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Case No: CR-2021-000584

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

Royal Courts of Justice
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 24/05/2021

Before :

MR JUSTICE MILES

IN THE MATTER OF ALL SCHEME LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

Robin Dicker QC and Conor McLaughlin (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Applicant company**
Tom Smith QC and Stefanie Wilkins (instructed by **Ashurst LLP**) for the **Financial Conduct Authority**

Hearing date: 19 May 2021

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APPROVED JUDGMENT

Covid Protocol: this judgment was provided by email at 19:20 on 24 May 2021 and is deemed to be handed down at that date and time. It will also be published on Bailii at 10.30am on 25 May 2021.

Mr Justice Miles:

Introduction

1. This is an application by ALL Scheme Limited ("the Company") for the sanction pursuant to section 899 of the Companies Act 2006 of a scheme of arrangement (the "Scheme") between the Company and certain of its creditors.

2. The Company was incorporated on 6 January 2021. It is part of the Amigo group of companies ("Amigo" or the "Group"). The Group, through its main operating entity Amigo Loans Ltd ("ALL"), is a provider of "guarantor loans", offering credit to those who are unable to borrow from mainstream lenders. The lending relationship involves a borrower and a guarantor with a stronger credit profile.

3. There has been a marked increase of consumer complaints against ALL relating to its lending activities and, in particular, to unaffordable or unsustainable lending. Consumers are entitled to seek redress for such complaints, which is typically quantified as the amount of the costs and interest they have paid on their loans (in the case of borrowers) or any amount paid under a guarantee (in the case of guarantors), and interest at 8%. ALL has made substantial provisions for redress claims in its statutory accounts and, as a result, has suffered accounting losses.

4. The COVID-19 pandemic has also affected the business and finances of the Group.

5. The Company, incorporated for the purpose of promoting the Scheme, has assumed joint liability with ALL (and two other Group entities) by way of a deed poll, in respect of potential redress claims by borrowers and guarantors ("Redress Creditors"), and sums owed to the Financial Ombudsman Service (the "FOS") in relation to case fees for handling previous complaints. The Redress Creditors and the FOS are the "Scheme Creditors".

6. The purpose of the Scheme is, in broad terms, to provide a mechanism, including a bar date, for the determination of the claims of Scheme Creditors and to set up an earmarked fund which will be used to pay part of their claims. The Scheme Creditors will in turn release their claims against the Group. The Company's best reasonable estimate is that Scheme Creditors will receive approximately 10p in the pound, although customers may also benefit from further payments into the fund (depending on the total amount of redress as falls to be set-off against the outstanding borrowings of customers) and a share of the Group's future profits. Scheme Creditors may also receive less than 10p in the pound depending on the level of claims and other factors.

7. The convening hearing was held on 30 March 2021. Sir Alastair Norris convened a single meeting of the Scheme Creditors ("the Creditors' Meeting") to consider and, if thought fit, approve the Scheme.

8. The Financial Conduct Authority (the "FCA") did not appear by Counsel at the convening hearing but set out some concerns about the scheme in two letters dated 23 March 2021 and 29 March 2021. At that stage the FCA indicated that it did not intend to appear at the sanction hearing either, but reserved its position. The FCA changed its stance and announced on 10 May 2021 (two days before the Creditors' Meeting) that

it would oppose the sanction of the Scheme irrespective of the outcome of the Creditors' Meeting.

9. The Creditors' Meeting was held on 12 May 2021. 78,740 Scheme Creditors voted on the Scheme in person or by proxy. Of those voting 95.1% in number, representing 95.7% of votes cast by value, voted in favour of the Scheme. As I shall explain further below those 78,740 Scheme Creditors represent about 8.7% of the potential class by number.

10. The FCA appeared at the hearing by Counsel and opposed the sanction of the Scheme. The sanction hearing (which was conducted over MS Teams) was also attended by a number of creditors and shareholders. A number of them (mostly shareholders) made representations to me. The shareholders are not party to the Scheme but I have considered all representations carefully. I do not need to address them separately in this judgment as the points were covered in the submissions of Counsel for the Company and the FCA. The written and oral presentations of both sets of Counsel were of the highest calibre.

Factual background

11. I turn to the background to the Scheme. I draw on the helpful skeleton arguments of Counsel. Their summaries are in turn based on the various witness statements submitted on behalf of the Company and the FCA, being the first, second and third statements of Mr Beal (for the Company); the first and second statements of Mr Jennison (for the Company); the first statement of Mr Drummond-Smith (for the Company); and the first and second statements of Mr Mills (for the FCA); all of which I have read and considered.

12. The Group lends to customers whose credit profile does not allow them to access credit from mainstream lenders, with the support of a guarantor. Those loans are made by ALL, the operating entity within the Group, and served by Amigo Management Services Limited ("AMSL"). The ultimate parent company of the Group is Amigo Holdings PLC (the "Parent"), the shares in which are listed on the London Stock Exchange.

13. The Group estimates that ALL has entered into 927,000 individual agreements with 507,144 borrowers and 536,097 guarantors since January 2005 (together "the customers"). There are approximately 137,000 customers under current loans.

14. ALL has faced claims for redress in cases where it extended loans to borrowers who could not afford them or where a guarantee should not have been accepted (either because the related loan should not have been made or because the guarantor could not afford to offer the guarantee). In such cases, the FCA's rules and the FOS require any interest and costs paid by a borrower, or any amount paid by a guarantor, to be repaid with interest at 8% p.a. from the date on which those sums were paid. The Group is also indebted to the FOS for about £12.5 million in respect of case handling fees relating to claims which have previously been referred to it.

15. The Group is facing financial difficulties and these have led to the decision to promote the Scheme:

i) The COVID-19 pandemic has had a significant impact on the Group for two principal reasons. First, ALL granted a payment holiday to approximately 63,000 customers, which negatively impacted its cash flow due to lack of collections. Second, all new lending was paused in March 2020 except to key workers, and in November 2020 paused entirely. This has resulted, year-on-year, in a 36.9% fall in revenue, a decline in customer numbers of 32.7%, and a reduction of 32.9% in the value of the net loan book.

ii) In common with other lenders in the sector, there has been a large increase in the number of customer complaints against ALL. ALL's complaints provision for known and potential claims was increased to £150.9 million as at 31 December 2020.

iii) The FCA has carried out sector-wide reviews of the entire non-standard finance sector and, in addition, is carrying out investigations into ALL's affordability assessment process, as well as the governance and oversight of this process and complaints handling.

16. ALL recorded a statutory loss of £86.8 million for the nine-month period to 31 December 2020, compared to a £45.9 million profit for the same period the previous year.

17. The current management and non-executive directors of the Group joined in the second half of 2020. This includes Mr Jennison, who became Chief Executive Officer on 23 September 2020.

18. The Company's evidence is that in December 2020, the directors of the Parent formed the view that, absent the Scheme, ALL would be likely to enter administration because it would be unable to pay its creditors in full. It has repeated this position in public statements, in its statements to creditors in its communications about the Scheme, and to the financial markets (including shareholders) through RNS (i.e. regulatory news service) announcements.

19. On 12 May 2021 Mr Mills said (in his first statement) that the FCA considered that the probable alternative to the Scheme would be a revised scheme or reorganisation with stakeholders, rather than an imminent insolvency. The board of the Parent convened a meeting to consider this on 13 May 2021. Mr Jennison says in his first statement that the board confirmed its earlier views that, if the Scheme is not sanctioned, there is no viable option other than administration. I shall return to this point below.

20. An estimated outcome statement (showing returns in the event of a formal insolvency procedure) has been prepared by the directors of ALL (the "EOS"). PwC provided a letter ("the PwC Letter") which commented on the financial information considered by the directors and the reasonableness of the directors' assumptions. The EOS and the PwC Letter were made available on a website dedicated to the Scheme. The EOS concludes that, in the event of an administration, Scheme Creditors would not receive any payment.

21. This is because there is secured lending which ranks ahead of the claims of the Secured Creditors. There is a series of senior secured bonds issued by a Group

company. The gross principal amount outstanding as at 31 December 2020 was £234.1 million (with approximately £270 million, including remaining interest due to bondholders, outstanding as at 30 April 2021). ALL has given security over its assets in relation to these bonds. ALL has also entered into a £250 million revolving securitisation facility, the balance of which was £112.2 million as at 31 December 2020 (with £54 million expected to be outstanding as at 30 April 2021; in the event, the amount was £48 million). The securitisation facility provides for the equitable assignment of certain loans in ALL's loan book to an orphan SPV, with the collections received under such loans being held on trust by ALL in favour of the SPV.

22. The estimated realisable value of ALL's assets, including its loan book, are expected to be between £312-£325 million, depending on the collection strategy adopted by an administrator. PwC have estimated the costs of insolvency to be £37 million.

23. It follows that ALL's unsecured creditors, including the Scheme Creditors, would not receive a dividend in an insolvency (although those Scheme Creditors who have outstanding balances as borrowers would benefit from insolvency set-off). Equally, the shareholders of ALL (and therefore the shareholders in the Parent) would receive nothing.

24. The Group started to consider the possibility of a scheme in November 2020. Since then it has had extensive communications and discussions with the FCA and has shared all material drafts of documents relating to the Scheme with the FCA. The Company's evidence is that this has led to amendments in the Scheme favourable to Scheme Creditors (including by improving the parameters of the Future Business Contribution, as defined below).

25. As already explained, the Group incorporated the Company on 6 January 2021 for the purpose of proposing the Scheme. On 24 January 2021 the Company assumed joint liability alongside ALL, AMSL and the Parent by way of a deed poll in respect of liabilities owed by those entities to certain of its customers and the FOS (who are now the Scheme Creditors). Some customers were excluded from this assumption of liability, and are not subject to the Scheme, because, before 21 December 2020, ALL had accepted a complaint, made a settlement offer, or had accepted an opinion or decision of the FOS.

26. The assumption of liability by the Company pursuant to the deed poll took effect on the date of its execution. It will terminate and be treated as void ab initio if the Scheme has not been sanctioned before 3 September 2021 or if there is an Insolvency Event (as defined) in relation to any of the Group companies to which the deed poll refers.

27. The Company has also entered into a Contribution and Cooperation Agreement dated 25 March 2021 pursuant to which ALL has agreed to provide financial support to the Company for the purposes of the Scheme (to be held on trust in the "Scheme Fund"), conditional on the Scheme becoming effective. As to this:

    i) ALL will make an initial payment of £15 million to the Scheme Fund (the "Initial ALL Contribution");

ii) following calculation of any necessary adjustments to customers' outstanding balances pursuant to a valid claim (by way of set-off), ALL will also pay any sum by which the adjustments are less than a reasonable estimate of £85 million at a rate of 38.85%, capped at £20 million (the "Balance Adjustment Contribution"); and

iii) ALL will pay an amount equal to 15% of its annual consolidated profits before tax for each of the next four years starting from 1 April 2021 (after adjusting for the net effect of any change in provisions or costs for redress relating to loans issued prior to 21 December 2021) (the "Future Business Contribution").

28. The costs of the Scheme will be borne by ALL unless it enters insolvency before completion of the Scheme, in which case residual unpaid costs will be deducted from the Scheme Fund before it is distributed to Scheme Creditors with an accepted claim.

An outline of the Scheme

29. The Scheme operates, in outline, as follows:

i) Scheme Creditors will be entitled to submit a claim in respect of their Scheme Liability (in respect of which the Company is liable by virtue of the deed poll) within a six-month period using an online portal.

ii) The Company will assess that liability and inform the Scheme Creditor whether it agrees that it owes a Scheme Liability. Scheme Creditors will be entitled to refer the matter to the "Scheme Adjudicator" if they disagree with the Company's assessment.

iii) The Company will determine the value of a Scheme Creditor's "Ascertained Scheme Claim" which will be the amount of the claim taking into account any liability owed by the Scheme Creditor to ALL, AMSL or the Parent.

iv) Scheme Creditors' Ascertained Scheme Claims will result in a pro rata distribution from the Scheme Fund.

v) In return, Scheme Creditors will release the Company, ALL, AMSL and the Parent from any claims they may have against those entities as a result of a Scheme Liability.

vi) The Company will also appoint "Scheme Supervisors" to oversee the operation of the Scheme.

30. I should say something more about some of these points.

31. First, as to the procedure for claims, if the court sanctions the Scheme, the Company will give notice to Scheme Creditors and invite them to submit a claim in the Scheme. Such notice will be given by way of email and SMS to those Scheme Creditors for whom it holds contact details, by way of notice on the Scheme website, and by placing an advertisement in the Daily Mirror and the Daily Mail.

32. Scheme Creditors will have a six-month period (until the "Bar Date") to submit a claim under the Scheme through an online portal (in the case of Redress Creditors) or by providing details of its claim to the Company (in the case of the FOS).

33. The existence of the Bar Date, and its consequences for Scheme Creditors, were explained in the Explanatory Statement. It is also envisaged that notice will again be given to Scheme Creditors, by way of email and SMS and a notice on the Scheme Website and in media channels three months, and again one month, before the Bar Date.

34. Second, as to the determination of claims, the Company will assess claims which have been submitted in accordance with the terms of the Scheme. A partly automated process will be employed. The methodology is summarised at Schedule 4 to the Explanatory Statement. Scheme Creditors may also be asked to submit evidence in support of their claim and the Company may request further information. If that information is not provided, the Company shall make its determination based on the information available to it.

35. In the letters it published before the convening hearing the FCA expressed some concerns about the methodology which the Company proposed to adopt for determination of claims. The FCA has not however raised this issue in objecting to the sanction of the Scheme.

36. The Company will notify Scheme Creditors whether it accepts their claims. Scheme Creditors will have the opportunity to dispute the Company's assessment of their claim. The Company will seek to reach agreement with any Scheme Creditor within 30 days, failing which the claim will be referred to the Scheme Adjudicator. Where a Scheme Creditor does not dispute the Company's assessment of the claim, it will become an Ascertained Scheme Claim after 30 days. Otherwise, it will become an Ascertained Scheme Claim where agreement is reached between the Scheme Creditor and the Company, or a determination is made by the Scheme Adjudicator. The Company has recently appointed Claire Carroll, a partner of Eversheds Sutherland International LLP with experience in the financial services regulatory sector, as Scheme Adjudicator.

37. In determining the amount of the Ascertained Scheme Claim, the Company will take into account any liability owed by the Scheme Creditor to ALL, AMSL or the Parent arising out of an outstanding loan. The effect of this is that the Ascertained Scheme Claim is the Scheme Creditor's net claim after a balance adjustment has been made.

38. As explained above, the Scheme Fund will be available for distribution to Scheme Creditors in respect of their Ascertained Scheme Claims. The proposed distribution mechanism is as follows:

    i) ALL will first calculate and pay the amount of the Balance Adjustment Contribution which forms part of the Scheme Fund;

    ii) a deduction will be made in respect of Scheme Costs if ALL has entered an insolvency process;

iii) the Ascertained Scheme Claims will give rise to a pro rata distribution from the Scheme Fund, to be made by electronic transfer to the Scheme Creditors' nominated bank accounts; and

iv) where further payments are made to the Scheme Fund as a result of the Future Business Contribution, payments will be made in a similar manner.

39. The level of the distribution to be made in relation to Ascertained Scheme Claims is currently anticipated to be approximately 10p in the pound, although this is dependent on a number of variables such as response and uphold rate, and the distribution may therefore be higher or lower.

40. The estimated return of 10p in the pound takes into account the Initial ALL Contribution, but not the uncapped effect of set-off (which will result in customers' outstanding balances being reduced), the Balanced Adjustment Contribution or the Future Business Contribution. The estimated value of the Future Business Contribution is set out in a confidential exhibit to Mr Jennison's witness statement. The reason it was confidential is that it contains price sensitive information. There is no need to set out the contents of the exhibit here, but I record that the Company's forecast total Future Business Contribution is materially lower than the amount of Initial Contribution. I also observe that projections of profits for periods that distant are inherently uncertain and depend on the assumptions adopted.

41. Under clause 2.8.1 of the Scheme, the Scheme Creditors will also authorise the Scheme Supervisors to execute a deed of release on their behalf. The Deed of Release will release all Scheme Creditors' claims against the Company, ALL, AMSL and the Parent, as well as their directors and employees, in respect of a liability subject to the Scheme. This means that Scheme Creditors' only recourse is to a distribution from the Scheme Fund. ALL and the other Group Companies would then be able to carry on their business activities (including by seeking to resume lending) free of the Scheme Claims.

Role of the FCA

42. The FCA is the conduct regulator for financial services firms and financial markets in the United Kingdom. It has a duty under section 1B of the Financial Services and Markets Act 2000 to pursue certain objectives, one of which is the consumer protection objective.

43. The Group first contacted the FCA in November 2020 to discuss its intention to propose a scheme and since then the FCA and the Group, and their respective advisers, have had extensive communications and discussions about the Scheme.

44. When a regulated firm intends to propose a scheme of arrangement with its creditors it is customary for the firm to request from the FCA a "letter of non-objection". ALL initially made such a request but, after receiving initial feedback from the FCA, withdrew it.

45. Mr Mills explains that the FCA, in the discharge of its supervisory function, assesses schemes of arrangement proposed by regulated firms by reference to their compatibility with the FCA's rules, including the Principles of Business. These

criteria are potentially broader than the principles by which the court will exercise its discretion whether to sanction a scheme of arrangement. With this in mind the FCA sought to identify such of its concerns as are relevant to the court's discretion when considering the sanction of a scheme.

46. The Company did not suggest that the FCA lacks standing to appear and oppose this sanction application. The Company did however fairly point out that the FCA's decision to oppose the Scheme came very late in the process. The FCA did not appear at the convening hearing. At that stage it said that it did not intend to appear at the sanction hearing either, unless there was a change of circumstances. It then decided, only two days before the Creditors' Meeting, to oppose and served the witness statement of Mr Mills on 12 May 2021 (the day of the Creditors' Meeting). This was a change of stance by the FCA. The Company observed that there had been no change in the circumstances: the Scheme has not changed since the convening hearing. It argued that the FCA appears simply to have changed its mind, but has not explained why.

47. The Company made two observations about the FCA's change of stance. First, the Company had limited time to answer the FCA's evidence. I shall bear that in mind, but I also note that the Company did not ask to adjourn the sanction hearing and served further evidence from its directors. Second, the Company said that the unexplained change of mind by the FCA suggested that the objections should be treated with some caution. The FCA did not apparently consider at the date of the convening hearing that the Scheme was so flawed as to invite opposition and the Scheme has not changed since then. Again I bear this in mind, but it seems to me that in the end I have to consider the FCA's objections on their merits.

Section 899 and relevant authorities

48. Section 899(1) of the CA 2006 provides that,

> "If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement."

49. The court therefore has an unfettered discretion whether to sanction a scheme which has been agreed by the necessary majority of creditors (or members). This discretion has been considered in many cases. It is customary for the court to remind itself of one of the concise summaries given in the cases. But unusually, because of the nature of the issues in this case, I shall instead set out a fairly long passage from the judgment of Snowden J in *Re Sunbird Business Services Limited* [2020] EWHC 2493 at [49]-[62]. This is an illuminating rehearsal of some key principles which may easily be overlooked if reference is made only to the shorter, digested, accounts. Snowden J said this:

> "[49] First, schemes of arrangement under Part 26 provide a flexible means by which companies in financial difficulties can be restructured with the consent of the specified majorities of their creditors and the sanction of the court. The statutory power to bind a dissentient minority to a scheme supported by the requisite majorities in order to give a

struggling company a prospect of survival rather than collapse into formal insolvency is particularly valuable in the current uncertain economic climate. But from the earliest days of the scheme jurisdiction it has been repeatedly emphasised that, to use the words of Bowen LJ in *Re Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 583, the scheme jurisdiction represents "a most formidable compulsion upon dissentient, or would be dissentient creditors".

[50] As a consequence, the scheme jurisdiction and procedure contains a number of important safeguards to ensure that if the rights of dissentient creditors are to be modified or extinguished without their consent, this only takes place fairly and in accordance with due process. These safeguards include, at the convening stage, the jurisdictional requirement for creditors to be separated into different classes for voting purposes where their rights (either as against the scheme company or offered to them under the scheme) are sufficiently dissimilar that they cannot consult together in their common interest.

[51] Secondly, and has also been repeatedly stressed, at the sanction stage, the court does not simply act as a "rubber-stamp" for the wishes of the majority as expressed at the court meeting. The decision of the meeting in favour of a scheme represents a threshold that must be surmounted before the sanction of the court can be sought, but in deciding whether to sanction the scheme or not, the court exercises an important discretion which provides a safeguard against oppression of the minority: see per Chadwick LJ in *Re BTR plc* [2000] 1 BCLC 740 at 747g.

[52] The classic approach of the court to the exercise of this discretion was described by David Richards J in *Re Telewest Communications plc (No.2)* [2005] 1 BCLC 772 at [20]-[22] as follows,

> "[20] The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in *Re National Bank Ltd* [1966] 1 WLR 819 by reference to a passage in *Buckley on the Companies Acts*, which has been approved and applied by the courts on many subsequent occasions:
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> > "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
> >
> > The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."
>
> [21] This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under section 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."

> That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> [22] The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court "will be slow to differ from the meeting".

[53] The reference by David Richards J to the qualifications set out in the second paragraph of the extract from *Buckley on the Companies Acts* relevantly include, for present purposes, the requirement that the class of creditors must have been "properly consulted". In this respect, the origins of the text in Buckley are to be found in the judgment of Lindley LJ in the Court of Appeal in *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at page 408-409,

> "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 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 shew that there has been some material oversight or miscarriage."

[54] In determining what amounts to "proper consultation", the starting point is section 897(1) of the Act which provides that every notice summoning a meeting of creditors convened by the court under section 896 must be accompanied by a statement complying with section 897. Section 897(2) then provides,

> "The statement must—
>
> (a) explain the effect of the compromise or arrangement, and
>
> (b) in particular, state—
>
>> (i) any material interests of the directors of the company (whether as directors or as members or as creditors of the company or otherwise), and
>>
>> (ii) the effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons."

[55] These provisions are supplemented by paragraphs 14 and 15 of the new Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) which came into force on the day of the Convening Hearing and which provide as follows,

> "14. Explanatory statements should be in a form and style appropriate to the circumstances of the case, including the nature of the member and/or creditor constituency, and should be as concise as the circumstances admit. In addition to complying with the provisions of section 897 … the commercial impact of the scheme must be explained and members and/or creditors must be provided with such information as is reasonably necessary to enable them to make an informed decision as to whether or not the scheme is in their interests, and on how to vote on the scheme. Where a document is incorporated into the explanatory statement by reference, readers should be directed to the material part(s) of the document.
>
> 15. The court will consider the adequacy of the explanatory statement at the convening hearing. The court may refuse to make a meetings order if it considers that the explanatory statement is not in an appropriate form. However, the court will not approve the explanatory statement at the convening hearing, and it will remain open to any person affected by the scheme to raise issues as to its adequacy at the sanction hearing."

[56] The references in the new Practice Statement to the need for an explanatory statement to provide creditors with an explanation of the commercial impact of the scheme and "such information as is reasonably necessary to enable them to make an informed decision as to whether or not the scheme is in their interests" reflect existing case law.

[57] So, for example, in *Re Heron International NV* [1994] 1 BCLC 667 at 672g-i, Nicholls V-C said,

> "The second principal head of complaint relates to the absence of sufficient information to enable a creditor to exercise a reasonable judgment on whether the schemes are in his interest or not. An explanation of the effects of the schemes requires an explanation of how the schemes will affect a bond holder or creditor commercially. He needs to be given such up-to-date information as can reasonably be provided on what he can expect under the schemes … The extent of the information required to be supplied depends on the facts of the particular case…."

[58] Likewise, in *Re Ophir Energy plc* [2019] EWHC 1278 (Ch) at [22] I observed,

> "The basic requirement is that an explanatory statement must be circulated to the members or creditors affected by a scheme, and that it must contain all the information necessary to enable such members or creditors to form a reasonable judgment on whether the scheme is in their interests or not, and hence how to vote: see e.g. *Re Dorman Long & Co. Limited* [1934] Ch 635 at 657; and *Re Heron International* [1994] 1 BCLC 667 at 672. The extent of the information required to be supplied will of course depend upon the facts of the particular case. But the process under Part 26 of the Act depends upon full and accurate information being provided to those who are to vote upon the scheme, so that if the members or creditors have been provided with materially inaccurate, incomplete or otherwise inadequate information, the Court will most likely not be able to place any reliance upon, or give effect to, an affirmative vote at the Court meeting."

[59] In the context of a scheme for creditors which is put forward as an alternative to a formal insolvency process, it is certainly conventional for the scheme company to seek to fulfil these information requirements by putting forward a detailed analysis which estimates the likely returns for scheme creditors in such an insolvency and under the scheme, together with the likely timescales for such recoveries. That is because the reasonable creditor deciding how to vote, and the court which is asked to exercise its

discretion to sanction the scheme in the interests of all creditors, will at the very least require to be satisfied that all creditors are being offered a realistic prospect of receiving a greater or faster return under the scheme than they are likely to receive in the alternative if the scheme is not sanctioned: see per David Richards J in *Re T&N Limited* [2005] 2 BCLC 488 at [82] and my own observations to similar effect in *Re Noble Group* [2019] BCC 349 at [90].

[60] But that is the bare minimum. The reasonable creditor will also want to be provided with the necessary information to understand how any different groups of creditors and any other relevant stakeholders are treated under the scheme and in any wider restructuring in order that he can reach an informed view upon whether the losses which have been suffered and the available value are being appropriately allocated between stakeholder groups.

[61] So, for example, if creditors which would rank equally in a formal insolvency are being differently treated under the scheme, or are being left out of the scheme altogether so that they are not being required to accept a compromise of their claims at all, this should be fully disclosed and properly explained: see *Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch) at [63].

[62] Such factors will also be particularly relevant in a scheme or restructuring such as the instant case in which the existing shareholders, who would, by definition, receive nothing in a formal insolvency, are being permitted to retain a material stake in the restructured company. In such a case it is likely to be essential for the scheme company to provide a detailed statement of the underlying assumptions and valuation methodology that are said to justify such an outcome so that creditors can reasonably assess, objectively, whether the allocation of losses and the division of benefits among stakeholders is appropriate and fair."

50. There are two other passages from *Re English, Scottish and Australian Chartered Bank* which deserve notice. At p. 414 Lindley LJ said,

> "Then it is said they [*sc. the creditors*] have not had an opportunity of considering any other scheme which might be suggested. I do not think that is necessary. If you lay before creditors a scheme which they think is sufficient, I do not think it is the province of the Court to say that every conceivable scheme which the ingenuity of man can suggest was not laid before them and submitted to them. They are business men. They have looked at it, they know their own interest, and they have approved the scheme by a vast majority in favour of it."

At p. 414-415 Lopes LJ said,

> "What I understand to be decided by that case is this, that it is not sufficient for the Court to ascertain that the statutory conditions have been complied with; the Court must go further than that, and be satisfied that the statutable majority which are to bind the dissentient minority have acted bona fide, that they have in not acted adversely to those whom they professed to represent, and, lastly, that the arrangement contemplated is a reasonable arrangement, such as that which a man of business would reasonably approve. With regard to the word "reasonably" it must always be borne in mind the word "reasonably" is a relative term: it means reasonably with regard to the particular circumstances of the case. What is reasonable in one case might be unreasonable in another. The reasonableness must be always regarded with reference to other alternatives. For instance, an arrangement giving a very small benefit to creditors, if the alternative were absolute ruin to the company and no benefit to the creditors, would I think be reasonable."

The present application

51. I turn to consider the various requirements for this hearing, following the four-steps listed in *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at [17]. These steps are a helpful checklist or heuristic but are not a substitute for the application of the principles set out at greater length above.

Compliance with the statute

52. The first stage is whether there has been compliance with the provisions of the statute.

53. The first issue under this head is the composition of the class or classes for the scheme meetings. At the convening hearing, the court ruled on the composition of the Creditors' Meeting. No Scheme Creditor has raised an objection to the single class for the meeting following the convening hearing. Nor has the FCA suggested that separate classes were required. In keeping with the usual practice of the court, I see no reason to revisit the issue.

54. Since the convening order a number of steps have been taken. On 30-31 March 2021, following the convening hearing, the Company published on the dedicated website the Explanatory Statement, the Scheme, the EOS, and other financial information. Between 30 March 2021 and 3 April 2021, an email and/or SMS was sent to approximately 89% of the Scheme Creditors for whom the Group held contact details, inviting them to vote through a dedicated portal. Contact details were unavailable for approximately 11% of Scheme Creditors as a result of data protection legislation. 29 such customers contacted the Company and could be identified; this was not possible for four potential historical customers.

55. On the Scheme portal, Scheme Creditors were able to (i) vote online in advance of the Creditors' Meeting (thereby appointing the Chairman as their proxy); (ii) nominate a third-party proxy to attend the Creditors' Meeting and vote on their behalf; or (iii) pre-register their attendance at the Creditors' Meeting and submit any question they might have.

56. Scheme Creditors were required to complete one of these steps by 5pm on 10 May 2021 (two days before the Creditors' Meeting on 12 May 2021). However, the Chairman of the Creditors' Meeting also accepted 74 late requests for registration to attend the Creditors' Meeting.

57. The Scheme portal did not experience any downtime and the Company took steps to resolve such minor technical issues as arose. The Company was able to contact the majority of affected customers and allow them access to the Scheme portal or process their vote manually; a total of 119 customers were unable to be contacted despite unsuccessful attempts by phone, SMS and email.

58. There were 159 customers whose loans had been sold to a third-party debt purchaser and who had difficulties accessing the Scheme portal. The Company was able to restore the access of 157 customers. The remaining two customers were unable to vote on the Scheme but the Company would be able to resolve the issue in time to allow them to submit a claim.

59. Notice of the Creditors' Meeting was advertised in The Mirror (including its Scottish edition) and The Daily Mail (including its Scottish and Northern Irish editions). Details of the Creditors' Meeting were also posted on Amigo's Twitter and Facebook page.

60. The Company drew my attention to three issues relating to compliance with the Convening Order. First, the ability to pre-register for the Creditors' Meeting was not available until 9 April 2021. But Scheme Creditors then had more than four weeks to do so. Second, unlike the hard copy proxy form included in the bundle for the convening hearing which allowed Scheme Creditors to direct their proxy to vote in a particular way, the online form simply asked for the proxy's details. However, paragraph 14 of the Convening Order merely required that the proxy "may vote in the Third Party Proxy's absolute discretion"; and the proxy would have been able to do so. Third, paragraph 7 of the Convening Order required advertisement of the Creditors' Meeting in the Daily Mirror and the Daily Mail, including their Scottish and Northern Irish editions. Due to a misunderstanding no advertisement was placed in the Northern Irish edition of The Mirror. However, an advertisement did appear in the Northern Irish edition of The Daily Mail and the Company has indicated that, of 27,971 customers in Northern Ireland, 2,150 (approximately 7.68%) voted on the Scheme (which is roughly in line with the overall turnout). I am satisfied in each respect that there was no impact on the fairness of the meeting and I waive any defects (cf. *Re Rhythmone plc* [2019] EWHC 967 (Ch) at [14]-[15], per Norris J).

61. I have mentioned the Explanatory Statement. I shall return to this below, when considering the FCA's objections to the Scheme. I note at this stage that it included a two-page, highlighted summary headed 'IMPORTANT INFORMATION FOR CUSTOMERS'. This contained key details about the Scheme and the Creditors' Meeting, as well as making clear that customers' obligations to continue to repay outstanding loans were not affected and that, if they did not make a claim under the Scheme, they would no longer be able to assert a right of set-off against ALL. The Explanatory Statement also contained Q&As about the Scheme and explained the steps which customers needed to take. It contained a shorter and easier to read 'Part A' summary and a more detailed 'Part B'. The Company also posted six explanatory videos on the Scheme Website on 30 March 2021 and ten additional FAQs were uploaded to the Scheme Website on 14 April 2021, as well as Q&As on its Twitter and its Facebook page.

62. The scheme meeting was held virtually in accordance with the guidance of Trower J in *Re Castle Trust Direct plc* [2020] EWHC 969. The Chairman of the Creditors' Meeting, Mr Drummond-Smith, has filed a report about the conduct of the Meeting. I am satisfied that (subject to the adequacy of the Explanatory Statement: see below) the meeting complied with the order and that those present were able to consult together. The directors made presentations and answered questions from Scheme Creditors. The Creditors' Meeting lasted approximately 3.5 hours, including one hour for voting. The meeting was held over webcast and telephone line hosted by an external meeting provider. Paragraph 3 of the Convening Order suggested that Scheme Creditors would be able to see each other, which did not happen. I shall waive this immaterial defect as I do not consider that there was any impact on the proper conduct of the meeting. Scheme Creditors who wished to speak were invited to join by telephone and the technology was explained to them. Apart from one Scheme

Creditor experiencing an issue with login details circulated by the Company (which was resolved), no issues arose in relation to the technology employed.

63. Approximately 156 Scheme Creditors attended the Creditors' Meeting by webcast and 21 by telephone (the uncertainty of counting them results from the possibility that some Scheme Creditors may have joined by both means). Representatives from the Group and its advisers were also in attendance.

64. Those Scheme Creditors who participated in the voting process voted overwhelmingly in favour of the Scheme:

i) 74,877 Scheme Creditors present in person or by proxy at the Creditors' Meeting with claims valued for voting purposes at £230,744,046.00 voted in favour of the Scheme, representing 95.1% by number and 95.7% by value of the Scheme Creditors. This included the FOS's claim of £12,511,500.

ii) 3,863 Scheme Creditors present in person or by proxy at the Creditors' Meeting with claims valued for voting purposes at £10,319,764.38 voted against the Scheme, representing 4.9% by number and 4.3% by value of the Scheme Creditors.

65. As noted already, I shall return to the contents of the Explanatory Statement below. Subject to that, I am satisfied that the statutory requirements have been complied with regarding class composition, notification to creditors, and the statutory majorities were obtained at a properly conducted scheme meeting.

Fair representation at the meeting and voting bona fides

66. I turn to the second stage of the *Re Noble* checklist. Turnout at the Creditors' Meeting was approximately 8.7% of the total potential class of Scheme Creditors by number (78,740 Scheme Creditors out of an estimated potential class of creditors of 915,000 voted in person or by proxy). I was informed at the hearing that this represented about 10% by value (albeit with the caveat this was not a straightforward calculation). I shall return below to consider whether this turnout can be taken as fairly or adequately representative of the class of Redress Creditors as a whole. There is no reason to think that those who voted in favour acted otherwise than bona fides.

Blot or defect in the scheme

67. I should clear the fourth *Re Noble* step out of the way. A "blot" is sometimes described as a "technical or legal defect in the scheme, for example, that it does not work according to its own terms, or that it would infringe some mandatory provision of law" (*Re The Co-Operative Plc* [2017] EWHC 2269 (Ch) at [22], per Snowden J), though some authorities suggest it may be wider than this (which is not an issue I need decide here).

68. At the convening hearing, the Company raised a number of points which might be said to be blots on the Scheme. These included: (i) the use of an SPV; and (ii) the provisions of the Scheme allowing the Scheme Supervisor to execute a deed of release on behalf of Redress Creditors to release their claims against various companies. There are a number of cases where each of these techniques have been

used and I am satisfied that there is no reason to regard either as a blot. The FCA did not suggest that either feature constitutes a blot on the Scheme.

Further background and the probable alternatives to the present Scheme

69. It is convenient before turning to the third stage of the *Re Noble* checklist to say something more about the background and the probable alternatives to the present Scheme.

70. Much of the FCA's concerns about the Scheme stem from the respective positions of the Scheme Creditors and shareholders; and whether the Scheme Creditors are being treated fairly in being required to suffer a 90% haircut while the shareholders retain their economic interest in the Group.

71. As already mentioned, the shares in the Parent are listed on the LSE. There are some 8,000 shareholders including numerous retail holders. But there are also two institutional shareholders, holding approximately 17.85% of the shares in the Parent (according to notifications made on 17 May 2021). There are c. 475m shares in issue.

72. The price of the shares has increased since late December 2020, when the Group announced its intention to promote the Scheme in relation to Redress Creditors. The price has gone up by more than 250% since then. The closing price on 10 May 2021 (the day before the FCA announced its opposition the Scheme) put the market capitalisation of the Group at about £140m. According to the Investors' Chronicle, using data collected on 21 May 2021 Amigo is the highest riser in the FTSE All-Share index over the last three months.

73. The Scheme has been widely publicised. It is therefore reasonable to conclude that the market capitalisation of Amigo reflects the market's views of the value of the equity in the light of the terms of the Scheme, including the various contributions to be made to the Scheme Creditors (including the Initial Contribution and any Future Business Contribution). The FCA submits (and I agree) that the share price also reflects the market's view of the longer-term prospects of returns to the equity holders on the footing that the Scheme proceeds; pricing in ALL's contributions to the Scheme Fund and the release of ALL itself from redress claims.

74. The FCA says that the dramatic rise in the share price since the announcement of the intention of promote the Scheme suggests strongly that the market regards the Scheme as (so to speak) shifting value from the unsecured creditors to the shareholders. In other words, the promoting of the Scheme itself has generated shareholder value. I consider that there is real force in these points. I consider that the market views the Scheme, by removing the claims of the Redress Creditors in return for ALL's contributions, as leaving the equity holders with a valuable stake (c. £140m as at 10 May 2021).

75. The Company emphasises that under the Scheme the shareholders are making a sacrifice. They are effectively required to fund the various contributions to the Scheme Fund, as the payment of these sums will reduce the profits of the Group available for distribution to shareholders. But this is no more than a partial answer to the FCA's submissions. First, the market capitalisation of the shares shows the market pricing in the contributions that will have to be made under the Scheme. The market

perceived the equity as having a substantial value *after* taking account the requirement on ALL's to make such contributions. Secondly, in an insolvency the shareholders would get nothing at all.

76. The FCA says that in effect the Group is being recapitalised by a dramatic writing down of the claims of Scheme Creditors (despite them ranking ahead of the equity in the capital structure). Although ALL would have to make the contributions required by the Scheme, the shareholders would fully retain their interest; an economic interest which has been valued by the market at well over £100m (probably on the assumption that the Scheme will proceed).

77. Again I consider there be to force in this submission. It is not though a decisive or conclusive answer to the application for sanction: if the Company is able to demonstrate that the Scheme Creditors, having been properly consulted and informed of their options, have consented to this outcome, the court may be prepared to consider that the Scheme is a proper one for sanction. That is the issue to which I shall return to address in further detail below.

78. These observations about the value of the equity stake in the Group have further implications for this hearing. As Counsel for the FCA argued, it is commonplace in the restructurings of distressed companies for at least some of the equity to be transferred to creditors (known as a debt for equity swap). The shareholders are the lowest rank of a company's capital structure; and where the purpose of the restructuring is to recapitalise a company one would normally expect to see the equity holders losing their economic interests before those of the creditors. In this context I note that Mr Mills explains in his statement that the Group confirmed on 30 April 2021 (by when the rise in the share price had largely occurred) that it did not intend to change the contribution from shareholders to address the FCA's concerns that the shareholders will retain the bulk of the benefits of the Scheme at the expense of the Redress Creditors.

79. Against this background I turn to assess the likely alternatives to the Scheme.

80. As already explained, the directors have consistently stated that if the Scheme is not approved and implemented the Amigo Group will probably enter administration. This is what they said when the intention to promote the Scheme was first announced. They have repeated it in public statements to the markets, in the Explanatory Statement, and in the evidence before the court at the convening hearing and this sanction hearing.

81. As explained earlier, in his first statement Mr Mills said that the FCA does not agree that the probable alternative to the proposed Scheme is an insolvency process in respect of ALL and the Group in the short term or medium term. He said that there is likely to be a further process directed to achieving a restructuring of the business to enable the Group to continue trading. Mr Jennison rejected this and reiterated that the board's view was that the likely result of the Scheme not being approved was a formal insolvency procedure.

82. At the hearing before me Counsel for the Company submitted that the question was one for the Group's directors and that they had made their position clear. They had said and continued to say that the most likely alternative was insolvency. Counsel

accepted that the court was entitled to assess the probable alternative scenarios on the basis of all the evidence, including the objective facts and probabilities. But he said that the directors' public statements and evidence should be regarded as compelling. I accept that the directors have given careful thought in making their public statements and providing their evidence to the court. But I must also scrutinise what has been said (and not said) and carefully weigh it against the other evidence and the inherent probabilities. I also observe that the question is not one of past fact but is about what may happen hereafter. I also note that the directors' evidence does not contain any detailed analysis or figures showing when ALL would no longer be able to trade, or address the prospects of agreeing with the FCA a continuation of the informal moratorium of redress claims. I shall return to these points in more detail below.

83. The FCA's position about the alternative outcomes must also be given its due weight. As the Company says, there have been extensive communications between the FCA and the Group and their respective advisers. As the regulator of ALL and its business, the FCA has extensive knowledge of its business. In opposing the Scheme the FCA is exercising its statutory consumer protection functions and has had to give careful consideration to the possible alternative scenarios. The FCA has concluded that if the Scheme is not approved it is more likely that the directors will seek to preserve the value of the Group and will consider and propose revised restructuring plans.

84. I turn in more detail to the evidence about the Group's financial position and its cashflows. It is commonplace for a company propounding a scheme of arrangement as an alternative to a formal insolvency to provide the court with cashflow projections to demonstrate that the company will imminently be unable to pay its debts. It is striking that in the present case the Company's evidence does not contain anything of that sort. There is very little material to give the court any insight about the point at which Amigo might be forced into administration.

85. There appear in fact to be a number of reasons to suppose the directors of Amigo would have a reasonable period of time in order to assess and promote further restructuring proposals. The first is that the Group does not appear to be facing an imminent or even medium term cashflow crisis. The only cashflow evidence before the court is a "Financial Summary" graph which Amigo has posted on the dedicated Scheme website. The graph shows that the Group had cash of about £180m in April 2021 and that the cash balance is expected to increase to over £200m, where it will remain until January 2024 when the secured bonds require to be repaid. At that point the cash balance will fall to zero. The bonds have the benefit of a floating charge over the cash, but there is no evidence that the security contains restrictions on the ability of the Group to use the cash in its business. Indeed the evidence shows that ALL would be able to make the Initial Contribution of £15m under the Scheme without bondholder consent. The Company has not provided the court with any other cashflow evidence to suggest that the Group will run out of liquidity in the short or even medium term. Counsel for the Company accepted during the hearing that there was no evidence of an imminent cashflow crunch.

86. A second reason for concluding that that there is no imminent need for ALL or the Parent to enter administration concerns the agreed informal moratorium on the payment of redress claimants. As already explained the Group has made an accounting provision of some £150m in respect of Redress Creditors. If those claims had to be paid in the short term, there would be reason to conclude that an

administration was the only route open to the directors (absent the Scheme). But the Group is not in that predicament. The FCA has agreed since December 2020 (when the intention to promote a scheme was announced) to an informal moratorium on the payment of redress claims. The FCA's Counsel confirmed during the hearing that were the court to refuse to sanction the Scheme but the Group wished to consider and promote another restructuring scheme or plan the FCA would agree to the continuation of the existing moratorium. It seems to me that the FCA was confirming what must always have been probable given the FCA's stance that a restructuring is both feasible and desirable. The continuation of the moratorium on redress claims would give the directors a breathing space to develop and propound a revised restructuring. The prospects of a continuation of the informal moratorium by agreement with the FCA have not been addressed in the evidence provided by the directors of the Company.

87. As already explained, the shares in the Parent had a material market capitalisation on the day before the FCA indicated its opposition to the scheme. The market's perception is that there is substantial surplus value in the enterprise, over and above the amounts attributable to the secured creditors. That perception must be that the Group has business - the brand, employees, infrastructure and so forth - to generate significant positive earnings in the future. It seems to me improbable, given that evidence of surplus value, that the directors of an FCA-regulated listed group would simply force the Group into insolvency without carefully assessing (with their professional advisers) further, revised, restructuring proposals. The directors have statutory and fiduciary duties to promote the business of the companies in the group, and to take account of the interests of the various stakeholders. It seems to me probable that the directors would pause to consider and (if realistic) promote revised restructuring steps.

88. Counsel for the Company submitted that, though there may be no imminent cashflow crisis, there were powerful objectively intelligible reasons for the directors' stated position that an administration was both probable and imminent. Another scheme or restructuring might take another six months and cost millions of pounds (Counsel suggested this could be as much as another £15m) which the Group does not have. He pointed out that the FCA has not identified what it would regard as a fair or proper reorganisation. So Amigo could go through another costly process only to face the opposition of the FCA all over again. He submitted that if the present Scheme fails, the directors may well properly conclude that, given the uncertain prospects of success, they should not risk throwing away the further costs of pursuing a revised reorganisation, and should therefore place the Group into administration.

89. The Company made the allied submission that there was no realistic scope for greater contributions of ALL's assets to Scheme Creditors. The directors could therefore reasonably decide that there was simply no point in considering further restructuring proposals. The Company said in particular that the Initial Contribution was limited by the need to retain sufficient cash to pay off the bondholders in January 2024. Moreover, as to the Future Business Contribution, Mr Jennison has explained that the directors considered the amount of the contribution and concluded that 15% over four years was the most that could be ceded. He says that the question was considered by the board with the Group's specialist financial advisers, and that they had concluded that it would not be possible for the Group to offer more. He explains that, if the

Scheme were to be approved and implemented, the Group would then seek to raise new finance by way of a rights issue from the shareholders, to enable it to restart its business of advancing loans to customers. For a successful rights issue, equity holders will require an adequate return on their investment and, after consultation with the Group's financial advisers, the directors decided that 15% was the greatest contribution that could be made.

90. The Company has given no details of or disclosed any financial advice provided to the directors or the financial analysis on which it was based; indeed no underlying material has been disclosed which might justify the calculation of the future contributions. There is no explanation of the reasoning or analysis by which the directors reached a conclusion that the limit was 15% (rather than any other level) or why the contribution should be restricted to four years' profits rather than a longer period. The court therefore has no material allowing it to test or assess the conclusions the board may have reached.

91. Moreover, nothing was said in the Explanatory Statement or any of the other materials relating to the Scheme to explain that the Future Business Contribution had been calculated by reference to the returns needed to be offered to investors under a future rights issue. Indeed, at the Creditors' Meeting, the directors said that Amigo's shareholder base is predominantly made up of small private investors who are unlikely to have the ability to provide further capital. That was said to explain why the shareholders had not to date been asked to contribute cash funding to Redress Creditors under the Scheme. That is of course a different context from a future rights issue. But if what the directors said at the Scheme Meeting was correct, it is very hard to see what would enable Amigo to raise capital from the same constituency of shareholders in the future by way of a rights issue. I find the account that was given at the Creditors' Meeting hard to square (at least without the benefit of seeing the advice or supporting financial analysis) with the explanation offered by Mr Jennison for the calculation of the Future Business Contribution. At any rate I am unable to conclude on the basis of the very limited evidence presented by the Company that there would be no room for an improved initial contribution and/or contribution from future profits. The Company has not satisfied me that the latter contribution could not be set at a higher rate or relate to more than four years' profits. It seems to me more likely that there is a range of possible approaches and that the proposal advanced by the Company in the Scheme is only one such possibility.

92. The FCA submits that, in any event, there is a more fundamental question concerning the allocation of the losses between the various stakeholders. Its primary submission is that the question facing the directors is not merely whether ALL might be able to make a larger contribution from the future profits. The directors should also be considering the possibility of a restructuring or recapitalisation under which the Scheme Creditors would become entitled to a share of the equity in the Group in recompense for agreeing to write down their debt. Counsel says that it is common in restructurings or recapitalisations of distressed companies for creditors who are facing a reduction or other impairment in the value of their debt to receive a stake in the equity of the business. I agree with that submission. It appears to me that the directors would be bound to give careful consideration (with their advisers) to promoting a plan or scheme of reorganisation including such elements. I am not persuaded on the material before me that, if the present Scheme fails, there would be

no room for another restructuring of the Group under which the position of Scheme Creditors could be improved.

93. Counsel for the Company submitted that the Group had taken a deliberate decision not to seek to involve the shareholders in a restructuring. The Group considered that it would be difficult to engage with the wide and disparate group of shareholders, which includes many retail investors. I find this submission unpersuasive. The Scheme which the Company has propounded is one with a much larger group of consumers, by orders of magnitude (they have notified about 915,000 customers). The Redress Creditors are also a disparate group, with no organising committee. The Company did not appear to see that as an obstacle to propounding the Scheme. Moreover, as already explained, at least some of the shareholders are institutions who may be able to form the core of a committee for the purposes of considering the Company's proposals. I also consider there is force in the FCA's submission that there have been other cases (referred to below) where disparate groups of stakeholders have been provided with independent advice and assistance at the expense of the scheme company and that something similar could potentially be done here. For these reasons I do not accept that the Group has given adequate reasons for saying that it would not be possible to engage with shareholders in a broader restructuring.

94. The Company suggested that, to the extent that a further restructuring involved a revised proportion of future profits of the Group being provided to Redress Creditors, there might be issues under the Listing Rules. However the evidence on this point was unconclusive: it appears that there may be workarounds, or that the issues raised can be addressed through shareholder consents and Counsel for the Company did not seek to suggest that the Listing Rules was a conclusive barrier to a further restructuring.

95. As to the time and costs of a further restructuring, the picture presented by Counsel seems to me to be extremely pessimistic. Amigo and its advisers have already undertaken much work in developing the existing Scheme, which would not be wasted. Any further restructuring proposals would build on the existing ones. I do not see why a further restructuring would take as long as six months. For similar reasons I am unable to accept the suggestion that the further costs would be or approach £15m (a figure anyway not supported by any evidence).

96. Counsel for the FCA submitted that the court has to distinguish between two questions: what would happen if there was no scheme or restructuring at all? and what would happen if <u>this</u> Scheme was not approved and sanctioned? He argued that the Company's evidence tends to conflate the two questions and treats this Scheme as the only possible scheme for returning Amigo to financial health.

97. I agree with this submission. The evidence adduced by the Company has failed to persuade me that the most likely alternative to <u>this</u> Scheme is the imminent collapse of Amigo into insolvency. I agree with the FCA that there is nothing in the evidence to suggest any imminent cashflow event that would force Amigo into insolvency. I also agree with the FCA that the directors, who have statutory and fiduciary duties to promote the business and have regard to the interests of the stakeholders, would most probably take time to promote a further restructuring. The evidence adduced by the Company does not satisfy me that there is no room for further proposals to be formulated to preserve value for stakeholders. This view is strongly supported by the substantial increase in the market capitalisation of the Group since the Scheme was

announced. Counsel for the FCA submitted (and I agree) that it is unlikely that the directors would put the Group straight into administration and destroy the substantial surplus value of the enterprise (i.e. the value exceeding the claims of the secured creditors). There will doubtless be additional costs but these should not be exaggerated: work has already been done which is likely to feature in any revised proposals (such as the processes for lodging and adjudication of redress claims). None of that would be wasted, and any revised proposals would build on the existing Scheme.

Fairness and the FCA objections to the Scheme

98. I return to *Re Noble* at [17], where Snowden J said,

> "at the third stage, the court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme."

99. This draws on *Re Telewest* at [20] to [21] (cited above).

100. Counsel for the Company submits that, applying this guidance, the Scheme was one which a creditor could reasonably approve. He emphasises that the court is not concerned to decide whether the scheme is the only fair one or even the best one. The test is one of rationality: could a reasonable creditor vote in favour and the court should not substitute its own views for those of creditors. There is no free-floating test of "fairness". The FCA's stance is, properly analysed, a complaint that the Scheme is not as favourable for the Scheme Creditors as it might have been, it is not the "best" scheme. The Company did not accept that. But, he says, in any event that is the wrong question. The creditors have voted in favour by an overwhelming majority and there is no reason for the court to think that they were irrational: the court should respect the vote and should not be asked to substitute its own view for those of creditors.

101. Counsel for the FCA submits that the court cannot be satisfied that the Scheme is a fair one. He says that the rationality test presupposes that the creditors were properly consulted and informed, and were therefore able properly to appreciate the alternatives open to them (see the discussion in *Re Sunbird*). He submits that the relevant constituency was made up of consumers of loans; who are involuntary creditors, financially unsophisticated, and likely to know nothing about corporate insolvency restructuring. They lacked legal or financial advice. There was no steering committee and no negotiation of the terms of the scheme. Counsel submits that the turnout was very low, so that the court cannot be satisfied that the class was adequately represented. As to the information provided to Scheme Creditors the FCA submits that the Explanatory Statement was incomplete or inadequate in that it presented the alternatives as starkly binary and suggested that, if creditors rejected the Scheme, they would get nothing at all. He says that was not a fair presentation of the realistic alternatives to the rejection of the Scheme. Nor, he submits, did the Explanatory Statement provide an adequate explanation to enable this constituency of creditors to understand why the allocation of losses and division of benefits among stakeholders was being advanced by the directors as an appropriate and fair one (and recommended as being in the Scheme Creditors' best interests). Counsel for the FCA

also notes that the burden lies on the Company seeking the court's sanction. It urges the court to refuse to sanction the Scheme.

102. I start with the legal principles to be applied. I have already set out the relevant authorities, from which I draw the following guidance:

i) The scheme jurisdiction involves compulsion and there are therefore statutory safeguards including the need for a convening hearing, the procedures to be followed before and at scheme meetings and the need for the sanction of the court. The court does not act as a rubber stamp but has to decide whether it is right, in the exercise of its unfettered discretion, to approve a compulsory process which overrides the rights of creditors or members.

ii) The statutory scheme requires creditors or members to be properly consulted. This includes the provision to them by the scheme company of fair and sufficient information to enable them to make a rational voting decision.

iii) Third, the form, style and contents of the information required to be provided depends on the facts of the particular scheme, including the nature of the constituency to which it is addressed.

iv) A reasonable creditor or member will, when voting, need to consider the alternatives to the company's proposal.

v) The information provided to creditors or members should therefore fairly set out the alternatives and their consequences.

vi) The court will consider whether the creditors or members who attend the scheme meeting and vote in favour of the scheme fairly or adequately represent their class and have acted bona fide.

vii) The court does not apply its own free-floating views of what it sees as "fair" or "just" in preference to the views of the creditors or members themselves.

viii) Rather, where the court is satisfied that full and adequate information has been provided (so that the process has "not miscarried") the court will generally be prepared to defer to the views of the creditors or members, who will be regarded as better judges of their own commercial interests than the court. In such cases the court asks whether an intelligent and honest member of the class and acting in respect of his interest might reasonably approve. But - to emphasise the point - the rationality test is only appropriate if the creditor or member has been properly informed and consulted.

ix) If creditors have not been given fair, full and adequate information the court will probably be unable to place any reliance on or give effect to an affirmative vote (see *Re Ophir* and *Re Sunbird*).

x) The extent to which the court will give deference to the views of the creditors must also depend on the nature of the creditors and their ability to understand what is being proposed. In *Re English, Scottish and Australian Bank* (the foundation of many of the later statements) Lindley LJ emphasised that the creditors were "businessmen"; he had in mind commercially astute people who could be expected to be better judges of their own interests than the court could.

xi) In a scheme or restructuring in which the existing shareholders, who would, by definition, receive nothing in a formal insolvency, are being permitted to retain a material stake in the restructured company, it is likely to be essential for the scheme company to provide a detailed statement of the underlying assumptions and valuation methodology that are said to justify such an outcome so that creditors can reasonably assess, objectively, whether the allocation of losses and the division of benefits among stakeholders is appropriate and fair.

103. With these principles in mind, I turn to assess the particular (and unusual) features of this case.

104. The first feature to note is the comparative degree of financial experience and sophistication of the Scheme Creditors. This is relevant, first, when determining the content, style and form of the information required to be provided to creditors. It is also relevant to the court's assessment of the weight it can properly give to the outcome of the meeting. The court may properly ask whether the creditors are likely to understand the process and this may depend on their experience in finance or business.

105. I have reached the following conclusions about the class of Redress Creditors and their ability to understand the Scheme and the alternatives available to them when voting. The first concerns the nature of the customers. ALL's customers are often financially vulnerable people who do not have access to mainstream credit. They are unlikely to be financially experienced or sophisticated. The FCA (which has expertise through its regulation of the sector) describes them as typically having relatively low levels of financial literacy. I accept this description. It also appears to me that, in consequence, it is very unlikely that they will have any knowledge or experience of schemes of arrangement or corporate reorganisations. These are esoteric processes unknown to most people outside the financial world, let alone people with low financial literacy. They are also unlikely to have much understanding of corporate insolvencies.

106. A second significant feature of the present case is the absence of professional advice. I agree with the FCA that Redress Creditors are unlikely to have had access to legal or financial advice in relation to the Scheme. In this regard the FCA noted that there are reported cases about schemes of arrangements with vulnerable creditors where the relevant scheme company has paid for lawyers and financial experts to advise the creditors about the proposed scheme. Hence in *Re Cape plc* [2006] EWHC 1446 (Ch) at [12]-[13] David Richards J recorded that the creditors (victims of exposure to asbestos) had been advised by lawyers, including counsel, at the expense of the scheme company, to advise on the scheme. In *Re T&N Ltd* [2006] EWHC 1447 (Ch), another case involving exposure to asbestos, the administrators who proposed the scheme arranged for counsel to be appointed to advance arguments about the scheme. Nothing of that kind happened here.

107. The FCA does not suggest that the provision of advice to creditors is a precondition for a scheme to be sanctioned, even in a case involving financially unsophisticated consumers. That must be right and each case turns on its own facts. But I consider nonetheless that there is force in the FCA's observation that this is a relevant consideration when the court comes to assess the weight to be given to the casting of votes at the Creditors' Meeting.

108. A third relevant feature (which rubs shoulders with the second feature) is that the Scheme was not the outcome of any negotiations between the Company and its creditors. Nor was there any creditors' committee or similar body with responsibility for co-ordinating communications between the creditors and the Company in advance of the Creditors' Meeting.

109. The Company submits that, while scheme companies may choose to negotiate the terms of the scheme with creditors in advance to enhance the prospects of a successful vote, there is no requirement under Part 26 of the Companies Act for the Company to negotiate the terms of a scheme before it is put to a vote a properly convened scheme meeting. Under the statutory scheme it is for the company to propose terms and for the scheme creditors to decide whether or not to accept them. I agree with those submissions, and the FCA did not suggest that the position was otherwise. But I agree with the FCA that the lack of any negotiation is relevant (along with the other features of the case) to the weight the court should give to the vote at the scheme meeting. The FCA again refers to *Re Cape plc* and *Re T&N* as cases where there were advance negotiations between the relevant companies and committees of creditors and their advisers. That has not happened here and the Redress Creditors have therefore had no involvement in the development or terms of the Scheme.

110. The Company observes that the FCA, in its statutory consumer protection function, has made comments to the Company about the Scheme since November 2020, and has commented on the Company's drafts. The Company's evidence is that the volume of communications with the FCA has been unusually extensive. The Company says that the Scheme has to some extent been shaped by these communications: so, e.g., the FCA's comments led the Company to increase the Future Business Contribution from 5% of the profits for three years to 15% of the profits for four years.

111. However this point should not be overstated. The FCA does not (as a matter of policy) negotiate the terms of schemes of arrangement with regulated firms and it has not sought to do so in the present case. Moreover, at an early stage in the process the Company sought a letter of non-objection from the FCA but, after initial feedback, withdrew that request. The FCA has never agreed or endorsed the terms of the Scheme or said that it will support it.

112. On the second and third features of the scheme I therefore accept the Company's submission that there is no requirement that a company proposing a scheme has to provide scheme creditors with access to independent legal or financial advice, or to negotiate the terms of the scheme. But where this has not happened, a scheme is necessarily presented to the creditors as something they have to take or leave. This feature may have a bearing on the nature and extent of the disclosure required in the Explanatory Statement (see below). Moreover when the court comes to consider the scheme at the sanction stage it does not have the assurance that its terms have been hammered out through a negotiated process with the benefit of expert advice. This

may bear on the court's willingness to defer to the vote of a statutory majority at the scheme meeting.

113. A fourth significant feature is the level of the turnout at the meeting. This bears on whether the meeting was fairly representative, which is fact-specific: *Re Cape plc* (*supra*) at [21]–[26], per David Richards J. The court should consider the absolute number of creditors attending and the proportion they bear to the whole class, the way that the meeting has been notified or advertised, and any explanations there may be for the level of actual participation.

114. The Company relied on *Re Instant Cash Loans Limited* [2019] EWHC 2795 (Ch), where Zacaroli J sanctioned a scheme of arrangement in relation to a high-cost lender faced with redress liabilities of the kind faced by the Group. He addressed the turnout of 4% of potential creditors at the creditors' meeting at [29] to [30] and was satisfied, on balance, that it fairly represented the class. In doing so he considered the evidence about the historic levels of customer complaints.

115. However, each case turns on its facts. In the present case the absolute turnout at the Creditors' Meeting was reasonably high, being over 78,000 creditors. But this represents only about 8.7% of the whole potential class by number. The meeting was properly notified and advertised through various media (see above). I am satisfied that the Company did what it could properly to bring the meeting to the attention of the Scheme Creditors.

116. There are a number of reasons why more creditors might not have attended. First, they are a disparate group. Second, they are very unlikely to have any experience of schemes of arrangement or corporate insolvency. Third, as already discussed they are likely to have relatively limited financial literacy. Fourth, the figure of 915,000 includes borrowers or guarantors under loans going back to 2005. They may well have had no dealings with ALL for many years and may have no interest in bringing claims so long after the event. Fifth, the potential claims range in size and those with smaller claims may have little interest in engaging with ALL. Moreover, as the Company submits, customers were asked to confirm that they considered they had a valid claim before being able to vote on the Scheme Portal. So, of the 915,000 customers who were entitled to vote, those who did so expressly confirmed that they believed they would be affected by the Scheme.

117. I agree with the FCA's submission that the turnout (at less than 9% by number) was comparatively low. In my judgment this would not without more be a reason for declining to sanction the Scheme. But it is to my mind nonetheless a factor of to be given some weight in the overall exercise of the court's discretion (to which I shall return below).

118. I turn next to consider the form, style and contents of the Explanatory Statement. It is carefully written and is in admirably plain English.

119. The Explanatory Statement starts with a series of questions and answers about who and what was affected by the Scheme, what it proposed, what it meant for creditors, and what creditors had to do to vote. It then contains a summary of the Explanatory Statement. This explains (among other things) the background to the scheme, why the

Explanatory Statement was being sent, how the Scheme would work, the advantages and disadvantages for Scheme Creditors, and what Scheme Creditors should do next.

120. Paragraphs 1.1 to 1.3 of the Explanatory Statement said,

> 1.1 The past year has been difficult for Amigo Loans Ltd (Amigo) because of: (a) the economic impact of Covid-19; and (b) a significant increase in the level of customer complaints received.
>
> 1.2 As a result, Amigo is not making enough money to pay all of its creditors. Usually, this would mean that Amigo and other entities within the Amigo Group would have to go into an insolvency process (administration or liquidation). If this happened and you were owed money by Amigo, based on our calculations, you would receive nothing.
>
> 1.3 However, if the Scheme goes ahead, based on our calculations, creditors will get more money than they would in an insolvency. A full explanation of the terms of the Scheme is contained in PART B. In addition, a simplified group structure chart is attached at Schedule 1.

121. Paragraph 8 of the Explanatory Statement contains a table headed "Advantages and possible disadvantages of the Scheme". The first two advantages were stated as follows:

> - The main benefits of the Scheme are that, if it is approved: (i) Amigo will make available the Initial Amigo Contribution; (ii) if it becomes payable, Amigo will pay the Balance Adjustment Contribution; and (iii) depending on the future performance of the business, Amigo will make the Future Business Contribution. These funds would not be available in the insolvency of Amigo (administration or liquidation) that would likely occur if the Scheme was not approved.
>
> - This means that, based on our calculations, Scheme Creditors would receive a higher percentage of their claim than they would if Amigo entered insolvency. Depending on the uncertain factors outlined at paragraph 7.7 of this PART A, we reasonably estimate that Redress Creditors and the FOS might receive around 10% of their Scheme Claim compared to nothing if the Scheme is not approved and Amigo goes into insolvency. This estimate does not include a provision for the Future Business Contribution.

122. Part B of the Explanatory Statement gives a detailed explanation of the Scheme. Paragraph 1.49 explains that the purposes of the Scheme were to avoid the Group going into insolvency and to facilitate the ongoing trading of the business once Amigo can begin to restart lending; and that it was envisaged that the secured creditors would be paid in full.

123. Paragraph 4.5 stated that the Company was proposing the Scheme instead of ALL going into insolvency. It said,

> "Should the proposed Scheme not be approved by the Scheme Creditors at the Creditor's Meeting, the directors anticipate that Amigo would shortly thereafter seek the appointment of an administrator or liquidator".

124. Paragraph 8.4 said,

> "The reasonable estimate of the outcome for Redress Creditors and the FOS in the Scheme is 10% of their claims. However, the final outcome may be higher or lower than this, with the key variables being: (i) the number of Redress Claims submitted in the Scheme; (ii) the number of those claims which are accepted; (iii) the proportion of claims as between borrowers and guarantors; (iv) the proportion of claims as between current and past customers (including the extent of set off applied) and (v) the value of the Future Business Contribution (which has not been provided for in arriving at the 10% estimate). These factors will combine to make up the total value of Redress Liabilities and, together with the value of the Future Business Contribution, the ultimate dividend outcome. Much of this information will not be known until all claims have been submitted and assessed in the Scheme. For example, if the number of claims received and the number of claims accepted are significantly higher than we have estimated, whilst the other variable factors turn out to be as we have estimated, Redress Creditors and the FOS will get a reduced pay-out rate on their claims than this estimate indicates."

125. Amigo's directors recommended the Scheme to the Scheme Creditors as being in their best interests and encouraged them to vote. For instance paragraph 7.3 said,

> "We strongly encourage you to vote on the Scheme. The board of directors of Amigo firmly believe it to be in your best interests to vote in favour of the Scheme."

126. The Explanatory Statement explains that some of the directors and management have interests in the shares, with Mr Jennison, the Group CEO, having the biggest interest, of 1.25m shares and 9.5m shares under a long-term incentive plan (of which no further details are given). Mr Beal, the Chief Restructuring Officer of the Group, has 989,898 shares and total awards of 1,198,675 shares under the long-term incentive plan and other smaller options and incentive plan interests. Some of the other directors or members of management are listed as having smaller interests in the shares.

127. The FCA submits that the Explanatory Statement failed fully and fairly to inform the constituency of Redress Creditors about the Scheme and the realistic alternatives open to them. The FCA contends, first, that the Explanatory Statement wrongly presented a starkly binary choice between something (a possible dividend from the Scheme Fund) and nothing at all. The FCA says that there was no proper examination or explanation of other realistic alternatives, such as the possibility of a broader restructuring including a transfer of a share of the equity to the Scheme Creditors.

128. The FCA says, secondly, that the Explanatory Statement was materially deficient in that there was no explanation or analysis in the Explanatory Statement of the basis on which the shareholders would be entitled to retain in full their equity, or of the reason for setting the Future Business Contribution at 15% over four years.

129. As to the first of these complaints, the Company did not seek to argue that the choice presented in the Explanatory Statement was anything other than binary. The Company's position was that it was entitled to convey this message: the directors had decided (and consistently stated in public communications) that if the Scheme failed Amigo would go into a formal insolvency process. That was the most likely alternative to the Scheme being passed. If that happened the Statement fairly and

accurately explained that the returns for Scheme Creditors would be zero. The Company says that it was not required to set out a menu of options or other possible outcomes.

130. As to the second complaint, the Company submitted that the Explanatory Statement did not need to say more than it did about the position of the shareholders. It was indeed self-evident that they were retaining their interest (subject to effective sacrifice of the various contributions required to be made by ALL into the Scheme Fund). The issue for the Scheme Creditors was clear. There was no need to say anything more about the position of the shareholders.

131. I prefer the submissions of the FCA for the following reasons.

132. In the first place the impression that would have been conveyed by the Explanatory Statement to a financially unsophisticated consumer in the position of the Redress Creditors was that a formal insolvency would be the automatic and immediate consequence of a negative vote about the Scheme. Creditors could therefore decide to accept something (10% with a chance of something more or less than that) or nothing. In my judgment, given the nature and capacities of the constituency of Redress Creditors, the Explanatory Statement failed fairly and fully to explain to those creditors the realistically probable alternatives. As already explained, if this particular Scheme is not passed and approved, the informal moratorium on payments to Redress Creditors will continue and this will give a breathing space for the directors to explore further restructuring proposals. There is no pressing cashflow or other reason for the directors to decide to place the Group into an immediate insolvency. Again as already explained, I would expect the directors, in light of their statutory and fiduciary duties, to liaise further with the FCA and give careful thought to further restructuring proposals. I consider that the Explanatory Statement gave the constituency of Scheme Creditors the false impression that, absent <u>this</u> Scheme being passed, the directors would have no choice in the matter and that insolvency would be automatic and imminent.

133. The Redress Creditors would also have very little grasp of the usual range of outcomes available to distressed companies seeking to recapitalise themselves. They are unlikely to have understood that the choice was not necessarily the binary one presented – it’s <u>this</u> Scheme or nothing.

134. Secondly, I accept the submission of the FCA that the Explanatory Statement should have explained the basis on which it was being proposed by the directors that the shareholders were to retain the full equity interest and that this was in the best interests of the Scheme Creditors. This was far from a financially literate or experienced audience and it is most improbable that the Redress Creditors (or at least many of them) would have appreciated that the shareholders rank last in a company’s corporate structure and that (accordingly) it is commonplace in corporate restructurings for the equity holders to be compelled to sacrifice at least part of their interests. There was nothing to explain why the directors of the Company were proposing that the shareholders should (subject to the contributions of ALL to the Scheme Fund) retain the whole of their interest in the Group while the Scheme Creditors should accept a 90% haircut. There is no material or analysis to explain why the directors were saying that this outcome was in the best interests of the Scheme Creditors (as expressly represented by the Explanatory Statement). There was indeed

no financial information or analysis at all to explain the allocation of the financial sacrifices of the two groups of stakeholders.

135. Nor was there any explanation of the basis of or reasons for setting the Future Business Contribution at 15% over four years. The deal was presented as something Scheme Creditors could take or leave, but it was not explained to them that the equity holders would be left with an interest (still less one which the stock markets viewed as having a significant value). Given the particular nature and features of the constituency it seems to me that the Redress Creditors would have thought that there was no more value to be had and that the other stakeholders had given as much as could be required of them. As noted above, there are repeated statements in the Explanatory Statement that the directors considered the Scheme to be in the best interests of the Scheme Creditors. I consider that the Redress Creditors would not have appreciated that they might well have been expected to receive at least a share of the equity interest.

136. For these reasons I do not consider that the Explanatory Statement adequately and fairly explained to the Scheme Creditors the basis on which the benefits and losses were being allocated or divided among the stakeholders (cf. *Sunbird* (supra) at [62]).

137. The Company submitted that some of the questions asked in advance of the Creditors' Meeting and answered by the board at the Meeting concerned the position of the shareholders and that this shows that the relevant creditors were capable of understanding the issues. Mr Drummond-Smith explains that two Scheme Creditors asked in advance about the level of impact on the shareholders and whether the shareholders would be receiving a dividend. The answer was that Amigo noted that it is currently under restrictions imposed by its regulator, the FCA, which restrict the payment of any dividends to its shareholders and that, even if that restriction were lifted, the Parent would be making payments to Scheme Creditors in accordance with the Future Business Contribution. Furthermore, Holdings PLC's shareholders would be indirectly contributing to the Scheme by virtue of the Future Business Contribution, the payment of which would reduce profits available for distribution to shareholders by 15% in each of the next four financial years. There is nothing in this question and answer to suggest that any Scheme Creditors appreciated the possibility of the shareholder being asked to cede a share of the equity. Nor was there any further explanation of the calculation of the Future Business Contribution. Moreover, such questions as were asked were raised by only a very small number of creditors and there is no reason to think that they were representative (in terms of experience, sophistication or understanding) of the huge majority who asked no questions at all.

138. I have therefore concluded that, given the limited financial sophistication and literacy of the constituency of Redress Creditors, the Explanatory Statement was insufficient to inform them about the Scheme and the realistic alternatives to it. Scheme Creditors were therefore not properly consulted for the purposes of the Creditors' Meeting. The information was not sufficiently full or accurate to enable the constituency of Scheme Creditors to form a reasonable judgment on whether or not the Scheme was in their interests. This itself means that the court is most unlikely to be able to place any reliance on, or give effect to, the affirmative vote at the Creditors' Meeting (see *Sunbird* at [58] and the cases cited therein). This conclusion is reinforced by the other features listed above: the Scheme Creditors lacked any advice; there was no steering group; there was no negotiation; and the turnout at the meeting was less than 9% by

number. In all these circumstances I am not persuaded that I can properly place any reliance on the vote at the Creditors' Meeting or give effect to it.

139. It also follows that this is not a case where the only issue is, as Counsel for the Company submitted, whether the rationality test has been satisfied. That test applies where the court is satisfied that creditors are sufficiently informed to reach a reasonable judgment. But for the reasons just given the Company has not satisfied me of that.

140. The Company submitted that the FCA was in reality inviting the court to compare different possible schemes. There is ample authority against just doing that where the court is satisfied that the creditors have been properly consulted. *Re Telewest* and *Re Noble* are examples. Others include *Re Inmarsat plc* [2019] EWHC 3470 (Ch) at [47] and *In Re Steinhoff International Holdings NV* [2021] EWHC 184 (Ch), at [135]. The position is stated clearly in *Re Bluebrook Ltd* [2010] B.C.C. 209 at [79].

141. I do not consider that those cases have any bearing on this one. The court in those cases was satisfied that there been proper consultation with creditors (including by the provision of full and fair information about the scheme). That being so, the court applied the rationality test. It therefore did not matter that there might have been a better possible scheme; and it was no part of the court's function to force the parties into further negotiations. But that is different from the case where the court is not satisfied that the Company has fully and fairly informed the creditors so that the scheme meeting has been properly consulted. In such a case, as other authorities show, the court is likely to be unable to approve the results of the meeting as being fairly and properly representative of the interests of the class or creditors as a whole.

Conclusions

142. I am not satisfied that the court should sanction the Scheme. I understand why the directors have sought to find a way of addressing the potentially unsustainable level of redress claims. Moreover, the evidence of the market capitalisation of the Group suggests that the market considers there to be substantial surplus value in the Group (over and above the claims of secured creditors); and the directors' own evidence is that, if the position of the redress claims can be resolved, the Group should be able to resume lending and generate profits. Some form of restructuring of the Group is clearly desirable and indeed needed. But the question is whether, in all the circumstances, <u>this</u> Scheme should be approved. As explained above, I have accepted the submissions of the FCA that the Redress Creditors lacked the necessary information or experience to enable them properly to appreciate the alternative options reasonably available to them; or to understand the basis on which they were being asked by Amigo to sacrifice the great bulk of their redress claims, while the Amigo shareholders were to be allowed to retain their stake.

143. I have also accepted the FCA's submission that the court's refusal to sanction the Scheme will probably not lead to the imminent insolvency of the Group; there is no evidence of any immediate (or even medium-term) liquidity crunch, and the directors will doubtless wish, if possible, to preserve the value of the enterprise for its various stakeholders. The FCA expects the directors to continue to explore and promote a restructuring which fairly allocates the benefits and losses among the various

stakeholders. I agree with that, and would urge the directors to continue their efforts to promote a suitable restructuring.