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High Court of Justice
12 februari 2016, nr. [2016] EWHC 246 (Ch)
(mr. Snowden)
Noot mr. P.J.M. Declercq

Scheme of Arrangement. Foreign scheme company which moved its COMI to England. Meeting of scheme creditors. Inadequate notice of convening hearing given to scheme creditors. No justification for urgent hearing. Adjournment of convening meeting.

[Companies Act 2006 part 26]

The scheme is intended to release and discharge the scheme company and the parent from all of their liabilities pursuant to the Notes and the US Judgments in return for the issue by the parent to scheme creditors of new notes (or equivalent loan participations), together with a cash payment by the parent of about 13.5% of the face value of the existing Notes. In contrast to the existing Notes, the new notes will be unsecured, carry low interest rates and will only be payable between 2020 and 2036. On 15 December 2015 the scheme company gave a notice dated 7 December 2015 to DTC, Euroclear and Clearstream for dissemination to all account holders holding Notes through their systems. The notice asserted that the scheme company had moved its COMI to England because it proposed to effect a compromise with creditors in respect of the Notes by way of a scheme of arrangement under the Companies Act 2006. No further details were given at that stage. On 7 January 2016 the scheme company produced a letter and sent it via an information agent to DTC, Euroclear and Clearstream for dissemination in the same way as the COMI notice. The letter was also posted on-line by the information agent, though only accessible to persons who obtained a password from the information agent. The Practice Statement letter set out an account of the background to the Scheme and a summary of its terms, and gave notice that the hearing of the scheme company's application to convene a single meeting of scheme creditors would be heard on 21 January 2016. The Application by the scheme company seeks an order that I should convene a single meeting of scheme creditors. As defined in the scheme, this is a very broad category of persons including any person with a claim against the scheme company arising out of or in relation to the Notes and the US Judgments. That would include the Trustee and intermediaries and account holders in the clearing systems. The application is supported by two witness statements from a Mr. Alex Smotlak. Nothing is known or disclosed about Mr. Smotlak other than he was appointed as the sole director of the scheme company on 30 October 2015 to replace the previous incumbents. As Mr. Smotlak is the sole director and employee of the scheme company, it is wholly unclear who are the "colleagues" to whom he refers. The remainder of Mr. Smotlak's first witness statement is no more forthcoming and does not identify the sources of his information. His second witness statement simply repeats the same wording and offers a further clarification that the source of some of his knowledge is discussions with "relevant people within the APP Group". I take the view that this evidence does not comply with CPR 32PD 18.2, which requires that a witness statement must indicate the source for any matters of information and belief. Vague references to unidentified "collegues" and "relevant people" do not do that. It is also hihgly undesirable that the evidence on behalf of the scheme company should come solely from a recent appointee who has no personal knowledge of relevant events.
Whilst protesting the jurisdiction, in the first instance APPIO simply seeks an adjournment of the convening hearing on the grounds that inadequate notice has been given of it to scheme creditors. It contends that given the complex nature of the scheme and the factual background, there is no justification for an urgent hearing of the application. I accept those submissions. The primary purpose of following the Practice Statement is to enable scheme creditors to have an effective opportunity to appear at the convening hearing at which the constitution of the classes is determined. This will minimise the risk of a successful challenge to the constitution of the classes only being raised at the sanction hearing. The convening hearing also provides the opportunity for any other issues to be raised that go to jurisdiction or which would unquestionably lead to the court declining to sanction the scheme. The aim is to avoid the waste of time and money that would occur if scheme meetings were convened and held on an incorrect basis or where there is some other fundamental roadblock to the scheme. These purposes can self-evidently only be served if the notice of the convening hearing to creditors is adequate. What is adequate notice will depend on all the circumstances. The more complex or novel the scheme, and the less consultation that has taken place with creditors

as a whole before the scheme is launched, the longer the notice should generally be. That said, if the scheme is being put forward as a matter of great urgency when the company is in real financial distress, there may not be time to give very much notice to creditors if a default is to be avoided. In such a case the scheme company may well be able to persuade the court that there is good reason to shorten the period of notice or depart altogether from the Practice Statement; and in such a case, any opposing creditor would have a good reason why he had been unable to raise a class or jurisdictional question prior to the sanction hearing. But in the absence of evidence of real urgency, the Practice Statement should be followed and a sufficient period of notice given of the convening hearing to enable scheme creditors to consider the matter, take advice and, if desired, participate at the hearing. That is certainly the case where (as in the instant case) there is said to be a large supporting creditor which has been involved in negotiating the scheme with the scheme company, but the other scheme creditors have not been consulted and cannot be identified from any register held by the scheme company so as to enable notices to be given to them directly. The court must be astute to detect any attempt to "bounce" creditors into a convening hearing in relation to a complex or novel scheme on inadequate notice. In the instant case the scheme is not simple and straightforward. It seeks to use a recent COMI shift to England of a SPV shell company to force a compromise of the foreign-law debts and judgment debts of its parent which is a substantial and ostensibly solvent company with no connection to England. It is also apparent that the method of notification to scheme creditors by the dissemination of notices through the clearing systems was inherently unlikely to result in notice being received by all creditors simultaneously or speedily. As I understand the process, a notice given to DTC, Euroclear or Clearstream will be distributed by the clearing systems to their account holders. These are generally large banks, broker-dealers or other major financial institutions. Such account-holders may hold an interest in the Notes for their own account, but are more likely to do so as agents for the account of their clients, or for intermediaries such as stockbrokers, investment managers and nominee companies, who in turn act on behalf of their own clients. There may be several links in the chain before the ultimate beneficial owner of the Notes is reached, and the transmission of notices through this chain depends at each stage upon the recipient passing the notice on to the next person in the chain, a process which may or may not be automated and may well depend upon human intervention. In the instant case, the evidence of Mr. Smotlak is that the scheme company does not know, and cannot ascertain, the identity of many of the scheme creditors who hold their interests in the Notes through the clearing systems. In my judgment, 14 days was inadequate notice of a convening hearing for a scheme of this type, and I have no confidence that all or even a majority of Scheme Creditors will have received the Practice Statement letter either before the date of the hearing or with adequate time to digest it and take advice about it. Moreover, the evidence of the scheme company does not disclose any good reason for urgency. The relevant debts of the scheme company and the parent under the defaulted Notes and the US Judgments have been outstanding for many years, and having obtained the protection of the Indonesian Judgment, the parent has simply carried on running a substantial and profitable business with no concern that it might be the subject of any immediate insolvency proceedings. Finally, I would observe that if the scheme company and the parent are truly determined to promote the scheme as a means of upholding the pari passu principle and to promote equality among creditors, it is notable that they have not taken the step that would most obviously seem appropriate, namely to apply to the New York court for a stay of enforcement of the US Judgments to enable them to promote the scheme. I shall therefore adjourn the convening hearing. I will direct that the hearing be relisted before me on a date not before 3 March 2016 which is convenient for counsel.

In the matter of *Indah Kiat International Finance Company BV*,
applicant,
represented by W. Trower QC and A. Goodison,
and
APP Investment Opportunity LLC,
opposant,
represented by F. Toube QC and R. Perkins.

1. This is an application by Part 8 Claim Form by Indah Kiat International Finance Company B.V. (the "Scheme Company") for an order convening a single meeting of its scheme creditors (the "Scheme Creditors") to consider and if thought fit approve a scheme of arrangement (the "Scheme") pursuant to Part 26 of the Companies Act 2006.

2. The application is strenuously opposed by one of the Scheme Creditors, APP Investment Opportunity LLC ("APPIO"), which contests the jurisdiction of this court to entertain or sanction the Scheme. In the first instance, APPIO simply seeks an adjournment of the Scheme Company's application on the grounds that inadequate notice has been given to Scheme Creditors. However, it also raises a significant number of other issues concerning the adequacy of the evidence and disclosure by the Scheme Company, together with questions concerning the procedure and scope of the court's jurisdiction to sanction creditor schemes for foreign companies in relation to debts governed by foreign law.

Background

3. The Scheme Company is a special purpose vehicle which was incorporated for financing purposes in the Netherlands. The debts proposed to be compromised by the Scheme are the debts of the Scheme Company under Indentures creating two series of notes issued by the Scheme Company in 1994 (the "Notes"). The Notes were due in 2002 and 2006, had a combined face value of US$350 million and carried interest at rates of 11.875% per annum and 12.5% per annum. The Notes have at all times been held in global form by a custodian on behalf of a trustee for noteholders (the "Trustee") but interests in the Notes are traded by "Noteholders" through the clearing systems, DTC, Euroclear and Clearstream.

4. The Notes are guaranteed by PT Indah Kiat Pulp & Paper Tbk (the "Parent") which is the sole shareholder of the Scheme Company, and which was the recipient of an immediate loan from the Scheme Company of all of the monies subscribed for the Notes in 1994. Pursuant to its guarantee, the Parent undertook to the Trustee to be jointly and severally liable with the Scheme Company as if it were the principal debtor and not merely as surety. The Parent also provided security over certain of its assets to secure its obligations in relation to the Notes.

5. The Indentures, the Notes and the obligations of the Parent in relation to them are all governed by New York law and the parties submitted to the non-exclusive jurisdiction of the New York courts in relation to such obligations. Under New York law, the rights of the holder of any indenture security (such as the Notes) to receive payment of principal and interest on or after the due dates and the right to take enforcement action cannot be impaired or affected without the consent of the holder: see section 316(b) of the Trust Indenture Act 1939, 15 USC §77ppp.

6. The Scheme Company's liabilities under the Notes are exactly off-set in its balance sheet by the debt owed to it by the Parent, and it has negligible other assets or liabilities. In contrast, the Parent is a substantial enterprise incorporated in Indonesia and is a member of the Asia Pulp and Paper group of companies which operates a global pulp and paper business (the "APP Group"). Approximately 52.72% of the Parent's shares are owned and controlled by a company in the Sinar Mas Group which is a large conglomerate owned and controlled by the Widjaja family of Indonesia. The remaining shares in the Parent are listed on the Indonesia Stock Exchange.

7. The only alleged connection of the Scheme Company with England is said to be that its centre of main interests (COMI) was shifted to England from the Netherlands about three months ago for the sole purpose of promoting the Scheme. It is common ground that the Parent has no connection whatsoever with England.

8. The Notes fell into default in about 2001 after an economic crisis in Indonesia and the South East Asian region affected the Parent's business during the 1990s. An attempt to restructure the Notes by way of an exchange offer failed in 2004, and the Notes were then the subject of a number of judgments against the Scheme Company and the Parent in the Supreme Court of New York between 2004 and 2006. These judgments (together the "US Judgments") include the so-called "Gryphon Judgments" which were entered in favour of various plaintiffs in 2004 and 2006 in a total amount of about US$233 million, and the so-called "US Bank Judgment" entered in 2005 in favour of the then Trustee for the balance of the Notes in the total sum of about US$315 million. Together with accrued interest, the total amount due in respect of the Notes as at 31 December 2014 was about US$946.9 million, and must now exceed US$1 billion.

9. The response of the Scheme Company and of the Parent to attempts to enforce the defaulted Notes in Indonesia was to engage in protracted litigation in the Indonesian courts which eventually resulted in a decision of the Indonesian Supreme Court in 2011 purporting to invalidate the

Notes and the obligations of the Scheme Company and the Parent in relation to them ("the Indonesian Judgment").
10. The Indonesian Judgment was not, however, given under the governing law of the Notes, and as a consequence, there are, as the Scheme Company's evidence acknowledges, "questions over the international enforceability" of the Indonesian ruling. Indeed, it emerged during the hearing before me that an attempt by the Scheme Company and the Parent to request the New York courts to recognise and give effect to the Indonesian Judgment invalidating the Notes was rejected some years ago. Moreover, Mr. Trower QC, who appeared for the Scheme Company, accepted and indeed asserted that notwithstanding the Indonesian Judgment, the Trustee and the Noteholders were creditors of the Scheme Company and of the Parent "for the purposes of these proceedings".
11. In response, Miss Toube QC, who appeared for APPIO, invited me to extract an undertaking from the Scheme Company and the Parent to this court, as a condition of being permitted to promote the Scheme, to the effect that they would not seek to deny that APPIO was a creditor in respect of the Notes before any other court in any other jurisdiction. In my judgment such an undertaking would serve no useful purpose and I decline to require it. So far as this court is concerned, there can be no doubt that the Indonesian Judgment would not be regarded as discharging the Notes or the security in respect of the Notes, which are governed by New York law: see *Gibbs v Societe Industrielle at Commerciale des Metaux* (1890) LR 25 QBD 399 and *National Bank of Greece v Metliss* [1958] AC 509. The only other courts in which the matter is likely to arise in the foreseeable future are the New York courts which have already accepted that Notes are valid and binding, and the Indonesian courts which have ruled to the contrary. An undertaking to this court is unnecessary as regards the former and most unlikely to have any effect upon the latter.
12. Since the Indonesian Judgment in 2011 the Parent has not been troubled by any further attempts to enforce the Notes in Indonesia. In 2012 the Parent and the Trustee compromised attempts to enforce the US Bank Judgment in the United States on the basis that they would turn over any relevant property in the US to satisfy that judgment. However, the Scheme Company and the Parent profess not to have any relevant property in the United States. Perhaps not surprisingly, no attempts have been made to enforce the Notes or the US Judgments against the Scheme Company in the Netherlands. There matters rested for several years, with neither debtor company making any effort or proposals to reduce or discharge their long-overdue debts to Scheme Creditors.
13. The situation appears to have changed when, in or about late March last year, APPIO took an assignment from the Trustee of a portion of the rights under the US Bank Judgment corresponding to Notes of which APPIO was the beneficial owner. APPIO thereby became a judgment creditor of the Scheme Company and the Parent, and entitled to take enforcement action in its own name. It is currently owed a principal sum of about US$11.7 million, which together with interest and costs amounts to about US$37.8 million. Since taking its assignment, APPIO has sought to take steps towards enforcement in the United States, including commencing a proceeding in the New York court to renew the US Bank Judgment so as to prevent it expiring by reason of limitation, and seeking discovery from the Scheme Company and the Parent to identify any relevant property in the US.
14. APPIO's activities seem to have prompted the Parent and the Scheme Company into action. Various statements in the evidence filed by the Scheme Company and the draft Explanatory Statement were summarised in Mr. Trower's skeleton argument as follows,
"The objectives of the Scheme are to provide finality and certainty as regards the past problems concerning the Notes and the Debt; to provide for a better overall outcome for the general body of the Scheme Creditors than the likely alternatives; to create an environment where no Scheme Creditor is through its own actions able to "steal a march" on other Scheme Creditors and engineer a situation where their own interests are benefited at the expense of those of others; and to allow the Parent (and the Group) to continue to carry on business as a going concern, which the Scheme Company and the Parent believe is the best way to maximise potential returns to the Scheme Creditors."
15. Miss Toube's response to this portrayal of the objectives of the Scheme was to point out that its references to one creditor "stealing a march" and "benefitting its own interests at the expense of others" seem to presuppose, but not to acknow-

ledge, that the Parent is insolvent and unable to pay the amount due on the Notes. She suggested that these assertions sit ill with the Parent's balance sheet, which shows a healthy surplus of in excess of US$2.5 billion. She also points out – significantly – that there is no acknowledgment in the evidence that the Parent will be forced into liquidation if the Scheme is not sanctioned. I shall return to these points later in this judgment portray the alternatives to the Scheme in the Explanatory Statement.

The Scheme in outline

16. The Scheme aims to treat the underlying beneficial owners of interests in the Notes as Scheme Creditors on the basis that they are able to obtain a right to sue the Scheme Company in their own name, and hence that they are contingent creditors.

17. The Scheme is intended to release and discharge the Scheme Company and the Parent from all of their liabilities pursuant to the Notes and the US Judgments in return for the issue by the Parent to Scheme Creditors of new notes (or equivalent loan participations), together with a cash payment by the Parent of about 13.5% of the face value of the existing Notes. In contrast to the existing Notes, the new notes will be unsecured, carry low interest rates (of 3MLIBOR +1% to +3% or a fixed rate of 2%) and will only be payable between 2020 and 2036. There is a cash alternative of the payment of 25% of the face value of the Notes, but this is subject to a very low overall cap of US$8 million.

18. Receipt of new notes under the Scheme will depend upon each Scheme Creditor submitting a notice of election by a specified date 4 weeks after the Scheme becomes effective, in default of which the only consideration available will be a loan participation; and an entitlement to that will depend upon the Scheme Creditor filing a notice on or before a "Sunset Date" which is intended to be about 7 month after the Scheme becomes effective.

19. Given that the Parent is not the company in respect of which the Scheme is proposed, and hence is not the company to which the provisions of sections 895-899 of the Companies Act 2006 could apply, there is no obvious mechanism by which the terms of the Scheme itself could validly effect a release of the debts of the Parent. However, the Scheme contains a provision under which each Scheme Creditor would be deemed to authorise the Scheme Company to execute and deliver a deed on its behalf, waiving, releasing and discharging any claims that the Scheme Creditor has or might have against the Parent in relation to or arising out of the Notes or the US Judgments (the "Deed of Release"). The Deed of Release would also purport to release all claims of the Scheme Creditors relating to such matters against any other members of the APP Group, and all directors or former directors of the Scheme Company, the Parent and any other member of the APP Group.

The COMI notice and Practice Statement letter

20. On 15 December 2015 the Scheme Company gave a notice dated 7 December 2015 to DTC, Euroclear and Clearstream for dissemination to all account holders holding Notes through their systems. The notice (the "COMI notice") asserted that the Scheme Company had moved its COMI to England because it proposed to effect a compromise with creditors in respect of the Notes by way of a scheme of arrangement under the Companies Act 2006. No further details were given at that stage.

21. On 7 January 2016 the Scheme Company produced a letter pursuant to the *Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 WLR 1345 and sent it via an information agent to DTC, Euroclear and Clearstream for dissemination in the same way as the COMI notice. The letter was also posted on-line by the information agent, though only accessible to persons who obtained a password from the information agent. The *Practice Statement* letter set out an account of the background to the Scheme and a summary of its terms, and gave notice that the hearing of the would be heard on 21 January 2016.

The Application and evidence in support

22. The Application by the Scheme Company seeks an order that I should convene a single meeting of Scheme Creditors. As defined in the Scheme, this is a very broad category of persons including any person with a claim against the Scheme Company arising out of or in relation to the Notes and the US Judgments. That would include the Trustee and intermediaries and account holders in the clearing systems. The Scheme Company's stated intention, however, is that,

"... those who cast votes at the Scheme Meeting should be those with the underlying economic and beneficial interest in the Notes, i.e. the true commercial owners of the Notes."
23. The Application is supported by two witness statements from a Mr. Alex Smotlak. Nothing is known or disclosed about Mr. Smotlak other than he was appointed as the sole director of the Scheme Company on 30 October 2015 to replace the previous incumbents, a Mr. R.R. Lai, a Mr. T.A. Lek and Anchor Management B.V.
24. At the commencement of his first witness statement, Mr. Smotlak acknowledges that by reason of his very recent appointment,
"... my knowledge of the facts and matters I set out in this witness statement is derived primarily from discussions with my colleagues and professional advisers for the Scheme Company and from relevant documents of or relating to the Scheme Company and its affairs. Where facts and matters I set out are not within my own knowledge, they are true to the best of my information and belief."
25. As Mr. Smotlak is the sole director and employee of the Scheme Company, it is wholly unclear who are the "collegues" to whom he refers. The remainder of Mr. Smotlak's first witness statement is no more forthcoming and does not identify the sources of his information. His second witness statement simply repeats the same wording and offers a further "clarification" that the source of some of his knowledge is discussions with "relevant people within [APP] Group."
26. I take the view that this evidence does not comply with CPR 32PD 18.2, which requires that a witness statement must indicate the source for any matters of information and belief. Vague references to unidentified "colleagues" and "relevant people" do not do that. It is also highly undesirable that the evidence on behalf of the Scheme Company should come solely from a recent appointee who has no personal knowledge of relevant events. For reasons that I will explain, this is not a mere procedural defect: there are more substantive issues as to the evidential basis upon which the court is being asked to initiate the scheme process.

Adjournment
27. Whilst protesting the jurisdiction, in the first instance APPIO simply seeks an adjournment of the convening hearing on the grounds that inadequate notice has been given of it to Scheme Creditors. It contends that given the complex nature of the Scheme and the factual background, there is no justification for an urgent hearing of the application. I accept those submissions.
28. The primary purpose of following the *Practice Statement* is to enable scheme creditors to have an effective opportunity to appear at the convening hearing at which the constitution of the classes is determined. This will minimise the risk of a successful challenge to the constitution of the classes only being raised at the sanction hearing. The convening hearing also provides the opportunity for any other issues to be raised that go to jurisdiction or which would unquestionably lead to the court declining to sanction the scheme. The aim is to avoid the waste of time and money that would occur if scheme meetings were convened and held on an incorrect basis or where there is some other fundamental roadblock to the scheme: see per David Richards J. in *Telewest Communications plc (No.1)* [2005] 1 BCLC 752 at paragraph 14, and *T&N (No.3)* [2007] 1 BCLC 563 at paragraphs 18-20. These purposes can self-evidently only be served if the notice of the convening hearing to creditors is adequate.
29. What is adequate notice will depend on all the circumstances. The more complex or novel the scheme, and the less consultation that has taken place with creditors as a whole before the scheme is launched, the longer the notice should generally be. That said, if the scheme is being put forward as a matter of great urgency when the company is in real financial distress, there may not be time to give very much notice to creditors if a default is to be avoided. In such a case the scheme company may well be able to persuade the court that there is good reason to shorten the period of notice or depart altogether from the *Practice Statement;* and in such a case, any opposing creditor would have a good reason why he had been unable to raise a class or jurisdictional question prior to the sanction hearing.
30. But in the absence of evidence of real urgency, the *Practice Statement* should be followed and a sufficient period of notice given of the convening hearing to enable scheme creditors to consider the matter, take advice and, if desired, participate at the hearing. That is certainly the case where (as in the instant case), there is said to be a large supporting creditor which has been involved in negotiating the scheme with the scheme company, but the other scheme creditors have not been

consulted and cannot be identified from any register held by the scheme company so as to enable notices to be given to them directly. The court must be astute to detect any attempt to "bounce" creditors into a convening hearing in relation to a complex or novel scheme on inadequate notice.
31. In the instant case, as Mr. Trower rightly acknowledged, the scheme is not simple and straightforward. It seeks to use a recent COMI shift to England of a SPV shell company to force a compromise of the foreign-law debts and judgment debts of its parent which is a substantial and ostensibly solvent company with no connection to England.
32. It is also apparent that the method of notification to Scheme Creditors by the dissemination of notices through the clearing systems was inherently unlikely to result in notice being received by all creditors simultaneously or speedily. As I understand the process, a notice given to DTC, Euroclear or Clearstream will be distributed by the clearing systems to their account holders. These are generally large banks, broker-dealers or other major financial institutions. Such account-holders may hold an interest in the Notes for their own account, but are more likely to do so as agents for the account of their clients, or for intermediaries such as stockbrokers, investment managers and nominee companies, who in turn act on behalf of their own clients. There may be several links in the chain before the ultimate beneficial owner of the Notes is reached, and the transmission of notices through this chain depends at each stage upon the recipient passing the notice on to the next person in the chain – a process which may or may not be automated and may well depend upon human intervention.
33. In the instant case, the evidence of Mr. Smotlak is that the Scheme Company does not know, and cannot ascertain, the identity of many of the Scheme Creditors who hold their interests in the Notes through the clearing systems. Further, although the *Practice Statement* letter was given to the clearing systems on 7 January 2016, 14 days before the hearing was due to take place on 21 January 2016, Mr. Smotlak' s evidence is that of the three Scheme Creditors who have been in contact, one received the letter on 11 January 2016, the second received it on 14 January 2016 and the third may not have received it until the day before the hearing.
34. In my judgment, 14 days was inadequate notice of a convening hearing for a scheme of this type, and I have no confidence that all or even a majority of Scheme Creditors will have received the *Practice Statement* letter either before the date of the hearing or with adequate time to digest it and take advice about it.
35. Moreover, as Miss Toube submitted, the evidence of the Scheme Company does not disclose any good reason for urgency. The relevant debts of the Scheme Company and the Parent under the defaulted Notes and the US Judgments have been outstanding for many years, and having obtained the protection of the Indonesian Judgment, the Parent has simply carried on running a substantial and profitable business with no concern that it might be the subject of any immediate insolvency proceedings. Instead, it seems that the only matter that has propelled the Scheme Company and its Parent into action are the steps taken by APPIO in the US with a view to seeking to enforce their long-standing rights as judgment creditors. But the evidence suggests that those steps are at a relatively early stage. Moreover, although the Scheme Company and its Parent justify their promotion of the Scheme by a concern that APPIO should not be permitted (as they put it) to "steal a march" to the detriment of other creditors, it is difficult to see how this assertion of potential harm to other creditors can sit easily with the Scheme Company' s and the Parent' s assertion that they have no relevant assets in the US that could be seized.
36. Finally, I would observe that if the Scheme Company and the Parent are truly determined to promote the Scheme as a means of upholding the *pari passu* principle and to promote equality among creditors, it is notable that they have not taken the step that would most obviously seem appropriate, namely to apply to the New York court for a stay of enforcement of the US Judgments to enable them to promote the Scheme. Such a course was taken and a stay of the enforcement of English judgments granted so as to permit the promotion of a scheme of arrangement in England in relation to a Vietnamese company in *Bluecrest Mercantile B.V. v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm) (Blair J). That decision provides a valuable adjunct to the scheme jurisdiction in England, and Mr. Trower did not suggest that a similar application could not be made to the New York court by the

Scheme Company and the Parent. He was, however, unable to provide any explanation as to why no such application had been made.
37. Accordingly, and subject to any request from the Scheme Company for a longer adjournment to deal with any of the matters to which I will refer below, I will adjourn the convening hearing for at least the period requested by Miss Toube, namely 6 weeks from 21 January 2016.

Other reasons for an adjournment
38. Even if I had not been persuaded that the notice to Scheme Creditors was inadequate, I would not in any event have made an order convening a single meeting of Scheme Creditors or given the direction sought for the circulation of the draft Explanatory Statement placed before me. That is because I consider that the evidence adduced by the Scheme Company as to the appropriate composition of the scheme meeting(s) and the draft Explanatory Statement are materially deficient in their current form.

The role of the court at the convening hearing
39. It is, of course, well understood that the convening hearing is "emphatically not" the occasion upon which the court considers the merits or demerits of a scheme or engages in a debate as to any of the discretionary factors which will ultimately be relevant to the decision whether or not to sanction the scheme at the sanction hearing: see e.g. *Telewest Communications plc (No.1)* [2005] 1 BCLC 752 at paragraph 14 per David Richards J. As I have indicated above, the only issues that are generally appropriate to be considered at the convening hearing are the proper class composition of the scheme meetings, together with any other essential issue which, if decided against the scheme company, would mean that the court simply had no jurisdiction or would unquestionably refuse to sanction the scheme.
40. But the court is not bound to accept at face value bare assertions in the evidence in relation to class composition or any other matter. At the convening hearing, the applicant company has the burden of adducing evidence of sufficient quality and credibility to persuade the court to act. Further, and importantly, whether or not there is any opposition, the company proposing a scheme of arrangement has a duty to make full and frank disclosure to the court of all material facts and matters which may be relevant to any decision that the court is asked to make. The scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court.
41. In addition, the task of producing an explanatory statement is the sole responsibility of the scheme company, and it is well-established that the scheme company has a duty to place before members or creditors sufficient information for them to make a reasonable judgment as to whether the scheme is in their commercial interest or not: see e.g. *Re Heron International NV* [1994] 1 BCLC 667 at 672g-h, and *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* [1988] 14 ACLR 375 at 378, cited with approval by Neuberger J in *Re RAC Motoring Services Ltd* [2000] 1 BCLC 307 at 326-7.
42. It is most assuredly *not* the function of the court at the convening hearing to approve the contents of the explanatory statement (not least because the court has no means of investigating whether what is said is accurate or complete). However, if the court detects, or its attention is drawn to, manifest deficiencies in the draft explanatory statement, it must be entitled to decline to convene the scheme meeting unless and until they are corrected. To proceed otherwise would risk non-compliance with the essential requirements of section 897 of the Companies Act 2006, or the court subsequently declining to sanction the scheme on the basis that it could have no confidence in the statutory majorities that had been obtained. But it must be emphasised that even if the scheme company purports to correct the identified deficiencies, this cannot preclude a challenge by a scheme creditor to the adequacy of the explanatory statement at the sanction hearing.

Classes
43. In the instant case, as I have indicated, the Scheme Company submits that it is appropriate to put all Scheme Creditors into a single class. APPIO contests this on two bases: first because it contends that it is entitled to be placed into a separate class from other Scheme Creditors because it has taken an assignment of a part of the US Judgments and is thereby entitled to enforce such debt against the Scheme Company in its own name; and secondly because it says that the court can have no confidence in the evidence adduced by the Scheme Company as to the independence

of the "Supporting Creditor". That is a company which has been presented in the *Practice Statement* letter, the evidence and draft Explanatory Statement as a Scheme Creditor with a beneficial interest in 28.6% of the Notes, which is said to have been involved in the negotiation of the commercial deal that underlies the Scheme, and which intends to vote in favour of it. The Scheme Company intends that the Supporting Creditor should be placed into the same class for voting purposes as all other Scheme Creditors.

44. As to the first objection, my provisional view is that Mr. Trower is correct in his submission that it would not be appropriate to place APPIO (or indeed any other Scheme Creditor which might have obtained a Gryphon Judgment in its own name or have taken an assignment of a part of the US Judgment) into a separate class from those Noteholders whose interests are still represented by a judgment in favour of the Trustee on their behalf. The essential rights of any Scheme Creditor against the Scheme Company derive from the same series of Notes, and the Scheme proposes to treat all Scheme Creditors in an equivalent manner, giving them the same economic benefits proportionately to their holdings of Notes, whether they elect for new notes or loan participations.

45. Further, all of the Scheme Creditors have the direct or indirect benefit of the US Judgments in proportion to their holdings of Notes, and as I understand it, it would be open to any of the Scheme Creditors whose interests are currently represented by the Trustee to seek an assignment of rights in the same way as APPIO has done. Moreover, the evidence that I have seen does not persuade me that those Scheme Creditors who are currently able to take direct enforcement action against the Scheme Company or the Parent in the US have an additional legal right of sufficient value or importance that it is impossible for them to consult with the Scheme Creditors whose interests are still represented by the Trustee as regards the essential commercial merits or demerits of the exchange deal offered by the Parent under the Scheme.

46. I do not, however, need finally to decide this point until all of the Scheme Creditors have had the opportunity to be represented at the adjourned convening hearing, and I decline to do so until then.

47. The second point made by APPIO concerns the inadequacy of the evidence as regards the Supporting Creditor, and is of greater force. Both in the *Practice Statement* letter and in the draft Explanatory Statement, much is made of the role of the Supporting Creditor in the negotiation of the Scheme and its intention to vote in favour of it. For example, the draft Explanatory Statement draws attention to the recommendation of the Board of the Scheme Company (i.e. Mr. Smotlak) to vote in favour of the Scheme. That recommendation is contained in an open letter to Scheme Creditors from Mr. Smotlak which is to be circulated together with the Explanatory Statement. Mr. Smotlak' s letter includes a prominent reference to a letter from Singaporean lawyers acting for the Supporting Creditor which indicates that it intends to vote in favour of the Scheme. At the end of the relevant paragraph, Mr. Smotlak then expressly relies upon "the material support that the Scheme Company has received from its creditors" as a basis for his professed belief that it is in the best interests of all Scheme Creditors for the Scheme to be implemented.

48. The letter from the Supporting Creditor's Singaporean lawyers gives no information about the Supporting Creditor other than its name (Capital Unity Pte. Ltd). It does, however, assert, "The [Scheme Company] and the Parent have, in consultation with, and based on discussions and negotiations with our client, considered various options for implementation of the restructuring and have concluded that the Restructuring promoted by the [Scheme Company] would be most effectively implemented for the benefit of all stakeholders via a scheme of arrangement in England. The key for this conclusion is that the laws of the other possible jurisdictions do not provide a mechanism whereby the Parent's indebtedness in respect of the Notes could be effectively restructured and for dissenting minority creditors to be bound by the terms of the Restructuring. If the Restructuring was implemented through any other means it is possible that any dissenting minority creditors could attempt to steal a march of [sic] other holders of the Notes

...

...

The Supporting Creditor notes that, if the Scheme is not implemented, the Parent's going-concern business is likely to be significantly interrupted

which would adversely impact all stakeholders of the Parent, including our client as a substantial holder of the Notes."

49. The clear, albeit unstated, implication of the materials to be provided to Scheme Creditors is that the Supporting Creditor is wholly independent from the Scheme Company and the Parent and has been negotiating with it at arms-length. The references to the Supporting Creditor are obviously an attempt to persuade the other Scheme Creditors to follow suit and vote in favour of the Scheme. The existence of the Supporting Creditor may well also have the effect of dissuading potential opposition by indicating that a substantial block of votes is already committed to the Scheme.

50. Mr. Smotlak's first witness statement volunteered the following information about the Supporting Creditor,

"The Supporting Creditor holds around 28.6% by value of the Notes. The Scheme terms and proposals have been proposed after consultation with the Supporting Creditor in an endeavour to obtain Noteholder input on the terms of the compromise proposal. The Supporting Creditor is not an affiliate of the Group or connected with the Group and is an independent arms-length creditor under the Notes. No consent fee is being paid to the Supporting Creditor, although its legal fees are being paid by the Parent..."

51. That evidence was reaffirmed in Mr. Smotlak's second witness statement, which "clarified" that the basis of Mr. Smotlak's belief as regards the Supporting Creditor was "discussions with the Group's legal advisors and relevant people within the [APP] Group". Mr. Smotlak further asserted that,

"None of the Notes are held or financed by the Scheme Company, the Parent or their affiliates or beneficial owners."

52. I have already indicated that I do not regard the evidence of Mr. Smotlak as being satisfactory or compliant with the CPR because he does not identify the source(s) of his information concerning matters of which, by reason of his very recent appointment, he does not have personal knowledge. More specifically, given the importance attached to the supposed commercial input and approval of the Scheme by the Supporting Creditor, it is surprising that neither Mr. Smotlak' s evidence nor the draft Explanatory Statement, nor even its own lawyer's letter, gives any further background or detail as to the nature and identity of the Supporting Creditor. There is no explanation, for example, as to when or how the Supporting Creditor acquired its interest in the Notes, or came to be introduced to the Scheme Company or the Parent, or as to who conducted any substantive negotiations or discussions about the Scheme on its behalf, or when that occurred. Nor does Mr. Smotlak give any indication as to any inquiries which have been pursued (whether by himself or anyone else) concerning the origins and ownership of the Supporting Creditor, so as to substantiate his assertion that the Supporting Creditor is an independent arms-length creditor which is unconnected with the Scheme Company or its Parent.

53. The accuracy and completeness of the Scheme Company' s description and evidence as to the Supporting Creditor was thrown into doubt when it was discovered by APPIO that the Supporting Creditor was in fact only incorporated in Singapore on 23 September 2015. It was also revealed that it has two Singaporean citizens as its directors, who are also its registered shareholders, together with what appears to be a Cayman Islands fund about which nothing more is known.

54. Miss Toube pointed out that the "Fairness Opinion" produced by FTI Consulting and included within the Scheme documentation states that FTI Consulting was engaged by the Scheme Company and the Parent on 30 September 2015 to provide its opinion on the fairness of the proposed restructuring as set out in a term sheet which had been agreed following "productive negotiations" between the Parent and the Supporting Creditor.

55. Miss Toube submitted, and I agree, that it is simply implausible that any meaningful arms-length commercial negotiation leading to the agreement of a term-sheet for the Scheme could have taken place and been completed in the one week between the formation of the Supporting Creditor on 23 September 2015 and the engagement of FTI Consulting on 30 September 2015.

56. Instead, the obvious inference is that if any substantive commercial negotiations concerning the Scheme have taken place, they must originally have taken place with someone other than the Supporting Creditor. Moreover, the acquisition, at about the time that the terms of the Scheme appear to have been finalised, of such a large block of Notes by a newly-formed company based in

Singapore and with an off-shore fund as a shareholder, strongly suggests that the Supporting Creditor is simply acting as a nominee for, or is acting under the control of, someone else.

57. In short, there is ample reason to believe that Mr. Smotlak's evidence and the draft Explanatory Statement produced by the Scheme Company concerning the Supporting Creditor is inaccurate and/or incomplete in its account of the genesis of the Scheme proposals and the role played by the Supporting Creditor in them. Nor, I think, does the current draft of the Explanatory Statement provide sufficient information about such matters for the Scheme Creditors to be able to form a proper view as to the appropriate weight to be attached to the voting intention of the Supporting Creditor and the recommendation from Mr. Smotlak which is based in part on it.

58. Those concerns would be sufficient on their own to justify my refusal to convene a scheme meeting on the basis of the material presented to me. But they are heightened by the fact that in 2003, another company in the APP Group (of which the Scheme Company and its Parent in this case are members), was found to have procured the sanction of the Bermudian Court to a scheme of arrangement by relying on perjured evidence concerning the connection between the controlling shareholders of the APP Group ("the APP Controlling Shareholders") and the creditors who supported the scheme.

59. In that case, a number of opposing creditors sought an adjournment of the sanction hearing in order to investigate suspicions that the requisite majority vote in favour of the scheme at the scheme meeting had been obtained because a large number of creditors voting in favour had been influenced by their connection with the APP Controlling Shareholders. That adjournment was refused, and the scheme sanctioned, on the basis of an affirmation by a Mr. Indra Widjaja, who was at the time President Commissioner of the Parent in this case. Mr. Widjaja's affirmation was given on behalf of the APP Controlling Shareholders and stated,

"The APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors, including the Supporting Noteholders, who voted in favour of the Scheme, other than BII, whose connection to the APP Controlling Shareholders is disclosed in the Scheme Document. The APP Controlling Shareholders have not directly and/or indirectly, purchased any of the Existing Notes."

60. Three years later, evidence emerged that a substantial number of the supporting creditors were in fact employees of a company ultimately owned by the Widjaja family. In *Fidelity Advisor Series VIII v APP China Group Ltd* [2007] Bda LR 35, the Supreme Court of Bermuda held that Mr. Widjaja had committed perjury by making the statement set out above. Kawaley J said at paragraph 167,

"... my fundamental factual finding is that I am satisfied, to the standard proof that the law requires for allegations of fraud and dishonesty, that Mr. Widjaja perjured himself by deliberately and falsely stating that that the APP Controlling Shareholders are not affiliated to or otherwise connected with any of the creditors ..."

61. Ultimately the Bermudian Court did not set aside the scheme because it took the view that the consequences would be very extreme and because it found that even if Mr. Widjaja had not perjured himself, the scheme in that case would have been approved. However, Kawaley J. stated (at paragraph 189) that this result:

"... should not in [any] way be seen as seeking to diminish the gravity, in public justice terms, of the serious fraud which has been perpetrated on this Court. This Court on a regular basis implements schemes of arrangement based on a company' s representations that the voting process has been fair and that material conflicts of interest have been disclosed. Where the directing minds of exempted companies and the voting creditors and/or shareholders are located in distant parts, far beyond the jurisdiction of this Court, the risk of fraud is no doubt greater than when all relevant parties are within the convenient reach of this Court. There is an obvious public interest in protecting the integrity of Bermuda as a financial centre, by deterring persons in distant parts from harming other persons in distant parts, and utilising this Court as an unwitting instrument of fraud."

62. Mr. Trower rightly reminded me that I should not assume that simply because one member of the Widjaja family had been found to have committed perjury in relation to a scheme of arrangement in the past, that a similar fraud was being perpetrated in this case. He also pointed out that Mr. Indra Widjaja is no longer a director or officer

of the Parent in this case (although the precise date upon which he ceased to act as President Commissioner is unclear). I do not make any such assumption, but such events and the cautionary words of Kawaley J. to which I have referred simply reinforce the existing requirement for the Scheme Company to exhibit the utmost candour in its dealings with the Court to which I have already referred.

63. Mr. Trower also submitted that any concerns about potential connections between the Supporting Creditor and the Scheme Company or its Parent would not in any event raise a class issue, but could only go to the exercise of discretion at the sanction hearing. He therefore suggested that they should not detain me at the convening stage. I disagree.

64. I have already indicated that the deficiencies in the evidence raise concerns about full and frank disclosure, which is an obligation at all stages of scheme proceedings. Further, they raise obvious concerns about the accuracy or completeness of the Explanatory Statement and other materials to be circulated to Scheme Creditors, which are properly raised at the convening stage. But I also think that it is at least possible that the question of whether the Supporting Creditor is connected or associated with the Scheme Company or the Parent might have a bearing upon the question of class composition which I *do* have to decide at the convening stage.

65. As is well known, the test for the composition of classes focuses on a comparison of existing rights against the scheme company and the treatment of those rights under the scheme. The test was summarised by Lord Millett in *UDL Holdings Limited* [2002] 1 HKC 172 at page 184F-G,

"Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting".

66. Likewise, in *Re Primacom Holding GmbH* [2013] BCC 201 Hildyard J said, at paragraph 44:

"... in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing and the rights offered in the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together."

67. Clearly, this approach is likely to relegate most arguments about whether the Supporting Creditor is connected or associated with the Scheme Company or its Parent to a question of discretion – namely whether the statutory majority was achieved with the votes of persons promoting an interest adverse to the class that they purported to represent. But that is not necessarily so. In *UDL Holdings Limited* at pages 181-182, Lord Millett considered the case of *Re Hellenic & General Trust* [1976] 1 WLR 123,

"In *Re Hellenic & General Trust Ltd* a Scheme of Arrangement was used as a means of effecting a take-over. The Scheme provided that all the shares in the company should be cancelled and that fully paid shares should be issued to H, which would pay 48 pence per share to the former shareholders for the loss of their shares. M, a wholly owned subsidiary of H, already owned more than 50% of the shares. A single meeting of members was called, at which the Scheme was approved by the requisite majority with the help of M's votes. Templeman J refused to sanction the Scheme, holding that M's interests as a wholly owned subsidiary of the purchaser were different from those of the other shareholders who were vendors. He did not merely exercise his discretion to withhold the Court's sanction; he held that the Court had no jurisdiction to sanction the Scheme because a separate meeting of the minority shareholders should have been summoned.

...

The key to the decision is that M was effectively identified with H. It would plainly have been inappropriate to include M in the same class as the other shareholders if it had been buying their shares; it should not make a difference that the purchaser was its parent company.

But this was not because M and the other shareholders had conflicting interests, nor because they had different rights to start with. M's legal rights at the outset were the same as those of the other shareholders. What put M into a different category from the other shareholders was the different treatment it was to receive under the Scheme. The other shareholders were being bought out.

In commercial terms M was transferring its shares to its own parent company and obtaining for its parent company the right to acquire the remainder of the shares from the other shareholders. The rights proposed to be conferred by the Scheme on M and the other shareholders were commercially so dissimilar as to make it impossible for M and the other shareholders to consult together with a view to their common interest, for they had none."

68. Applying Lord Millett' s approach, it seems to me that it is at least arguable that if, for example, it were to transpire (as APPIO plainly suspects) that the Parent or one of its associated companies was the "true commercial owner" of the Notes intended to be voted by the Supporting Creditor, it would be inappropriate for those Notes to be voted at the same Scheme meeting with other Scheme Creditors. If that were the case, in effect the debt represented by the Notes would already have been acquired by the debtor itself, and the rights to be conferred by the Scheme would in effect be new note obligations owed by the Parent to itself.

The deficiencies in the Explanatory Statement and other Scheme documentation

69. I have already indicated that the draft Explanatory Statement and other documentation to be sent to Scheme Creditors does not appear to provide accurate or complete information about the Supporting Creditor and its role in the proposals for the Scheme. Mr. Trower submitted that if I was to adjourn the application for that reason, I should also indicate any other areas of concern as regards those documents so that such concerns could be addressed (if so advised) prior to the adjourned hearing. I will do so briefly, but with the rider that I do not thereby intend to exclude APPIO from raising any other concerns.

70. As well as the Supporting Creditor, APPIO' s other major concern about the Explanatory Statement and the scheme documentation to be sent to Scheme Creditors concerned the portrayal of the alternatives to the Scheme.

71. In *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046, I observed, at paragraph 24,

"I would, however, indicate for the future that companies that seek the consent of their creditors and the sanction of the court to a scheme of arrangement that is put forward as a more advantageous outcome for creditors than formal insolvency proceedings may be well advised to ensure that greater detail is provided, both in the explanatory statement and in the evidence before the court, as to the possible alternatives to the scheme and the basis for the predicted outcomes. The provision of such information is likely to be essential if there is a challenge to the scheme."

72. In the instant case, that information is purportedly provided in the letter from Mr. Smotlak to Scheme Creditors to which I have referred, and in the "Fairness Opinion" obtained by the Scheme Company and the Parent from FTI Consulting. Mr. Smotlak' s letter asserts that alternatives to the Scheme include (i) a consensual arrangement and (ii) the Scheme Company and the Parent entering into formal insolvency proceedings in the Netherlands and/or Indonesia. I note in passing that if the COMI of the Scheme Company has been irrevocably moved to England (as the Scheme Company contends is the case) the main insolvency proceedings in respect of the Scheme Company under the EC Insolvency Regulation (EC 1346/2000) would have to be in England and not the Netherlands.

73. Mr. Smotlak dismisses the possibility of a consensual arrangement because of the difficulties of identifying the holders of the economic and beneficial interests in the Notes, and because of what he asserts is the risk that dissentient creditors might "hold out" for more favourable terms. He allo suggests that they might institute enforcement action or formal insolvency proceedings against the Scheme Company and/or the Parent. Mr. Smotlak' s letter then concludes,

"Having considered the potential alternative strategies, the the Scheme Company, the Board and the board of directors of the Parent have concluded that commencing Insolvency Proceedings in respect of the Scheme Company and/or the Parent would not be in the best interests of the Scheme Company, the Scheme Creditors, the Parent, the APP Group as whole, or any creditors and shareholders of the Parent. Rather, the Scheme Company, the Board and the board of directors of the Parent believe the implementation of the Scheme offers the best prospects for the Scheme Company and the Parent and their group companies in the light of prevailing circumstances. Ultimately, the Scheme Company, the Board and the board of directors of the Parent believe that the Scheme offers holders of the Notes the best prospects of allowing the Scheme Com-

pany, the Parent and the APP Group to continue to carry on its business as a going concern and of Scheme Creditors obtaining any enhanced recovery of the debt outstanding under the Notes."
74. As regards the outcome of formal insolvency proceedings, the Fairness Opinion contains an analysis of the likely returns to Scheme Creditors if the Scheme Company and the Parent were to go into liquidation. It concludes that such returns would be lower than the likely returns under the Scheme and ends with the following opinion,
"In our view, it is in the interests of the holders of the existing Notes, [the Parent], the APP Group and their respective stakeholders to proceed with the restructuring based on the proposed restructuring terms contained in the term sheet."
75. Miss Toube criticises this material for not presenting any analysis or evidence as to whether the Scheme Company, or more importantly, the Parent, *would* actually be forced into formal insolvency proceedings if the Scheme were not approved. She points out that nowhere in the documentation is there any statement or analysis to that effect, nor even any admission or acknowledgement by the Parent that it is insolvent and unable to pay its debts, or that it would be in the absence of the Scheme.
76. As regards the Parent' s financial position, the consolidated unaudited financial statements of the Parent and its subsidiaries as at 30 September 2015 show total assets of US$6.65 billion and total liabilities of US$4.07 billion – a net surplus of US$2.58 billion. Current assets of US$1.77 billion also comfortably exceed current liabilities of US$1.31 billion. The performance of the business over the nine-month period to 30 September 2015 is also reported as showing significant improvement over previous years, with gross profits for the period of some US$440.9 million attributable to "an increase in net sales and, to a lenser extent, our colt of goods increasing at a slower pace than our net sales".
77. On the basis of these numbers, Miss Toube submits that the Parent is plainly balance-sheet solvent and trading profitably. Miss Toube also submits that if the Scheme was rejected, the Parent would certainly be able to pay the debts which it owes to her clients from available cash in order to avoid enforcement action or insolvency proceedings instituted by them. The extent to which the Parent would be able to pay the remainder of the debts owed in respect of the Notes and the US Judgments is far less clear, but Miss Toube is right that there is no analysis by Mr. Smotlak or in the Fairness Opinion as to whether, and if so, to what extent, for example, the Parent might be able to raise substantial sums of money on the security of its net assets.
78. Faced with these points, Mr. Trower realistically did not suggest that the draft Explanatory Statement and Fairness Opinion did contain a full analysis of all of the alternatives to the Scheme. In my judgment they should do so. I also consider that it should be made clear whether or not the authors of any fairness opinion provided to Scheme Creditors are prepared to accept responsibility to Scheme Creditors for that opinion.
79. Miss Toube also criticised the draft Explanatory Statement for failing to disclose that the current and former directors of the Scheme Company and the Parent will benefit from wide-ranging releases of liability for breach of fiduciary duty and other claims in connection with the Notes. Paragraph 3.2(a) of the Explanatory Statement simply asserts that Mr. Smotlak does not have "any interest in the transactions contemplated by the proposed Scheme", and there is no mention anywhere of the wider releases from which other APP Group companies and their directors and ex-directors will benefit.
80. Whilst the disclosure may be strictly accurate in relation to Mr. Smotlak, it seems to me that attention should be drawn in the documentation to the fact that releases will be given to persons other than the Scheme Company and the Parent in connection with the Notes and the US Judgments. In addition, some assessment ought to be made of the potential financial effect (if any) of those releases upon Scheme Creditors.

Other matters
81. As I have indicated, and Miss Toube acknowledged, the role of the court at the convening hearing is limited. Nonetheless, Miss Toube sensibly gave advance notice of a number of further issues which APPIO intends to raise at the appropriate juncture in due course, whilst reserving APPIO's right to raise other arguments that might occur to it. I will briefly summarise the more significant of those points, and in so doing I will respond to Mr. Trower's understandable request that I should indicate, so far as I am able, whether I would intend to determine such matters

at the convening hearing or whether they should be dealt with at sanction. In that way the parties will know where they stand procedurally.
82. First, APPIO contends that it is necessary for the Scheme Company to satisfy the jurisdictional requirements of Part 2 of the Recast EU Regulation on Jurisdiction and Judgments (EU 1215/2012), and that it cannot do so. APPIO points out that the Scheme Company, the Parent and the parties to the Notes have only submitted to the non-exclusive jurisdiction of the courts of New York and not England; that the only Scheme Creditors which have been identified (Euroclear and Clearstream) are domiciled in other EU member states; and that there is no evidence that any of the Scheme Creditors are domiciled in England.
83. These submissions raise the type of issue that I considered at some length in *Re Van Gansewinkel Groep B.V.* [2015] Bus LR 1046. Since there is an argument to the effect that it is not necessary to satisfy the jurisdictional requirements of Part 2 of the Recast Jurisdiction and Judgments Regulation at all, and even if it is, the question of whether such requirements can be met may depend upon an assessment of the number and value of Scheme Creditors who are domiciled in England and in the other EU member states, it seems to me that this is an issue that should be left over to the sanction hearing. If I convene a scheme meeting or meetings I will, however, hear submissions from the parties as to how the Scheme Company might take steps to ascertain and keep a record of the domicile of Scheme Creditors who vote upon the Scheme.
84. Secondly, APPIO makes three connected points: (i) that the Scheme Company' s move of its COMI to England is ineffective, so that the Scheme Company has no connection with England, (ii) that the real commercial object of the Scheme is the release of the Parent' s debts, and it is common ground that the Parent has no connection with England, and (iii) that the Scheme (or at least the release of the Parent) would not be recognised in the US under Chapter 15 of the US Bankruptcy Code.
85. To put these points into context, it is common ground between the parties that the only "pure" jurisdictional requirement for a scheme is that contained in section 895(2) of the Companies Act 2006, namely that the Scheme Company is a company "that is liable to be wound up under the Insolvency Act 1986". It allo seems that this requirement is satisfied if the scheme company is a company of a *type* that is liable to be wound up: it is not necessary to establish that the scheme company has, at the relevant time, either its COMI or an establishment in England within the meaning of the EC Insolvency Regulation: see e.g. *Re DAP Holding NV* [2006] BCC 48 and *Re Rodenstock GmbH* [2011] Bus LR 1245 especially at paragraphs 43-44 and 54-56. It is therefore clear that the Scheme Company fulfils this "pure" jurisdictional requirement.
86. However, according to the authorities, the test to decide whether the court might be justified in exercising its jurisdiction to sanction a scheme in relation to a foreign company is whether there is a "sufficient connection" with England: see *Re Drax Holdings Limited* [2004] 1 WLR 1049 at paragraph 29 and *DAP Holding NV* (supra). That test is not defined by reference to the EC Insolvency Regulation' s concept of COMI, but will depend upon all the circumstances
87. Moreover, in *Magyar Telecom B.V.* («JOR» 2014/181, m.nt. Declercq; *red.*) [2015] 1 BCLC 418 at paragraph 21, David Richards J indicated that he was inclined to the view that the question of whether there was a sufficient connection with England to justify the exercise of the court' s scheme jurisdiction in relation to a foreign company was closely related to the question of whether the scheme, if approved, would be recognised and thus have a substantial effect abroad. I respectfully agree with that observation.
88. There must be a basic requirement for a foreign scheme company to adduce at the convening hearing some evidence of a connection with England and of the prospects that the scheme will be recognised and given effect in relevant jurisdictions where there are assets (or creditors) abroad, so as at least to satisfy the court that there is a realistic prospect of the court ultimately sanctioning the scheme. However, in the vast majority of cases it also seems to me that these related questions will most appropriately be determined after a full review of the evidence and together with the other discretionary factors that fall for consideration at the sanction stage.
89. I do not rule out the possibility that an opposing creditor might succeed in demonstrating at a convening hearing that the scheme company' s evidence in relation on to connection and recognition manifestly fails to pass even the relatively

low initial hurdle, but that would, I think, be an unusual case. Certainly, if there are significant disputes of fact or expert evidence of foreign law, the convening hearing is unlikely to be the appropriate occasion upon which they should be litigated. It is more likely to be appropriate to resolve such questions once the results of the scheme meeting are known and on the basis of cross-examination and disclosure if appropriate.

90. In the instant case, Mr. Smotlak has given evidence of a number of steps taken by the Scheme Company to establish a connection with England, and the Scheme Company has produced expert reports into the likelihood of the Scheme being recognised in the United States, Indonesia and the Netherlands. In particular, the Scheme Company and the US expert point to the *Magyar Telecom* case («JOR» 2014/181, m.nt. Declerq; *red.*) as supporting the contention that the Scheme and the releases afforded to the Parent would be recognised in the United States.

91. Magyar was a company incorporated in the Netherlands which owned the main operating subsidiary of a large telecommunications group based in Hungary. It also operated as the financing company for the group. It had taken steps (not dissimilar to those taken by the Scheme Company in this case) to shift its COMI to England, where it promoted a scheme to restructure its debts under notes governed by New York law. Under the scheme, the existing notes were to be replaced by new notes to be issued by the scheme company itself, and the noteholders were also to provide releases in respect of guarantees provided by the operating subsidiary and certain other group companies.

92. The *Magyar Telecom* («JOR» 2014/181, m.nt. Declerq; *red.*) scheme was unopposed. It was sanctioned by David Richards J and subsequently recognised as a foreign main proceeding under Chapter 15 by the US Bankruptcy Court for the Southern District of New York: see *Re Magyar Telecom BV* («JOR» 2014/181, m.nt. Declerq; *red.*) [2013] WL 10399944 (Dec 11, 2013).

93. APPIO will doubtless argue that *Magyar Telecom* («JOR» 2014/181, m.nt. Declerq; *red.*) is of reduced authority because the hearing before David Richards J and the application for recognition in the US were both unopposed. APPIO also indicates that it will argue that the Scheme Company' s expert evidence of US law is wrong. It may also be said that *Magyar Telecom* («JOR» 2014/181, m.nt. Declerq; *red.*) can be distinguished on the facts, among other things because the scheme company in that case was not a mere shell but was the parent company of the operating group at the centre of the scheme; and it was conceded to be insolvent and facing liquidation in England as the only alternative to the scheme (a point which plainly carried substantial weight with David Richards J – see paragraphs 19 and 23 of the judgment).

94. Nonetheless, on the basis of the materials that I have currently seen, it seems to me that *Magyar Telecom* («JOR» 2014/181, m.nt. Declerq; *red.*) does provide support for the proposition that it is at least reasonably arguable that the English court could consider it appropriate to sanction the Scheme if satisfied on the evidence that it would achieve its purpose in the United States. Alternatively, if there was a significant question over recognition, sanction could be given subject to a non-waivable condition precedent that the Scheme (including the release of the Parent) should be recognised in the United States under Chapter 15: see e.g. *Re Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch).

95. On that footing, it seems to me that the questions raised by APPIO of whether it is appropriate to use the scheme jurisdiction in a case such as the present, of whether there is a sufficient connection, and of the likelihood of recognition abroad should all be addressed together at the sanction hearing.

96. For completeness I should also mention that at the hearing I raised the question of whether this court should be more circumspect about convening a scheme meeting or sanctioning a scheme to compromise a debt of the scheme company which was not merely a contractual obligation governed by a foreign law, but arose out of a judgment and order for payment made by a foreign court. However, on the basis that it could be made clear to the US Courts that simply by convening a scheme meeting, this court would not be giving any indication as to its views of the merits or appropriateness of the proposed Scheme, I do not think that I need to resolve any such concerns at this stage. That is a matter which can be addressed together with other issues of recognition at the sanction hearing.

Order

97. I shall therefore adjourn the convening hearing. I will direct that the hearing be relisted before me on a date not before 3 March 2016 which is convenient for counsel. The date of the relisted hearing should be notified to Scheme Creditors as soon as it is known. I shall also direct that if the Scheme Company intends to produce any further evidence, a revised draft of the Explanatory Statement and/or of the Fairness Opinion, such documentation must be filed and served on any Scheme Creditor who has indicated an intention to appear at the hearing no less than 10 days before the date fixed for the hearing. I shall also give permission to the Scheme Company and APPIO to apply to me in the meantime on two clear business days' notice in writing for any further directions that might be required.

NOOT

Introduction

1. This matter presents yet another example of a Dutch finance company, in a larger group of companies, that sought to avail itself of a solvent English Scheme of Arrangement ("Scheme") in order to implement a (balance sheet) restructuring it negotiated with stakeholders outside of a formal insolvency proceeding. In earlier annotations (regarding the Dutch company NEF Telecom BV in «JOR» 2013/58 and «JOR» 2013/59 and regarding the Dutch company Magyar Telecom BV in «JOR» 2014/181 (the "Magyar Judgment")) I already highlighted various aspects of the continuing popularity of Schemes to also restructure foreign companies and how the boundaries of application are extended further and further.

2. Interestingly, last year Justice Snowden, who rendered the judgment in the present matter (the "Judgment") of the Dutch company Indah Kiat International Finance BV ("Indah Kiat"), already delivered a lengthy and detailed judgment on 22 July, 2015 in the Van Gansewinkel Group BV ("VGG") matter ([2015] EWHC 2151 (Ch) (the "VGG Judgment"), involving another Dutch company. In his VGG Judgment, Justice Snowden reflected on the rationale for the use of Schemes to restructure foreign companies and, in light thereof, acknowledged that there may be considerable commercial imperative (and indeed pressure) upon the English court to approve a Scheme. However, at the same time Justice Snowden also emphasized that, even where the Scheme in question has the support of an overwhelming majority of creditors who are to be subjected to it, the English court does not act as a rubber stamp (paragraph 5 of the VGG Judgment).

3. Unlike in the VGG matter, in the present Indah Kiat matter there was creditor opposition to the proposed Scheme. The proposed Scheme was not simple and straightforward as it sought to use a recent COMI (Centre of Main Interests) shift to England of a Dutch SPV shell company to force a compromise of US law governed debts and judgment debts of its Indonesian parent (PT Indah Kiat Pulp & Paper Tbk (the "Parent")) which is a substantial and ostensibly solvent company with no connection to England. The order Justice Snowden makes in the Judgment is to adjourn the convening hearing to be relisted before him on a date not before 3 March 2016. After a long line of approved Schemes in the last number of years, this begs the questions: How significant is this? Are we witnessing the beginning of the end of a trend?

English court does not act as a rubber stamp

4. The VGG Judgment was already characterised by some as a change in attitude of the English courts towards approving a Scheme that is used to restructure a foreign company. It would be more difficult going forward and therefore the Scheme, as a restructuring tool, it was said, had weakened. Personally, I disagree with this assessment. In my view, if anything, the VGG Judgment has only strengthened the Scheme as it demonstrates the level of scrutiny conducted by the English court, which, in turn, strengthens the case for recognition abroad of the English court's decision to sanction an English Scheme in respect of a foreign company. This, I think, is important because English courts will not be of a mind to make an order sanctioning an English Scheme if the order has no substantive effect or will not achieve its purposes. The English court does not need certainty as to the position under foreign law, but it needs to have some credible evidence that it is not acting in vain in sanctioning an English Scheme. The Judgment in the instant matter of Indah Kiat further demonstrates in my view that the English court does not act as a rubber stamp, but instead facilitates

affected stakeholders to express their concerns and, also from a procedural perspective, ensures that this can actually be done appropriately.

Safeguards

5. The facts in the Indah Kiat matter are unusual and are summarized in paragraphs 8-15 of the Judgment. In short, two series of notes with a combined face value of US$ 350 million (the "Notes") already fell in default in about 2001 and after a failed restructuring attempt where then the subject of a number of US judgments, which in turn were – in effect – set aside following litigation in Indonesia that resulted in an Indonesian judgment that reached the opposite outcome from the US judgments.

6. On 15 December, 2015, in a so-called COMI notice, Indah Kiat informed, through Euroclear and Clearstream, the holders of the Notes about a COMI shift from the Netherlands to England in order to effect a compromise with creditors by way of an English Scheme. On 7 January, 2016, Indah Kiat produced a so-called Practice Statement in which it set out an account of the background to the Scheme, a summary of its terms and it gave notice that the hearing of Indah Kiat's application to convene a single meeting of Scheme creditors would be heard on 21 January, 2016. While protesting jurisdiction, one of the Scheme creditors, APP Investment Opportunity LLC ("APPIO"), sought an adjournment of the convening hearing on the grounds that inadequate notice had been given to the Scheme creditors. While Justice Snowden accepted these submissions, he explains in quite some detail that the granting of the requested adjournment was not solely based on a mere procedural defect in the notice. Justice Snowden also identified more substantive issues as to the evidential basis upon which the English court is being asked by Indah Kiat to initiate the Scheme process.

7. While adequate notice depends on all the circumstances, Justice Snowden provides as guidance that, in the absence of real urgency (which he deemed not present here), the more complex or novel the Scheme, and the less consultation that has taken place with creditors as a whole before the Scheme is launched, the longer the notice should generally be (paragraphs 29/30 of the Judgment).

8. Indah Kiat's application was supported by two witness statements from Mr Smotlak, who was appointed sole director of Indah Kiat only on 30 October 2015. In addition, the English court was also provided with a so-called draft Explanatory Statement. Justice Snowden viewed the evidence provided by Mr. Smotlak non-compliant with the requirement that a witness statement must indicate the source for any matters of information and belief. Vague references to unidentified "colleagues" and "relevant people" do not do that (paragraph 26 of the Judgment). Justice Snowden further found the evidence provided by Idah Kiat in support of convening one single meeting of Scheme creditors and the draft Explanatory Statement materially deficient in their current form (paragraph 38 of the Judgment).

Full & Frank Disclosure: Supporting Creditor & Parent's Solvency

9. The company proposing a Scheme has a duty to make full and frank disclosure to the English court of all material facts and matters which may be relevant to any decision the court is asked to make. In particular when a foreign company decides to use an English Scheme to restructure its debt, the Scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court (paragraph 40 of the Judgment). In short, based on the evidence provided to the English court together with the concerns raised by APPIO, Justice Snowden felt that legitimate doubts were cast on how full and frank the disclosure of Indah Kiat, as proposing Scheme company, had been. In that context, it was emphasized as well established that the Scheme company has a duty (in producing an Explanatory Statement) to place before members or creditors sufficient information for them to make a reasonable judgment as to whether the Scheme is in their commercial interest or not.

10. In the VGG Judgment (paragraph 24) Justice Snowden had already clearly made the following note of caution: "*I would, however, indicate for the future that companies that seek the consent of their creditors and the sanction of the court to a [Scheme] that is put forward as a more advantageous outcome for creditors than formal insolvency proceedings may be well advised to ensure that greater detail is provided, both in*

the Explanatory Statement and in the evidence before the court, as to possible alternatives to the [Scheme] and the basis for the predicted outcomes."

11. Full and frank disclosure by Indah Kiat was questioned as to (i) the weight to be attached to the Scheme voting intention of the so-called Supporting Creditor (i.e. a company holding a beneficial interest of 28.6% in the Notes with whom the proposed Scheme allegedly was negotiated at an arms' length basis) and (ii) the analysis of alternatives to the Scheme addressed in the Fairness Opinion. In paragraphs 47-62 of the Judgment it is explained why there are good reasons to suspect that the so-called Supporting Creditor may be connected or associated with Indah Kiat or the Parent, as a result of which the Parent, or one of its associated companies, would be the "true commercial owner" of the Notes. If that indeed were the case, it would create a "class issue" that Justice Snowden felt he has to decide at the convening hearing (paragraph 68 of the Judgment). Based on the consolidated unaudited financial statements of the Parent and its subsidiaries, APPIO further successfully questioned whether Indah Kiat or the Parent would actually be forced into formal insolvency proceedings if the Scheme were not approved, as the Parent seems to be balance sheet solvent and trading profitably (paragraphs 72-78 of the Judgment).

Jurisdiction

12. In my earlier annotation to the Magyar Judgment I addressed in some detail the relevant jurisdiction tests for an English court to consider when a foreign company proposes to use an English Scheme to restructure. In the VGG Judgment, also Justice Snowden provided a detailed analysis of Scheme jurisdiction under the English Companies Act 2006, under the Insolvency Regulation (EC Regulation No. 1346/2000 on Insolvency Proceedings), and under the Judgments Regulation (EU 1215/2012 Recast EU Regulation on Jurisdiction and Judgments). At present, it has not yet been (expressly) decided by an English court whether Schemes altogether fall outside of the Judgments Regulation. As credible arguments in favour and against this position exist, in practice a so-called 'alternative approach' is being used by English courts (including by Justice Snowden in the VGG Judgment) which is to assume that the Judgments Regulation does apply and to find jurisdiction to entertain a Scheme 'within its provisions'.

13. Interestingly, APPIO takes the position that it is necessary for Indah Kiat to satisfy the jurisdictional requirements of the Judgments Regulation and contends that it cannot do so (paragraph 82 of the Judgment). Like Magyar, Indah Kiat shifted its COMI to England and therefore jurisdiction under the Companies Act 2006 should not be a problem (paragraph 85 of the Judgment). However, APPIO also argues that (i) the COMI shift to England is ineffective, (ii) the real commercial object of the Scheme is the release of the Parent's debts, which has no connection to England, and (iii) the Scheme (or at least the release of the Parent) would not be recognised in the US under Chapter 15 of the US Bankruptcy Code (paragraph 84 of the Judgment).

14. Justice Snowden concludes, however, that the questions raised by APPIO regarding jurisdiction should all be raised at the sanction hearing (i.e. stage 3 of the Scheme process, after the convening hearing (stage 1) and the voting on the Scheme in the Scheme meeting(s) (stage 2)).

15. As far as the US recognition question is concerned, Justice Snowden not only referenced the Magyar Judgment (which he acknowledged was unopposed), but also referenced a recent Scheme judgment of 17 December 2015 Re Codere Finance (UK) Limited [2015] EWHC 3778 (Ch) (the "Codere Judgment"). In that matter, a "sufficient connection" with the UK was created by the acquisition of the Spanish company Codere SA of all the shares of the English company Codere Finance (UK) Ltd and the English company agreed to assume a primary, joint and several obligation in respect of all the obligations of the Spanish company under the notes. The accession of the English company as co-obligor in relation to the notes allowed the English company to propose an English Scheme in respect of the notes. Implementation of the Scheme was, however, conditional on the English company obtaining an order recognising the Scheme and its effects under Chapter 15 of the US Bankruptcy Code. Based on the Codere Judgment, Justice Snowden's practical approach, in the event there is a significant issue of recognition regarding the English Scheme proposed by

Indah Kiat, was that sanction could be given subject to a non-waivable condition precedent that the Scheme (including the release of the Parent) should be recognised in the United States under Chapter 15 (paragraph 94 of the Judgment).

Conclusion

16. The Judgment addresses some interesting jurisdictional and other issues relating to an English Scheme in respect of which further guidance would be very welcome for practitioners, in particular since opposition to a Scheme is a rather rare occurrence. However, will the opposition in the matter of Indah Kiat last, or will a settlement be reached? If the latter is the case, certain of the issues raised in the Judgment may not have to be addressed by Justice Snowden after all. Even so, in the Judgment Justice Snowden has, in my view, further solidified the robustness of the English Scheme as a restructuring tool. The level of scrutiny employed by the English court in combination with a practical approach towards thorny issues such as Chapter 15 recognition in the US is helpful and further creates much needed transparency and predictability.

17. Will this remain relevant for Dutch companies if the Dutch extrajudicial composition as proposed by the draft bill on the Continuity of Companies Act II ("WCO II") is enacted in the Netherlands? Definitely. Under the WCO II jurisdiction will be determined by the COMI of the company. However, the English Scheme should still be available to Dutch companies provided the Dutch company can establish a "sufficient connection" with the UK, regardless of whether its COMI is transferred to the UK.

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