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some material oversight or miscarriage."

107. This statement was endorsed by Kelly J. in Re Colonia Insurance Ireland Limited where he emphasised that it is not the function of the court to act as a rubber stamp yet it should be slow to differ with creditors or members who are familiar with the scheme.

108. These principles were repeated by Barniville J. in re Ballantyne Re [2019] IEHC 407, in re Allergan [2020] IEHC 214, re Nordic Aviation [2020] IEHC 445, Fundlogic [2020] IEHC, re Xtrackers [2020] IEHC 330 and by this court in re Mallinckrodt [2022] IEHC 270.

109. The evidence in this case is that the scheme and the transaction which it facilitates are in the commercial interests of the applicant, of the scheme shareholder and the wider Barclays Group. The evidence of Mr. Ceccato was that the purpose of the transaction is strategic, namely to enable the Barclays Group to focus its activities in mainland Europe on investment and corporate banking.

110. The scheme and scheme orders are the first of two steps to implement the applicant's objective. The evidence is that these mechanics were chosen to achieve the objective with the

least possible disruption to customers, employees and other third parties, whether such disruption would flow from multiple legal complexities such as obtaining consent from every counterparty or from general execution risk.

111. There is therefore a clear and discernible purpose to the scheme and no question of the member approving a scheme otherwise than would any intelligent and honest person acting in respect of his own interests.

Discretion

112. All of the statutory requirements and court directions have been complied with and I have examined the factors identified by Kelly J. in Re Colonia Insurance. In every case however, the sanction remedy is discretionary and I am required to consider whether there are any other factors which are relevant before making the decision. No special considerations informing the exercise of discretion were drawn to my attention. It is necessary however to consider the questions of jurisdiction and recognition and the analysis of whether the scheme is truly a 'reconstruction' scheme for the purpose of Section 455.

Part 5: JURISDICTION

113. Since the overwhelming majority of customers, creditors and other counterparties are located outside the State, the court must consider the question of the recognition and effectiveness of the scheme in the relevant other jurisdictions. The starting point for this is jurisdiction.

114. There is no requirement that the court have certainty on the subject of recognition and enforcement under foreign laws, but the court ought to be satisfied by reference to credible evidence that it is not acting in vain (See *Re Van Gansewinkel Group* [2015] BCC 172, per Snowden J.).

Application of Part 9

115. Section 1002 of the Act extends the scheme of arrangement provisions in Part 9 to plcs incorporated and registered under the Act except to the extent that they are otherwise disapplied or modified, which has not been done in any manner relevant to this application. Therefore, as a matter of domestic company law it is clear that the court has jurisdiction to hear and determine this application.

International jurisdiction

116. Two separate questions arise. Firstly, submissions were made as to the applicability to these proceedings of Regulation EU 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels Regulation).

117. Secondly, I heard evidence and submissions as to whether, outwith the Brussels Regulation, the scheme and scheme orders would be recognised in the four jurisdictions in which customers, creditors and other third parties would be affected, namely Germany, Austria, the Netherlands and Luxembourg.

The Brussels Regulation

118. Article 1 of the Regulation states that it shall apply "in civil and commercial matters whatever the nature of the court or tribunal".

119. The term "judgment" is defined in Article 2 to mean:-

> *"Any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court."*

120. Article 1.2(b) stipulates that the Regulation shall not apply to *"bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings"* (emphasis added).

121. The applications for sanction of a scheme of arrangement and scheme orders are not "bankruptcy or proceedings relating to the winding up of insolvent companies or other legal persons". However, on first reading a question arises as to whether they are "judicial arrangements, compositions and analogous proceedings".

122. The Regulation does not cross refer to EU Regulation 2015/ 848 of 20 May 2015 on insolvency proceedings (recast) (the "Insolvency Regulation"). The Appendix to that Regulation lists the types of proceedings in each member state to which it applies. It does not list schemes of arrangement. By contrast, the Appendix includes for Ireland examinership pursuant to Part 10 of the Act. Schemes of arrangement confirmed under that Part 10 attract the recognition and enforcement benefit of the Insolvency Regulation. Part 9 schemes do not.

123. Although each of the Brussels Regulation and the Insolvency Regulation now in force is a recast, neither states in terms that Part 9 schemes of arrangement are within their scope. In *Re Van Gansewinkel* (op cit), Snowden J. observed that "it must be highly doubtful that the framers of Part II of the Judgments Regulation had schemes of arrangement in mind at all". This is relevant when I come to examination of Articles 8 (special jurisdiction) and 18 (consumer contracts).

124. In re Nordic Aviation Capital DAC [2020] IEHC 445 Barniville J. (as he then was) analysed the judgments of the courts of England and Wales on this subject notably re Rodenstock GmbH [2012] BCC 459, Magyar Telecom [2013] 1 BCLC and re Van Gansewinkel Groep [2015] BCC 172, all pre-Brexit cases. The question had also been considered by the Court of Justice of the European Union in *Nickel & Goeldner Spedition GmbH v Kintra UAB* [2015] QB 96 *and Comité d'enterprise de Nortel Networks SA v Rogeau* [2015] BCC 490.

125. Barniville J. concluded that the better view on this question and adopted in the English cases was that schemes of arrangement proceedings are not excluded from the application of the Brussels Regulation by Article 1.2(b). This view is based partly on the principle of "dove

tailing" as between the Brussels Regulation and the Insolvency Regulation, and this approach has been followed in a number of cases.

126. Even if there remained any doubt on this question for schemes of arrangement for insolvent or potentially insolvent companies, which I do not believe there is, I have no hesitation in holding that where the scheme relates to a solvent company the proceedings are not even "analogous" to bankruptcy or insolvency proceedings. This was clearly stated by David Richards J. in *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch.).

127. These are therefore "civil and commercial" matters within the scope of the Brussels Regulation.

Chapter 2 of the Brussels Regulation – jurisdiction

128. Article 4 states the basic principle that subject to special provisions in the Regulation persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

129. BAGL is the only respondent named on the originating notice of motion. It is incorporated and registered in the State.

130. The scheme shareholder is incorporated and registered in England. It has consented to the scheme and the making of the orders sought under s. 455. The next question is whether any consumers or other creditors are being "sued" in these proceedings, in which case the mandatory provisions of Article 18.2 would apply.

Article 8.1 and Article 18.2

131. Article 8.1 provides as follows:-

> *"A person domiciled in a Member State may also be sued… where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them*

together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

132. Article 18.2 provides as follows:-

"Proceedings may be brought against a consumer by the other party to the contract only in the courts of the member state in which the consumer is domiciled".

133. The significance of Art 8.1. for schemes of arrangement has been considered by Barniville J. in *Re Nordic Aviation DAC* (op cit) and in a number of the English cases. Article 18.2 has not required or received the same attention.

134. I shall return later to Article 8.1, but the first question the court needs to examine is whether Article 18.2 deprives the court of jurisdiction as regards customers or creditors domiciled outside the State, of which there are 2.3 million in this case.

135. If the applicant were to "sue" or bring proceedings "against" those customers, in the sense intended to be protected by Article 18.2, it would be obliged to do so in Germany.

136. It is intended that creditors, including the customers who are consumers, will be bound by the transfer order. That is the purpose of the s. 455 application. But they are not parties to the scheme itself. They have been given notice of the scheme and of the transaction, and informed that they may appear at and be heard at the sanction hearing. None elected to do so. No compromise, write-down or impairment of their rights or claims is sought by the scheme or the scheme orders. The effect would be that they are bound by the "universal succession" if the orders are made, a unilateral change in the identity of their counterparty.

137. The jurisdiction of the court to impose such a change by orders pursuant to s. 455 was expressly approved by Laffoy J. in *Citi Hedge Fund Services (Ireland) Limited* [2013] IEHC 287 [2013] IR 743.

138. The applicant and the legitimus contradictor both submit that Article 18.2 does not apply because proceedings are not being brought "against a consumer" in the manner in which Article 18.2 is intended to protect consumers. The applicant submits the following:-

(a) The customers are not named as parties to the proceedings.

(b) The scheme does not impose any arrangement or compromise on or vary any substantive rights or claims of customers.

(c) The scheme is between the company and its member, such that customers and creditors had no standing to vote for or against the scheme.

(d) It is the orders pursuant to s. 455 and not the scheme itself which would have the substantive effect of changing the counterparty to customers and other creditors.

139. The court was referred also to Recital 18 to the Regulation which states the objective of Article 18.2:

> *"In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."*

140. The legitimus contradictor cited academic commentary, namely a work by Magnus and Mankowski where the position was put as follows:-

> *"The purpose of s. 4 (of Chapter 11) of the Brussels Ibis Regulation is to protect the weaker party, here the consumer by rules of jurisdiction more favourable to its interests than provided for by the general rules. Recital 13 Brussels 1 Regulation underlines this as does recital 18, both as a statement of principle and policy. The special rules introduced by the provisions over consumer contracts serve to ensure adequate protection for the consumer, as the party deemed economically weaker and less experienced than the other, commercial, party to the contract. They can be aptly coined "protective jurisdiction". They aim at rebalancing, at the level of international*

jurisdiction, a contractual relationship that is unequal in principle. They exact a social justice, equality and economic benefit to the consumer. Tilting the jurisdictional balance in the consumers favour is not to discourage consumers from enforcing their rights and thus to strive (as far as it goes) for a not suboptimal level of regulation. Furthermore, in consumer contracts only limited party autonomy is accepted."

141. The authors go on to say that the protective regime established by Articles 17 – 19 deals solely and exclusively with individual claims in contract, and that those articles are not concerned with collective redress. The text of the Regulation does not state such a limitation to Article 18.2. Nonetheless, I am persuaded by this analysis and find that Articles 17 – 19 are directed at proceedings which are brought against a consumer to enforce contractual and other remedies, the most obvious example being recovery of loans. No consumer is called on by these proceedings to 'defend itself', in proceedings against it, in a manner which would warrant the protection of Article 18.2.

142. For these reasons I conclude that the provisions of Articles 18.2 do not apply to these proceedings.

Article 8.1 – co-defendants

143. Extensive submissions were made by all parties as to whether the domicile in the State of the respondent BAGL could be relied on to satisfy the expediency test to confer on this court jurisdiction over non-domiciled creditors of the applicant

144. For the reasons stated below I am not persuaded that Article 8.1 may be relied on to invoke jurisdiction to sue customers or other creditors, even non-consumers, on the ground that one 'defendant', BAGL, the wholly owned subsidiary of the applicant is domiciled in the State.

145. In *Re Van Gansewinkel* (op cit) Snowden J. considered the application of Article 8.1:-

"Article 8(1) would be potentially engaged provided that at least one creditor is domiciled in England and it is expedient to hear the "claims" against all other scheme

creditors together with the "claim" against him. In the instance case, the numbers and size of the scheme creditors domiciled in England were far from immaterial, and in my judgment they were sufficiently large that the test of expediency was satisfied. I therefore consider that I was entitled to regard all scheme creditors as coming within the jurisdiction of the English court under Article 8(1) for the purposes of the exercise of the scheme jurisdiction in relation to them."

146. In re Nordic Aviation (op cit) Barnville J. put it thus:-

"In most, if not all, of the English cases, the court has concluded that it would have jurisdiction under Chapter II, <u>often</u> in reliance on Article 8, on the basis that one or more of the scheme <u>creditors</u> were domiciled in the UK: Magyar Telecom, Van Gansewinkel, Re DTEK Finance PLC [2017] BCC 165 (Newey J.) and [2016] EWHC 3563 (Ch) (Norris J.) (" DTEK") and Lecta Paper. As that seemed to me to be a sensible approach, I was prepared to adopt it in the present case.

The Scheme Company relied on Article 4.1, Article 7(1)(a) and Article 8(1) of the Brussels Recast Regulation. I was satisfied that the court had jurisdiction under Article 4.1 and Article 8.1." (Emphasis added).

147. In Nordic Aviation at least one of the scheme creditors was domiciled in Ireland namely Citibank Europe Plc. That creditor was owed US$100 million by a company in the Nordic Aviation Group whose debt was guaranteed by the scheme company. Citibank was entitled to appear and be heard on the scheme company's application for scheme sanction and would be bound by the court's order. Barniville J. held that on that basis it could be regarded as person being "sued" in the courts of the State. He continued:-

"On the basis that those Scheme Creditors can be regarded as "defendants" (on the basis that they too could have appeared and opposed the application and would be bound by the result), and having regard to the fact that at least one of the Scheme

Creditors is domiciled in Ireland, I was satisfied that the court had jurisdiction in relation to the Scheme Creditors who were domiciled in other Member States, in accordance with the provisions of Article 8(1)."

148. Barniville J. continued:-

"I do not believe that it is necessary to establish that more than one Scheme Creditor is domiciled in Ireland or for the court to consider the size of the Scheme Creditor's claim in order for Article 8(1) to be engaged. In any event, the one Scheme Creditor who is domiciled in Ireland could not, having regard to the size of its debt (US$100 million), be said to be immaterial. I was satisfied that, in those circumstances, it was expedient to hear and determine the application to sanction the Amended Scheme insofar as it applied to all EU domiciled Scheme Creditors under Article 8(1)."

149. Barniville J. concluded that the scheme was likely to be recognised in other Member States of the European Union under the provisions of the Brussels Recast Regulation.

150. There are three important differences between this case on the one hand and Nordic Aviation and the English cases cited in it on the other hand.

151. Firstly, they concerned schemes between the company and its creditors, whereas this is a scheme between the company and its members. Secondly, unlike this scheme, in those cases the scheme compromised and impaired the interests and claims of creditors. Thirdly, the 'defendant' whose domicile in the State was relied on to invoke Article 8.1 was a creditor, unlike BAGL.

152. In the passages I have quoted both Snowden J. in Van Gansewinkel and Barniville J. in Nordic Aviation focused on the fact that the party domiciled within the State and whose domicile gave rise to the application of Article 8.1 as against others was itself a creditor.

153. No instance was cited to me of any customer or creditor domiciled in Ireland. BAGL is the only respondent and the only party intended to be affected by the scheme which is domiciled

in Ireland. It is a wholly owned subsidiary and not a creditor of the applicant. In those cases where Article 8.1 has been relied on to assume jurisdiction in respect of creditors generally relief was sought "against" at least one creditor in the form of the "writing down" or "compromising" provisions of the scheme.

154. The effect of the scheme orders if made pursuant to s. 455 is that assets, liabilities and contracts will transfer to BAGL. BAGL is a creature of the applicant and a consenting and willing transferee. It was a shelf company whose name was changed so that it could be utilised for the very purpose of receiving assets, liabilities and contracts of the applicant and later merging with BAWAG.

155. In the cases of Re Van Gansewinkel and Nordic Aviation the creditor whose domicile in the State of the scheme was relied on for Article 8.1 was being "sued" in the same way or in a claim "closely connected" to the claim against the other creditors.

156. I cannot accept that Article 8.1 can be invoked by relying on one "defendant" who is itself a wholly owned subsidiary of the applicant incorporated for the very purpose of receiving assets, liabilities and contracts of the Target Business pursuant to the scheme orders sought.

157. I would go so far as to say that in any civil or commercial proceedings it is difficult to countenance that Article 8.1 could be relied on by identifying as a "defendant" domiciled within the State a party which has been incorporated under the auspices of and is a wholly owned subsidiary of the "plaintiff" and in respect of whom the orders sought will have effects different to their effects on the non-domiciled parties against whom any relief is sought.

158. None of this is to say that in an appropriate case where even only one creditor or other party who is truly a defendant domiciled in the State and is to be affected by a scheme in the same or a corresponding manner as other parties domiciled elsewhere in the EU, the provisions of Article 8.1 would not apply, as was held in re Van Gansewinkel and Nordic Aviation. This is not such a case.

Conclusion as regards jurisdiction

159. As a matter of company law this court clearly has jurisdiction to hear and determine these proceedings pursuant to Part 9 of the Act of 2014.

160. The application is a commercial matter for the purpose of Article 1 of the Brussels Regulation and the Regulation applies to these proceedings.

161. The only respondent joined in the proceedings is BAGL which is domiciled in the State. Accordingly, this court has jurisdiction pursuant to Article 4.1 of the Regulation.

162. Article 18.2 does not apply because these are not proceedings "against a consumer".

163. The domicile in the state of BAGL cannot be relied on for the purpose of Article 8.1.

PART 6: RECOGNITION AND ENFORCEMENT

164. Article 36 of the Brussels Regulation provides that a judgment "given in a Member State shall be recognised in the other Member States without any special procedure being required."

165. Article 45 identifies conditions in which recognition of a judgment shall be refused. They include:

a) if such recognition is manifestly contrary to public policy ("ordre public") in the Member State addressed; and

b) if the judgment conflicts with the mandatory rules of jurisdiction for insurance, consumer or employment related claims.

166. The majority of the customers, creditor and other counterparties of the applicant are domiciled in Germany and the majority of the contracts with such parties are governed by German law. A small number of counterparties are domiciled in Austria, the Netherlands and Luxembourg. The applicant exhibited Legal Opinions addressing issues of recognition and enforcement in those four states, both from the perspective of the Brussels Regulation and under their respective rules on private international law as they apply to corporate measures.

Germany

167. There was exhibited an opinion of German counsel Dr. Patrick Cichy, a partner in Freshfields Bruckhaus Deringer. Dr. Cichy expressed the view that these proceedings and the scheme if confirmed would be recognised and effective in Germany.

168. In relation to the Brussels Convention Dr. Cichy stated:-

> *"The dominant view in German legal literature is that a scheme of arrangement is recognised as a judgment under Article 36 of the Brussels 1 Recast. The sanction of a scheme of arrangement is the result of a court driven process. During the scheme of arrangement process, the Irish High Court does not only have a notarising function or performs the role of e.g. a notary, but also examines whether the scheme of arrangement proposals are fair, reasonable and represent a genuine attempt to reach an agreement between a company and its creditors (in the case of a creditors scheme of arrangement) or members (in the case of a members scheme of arrangement, as with the scheme). Also under ECJ case law, the mere possibility of an adversarial procedure satisfies the requirements for a "judgment". During the scheme proceedings every affected creditor or member has the right to oppose the application for sanction e.g. in serving evidence and making submissions; it is precisely for this purpose he must be given notice (quoting Rodenstock [2011] EWHC 1104). Here the scheme itself does not seek to vary creditors rights and so creditors do not need to approve the scheme. However, we understand that creditors will be entitled to appear and object to ancillary orders under s. 455 of the Companies Act 2014 of Ireland effecting the transfer of the Target Business."*

169. Dr. Cichy concluded that under Article 36 of the Regulation no other process is required for recognition of the scheme and no consent of any counterparty is required for such recognition.

170. Dr. Cinchy considered Article 18 and stated the following:-

"The scheme is a member scheme of arrangement rather than a creditor scheme of arrangement and does not directly include any consumers. Consumers will only be directly affected because the transfer of the Target Business by operation of law that will also transfer the consumer contracts that form part of the Target Business. The terms and conditions of the consumer contracts will not change as a consequence of such transfer. There are also no debt cuts or measures similar to those found in the Equitable Life case, since the scheme would be used to effect a corporate reorganisation of the company. As a consequence, in our view, the scheme as a member scheme of arrangement does not qualify as a "proceeding against" a consumer by other party to a contract within the meaning of Article 18(2) Brussels Recast".

171. From the perspective of German private international law Dr. Cichy stated that the legal effects of the scheme depend on the "lex societatis", which for both the applicant and BAGL is Irish law.

172. As to the consequences Dr. Cichy stated the following:-

"…the relevant rights and obligations will be transferred to the acquirer (NewCo) as a whole by virtue of the scheme order, which we would categorise as transfer by way of (partial) universal succession. This means that the rights and obligations will be transferred automatically by operation of law. While an individual transfer of contracts would normally require the counterparties consent, it is possible under German law to transfer contracts by way of (partial) universal succession without such consent being required. Only such certain strictly personal rights cannot be transferred by way of (partial) universal succession".

173. Dr. Cichy does not "expect" that the transferred contracts in this case contain strictly personal rights and/or obligations and he concludes that the scheme if sanctioned would be recognised and effective in Germany.

174. In relation to Article 45, Dr. Cichy expressed the view that the scheme does not infringe on "German public order".

175. A separate Opinion in relation to the effect of the transaction on employees was provided by Dr. Boris Dzida, also of Freshfields Bruckhaus Deringer. Dr. Dzida confirmed that the proposed transaction will cause an automatic transfer of the employees' relationships from the applicant directly to BAWAG under the German laws on transfers of undertakings.

The Netherlands

176. The principal contract with a counterparty in the Netherlands is a service agreement relating to the provision of internet number sources, registration services and ancillary documents. An opinion was provided by Mr. Michael Broeders, admitted to the Bar in Netherlands, and a partner at Freshfields Bruckhaus Deringer. Mr. Broeders examined the position by reference both to the Brussels Regulation and to the principles of Dutch private international law. He stated his view that the scheme would qualify as a judgment within the meaning of the Brussels Regulation and that it would be recognised in the Netherlands pursuant to Article 36. Mr. Broeders considered it likely that Dutch courts would accept the grounds for jurisdiction applied by an Irish High Court having regard to the fact that the applicant is incorporated in Ireland. He concluded that *"the Irish proceedings would therefore likely meet all the requirements mentioned above. Consequently the Irish proceedings and the scheme would likely be recognised and enforceable in the Netherlands on the basis of general Dutch domestic principles of international law".*

177. Mr. Broeders confirmed his opinion that the rights and obligations between the applicant and its counterparties will be transferred automatically by operation of law and he

continued *"while an individual transfer of contracts would normally require the counterparty's consent, it is possible under Dutch law to transfer contracts by way of (partial) universal succession without such consent being required"*.

Austria

178. The principal Austrian contractual relationship intended to be transferred is an agreement with a company which provides credit reports/scorings in Austria. An opinion was given by Mr. Konrad Groller, also of Freshfields Bruckhaus Deringer. Mr. Groller confirmed that an order sanctioning the scheme would be regarded as a judgment and that there was no reason pursuant to Article 45 or otherwise why it would not be recognised and enforceable in Austria.

179. As regards recognition independently of the Brussels Regulation he stated:-

> *"According to Austrian case the law applicable to the legal person, inter alia, also determines its internal and external organisation and any questions relating to the legal effects of conversions, mergers and any forms of asset transfer under corporate law".*

180. Mr. Groller confirmed that it is possible under Austrian law to transfer contracts by way of partial universal succession without consent being required and that the scheme would be recognised and effective in Austria.

Luxembourg

181. Two of the agreements entered into by the applicant are with Luxembourg counterparties, namely a credit agreement and a data processing agreement. An opinion was exhibited made by Mr. Gregory Minne of the law firm of Arendt & Medernach in the Netherlands.

182. Mr. Minne stated that there is no exact legal equivalent to the scheme under Luxembourg law. He considered two options for recognition, both by reference to the Brussels Regulation as a judgment and secondly as a "court settlement".

183. Mr. Minne stated that the scheme and scheme orders would qualify as a judgment under the Brussels Regulation and therefore would be recognised pursuant to Article 36. He considered also whether any grounds for refusal of recognition would be available pursuant to Article 45. There is very limited Luxembourg legal doctrine on such a question, and Luxembourg international public policy is "constantly evolving by reference to case law and there would be some uncertainties". However, he expressed the clear view that there is no reason to conclude that the scheme would be contrary to Luxembourg public policy.

184. Mr Minne stated also that there would be strong arguments to deem that the scheme would qualify as a "court settlement" which would be recognised pursuant to Article 59 of the Regulation.

185. In summary Mr. Minne stated his opinion that the scheme, if sanctioned by this Court, and its effects would be recognised under Luxembourg law and by the courts of Luxembourg.

Conclusion on recognition and enforcement

186. I am satisfied from the opinions exhibited that the scheme and scheme orders will be recognised and enforceable in the relevant jurisdictions. Therefore, if the orders are made the court will not be acting in vain.

PART 7: IS THE SCHEME A RECONSTRUCTION SCHEME?

187. Orders pursuant to s. 455(2) for the transfer of assets and liabilities, can only be made where the arrangement is proposed "for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies".

188. The scheme is not for an "amalgamation" and the question arises whether it is for the "reconstruction" of the applicant.

189. The term "reconstruction" is nowhere defined in the Act. It is used in two other places as follows:-

(a) In the heading to s. 73, which concerns the disapplication of requirements in respect of paid-up capital where shares are allotted at a discount, and

(b) Section 621(2)(b) & (e), which relate to the priority of claims of employees on a winding up, save where the winding up is made for the purposes of reconstruction or amalgamation.

190. Neither of these sections contain any definition of the term reconstruction and their context is of no assistance.

191. There was drawn to the court's attention a series of cases in which the court was concerned with determining whether a scheme was truly a scheme of "reconstruction" within the meaning of the section. The question was considered in only one reported Irish case, *Re Patrick W. Keane v The Revenue Commissioners* [2008] ITR 57.

192. Most of the cases concern a question of whether the scheme qualifies as a reconstruction for the purpose of availing of exemption from stamp duty or other taxes. In these cases, being a reconstruction scheme is only one of the requirements to avail of exemption from stamp duty. Patrick W. Keane concerned an application of an exemption by s. 80 of the Stamp Duties Consolidation Act 1999. Section 80 required the following conditions to be complied with:-

(i) The acquiring company must have increased its capital with a view to the acquisition of the "undertaking" of an existing company or the acquisition of not less than 90% of the issued share capital of a target company.

(ii) The section requires that not less than 90% of the consideration comprises the issue of shares.

(iii) The scheme must be *"effected for bona fide commercial reasons and does not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to stamp duty, income tax, corporation tax, capital gains tax or capital acquisition tax"*.

193. The requirement that the scheme must be "bona fide" and not for the avoidance of tax is not stated anywhere in s. 455. There is no suggestion in this case that the scheme or the subsequent merger with BAWAG are otherwise than bona fide for a legitimate commercial transaction or that they are structured to avoid the payment of tax. The difficulty however is that in the judgments cited the focus is as much, if not more, on the various requirements of tax statutes than on the core question now before this court of whether the scheme is a reconstruction scheme from a company law perspective.

194. Nonetheless it is informative for my decision to consider the judgments on this subject. The starting point is re *South Africa Supply & Cold Storage Company. Wilde v same company* [1904] 2 CH 268. This was not a tax case. The decision turned on the question of whether a winding up was "for the purpose of reconstruction". That term had been used in the memorandum of association of the company and therefore this was not a matter of interpretation of a statute but of the memorandum of association. Another distinction from the present case is that the memorandum used the phrase "for the purpose of reconstruction", and not also the alternative words "or in connection with… a reconstruction", which appears in s. 455(1)(b)(ii). Buckley J. had the following to say:-

> *"The only question I have to determine is whether, in the case of each of these two companies, there has or has not been a winding up "for the purpose of reconstruction or amalgamation".*
>
> *Neither of these words, "reconstruction" and "amalgamation", has any definite legal meaning. Each is a commercial and not a legal term and even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term "reconstruction" or "amalgamation".*

Beyond that, I have to consider whether the winding up is "for the purpose of reconstruction or amalgamation". I cannot answer that question simply by reading the resolution for liquidation and seeing whether they are expressed to be "for the purpose" I have named; I must go further and ascertain whether, as a matter of substance and of fact, the winding up was arrived at for one of those purposes".

195. Later Buckley J. continued as follows:-

"What does "reconstruction" mean? To my mind it means this. An undertaking of some definitive kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same. Does it make any difference that the newcompany or resuscitated company does or does not take over the liabilities? I think not. I think it is nonetheless a reconstruction because from the assets taken over some part is excepted provided that substantially the business is taken and it is immaterial whether the liabilities are taken over by the new or resuscitated company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them. It is not therefore vital that either the whole assets should be taken over or that the liability should be taken over. You have to see whether

substantially the same persons carry on the same business, and if they do that, I can see, is a reconstruction." (Emphasis added).

196. The principles described by Buckley J. were followed in numerous English cases and by Edwards J. in Patrick W. Keane.

197. The concept of continuity of ownership was restated by Pennycuick J. in *Brooklands Selangor Holdings Ltd v. Inland Revenue Commissioners* [1972] All Er Reports p.76, by Ferris J. in *Switzerland Investments v. IRC* [1990] STC 448 and by Parke J. in *Fallon v. Fellows* [2001] STC 1409.

198. If one looks at the combined effect in this case of the scheme, the scheme orders sought and the subsequent merger of BAGL with BAWAG it is clear that 100% of the ownership of the Target Business will change to BAWAG. Viewing the entire transaction as one, it is a "mere sale" as Buckley J. put it. That is clear from the Acquisition Agreement dated 4 July 2024. That document states that the sale and acquisition will be implemented by the two-step process of the scheme orders to transfer assets, liabilities and contracts to BAGL, followed by the merger of BAGL by acquisition with BAWAG.

199. There are two other ways of looking at this question. I have been urged by the applicant, and the legitimus contradictor agrees, that that the court may examine firstly the scheme and the scheme orders sought and analyse the position at that point in time. If the scheme is for reconstruction of the applicant, the next question is whether it loses that character because of the second step, planned and agreed to occur one minute later, namely the merger between BAGL and BAWAG.

200. Yet another way of looking at this matter is that although assets, liabilities and undertaking associated with the Target Business will ultimately come into new ownership, they account for only 3% of the business of the applicant, albeit an important part its activity up to now. 97% of the activity is retained, and it is said that in every other respect the applicant's

business will continue under the same ownership and therefore the applicant will itself stand reconstructed. Limited emphasis was placed on this point by the applicant. However, I consider this to be a forceful point. When one looks at this matter from the perspective of the applicant alone it will have divested itself of a part of its assets and undertaking, but it will stand reconstructed in the sense that going forward it can concentrate on other aspects of its business which is the objective of the entire transaction.

Can the scheme be analysed without reference to the later events

201. *Crane Fruehauf Limited v Inland Revenue Commissioners* [1975] 1 All ER 429 concerned a transaction in three steps, the first two of which the court concluded were an amalgamation scheme. The steps were:-

1. Crane made an agreement with Boden and the Boden shareholders which provided for the following steps:
    a. Crane acquired the entire share capital of Boden.
    b. The consideration was the issue of shares in Crane to the Boden shareholders.
    c. Fruehauf, a one third shareholder in Crane, was granted an option to acquire from Boden one third of the new shares it had acquired in Crane at a specified cash price.
2. Crane acquired the shares in Boden and issued shares in Crane to the Boden shareholders (steps (a) and (b) of the Agreement).
3. Immediately thereafter, the Boden shareholders transferred one third of the newly acquired shares to Fruehauf for the cash amount (step (c)).

202. This was a tax case. The court held that the mechanism by which a significant portion of the consideration was the cash payment in step (c), brought the scheme outside the provisions s. 55 of the Finance Act 1927 which provided for relief from capital and transfer stamp duty on that portion of the transaction. The court declared that the scheme was a scheme

of amalgamation, but that aspects of the scheme did not qualify for the relief sought by reference to the Finance Act.

203. In arriving at this conclusion Scarman L.J. said the following:

> *"This being the intention and effect of the scheme, it cannot lose its character of amalgamation merely because in the events that happened, and as envisaged by the scheme, the Boden shareholders were obliged to sell and did at once sell one third of their new Crane shares to Fruchauf. There existed only one undertaking comprising the two that had existed before the scheme".*

204. In that case the option agreement to transfer shares for cash which caused the parties to lose the stamp duty relief had been entered into at the same time as the agreement for the first two steps.

205. The applicant relies on the passage above in the judgment of Scarman L.J. as authority for the proposition that if a scheme is found to be one of reconstruction (or as in Crane, an amalgamation), it does not then lose its character as such a scheme because of events which occur immediately after the implementation of the scheme, even where there existed a prior agreement providing for such events.

206. The decision in Crane was that the third step fell outside the provision for stamp duty relief. Therefore, a question arises as to whether this statement by Scarman L.J. was obiter. That is a valid concern, Nonetheless, three of the four judges who considered the case, Templeman J. in the High Court and Scarman and Russell L.J.J. were clear in their finding that steps (a) and (b) were a scheme of amalgamation. There was therefore still a valid scheme, but the consequence of the cash payment in Step (c) was the loss of stamp duty relief.

207. In *Re Noble Corporation and Others* [2009] CILR 310, the Grand Court of the Cayman Islands was concerned with separate, but interlocking schemes of arrangement. The schemes were proposed with the objective of moving the group's head office and parent functions from

Cayman Islands to Switzerland. The mechanism proposed was a scheme whereby the existing parent company Noble Cayman would become a subsidiary of Noble Switzerland. Noble Cayman would repurchase and cancel all of its relevant shares. It would issue new shares to Noble Switzerland. Each existing shareholder in Noble Cayman would receive an equivalent amount of shares in Noble Switzerland. By a second and parallel scheme of arrangement for a subsidiary called Merger Sub, its property, rights and obligations were transferred to Noble Cayman, and Merger Sub would be dissolved without a winding up. A question arose as to whether the Merger Sub scheme was in truth an "amalgamation" or "reconstruction" as required to trigger the jurisdiction to make transfer orders, pursuant to Section 87 (1) of the Companies Law (2017 Revision).

208. Taken in isolation the scheme for the Cayman subsidiary could have been regarded as a "mere disposal" or transfer of its assets and undertaking to another subsidiary in the same group and therefore not an amalgamation or reconstruction. The court concluded that when this scheme was considered in conjunction with the scheme at parent company level the schemes together amounted to a "amalgamation" for the purposes of s.87, which corresponded broadly to s.455 of the Act.

209. This was not a tax case. The court concluded that it was appropriate to examine the interlocking schemes together and upheld the schemes as an "amalgamation". The court identified the fact that a number of English cases considering the definition of the term reconstruction were decided "in a somewhat narrower view of the meaning of the term reconstruction". Foster J. stated the following *"I was also referred to some English tax related cases concerning schemes of reconstruction in the context of applications concerning stamp duty or capital gains tax in which a somewhat narrower view of the meaning of the term "reconstruction" was taken (see Brooklyn Salenger Holdings Ltd v. IRC [1971] WLR 429;*

Baytrust Holdings Ltd v. IRC [1971] 3 All ER Reports 76; Swithland Investments Ltd v. IRC [1990] STC 448 and Fallon v. Fellowes [2001] STC 1409)".

210. Foster J. continued as follows:

> *"In my opinion it is appropriate and desirable in this jurisdiction and at this time to adopt a purposive and broad interpretation approach to provisions of sections 86 and 87 of the law and in particular with respect to the meaning of the words 'amalgamation' and 'reconstruction'. That would be consistent with broad interpretation already given to the term "arrangement" as it appears in the same sections by this court and in my view the same general approach should be adopted when considering the construction of the terms 'amalgamation' and 'reconstruction'. I also respectfully and gratefully adopt the words of Buckley J. in the South African Supply case that neither word has any definite legal meaning, that each is a commercial and not a legal term and that even as a commercial term has no exact definite meaning. He said that in each case one has to decide whether the transaction concerned is such that in the meaning of commercial men is one which would be comprehended within the term 'reconstruction' or 'amalgamation'. It seems to me that this must mean that I should determine whether the transaction before me would be probably considered a reconstruction or amalgamation by commercial men in this day and age.*
>
> *Furthermore in my opinion it is legitimate to look at the whole transaction which is under consideration, albeit that in this case it necessarily consists of two separate schemes of arrangement. It seems to me that in adopting the purposive approach it would be artificial and unduly restrictive to consider whether the proposed transfer of the assets and liabilities of merger sub to Noble Cayman constitutes an 'amalgamation' and/or a 'reconstruction' in isolation given that it is an integral part of the related and interdependent arrangement which merger sub has been specifically incorporated to*

facilitate. Although I do not any way consider the narrower, more legalistic approach to the construction of these words, which is based to a significant degree on the English fiscal cases, which was adopted in the My Travel case, that case is clearly distinguishable on its facts from the present circumstances in which the transfer of assets and liabilities by Merger Sub to Noble Cayman is clearly an essential element in a greater overall arrangement."

211. The applicant placed reliance on this judgment as authority for the proposition that the court should adopt what it describes as a modern and "purposive" approach to the question. That approach is commended by Foster J. But in doing so he stated the unsurprising proposition that it would be inappropriate for the court to look at one aspect of a transaction, in isolation from related and interdependent arrangements.

Patrick W. Keane & Company v The Revenue Commissioners [2008] ITR 57

212. In this case certain trading assets of a family owned company were transferred to newly formed companies owned by two family members, leaving the balance of the assets in the company itself for the benefit, from a management perspective at least, of the other family members. Edwards J. concluded that this was in substance a partition and not a reconstruction.

213. Prior to these transfers a new class of shares, the E shares, was created in the company and issued to all five shareholders. The E shares carried no voting or distribution rights, save for the right to return of capital on a winding up. After the asset transfers to the two new companies, those companies also issued new E shares to all the holders of E shares in the first company, being all the family members. The effect going forward was that three 'remaining' or 'continuing' shareholders held voting and controlling shares in the company and the two others held voting and controlling shares in their respective new companies. In addition all five held the non-voting 'E Shares' in the original company.

214. The scheme of arrangement was sanctioned pursuant to s.201 of the Act of 1963 and orders were made (Kearns J.) pursuant to s. 203 for the transfer of certain assets to the two new companies. The order of Kearns J. recited that the scheme was a "scheme of arrangement and reconstruction proposed for the purpose of the reconstruction of the company, and that under such scheme certain undertakings and property of the company are to be transferred to Harrowby Limited and Ritaville Limited".

215. The company later applied to Revenue for confirmation that the reorganisation would qualify for exemption from capital duty under the Stamp Duties Consolidation Act 1999. Revenue adopted the position that the reorganisation was not "effected in pursuance of a bona fide scheme of reconstruction as envisaged under s. 80" and the claim for relief was denied.

216. Edwards J. held that although the court had, on a petition under the Companies Act 1963, confirmed the scheme of arrangement as a scheme of reconstruction, when all of the elements of the transaction were taken into account, the issue of non-voting "E" shares to all of the original shareholders was a "contrivance" whose sole purpose was to "technically" qualify the transaction as a reconstruction so that the company and its owners could seek to avail of the exemption in s. 80 of the Stamp Duties Consolidation Act, 1999. He said: *"In reality therefore what we have here is a partition that is being dressed up to look like a reconstruction. Accordingly in my view it is not a "bona fide" scheme of reconstruction for the purpose of s. 80 of the Stamp Duties Consolidation Act, 1999. Even if it is, technically speaking a reconstruction (and I do not agree that it is) it would in any event almost certainly fall fowl of s. 80(4) of the 1999 Act which provides that s. 80 shall not apply unless the scheme of reconstruction is affected for bona fide commercial reasons and does not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to tax including stamp duty".*

217. Edwards J. rejected the proposition that because the court on a petition under the Companies Act had sanctioned the scheme as a "reconstruction" the question was res judicata. The petition for sanction of the scheme was unopposed and there was no contradictor with respect to the proposition that the transaction was properly to be characterised as a reconstruction.

218. Although Edwards J. concluded that he was not bound, in the context of the tax case, by the determination made under the Companies Act that this was a scheme of reconstruction, the order of Kearns J. when sanctioning the scheme was not appealed or set aside by Edwards J. The critical feature was that Edwards J. found that having regard to the manner in which shares had been issued across the group of original shareholders in what he found to be a "contrivance" the scheme could not qualify for the stamp duty relief.

219. Edwards J. made it clear that he was not deciding whether a "reconstruction" has the same meaning for the purpose of company law and Revenue law. It was not seriously submitted to me that the court should now decide that the word "reconstruction" has a different meaning in the company law context than the meaning for tax law. However, it is clear from the judgment of Edwards J. that his decision was based on a conclusion that a particular feature of the arrangements in that case, namely the issue of "E" shares by the new companies to the original shareholders was a contrivance for the purpose of seeking to avail of the exemption from stamp duty.

220. That decision was made by reference to the underlying purpose of stamp duty relief and was informed by the court's conclusion that a central part of the transaction structure was a contrivance to avoid tax.

221. Crane Fruehauf was not cited to Edwards J. but the facts of those two cases were very different. I see no reason to consider that Patrick W. Keane could have been decided differently if the statement of Scarman L.J. had been relied on. There is no doubt that the tax legislation

considered in Patrick W. Keane, and in the English tax cases on the subject, expressly requires Revenue, and where necessary a court, to analyse together all the steps in the overall transaction, to determine whether it is part of a scheme for the avoidance of tax. The same imperative is not stated in the Companies Act, although if there were any suggestion that a scheme is formulated for tax avoidance, this would weigh heavily against sanction. (See also paragraph 236 below). Absent such an abuse, when determining from a company law and a commercial perspective, as Buckley J. did in South Africa Supply, whether a scheme is for reconstruction, the statement by Lord Scarman in Crane provides a basis for adopting the view that the court can analyse each step in the transaction distinctly.

This case

222. The facts in the tax cases are typically more complex than the facts of this case. Here there are only two steps in the overall transaction. The first step is the "hive down" to BAGL of assets, liabilities and contracts. That step meets the criteria for reconstruction because the ownership of the assets and activity of the Target Business will remain within the Barclays Group. The following step, namely the merger of BAGL with BAWAG effects a complete absence of identity of shareholding. Ownership will move entirely to BAWAG. The question which I am required to decide is whether the fact that the "substantial identity" of ownership is only momentary precludes the scheme from qualifying as a reconstruction for the purpose of s. 455.

223. The submissions of the applicant and of the legitimus contradictor explore the question of whether the word "reconstruction" requires continuance of substantive ownership and control for more than the one minute envisaged in this transaction. If continuance of ownership for anything more than an instant is a requirement, then the traditional tests applied in the South Africa Supply and other cases would not be satisfied. Nonetheless, Buckley J. himself stated that the term "reconstruction" is not defined by statute or otherwise and can be interpreted by

a court by reference to the understanding of commercial parties. Therefore, there are good reasons why the court can accept the submission that it would not be correct to interpret "reconstruction" in s. 455 of the Act as incorporating a requirement for a continuum of ownership after the hive-down.

224. In support of this proposition the following arguments were made.

225. Firstly, that there is no express requirement in s. 455 of the Act that a reconstructed company remain in that state for any minimum period of time.

226. Secondly, nothing contained in the Act limits what the scheme company might subsequently do. If one was to interpret the section as requiring that the scheme company remain for any stipulated period of time in its reconstructed state, meeting the traditional test as in South Africa Supply, there is no certainty as to what that minimum period should be. If one minute is insufficient, what is an appropriate period? It was pointed out that as a general commercial, and even legal proposition, it would always be open to the reconstructed company to enter a subsequent sale or merger without tainting the original scheme and that the only difference here is that the interval is only one minute and the second step is part of a pre-agreed sequence.

227. Thirdly, it is submitted that it is appropriate to analyse the ownership position by reference to the position before and after the sanction of the scheme and the making of scheme orders, without analysing the position after completion of the subsequent merger. The submission continues that the reconstruction by the scheme and the scheme orders (ss. 453 and 455) to bring the Target Business into a new, or special purpose company, is a valid, proper, and necessary step to prepare the Target Business for sale through the merger of BAGL by acquisition with BAWAG and that it would be impractical to achieve that commercial transaction without first implementing the intra group restructuring step.

228. Fourthly, the scheme and scheme orders sought pursuant to s. 453 and 455 of the Act are one legal step, subject to scrutiny by this court under Part 9 of the Act. The merger is a separate legal step under a distinct statutory process, the Cross-Border Regulations, with its own court approval procedure both here and in the Vienna Commercial Court and scrutiny by the appropriate competition authority in Germany and by the European Central Bank. In fact, the ECB was requested to give two separate decisions. One was to exempt BAGL from the requirement to obtain a banking license, already decided. The second is the approval of the merger with BAWAG, a decision I was informed is still pending.

229. Fifthly, it is submitted that it would be illogical if the two separate court supervised steps, each of which are provided for and regulated by law and which are subject to scrutiny by this Court and other authorities and which would be lawful if implemented independently, would become impermissible merely because they are required for regulatory reasons to be implemented in close succession.

Conclusion as regards reconstruction

230. I do not believe that it is appropriate or necessary to view the scheme in this case with an artificial "shutter" which would drop during the one minute between the effective time of the applicant's scheme and the transfer orders and the effective time for the merger between BAGL and BAWAG. In circumstances where all of the steps are provided for in the Agreement of 4 July 2024 such an exercise would not be credible. But I agree with Lord Scarman's approach in Crane, which is that a scheme, if found to be a scheme of reconstruction, does not lose that character by reason of a subsequent step, however integrated it is to the transaction as a whole. Further, there is no requirement in Part 9 or elsewhere that a company once reconstructed by a scheme must remain in that state for any minimum duration.

231. There has been openly and comprehensively presented to the court that the objective of the scheme and scheme orders is to minimise disruption and risk to customers, creditors and

employees. Each of the steps are transparent, and subjected to scrutiny by this court, the Vienna Commercial Court, and regulators in the State, in Germany, Austria and by the ECB. That fact would not of itself justify any new approach to interpreting the word "reconstruction", but it informs the court when it comes to deciding that although separated in time by such a short interval as one minute, there is firstly a valid reconstruction of the applicant for the purpose of s. 455, and secondly a merger of the transferee BAGL with BAWAG. By adopting this approach the court is not engaging in an artificial analysis, but permitting the utilisation of Part 9 to achieve the legitimate purpose described extensively in the grounding affidavits.

232. This approach does not rely on an analysis which ignores the sequence of events. On the contrary it recognises that there is a second legal event which is facilitated by the making of s. 455 orders.

233. I am reinforced in this approach by the evidence that the applicant itself stands reconstructed in circumstances where it retains 97% of its original business. After the scheme and the merger are implemented the retained business will remain in the same ownership and will continue to operate as before. This means that the applicant will stand reconstructed and this is consistent with the strategic decision taken by the scheme shareholder to allow the applicant to concentrate on corporate and investment banking. It seems to me that this is a valid consideration in viewing the status of the applicant as a whole.

234. I am willing therefore to hold that the scheme is a scheme of reconstruction of the applicant and that it is appropriate to make the orders sought by reference to s. 455.

PART 8: TWO OBSERVATIONS

235. Firstly, this is not a tax case. My conclusion that the scheme is a reconstruction scheme has the effect that the court has jurisdiction to make orders pursuant to s. 455 of the Act. In Parts 3 and 4 I have considered the matters which the court considers in every scheme sanction application and have concluded that the scheme is an appropriate scheme to sanction. The

court was not addressed as to the tax implications of any aspect of the transaction either in this State or elsewhere and makes no finding on any such question.

236. Secondly, the court has been provided with a comprehensive description not only of the commercial rationale for the transaction, but of the extensive engagement between the applicant and its customers, creditors, employees and counterparties and, importantly, its engagement with regulators in the State, in Germany, in Austria and with the European Central Bank. All the cases regarding schemes and orders made under Part 9 emphasise that the remedy of sanctioning a scheme is discretionary and never a "rubber stamping" exercise. There may be cases where a court would find that the sequencing of transactions, or steps in a transaction, before or after a scheme would become effective, is such that the court should exercise its discretion to refuse sanction. It is the practice of the court to inquire not only that appropriate procedural and information steps are taken, but also that there is a discernible and transparent purpose to a scheme and nothing improper about its substance or structure. In doing so, if a court found that any part of a transaction was designed to 'side step' or evade such scrutiny or that for any other reason the scheme jurisdiction is being inappropriately invoked it would refuse sanction. This is not such a case but is instead a constructive use of Part 9 to safeguard the interests of all parties affected by the transaction.

Conclusion

237. For all of these reasons I shall make an order pursuant to s. 453 of the Act to sanction the scheme of arrangement between the applicant and its shareholder, and pursuant to s. 455 for the transfer to the respondent of the assets, liabilities and agreements of the applicant, as defined in the scheme.