CR-2024-002460

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

IN THE MATTER OF RELIANCE NATIONAL INSURANCE COMPANY (EUROPE) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

SKELETON ARGUMENT OF RELIANCE NATIONAL INSURANCE COMPANY (EUROPE) LIMITED

SCHEME OF ARRANGEMENT CONVENING HEARING

Estimated hearing time: c.2 hours

Estimated reading time: 4 hours. Suggested reading for the Court is as follows.[1]

Core Reading

(a) this skeleton argument.

(b) the practice statement letter dated 15 April 2024 ("**the PSL**") circulated by the Company [C1422-1442].

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[1] The Court should have available to it:
(a) an E-File Convening Hearing Bundle (in PDF format, paginated "C0001", "C0002" etc, in the top right corner (in red). The whole Court E-File is paged C0001 to C1530.
(b) an E-File Authorities Bundle (in PDF format, paginated in the bottom right corner in large red numbering).
(c) this skeleton argument.
Where not otherwise stated, this skeleton argument uses the definitions as given in Bolton 1, and as also used in the proposed Scheme.
The page number references in this skeleton argument are to the Court File red page numbering in the top right corner of the E-File Convening Hearing Bundle (eg "[C001 / [paragraph number]")] save where otherwise indicated (e.g. "[Auths/ [page]/[paragraph]]").

(c) the first witness statement of James Bolton ("**Bolton 1**") [C0017-C0098]. Mr Bolton is a director of Reliance National Insurance Company (Europe) Limited ("**the Company**"), and he explains: the background and the reasons for the proposed scheme of arrangement ("**the Scheme**"), the medical malpractice insurance policies held by hospitals/doctors, other healthcare institutions and public health authorities with the Company (for claims made by third party patients against those parties) ("**the Policyholders**" who are the scheme creditors), and relevant information concerning the Company's business in the context of the proposed Scheme. At Bolton 1, para 73, [C0045-6] he sets out a composite table of estimated outcomes for scheme creditors, showing that in the proposed scheme, Policyholders would receive an estimated payment of 100% of their claims, whereas in a continued run-off the payout is estimated at 64%, and whereas in an insolvent administration the payout is estimated at between 71% to 79%.

(d) the draft convening order/directions applied for, subject to the Court [C0249-C0254].

(e) communications with Policyholders (Bolton 1, paras 175-179 [C0078-C0080]); see the recent letters from 2 of the Policyholders dated 3 May 2024, and 7 May 2024, as referred to in Bolton 1, paras 179 (b) [C0080; see letter at C1394-1397, with the English translation at C1398-1401], and Bolton 1, para 179 (a) [C0079; see letter at C1419-1420, with the English translation at C1421]; see the response of the Company dated 7 May 2024 (to the Policyholder letter dated 3 May 2024) at C1403-C1417.

Insofar as time permits

(f) the proposed Scheme Explanatory Statement [C0099-C0248] (this repeats much of the content of the PSL and Bolton 1, so can be skim read); the draft Scheme ("**the Scheme Rules**") are at [C0177-C0225] (these are summarised in Bolton 1, and in this skeleton, so again can be skim read).

(g) the expert foreign law reports, as to likely recognition and enforcement, in Italy (Professor Cavallini of the Milan Bocconi University) and in Spain (Professor Garrido of the Universidad de Castilla La Mancha) [C1490-C1530]. Again, these can be read

quickly as recognition/effectiveness is ultimately a question for sanction. These explain, respectively, that the Scheme, if approved, would likely be recognised and enforced in Italy (the jurisdiction in which the majority of Policyholders are resident or domiciled) and in Spain (the domicile or residence of 2 Policyholders).

A. Introduction and overview of issues on convening hearing

1. The Company is an English registered company carrying out insurance business, albeit in run-off. It is regulated by the Prudential Regulation Authority (the "**PRA**") and the Financial Conduct Authority (the "**FCA**"). The Scheme is proposed for certain policyholders who have or may have claims against the Company arising under or out of the Italian and Spanish insurance policies originally written by QBE Insurance (Europe) Limited ("**QBE**") and transferred (by Part VII transfer) to the Company in 2018 ("**the Insurance Policies**"). [Bolton 1, para 21; C0023.]

2. The Insurance Policies are medical malpractice policies and are claims made policies (the last active claim year being for claims made by the end of 2013). They cover the Policyholder against claims made by patients for medical malpractice or medical negligence. By their nature, such claims are difficult to assess, whether in terms of liability or quantum. Due to these aspects, the claims are costly in terms of litigation fees and other fees, and also have proved difficult to conclude. Despite the historic nature of the cover, there therefore remains a material amount of ongoing litigation. Most of the ongoing litigation is between patients and the Policyholder in Italy, albeit the Company is sometimes joined to the proceedings as the indemnifying insurer for the relevant Policyholder. [Bolton 1, para 23; paras 26-7; C0024-25.]

3. The Insurance Policies are governed either by Italian or Spanish law. [Bolton 1, para 24; C0024.]

4. The Company categorises Policyholder claims into Open Claims or Closed Claims [Bolton 1, para 28; C0025.]. The total number of Open Claims, and Policyholders, as at 31 March 2024 was [Bolton 1, paras 30-1; C0026]:

   (1) in Italy, 322 Open Claims arising from 59 Policyholders ("**the Italian Open**

Claims").

(2) in Spain, 11 Open Claims arising from 2 Policyholders ("**the Spanish Open Claims**").

5. There are 67 Policyholders with Closed Claims (with 61 who have both Open Claims and Closed Claims). Closed Claims are claims where the Policyholder has notified the Company of a claim within the period covered by the relevant Insurance Policy, but (a) the Policyholder's claim has been settled by agreement with the Policyholder or has been the subject of final determination by the Court or (b) the claim has been closed for dormancy. [Bolton 1, paras 32-34; C0026-C0027.]

6. Unfortunately, the Company experienced a material deterioration in its financial position during both 2020 and 2021, the latter of which resulted in a breach of its regulatory capital requirements. This was caused by (a) a number of adverse litigation outcomes on individual claims; and (b) an increase in estimated future claims costs. [Bolton 1, para 58; C0038; and see further below in Sections C and D]. This deterioration was obviously not anticipated at the time of the 2018 Part VII transfer. But the Directors of the Company are forced to deal with the position of the Company as it is now and is anticipated to be.

7. In this regard, the financial position of the Company has worsened since 2021 and it continues to be in breach of its regulatory capital ratios [PSL, para 4; C1422; Bolton 1, paras 58-62; C0038-C0040]. It has suffered a continuing deterioration in its balance sheet position and, as matters currently stand, believes that it is balance sheet insolvent (or is likely to become insolvent) [Bolton 1, para 4; C0018]. The Directors have formed the view that the Company is likely to be unable to pay all claims in full if ordinary business and run-off is continued. This means that, although the Company could probably pay earlier established claims, the later claims would remain unpaid, because the assets of the Company would have been extinguished by payment of claims and costs. [Bolton 1, para 77; C0048.] It is estimated by the Company that allowing the ordinary run-off of the Company's business to occur would take until about 2030 [PSL, para 33; C1431], and would lead to a likely deficit of €11.7 million as regards creditors. [PSL, para 22 (a), see Scenario 1; C1427.] [See table at Bolton 1, para 73, C45, in

column "Cont'd run-off".]

8. Accordingly, if the Scheme is not approved by Policyholders and the Court, the Company considers that it would likely have no option but to enter into an insolvency process in England (as the Company is an English registered company) in the form of an administration, in short order. [PSL, para 5; C1423.] In such an administration, the estimated likely deficit as regards the Policyholders would be between €4.2m and €5.9m. [PSL, para 26; C1429.] [See table at Bolton 1, para 73, in columns "Admin (Lower outcome)" and "Admin (Higher outcome)"; C0045-6.] The likely alternative to the Scheme is therefore considered to be an insolvency in which Policyholders will not be paid in full.

9. The Scheme proposal, by utilisation of a bar date on claims, along with expert insurance assessment of claims, would allow for the early resolution of claims. The estimated outcome in the Scheme scenario is that, due principally to the reduction in claims handling expenses, it will result in estimated payment to Policyholders of their claims in full i.e. a potentially solvent outcome for Policyholders [PSL, para 22 (b), Scenario 2; C1427.] [See table at Bolton 1, para 73, in column "Scheme"; C0045-6.]

10. The utilisation of the expert insurance adjudicators, by way of the Scheme proposal, should mean that all Policyholder claims that are disputed will be assessed in a similar way, at a similar time, by insurance expert assessors, leading to a fair, quicker and more cost effective assessment and distribution process for Policyholders than would occur in the ordinary course of run off or in any formal English insolvency process (such as administration)[2] [see, for example, Bolton 1, para 131; C0064]. The Scheme, in essence, should mean that the claims of Policyholders (as determined in the Scheme) are met in full without the associated (and extensive) costs of litigating the same.

11. In particular, in the proposed Scheme, there is a deadline for submission of claims along with a claims agreement process and expert independent adjudication process if no

[2] This is typically referred to as a cut-off and estimation scheme, although the historic nature of most of the claims means that the primary benefit of this Scheme will the agreed valuation mechanism for existing claims rather than estimates for future claims. The benefits of such a scheme as compared to allowing claims to be dealt with in a proof process (whether in liquidation or administration) are identified in *Stronghold I* at [19]-[20] [Auths/385] and *Stronghold II* at [6]-[10] [Auths/552].

agreement can be reached. The aim is to allow for a quicker and fair process to determine claims and make greater distributions than would likely be possible in an insolvency proof process. [Bolton 1, paras 130-131; C63].

12. The Scheme only applies to Policyholders, who would all be simple insurance creditors with the priority afforded by regulation 21(2) of the Insurers (Reorganisation and Winding Up) Regulations 2004/353 ("**the Regulations**") [Auths/118/21(2)&(3)] which provides as follows:

> *"(2) Subject to paragraph (3), the debts of the insurer must be paid in the following order of priority- (a) preferential debts; (b) insurance debts; (c) all other debts."*
>
> *"(3) Preferential debts rank equally among themselves after the expenses of the winding up and must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions."*

13. Subject to the Court, the ultimate question for the Policyholders at any Scheme meeting for the vote is to consider whether they would prefer a distribution through the processes proposed by the Scheme, or whether they would prefer an insolvency distribution (probably through an Administration). An insolvency distribution process would likely delay before any distribution could take place, to await accurate assessment of the level of ultimate liabilities and assets. The Company also estimates that such a process would result in less assets available for distribution to Policyholders, due to the estimated costs of the Administration as well as the likelihood of reduced recoveries and asset realisations. It is the view of the directors of the Company that the Scheme is the best means to bring closure to the run-off of the Company's insurance business involving the Policyholders, in the shortest practicable time, and to maximise returns for the Policyholders when compared to other likely scenarios.

14. At this hearing, and subject to the Court, the principal issues to be addressed are likely to be:

(1) Whether sufficient notice of this convening hearing has been given to the Policyholders through the circulation of the PSL?

The PSL, along with a translated copy, was circulated to Policyholders as set out in Section B, with most Policyholders receiving 28 days' notice of this hearing. Given the Company's financial situation, and the nature of the Scheme/issues to be addressed at this hearing, the Company respectively submits that this is sufficient notice: see Section B below.

(2) Whether the proposed single class of Policyholders is correct?

If an insolvent administration is the correct comparator (i.e. the likely alternative to the Scheme) as the Company contends, there is no material difference in the rights of any Policyholders, or difference in their treatment under the Scheme. Critical to the analysis (and outcome for Policyholders) is whether the Company is correct that, absent the Scheme, it will be insolvent. The Company has adduced significant evidence in this regard (see further below) and respectively submits that it is clear that the likely alternative to this Scheme is an English administration: see Section D below.

(3) Whether there are any "roadblocks" apparent that mean that the Court would necessarily refuse to sanction the Scheme in due course?

There are good commercial reasons for the Company putting the Scheme to the Policyholders alone, and not to any other creditors: see Section G below.

The Company is an English company with some 99% of its assets located in England. It will enter administration in England if the Scheme does not proceed, and all Policyholders would have to submit claims in the English Administration. Although the Policyholders are all domiciled in Italy or Spain, there is good evidence that the Scheme is likely to be effective either through recognition in Italy/Spain or by reason of such creditors having to seek to enforce any claims in this jurisdiction: see Section H below.

(4) Information provision and the order sought to convene a single meeting of creditors.

The Company believes that the Explanatory Statement provides sufficient information to enable Policyholders to form a view on the merits of the Scheme and vote on an informed basis: see Section I below.

The directions leading to the proposed meeting, and for its conduct, are addressed in detail in Section I below. These are in large part standard, with some features which have been designed to cater specifically for the circumstances of the Company and the foreign location/language needs of the Policyholders. The Court will be taken through the directions proposed at the hearing if the Court indicates that it is otherwise content to direct that the Scheme meeting be convened.

B. Notification of the Scheme to Policyholders

15. The Company has been liaising with Policyholders with Open Claims, and explaining the proposal for a scheme of arrangement, since 2022 [Bolton 1, paras 175-7; C0078]. The PSL should not therefore have come out of the blue to any of those with Open Claims.

16. In accordance with the *Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)* [Auths/515-517] issued by the Chancellor of the High Court on 26 June 2020, the Company circulated the PSL (practice statement letter) as follows, to alert Policyholders to the convening hearing and the proposal of the Company as regards the single class.

    (1) On 15 April 2024, 99 emails were sent to Policyholders with Open Claims and Closed Claims (97 in Italy, and 2 in Spain), either by the authorised method of communication with Italian Policyholders being Posta Elettronica Certificata ("**PEC**"), or by communication with each of the brokers for the Spanish Insurance Policyholders. [Bolton 1, paras 182-183; C0081].

    (2) On 16 April 2024, the PSL (in English, and also the sworn Italian and Spanish versions) was posted on the Scheme Website[3]. [Bolton 1, para 186; C0082.]

[33] As at Thursday 9 May 2024, the website had been viewed 786 times.

(3) On 25 April 2024, an advertisement for the Scheme appeared in *Il Sole 24 Ore,* which is a widely circulated business, finance and economics newspaper in Italy. [Bolton 1, para 187; C0082.] [The advertisement is at C1488.]

(4) On 26 April 2024, the PSL was further circulated to a limited further group of Policyholders, being those who had commuted their claims , or who have never made a claim. [Bolton 1, paras 184-5; C0082.] Given the nature of commutation, and the claims made basis of the policies, it is not anticipated that these Policyholders will have any valuable claims to make within the Scheme. However, in order to ensure that all Policyholders have notice and are bound by the Scheme, the PSL was circulated to them.

17. Given the distribution of the PSL, the Company believes that the vast majority of Policyholders with claims received the PSL on 28 days' notice prior to the convening hearing listed for 13 May 2024. [Bolton 1, paras 190-1; C0083.] Further, the advertisement and the notification on the Scheme Website, and the further notifications made directly, were further steps taken by the Company by way of caution to endeavour to ensure that Policyholders are aware of the Scheme proposal. Given the nature of the proposed Scheme and the manner in which it has been drawn to the attention of Policyholders, it is submitted that the notice given was sufficient. As the Court is aware, shorter time periods have previously been held to be sufficient (i.e. 14 days in *Re ColourOz* [2020] BCC 926 at [125]-[127]; [Auths/513]). Whilst the Company accepts that the appropriate period of notice depends on the facts of the case (including the nature of the scheme claims/creditors), and that some further time was required in this instance given the location of creditors and subject matter of the Scheme, the fact that at least two creditors have sent letters making the demands set out below regarding the issue of the PSL (and did so materially in advance of the convening hearing) demonstrates that the PSL has served its purpose.[4]

18. To date, no Policyholder has made any objection to the single class as proposed by the Company. [Bolton 1, para 179; C0080.]

[4] Further correspondence, as relevant, from Policyholders or the Company will be filed in due course with the Court.

19. In terms of the above referred two responses:

(1) Grande Ospedale Metropolitano of Calabria ("**GOM**") sent a letter dated 3 May 2024 to the Company asking for detailed financial information [C1394-1401 is the English translation] to which the Company responded by letter dated 7 May 2024 [C1403-C1417] giving extensive financial information. The penultimate paragraph of the letter from GOM did ask that the letter be drawn to the Court's attention along with "*a request for a postponement to allow GOM and the Authorities to whom the proposal will be submitted , a thorough assessment of the subject and of the eventual implications on public finances.*" Whilst it is clear that GOM is concerned by the proposal for a Scheme, and wants further information, it is respectfully submitted that no postponement or adjournment of the convening hearing is required. The requested information has been provided and there will be 6 weeks for the Policyholders to consider the merits of the Scheme (and contents of the Explanatory Statement) before being required to vote on the same; and

(2) Azienda Ospedaliera Messina ("**OM**") sent a letter dated 7 May 2024 asking for an adjournment of the hearing [C1419-1421]; the Company will reply that an adjournment is not required (the Court will be provided with the Company's letter when it is sent).

No points are raised, or dispute made, in either of these letters, about the proposed single class.

20. **Regulator position with regard to the convening hearing.** The Company has also liaised with the PRA, the regulator to the Company, and has issued the PRA with documents for the Scheme as soon as such documents have been available. [Bolton 1, Section L. C0071-C0073.] So far as the Company is presently aware (as at the date of this skeleton argument), the PRA has no objection to the Scheme/proposed single class.

C. Background

21. The overall background is given at Bolton 1, paras 11 and following [C0021]. The

relevant history with regard to the proposed Scheme starts in November 2018, when QBE transferred its portfolio of the Italian and Spanish Insurance Policies to the Company by the Part VII Transfer.

22. As a result of the Part VII Transfer, the Company's business as the remaining active insurance liabilities was only the Insurance Policies, and some residual liabilities under the UK Employers' Liability Policies. [Bolton 1, para 16; C0022-3.]

23. The business of effecting and carrying out a contract of insurance is a regulated activity and requires authorisation from the PRA and the FCA. The Company is a "PRA-authorised person" as defined in section 2B(5) of the Financial Services and Markets Act 2000 ("**FSMA**"). [Bolton 1, para 17; C0023.]

24. The Company is currently running off its insurance business. The management of the claims run-off is currently outsourced under a services agreement to Premia UK Service Company Limited ("**Premia**"), with all non-claims services outsourced to Quest Consulting (London) Limited ("**Quest Consulting**"). [Bolton 1, para 18; C0023.]

25. The Company experienced a material deterioration in its financial position during both 2020 and 2021, which led to a breach of its regulatory capital requirements. This was caused by (a) a number of adverse litigation outcomes on individual claims; and (b) an increase in estimated future claims costs. [Bolton 1, para 58 onwards; C0038.] The reserve for outstanding losses reflects the value of the claims under the Insurance Policies that the Company expects to pay, with an additional reserve for unexpected developments in relation to these claims. It is to be noted that these reserves reflect a value based on advice received from the Company's third party administrator, Premia (itself having had access to legal and cost advice: Bolton 1 at paras 51, 58 and 59) [C0035-C0039]. Whilst there is inherently an element of uncertainty regarding the level of reserves/anticipated future liabilities – Bolton 1 para 59, these reserve estimates are the Company's best assessment of its likely liabilities which are reflected in its audited accounts. The Company has extensive experience, with Mr Bolton being both highly experienced in insurance matters having been involved in the London insurance industry for over thirty years, and he is also a licensed insolvency practitioner. He is also very familiar with schemes of arrangement, having managed or advised on the

implementation of approximately 100 schemes. [Bolton 1, para 2; C0018.]

26. As a result of the deteriorating position, the directors of the Company further examined the Company's financial position and created a remediation plan to seek to restore the Company to a more stable financial position. The remediation plan consisted of the Company actively seeking to accelerate the settlement and commutation of outstanding claims, as well as carrying out a review of the reserves and expenses of the Company. Unfortunately, it did not prove possible to reach agreement with enough Policyholders to restore the Company to a more stable financial position. [PSL, para 16; C1425.]

27. In 2021, the Company presented its remediation plan to the PRA and has continued to provide regular progress updates to the PRA. [Bolton 1, paras 152-4; C0071.] The Company and its advisers have also shared with the PRA on an ongoing basis the development of the Scheme and relevant documents as they have become available. [Bolton 1, paras 154-9; C0071-C0073.]

28. As at the date of this skeleton argument, the PRA has not objected to the proposed Scheme, but has not issued any formal letter of non-objection.

D. Financial difficulties

29. The Company is currently in serious breach of the Solvency Capital Requirement and Minimum Capital Requirement under the Solvency II regime [Bolton 1 para 61 and 62; C0039], meaning likely supervisory intervention or withdrawal of authorisation. In and of itself, such breaches require the Company to take steps to resolve such breaches, and since the Company has not been able to obtain further equity investment from its shareholder [Bolton 1 para 63; C0041], the Scheme (subject to creditors and the Court) is likely to be the best solution to the regulatory (and solvency) problem.

30. In March 2023, the Company engaged Ernst & Young LLP ("**EY**") to provide a counterfactual analysis [Bolton 1, paras 64 to 67; C0041-2]. This forecast that a Scheme would likely achieve a solvent outcome, and was the only scenario (as compared to a continued run-off or administration) which would do so: Bolton 1 para 65 [C0041], and see the EY analysis at C0379-0388.

31. Interpath Advisory ("**Interpath**") was then engaged in June 2023 to produce an independent report on the likely outcome in the three most credible scenarios, being a continued run-off, the proposed Scheme and an insolvent administration [Bolton 1, paras 68-70; C0042-43]. That report is at C0456-C0477. Again, based on the Company's then financial projections, the report concluded *inter alia*:

(1) A scheme would lead to material cost savings;

(2) An anticipated return to Policyholders of 100 cents in the Euro via the Scheme appeared reasonable;

(3) Absent the Scheme, continued run off would likely lead to cashflow insolvency for the Company during 2027 *"and is therefore not a viable option for the Company absent additional equity funding which appears highly unlikely to be provided to a run-off entity in this position.";*

(4) The Company's conclusion that it would likely have no option but to place the Company into an insolvency process should the Scheme not be approved was reasonable; and

(5) The assumptions made by the Company in respect of the various scenarios, including as to the level of reserves and the outcome in an administration, were reasonable.

32. Given the complexities of the Company's business, it has taken longer than anticipated to propose the Scheme, and, given the Company's deteriorating financial position, the directors of the Company have formed the view that it is unnecessary for the Company to incur further costs updating the EY or Interpath reports, but the Company itself has updated its projections based on its own management accounts as at 31 December 2023 for full information to be given to Policyholders. [Bolton 1, para 71; C0045.]

33. The overall estimated present financial position of the Company, in various scenarios, is summarised in the table at Bolton 1, para 73 [C0045]. By way of summary, the following estimates of projected percentage outcomes arise in the various alternative

scenarios.

(1) A continued run-off of the Company's business would result in a 64% projected payout to Policyholders.

(2) Administration would result in a 71%-79% projected payout to Policyholders.

(3) The Scheme would result in a 100% projected payout to Policyholders.

34. If it is not possible to accelerate the payment of claims by way of the Scheme, then the Company has reached the conclusion that it will likely be left with no option but to apply for Administration. [Bolton 1, para 90; C0052].

E. The proposed Scheme and how it operates/benefits of the Scheme

35. A summary of the Scheme is given at Bolton 1, paras 93-131. [C0053-64].

36. The Scheme applies to a Policyholder with a Scheme Claim. [Bolton 1, para 91; C0053].

37. Policyholders will be invited to submit all claims within 6 months of the Effective Date, such 6 month date to be the Claims Deadline, in other words a bar date. [Bolton 1, para 95; C0053].

38. The Company will then determine claims, and submit a First Determination Notice to Policyholders, and a Policyholder can either agree the claim (in which case it would then become that Policyholder's Ascertained Scheme Claim), or disagree, in which event the claim becomes a Disputed Scheme Claim. There is a further 90 day period given for the Company and the Policyholder to endeavour to agree the claim, failing which (in overall summary) the claim is determined by expert independent scheme adjudication by the Scheme Adjudicator. [Bolton 1, paras 97-108; C0054-C0057]. The Scheme Adjudicators are respectively Italian or Spanish expert insurance assessors, who will apply relevant and established Italian or Spanish insurance claim methodologies to assess the respective disputed claims. [Bolton 1, paras 104-107;

C0055-C0057.] This adjudication by insurance experts, along with the bar date, allows for all claims to be determined quickly and expertly, for the benefit of all Policyholders as a body, rather than allowing the piecemeal litigation that has taken place to date at great expense, and which would continue absent the Scheme or Administration.

39. The assets to be made available to the Scheme are the Scheme Assets, which are all the assets of the Company after providing for certain liabilities that the Company considers it appropriate to pay (see further below in this skeleton argument), to bring the business of the Company to an ultimate close. The Scheme Assets are estimated to be about €20m, which the Company estimates as sufficient to pay the Ascertained Scheme Claims. [Bolton 1, paras 113-15; C0059]. Almost all assets (c.99%) are located in England [Bolton 1, para 215 (b); C0091].

40. The payment of Scheme Claims is currently paused and has been since 15 April 2024 (the date the PSL was issued) to ensure that all Policyholders with Scheme Claims are treated equally. If the Scheme becomes effective, the Company expects to start to make payments to Policyholders with Ascertained Scheme Claims by May 2025. [Bolton 1, para 117; C0060].

41. The Scheme provides that Policyholders will be paid their Ascertained Scheme Claim, and will otherwise release and discharge claims against the Company. [Bolton 1, paras 120-121; C0060]. The Scheme also contains the usual releases against advisers and related parties. [Bolton 1, para 118; C0060].

42. The Scheme also provides for a moratorium on claims by Policyholders, save that Policyholders are permitted to pursue their Scheme Claims. [Bolton 1, para 122; C0061]. The Scheme does not prevent the Company from proceeding against a Policyholder, which may happen, for example, where the Company is appealing a judgment given on a Third Party Claim, or where the Company has a claim against a Policyholder for an unpaid deductible etc [see Bolton 1, para 123 (a) to (e); C0061].

43. The Company believes the proposed Scheme is likely to be more beneficial to Policyholders than the alternative of an English administration distribution, where there would likely be difficulties in assessing claims, and also delays in payment [Bolton 1,

para 130; C0063]; and that such delays would be likely to occur by reason of the absence of a bar date, risks of appeals and other officeholder obligations in respect of re-assessing proofs (see, for example, *Stronghold II* at [9] [Auths/552]).

F. Part 26 of the Companies Act 2006: the convening hearing

44. The Companies Act 2006 ("**CA 2006**"), s 895 (1) applies where a compromise or arrangement is proposed between a company and its creditors. Pursuant to s.896 (1) CA 2006 [Auths/6/s 896 (1)&(2)]:

> *"The court may, on an application under this section, order a meeting of the creditors or class of creditors .... to be summoned in such manner as the court directs."*

45. The proposed Scheme is plainly a compromise or arrangement within the meaning of Part 26: the Policyholders will receive replacement rights in a package designed to reduce both the time and the costs of distributions to them.

46. The court's function at the convening stage of proceedings for the approval and sanction of a scheme of arrangement is to consider whether it should direct the convening of the proposed meetings, and give associated directions if so satisfied. This principally means that consideration is to be given to the question of the proper class composition for the proposed meeting(s), as the Court will in due course only have jurisdiction to sanction the Scheme if the meeting(s) were properly convened. It is well known that the convening stage is not an appropriate occasion to consider the fairness of the proposed scheme. In *Re Telewest Communications plc (No 1)* at [14] David Richards J said [Auths/125/14]:

> *"... it is important to keep in mind the function of the court at this stage. This is an application by the companies for leave to convene meetings to consider the schemes. It is emphatically not a hearing to consider the merits and fairness of the schemes. Those aspects are among the principal matters for decision at the later hearing to sanction the schemes, if they are approved by the statutory majorities of creditors. The matters for consideration at this stage concern the jurisdiction of the court to sanction the scheme if it proceeds. There is no point in the court convening meetings to consider the scheme if it can be seen now that it will lack the jurisdiction to sanction it later. This is principally a matter of the composition of classes. Under s 425, the court will have no jurisdiction to sanction the scheme if the classes have been incorrectly constituted."*

47. This remains the approach which is adopted: see, for example, *Re Pizza Express Financing plc* [2020] EWHC 2873 (Ch) at [23]; [Auths/539/23]. There are, therefore, broadly three matters to be considered at the convening hearing:

(1) Class composition;

(2) Jurisdiction to sanction the scheme (and any other potential "roadblocks" to sanction); and

(3) Information to be provided to Policyholders in advance of the proposed scheme meeting, and the notice, timing and conduct of the scheme meeting.

G. Class

Approach in principle

48. The test for class composition in a scheme is well known: a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest: *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 per Bowen LJ at 583; [Auths/23]. This test focuses attention on the rights of creditors, rather than their interests, as Hildyard J explained in *Re Primacom Holding GmbH* [2012] EWHC 164 (Ch), [44]-[45]; [Auths/228/44-5]:

> *"… The golden thread of these authorities, as I see it, is to emphasise time and again…[that] in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing [rights] and the rights offered in the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.*
>
> *I emphasise this point because it does very seriously affect the composition of classes and enables the court to take a far more robust view as to what the classes should be and to determine a far less fragmented structure than if interests were taken into account…."*

49. When dividing creditors into classes, two considerations are relevant: the rights that the creditors would have if the scheme were not implemented, and the rights that the creditors would have if the scheme were implemented. As Chadwick LJ said in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [30]; [Auths/65/30]:

> *"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."*

50. The likely alternative to a scheme of arrangement is often called the "*comparator*". In *Re Stronghold Insurance Co Ltd* [2019] 2 BCLC 11 at [48]-[49], [Auths/392/48-9], Hildyard J described the importance of the comparator to formulation of classes as follows:

> *"What is now ordinarily adopted as the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed. In Re British Aviation Insurance Co Ltd [2006] 1 BCLC 665; [2005] EWHC 1621 (Ch), Lewison J (as he then was) considered this to be "critical to deciding whether all the policyholders form a single class"; and in Re Apcoa Parking (UK) Ltd [2014] EWHC 997 (Ch) I agreed that "that will necessarily inform, and in many if not most cases be the most important factor in, the discussions".*
>
> *The reason is two-fold. First, a fair comparison between a policyholder's rights if there is no scheme and its rights under the proposed scheme depends on ascertaining the nature and quality of the right in the "non-scheme world", and the latter depends on the appropriate comparator. Secondly, only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights be weighed fairly."*

51. When deciding whether creditors with different rights should vote in a single class, one question that the Court often asks is whether there is "*more to unite than to divide*" the relevant creditors. The phrase "*more to unite than to divide*" is derived from the decision of David Richards J in *Re Telewest Communications plc (No 1)* [2005] 1 BCLC 752 at [40]; [Auths/133/40]. In *Re APCOA Parking Holdings GmbH* [2015] Bus LR 374 at [52], [Auths/287/52], Hildyard J said:

> *"The modern approach ... is to break the question into two parts, and ask first whether there is any difference between the creditors in point of strict legal right ... and if there is, to postulate, by reference to the alternative if the scheme were to*

fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous motivation operating in the case of any particular creditor(s).”

52. As was observed in *Re Anglo American Insurance Ltd* [2001] 1 BCLC 755, 764d to e (per Neuberger J), [Auths/87]:

> *"if one gets too picky about potential different classes, one could end up with virtually as many classes as there are members of a particular group”.*

53. In this instance, given the insurance nature of the business conducted by the Company, the relevance of potential IBNR claims to the class analysis merits mention (i.e. the risk of claims which have been incurred (in the sense that an event has occurred to which the Insurance Policy should respond) but which have not been reported to the policyholder – incurred but not reported). Traditionally, the existence of such claims (sometimes referred to as unmatured claims) is an important factor which may lead to (i) separate classes in some form or other where some creditors have IBNR claims, and others do not, and the likely alternative to the scheme is a solvent scenario, but (ii) a single class where the likely alternative to the scheme is an insolvent scenario. Ultimately, each decision turns on its particular facts and the rights of the relevant proposed creditor body (as observed by Hildyard J in *Stronghold I* at [75] and [76] [Auths/398/75-6]). But, broadly, insolvency as the comparator tends to lead to a single class analysis in relation to those who hold the same policy rights against a company because, in an insolvency process, all claims would rank equally and be subject to valuation in accordance with the applicable rules (whether current, future, contingent etc). Thus:

(1) In *Re Hawk,* Chadwick LJ analysed at length the decision of *Sovereign Life* (see *Hawk* at [24-29]; [Auths/61-64/24-29]), and held that on the facts of *Hawk,* where the comparator was an insolvency distribution, all policyholders (whether with matured or unmatured claims) could meet in a single class (and that Arden J at first instance had been wrong to separate the classes): see [34-43], [Auths/66-71/34-43].

(2) In *BAIC*, Lewison J held the comparator was a solvent outcome, and therefore the policyholders with accrued claims should be in a separate class to those whose claims had not matured: see [2005] EWHC 1621 at [88-90], [Auths/173-174/88-90].

(3) Similarly, in the first of the *Stronghold* cases, Hildyard J held that separate classes of matured and unmatured policyholders should take place (and not a single class), where the comparator was a solvent outcome: see *Re Stronghold Insurance Co Ltd* [2018] EWHC 2909 at [Auths/381/E to I].

(4) Conversely, by the time the second set of *Stronghold* cases came before the Court, the company was by then insolvent and in administration, and it was held appropriate for those policyholders with matured and unmatured claims to meet in the same class (there were separate classes for direct insureds as opposed to reinsureds, but that was because direct insureds took priority of payment over reinsureds in the insolvency): see [Auths/551/5 (Stronghold insolvent); 553/12 (priority rights of direct insureds); 558/25 (a single class appropriate)].

On the facts

54. The Company has considered the rights of the Policyholders against the Company, for the determination of class, and has determined on the basis of the following points that a single class for Policyholders is appropriate, to meet and consider the proposal for the Scheme. [Bolton 1, para 200; C0086.] As at the date of this skeleton argument, there have been no objections to this single class proposal.

55. The Company's rationale for this approach is that:

(1) The likely alternative to the Scheme is an English administration in short order: see Bolton 1 at paras 4 [C0018], and 200 (b) [C0087]. This is the critical determining issue for class purposes. The Company's deteriorating financial position (see Section D above) is clear, and its current position is that it is balance sheet insolvent and likely (based on the evidence) to be unable to pay

the Policyholder claims in full outside the proposed Scheme[5];

(2) In such an administration/insolvency process, all Policyholder claims rank equally and with the same rights as between themselves both before the Scheme and after the Scheme regardless of whether those policies were governed by the laws of Italy or Spain [Bolton 1, para 200 (a); C0086];

(3) All Policyholder claims are "*insurance debts*" within regulation 21(2)(b) of the Regulations, and thus would all have the same priority rights in any insolvency of the Company (see further below regarding any claims which are not being addressed by the Scheme) [Bolton 1, para 200 (a); C0086];

(4) Given that the likely alternative to the Scheme is an Administration, upon such insolvency all Policyholder claims would be accelerated for valuation purposes to the date of insolvency irrespective of whether such claims are actual, contingent or future (and whether actual known claims, or IBNER claims).[6] There ought to be no difference between Policyholders, as all claims will be subject to the same valuation procedure and rank equally for dividends in such a process. The Scheme endeavours to replicate this process, albeit attempting to improve the position of what would happen in an insolvency, by in the Scheme having a proposed bar date, and expert determination of claims process [Bolton 1, para 200 (b); C0087];

(5) All Policyholders have similar claims (and a similar mix of claims) arising from medical malpractice and alleged negligence (irrespective of the actual details, or causes of action, of each individual claim) [Bolton 1, para 200 (c); C0087];

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[5] In this regard, the position is obviously different to that which Hildyard J concluded in the first *Stronghold* case was insufficient to demonstrate a likely alternative was an insolvent scenario (see the evidence cited in that judgment at [58] and [59], [Auths/394], which included statements that "*the directors of the Company are currently of the view that the Company will be able to pay its liabilities in full whether inside of the proposed Scheme or outside of the proposed Scheme*, …"). The position of the Company's director is that, in the absence of the Scheme, the directors consider that the Company would likely have no option but to enter into Administration in short order: see Bolton 1, para 4, [C0018]. The position is therefore equivalent to the second *Stronghold* case in which insolvency was the comparator.

[6] Regarding the IBNER claims, see Bolton 1, paras 36-37 [C0028]. These "*incurred but not enough reported*" claims are those where the Policyholder will know of the third party claim which has been made against it (and reported to the Company within the Policy Period) but there is a risk of additions to the claim or further claims arising from the same event.

(6) The Insurance Policies are "claims made" policies with the Policy Period having expired over 10 years ago. Accordingly, all Policyholders should be aware of all events that potentially give rise to Scheme Claims and be able to make the Company aware of them to the extent that they have not already done so. This is not a case where Policyholders can be easily divided into Policyholders with notified outstanding claims and Policyholders with IBNER claims. All Policyholders could potentially have both [Bolton 1, para 200 (d); C0087]; and

(7) None of its current Policyholders would have the benefit of protection from the Financial Services Compensation Scheme [Bolton 1, para 200 (e)][7].

56. The Policyholders, meeting together, ought to have no difficulty in determining with a view to their common interest, whether they prefer the Scheme proposals for enabling distributions to them, or whether they would prefer an insolvency distribution.

57. As regards the provisions in the Scheme, the following characteristics of the proposed Scheme illustrate that, within the proposed single class, there ought to be no difficulty in consulting together, as there is more that unites than divides the class, bearing in mind the main decision will be how best to distribute assets (and avoid the likely delay in any insolvency distribution). All Policyholders will be required to submit their Scheme Claims before the Claims Deadline. No claims are permissible after the expiry of the Claims Deadline (a bar date). After submission of claims, the Company will value each claim and inform each Policyholder of the decision. If the Policyholder disputes the Company's decision, then expert determination takes place for Disputed Scheme Claims. Therefore all Policyholders are subject to the same process, and ought to have no difficulty in deciding together whether they approve or reject the Scheme.

[7] The only policyholder previously eligible for FSCS protection (see Bolton 1 at [174], C0077) has commutated their policy by agreement. Given that status, the anticipated absence of any material claim by that creditor and the estimated provision for payment in full under the Scheme, it is not considered that that individual policyholder has rights which are sufficiently materially different to those of all other Policyholders to require them to be place in a separate class.

The creditors with whom the Scheme is proposed

58. The Company's proposed composition of the single class of Policyholders is also sensible, bearing in mind the aim of the Scheme is to accelerate and expertly value and pay outstanding claims of Policyholders, together, at the same time, and in a fair and equitable way for all Policyholders and to reduce the ongoing costs that would otherwise be incurred in this regard. Thus the Scheme addresses only the claims of Policyholders, and not any other creditors of the Company (albeit those other creditors are limited as described in paragraphs 60ff below in this skeleton argument).

59. There is no difficulty with a scheme being proposed with just one class of creditor (here, the Policyholders), even if there are other creditors of the Company who are not proposed to be subject to the Scheme, provided that the decision of the Company is not arbitrary: see *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch) at [19], [Auths/244/19]; and *Sea Assets Limited v P.T.Garuda (Indonesia)* [2001] EWCA Civ 1696 at [22 to 23], [Auths/100/22-23]. In the present case, there is good reason for the Scheme to be proposed only to the Policyholders, as they are the insurance creditors for whom the Scheme is especially designed to resolve their insurance claims in a fair and expeditious way.

60. The various claims not included in the Scheme are as follows, and include "Excluded Claims", as defined in the Scheme. [Bolton 1, para 132 (a); C0064].

    (1) Insurance Policy claims agreed by the Company, or determined by a binding non-appealable court order, prior to the issue date of the PSL being 15 April 2024; these claims are identified at Bolton 1, para 73 [C0046] in the total of €2.5m (see "Scheme" column, against "Claims paid pre-PSL).[8] Excluded Claims will be paid in full, the date of the issue of the PSL being the obvious cut-off point for payment of previously agreed claims. [Bolton 1, para 132 (a); C0064]; and

[8] As explained in Bolton 1, para 86-87, the Company's projections were that it would have been ordered to pay €2.5m, the final figure will not be available to the Company until late May 2024. The Company is paying these awards as any avoidance of payment could create significant additional costs for the Company. The Company also anticipates that all valid claims under the Insurance Policies (as determined under the Scheme) will be capable of being paid in full.

(2) Costs, charges, expenses and disbursements for or incidental to the Scheme, and any regulatory de-authorisation costs. [Bolton 1, para 132 (b); C0064]. It is necessary to meet such costs in full in order to ensure that the Scheme is viable and the Company's affairs are dealt with appropriately.

61. The Court should note that the Scheme also does not apply in respect of any claim made under an indemnity given by the Company to QBE to pay QBE in the event that any losses or expenses are incurred by QBE in respect of any liabilities under the Insurance Policies (which were transferred to the Company pursuant to the Part VII Transfer (the **QBE Indemnity**)). At present, QBE has not made any claim under the QBE Indemnity and any ongoing claims or costs are currently paid for by the Company. Pursuant to the Part VII Transfer, QBE has no ongoing liabilities under the Insurance Policies. In addition, ongoing claims under the Insurance Policies will be compromised in the Scheme if it becomes effective. Accordingly, the Company does not anticipate that valid claims will arise under the QBE Indemnity. If such claims do arise for any reason in the future, then in the event of the Company's insolvency (i.e. the likely alternative to the Scheme), such claims would be subordinated behind the Company's insurance debts, including the claims of the Policyholders under the Insurance Policies, by reason of regulation 21 of the Regulations and would not therefore receive any payment given the anticipated shortfall as regards Policyholders in an insolvency. Any possible claim by QBE is not therefore expected to be paid or provided for in the Scheme, and QBE has no basis to complain as to its exclusion (because it is effectively "*out of the money*" in any relevant alternative, and such "*out of the money*" creditors do not need to be dealt with as part of the restructuring: see, for example, *Re AGPC Bondco plc* [2024] EWCA Civ 24 at [248-249], [Auths/696/248-9]) [Bolton 1, paras 144 to 148; C0069-C0070]. QBE has been provided with the PSL, and the Company has also spoken with QBE to explain the reasons for the proposed Scheme, and QBE have given no indication it objects to the Scheme. [Bolton 1, para 148; C0070-1].

62. The Scheme also does not apply to policies in respect of the United Kingdom Employers Liability (Compulsory Insurance) Act 1969 ("**the UK Employers' Liability Policies**"), and the Company remains exposed to claims arising from 4,337 UK Employers' Liability Policies. [Bolton 1, para 134. C0065]. Bringing as much finality as possible to the Company's liabilities under the UK Employers' Liability Policies is key to the Company's

ability to enter into the Scheme and pay Policyholders the largest amount possible (including sums presently held for regulatory requirements). Without a strategy for dealing with the claims arising under UK Employers' Liability Policies, the Company would continue to have ongoing insurance liabilities that it would need to provide for and it would eventually run out of money. [PSL, para 40; C1434]. Further reasons for not including the UK Employers' Liability Policies in any Scheme are given in the Explanatory Statement [C0119, para 22], namely that such claims are difficult to predict and have a long potential tail; given the compulsory nature of the type of insurance, there is a question mark over whether it would be permissible in any event to compromise such compulsory type policies; and the current absence of significant numbers of claims would make it difficult to identify policyholders to actively participate and vote on any scheme.

63. To endeavour to resolve this issue of the UK Employers Liability Policies, the directors of the Company explored and considered the possibility of selling the whole of the Company's insurance business or exploring the possibility of other parties taking on such liabilities. Both alternatives were marketed, but no interest was received, and accordingly these options were not possible. [Bolton 1, para 137; C0066.] [Explanatory Statement, C0120, paras 23-24]. Accordingly, to resolve the issue, the Company proposes to enter an agreement with EIFlow Insurance Limited ("**EIFlow**"), an insurance company within the Quest group of companies, for EIFlow to agree by deed poll to take on all liabilities for the UK Employers' Liability Policies and to carry out all management of such policies. The "**Consideration**" for such agreement is to be £1m. [Bolton 1, para 138; C0066; Explanatory Statement, C0119-120, paras 22 to 25.] The Consideration is explained to Scheme Policyholders in the Explanatory Statement at C0120, para 25, and ultimately it is a matter for Scheme Policyholders at their meeting to consider such proposal in approving or rejecting the proposed Scheme. The agreement with EIFlow, and the payment of the Consideration, is subject to the Scheme being approved by the Policyholders and sanctioned (as made clear in the Explanatory Statement at C0121, para 29).

H. Other Jurisdiction Issues

64. The Company is incorporated and registered in England with its principal place of business in London at 4th Floor, 52-54 Gracechurch Street, London, EC3V OEH. It is a

company within the meaning of Part 26 of CA 2006. Given that it is an English company which could be wound-up in England, there is no need to establish any further "*sufficient connection*": see *Re Dundee Pikco Ltd* [2020] EWHC 89 (Ch) at 16] and [24] per Zacaroli J, [Auths/475/24].

65. The relevant policies are governed by Italian and Spanish law. The international effectiveness of the Scheme to bind the Policyholders or otherwise ensure that the Scheme is effective to achieve its aims (and ensure that the Court is not therefore acting in vain) are ultimately matters for sanction. However, the Court will typically at the convening hearing *"indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are other factors which would unquestionably lead the court to refuse to exercise its discretion to sanction the scheme": Re Noble Group Ltd* [2019] BCC 349 at [76] per Snowden J, [Auths/434/76]. The position that the Company will adopt at sanction is therefore addressed below: it maintains that it there is plainly a credible basis for it and the Court to proceed on the basis that the Court will have jurisdiction to sanction the Scheme.

66. The Court is concerned to ensure that there is (per Snowden J in *Re Far East Capital Ltd* [2017] EWHC 2878 (Ch) at [19]. [Auths/365/19]:

"*… a sufficient prospect that the Scheme will be recognised and given effect in those other jurisdictions in which the Company operates and in which it has assets which might otherwise be susceptible to attack by dissenting creditors.*" (emphasis added)

67. In *Re DTEK Energy BV* [2022] 1 BCLC 260 at [27], [Auths/573/27] Sir Alastair Norris summarised the relevant principles in general terms as follows (emphasis):

> *"27. The relevant principles are, I think, clear although the language in which they have been expressed has occasionally differed. But the words of a judgment are not to be treated in the same way as the words of a statute: and the concepts behind the modes of expression are clear. The principles seem to me to be these:-*
>
> *i) The Court will not generally make an order which has no substantial effect and will therefore need to be satisfied that the scheme will achieve its purpose: Re Magyar Telecom BV [2014] BCC 448 at [16] per David Richards J.*

ii) The Court will therefore need to be satisfied that the scheme will achieve a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets: Sompo Japan Insurance Inc v Transfercom Limited [2007] EWHC 146 (Ch) at [18]-[26] per David Richards J.

iii) The English court does not need certainty as to the position under foreign law, but it does require some credible evidence that it will not be acting in vain: Re van Gansewinkel Groep BV [2015] Bus LR 1046 at [71] per Snowden J.

iv) Such credible evidence must show that the scheme is "likely, or at least will have a real prospect, of having substantial effect" or "at least a reasonable prospect that the scheme will be recognised and given effect" : Re Codere Finance 2 (UK) Limited [2020] EWHC 2683 (Ch) at [34] per Falk J, Re KCA Deutag UK Finance plc [2020] EWHC 2977 (Ch) at [32] per Snowden J. This is not the "real prospect" standard that it is applied in procedural applications for striking out or for the grant of summary judgment or permission to appeal. Rather it is the degree of persuasion of which Hoffman J spoke in Re Harris Simons Construction Limited [1989] 1 WLR 368 at 370-371 and is now regularly applied (for example) in the administration context in relation to paragraph 11(b) of Schedule B1 to the Insolvency Act. "Reasonable prospect" captures it without further elaboration."

68. Thus, in *Re DTEK* the standard of proof required to be met by the company was described by the Court as "*modest*": see [28]. The threshold is relatively low: a real prospect of having substantial effect.

69. Substantial effect may be demonstrated in different ways, It will necessarily take into account the type of company and business with which the Scheme is concerned, and whether it is to emerge as a trading company or not. As the passage cited from *Far East*, above, makes clear, the Court's primary concern is to ensure that the Scheme will be regarded as substantially effective in jurisdictions where dissenting creditors might otherwise seek to enforce claims against assets.

70. Typically, a real prospect of substantial effectiveness will be shown (i) by expert evidence demonstrating that the scheme will be regarded as binding and effective in jurisdictions where creditors may seek to enforce claims, or (ii) because the extent of

support amongst creditors (on whom the scheme will necessarily be binding by virtue of voting in favour thereof, or participating in the scheme process) is in any event significant: see the reference to *"very solid support amongst scheme creditors*" in *Re DTEK Energy BV* [2022] 1 BCLC 260 at [32] per Sir Alastair Norris, [Auths/576/32]. See also *Re Noble Group Ltd* [2019] BCC 349 (sanction judgment) at [104] per Snowden J, [Auths/467/104]; *Re Virgin Atlantic Airways Ltd* [2020] BCC 997 (sanction judgment) at [71] to [72] per Snowden J, [Auths/534/71-2]).

71. At the convening stage, the question is (per Snowden J in *Noble*, above) simply whether it is "*obvious*" that the Court has no jurisdiction or that there are factors which would inevitably lead it to refuse to sanction the Scheme. The Company respectfully contends that the Scheme is jurisdictionally viable, and there are no clear and obvious factors which make it inevitable that sanction would be refused. In particular, there is a real prospect that the Scheme will be substantially effective in this case (even before taking into account the extent of the vote in favour of the Scheme):

(1) The Scheme is likely to be regarded as binding and effective in Spain and Italy based on the evidence obtained by the Company. Expert evidence has been provided as to Italian law by Professor Cavallini, and as to Spanish law by Professor Garrido, each (respectively) whose evidence is to the effect that it is likely the Italian Courts and the Spanish Courts would grant recognition and enforcement with respect to the proposed Scheme, as explained in each of their expert opinions. [Bolton 1, paras 217-219; C0091-C0092]. The Court is "*not required at this stage to reach any final conclusion on the question of the expert evidence, so long as its existence provides sufficient support for the conclusion that the Scheme is likely, or at least will have a real prospect of having substantial effect*": per Adam Johnson J in *Safari Holding* at [68] [Auths/638].

(2) The Scheme will in any event at least be regarded as binding and effective on those voting in favour or participating in the Scheme: see (in the Italian Opinion) at C1510, at footnote 7; and see in the Spanish Opinion at C1521.

(3) The Scheme will in any event be regarded as binding and effective in England where substantially all assets are located (c/f the position in various of the

authorities above, including see *Re Sompo Japan Insurance Inc* [2007] EWHC 146 (Ch) at [17-19]), [Auths/192/17-19]). The Scheme concerns an English insurance company in run-off, and will facilitate the completion of the run-off process. Although the Insurance Policies are governed by Italian or Spanish law, substantially all the available assets of the Company of €20.1m (i.e. 99% of the assets) are located in England and subject to the jurisdictional control of the English Court: see Bolton 1 at paras 215 (b) [C0091]; Bolton 1, para 47 [C0034]. Absent the Scheme, this sum would be distributed in an English insolvency, in accordance with English rules and procedure, and all creditors would be required to participate in that English process, since the Company is a private company limited by shares incorporated under the laws of England and Wales, and the Company's centre of main interests is in England. [Bolton 1, para 215 (a), C0091].

72. One final point should be mentioned. Prior to Brexit, and at a time when the Judgments Regulation was applicable in England, it was the practice of the Court to consider whether, on the assumption that the Judgments Regulation applied to a scheme of arrangement/sanction order, the English Court could take jurisdiction over creditors who were domiciled in other member states (see, for example, the analysis in *Castle Trust Direction Plc* [2020] EWHC 969 (Ch) at [26]-[30] [Auths/482]; *Re Dundee Pikco* at [17]-[18] [Auths/474/17ff]). This avoided the need to consider the vexed question of whether the rule in Article 4(1) of the Judgments Regulation, that any person domiciled in an EU member state must be sued in the courts of that member state (subject to applicable exceptions), applied to schemes of arrangements. In this instance, that would be a real issue given that all Policyholders are domiciled in EU states. However, that line of authority is no longer of relevance because the Judgments Regulation has not applied in England since 1 January 2021 (i.e. this court's ability to take "*jurisdiction*" in respect of foreign creditors is not subject to the operation of the Judgments Regulation). As such, EU domiciled creditors are now in the same position as creditors of the company who are located anywhere else in the world. As such, the relevant question is simply whether the Scheme would be likely to have sufficient effect (i.e. as above). The Company can put a Scheme to any of its creditors, wherever located, who do not need to be formally joined to the process. This is reflected in CPR PD49A (Applications under the Companies Acts and Related Legislation), by paragraph 15

which provides that: "*15 (1) This paragraph applies to an application for an order under Parts 26 and 27 of the 2006 Act to sanction a compromise or arrangement. (2) Where the application is made by the company concerned, or by a liquidator or administrator of the company, there need be no defendant to the claim unless the court so orders.*" Typically, creditors are not made parties to the scheme process unless there is a particular reason to do so[9].

I. Information to be provided to Scheme Creditors in advance of the proposed scheme meeting, and the notice, timing and conduct of the scheme meeting

Adequacy of the ES

73. At the convening hearing, the Court will normally consider (but not formally approve) the adequacy of the Explanatory Statement and check that it is in an appropriate form. As explained in *Re Amicus Finance plc* [2022] Bus LR 86 at [37(a)], [Auths/593/37(a)], per Sir Alistair Norris: "*... the touchstone is not whether the fullest specific information reasonably obtainable was included in the explanatory statement: it is whether what was provided was sufficient to enable the creditors to make an informed decision*".

74. The Company has prepared the Explanatory Statement (with the assistance of its professional advisers) intending to give the Policyholders the material information that they will need to exercise their judgment as to how to vote on the proposed Scheme at any meeting held.

Other matters to be addressed at the convening hearing

75. The directions sought from the Court are set out in the draft convening order at C0011-

[9] If a Scheme Creditor were to be joined as a defendant, and service out was necessary, then reliance could be placed for permission to serve out on CPR PD6B, para 3.1 (20) being "Claims under various enactments. (20) A claim is made- (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph." Alternatively, reliance could be placed upon para 3.1 (11) being "Claims about property within the jurisdiction. (11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales." The Company's assets are both property (the term "property" is not defined in the Glossary to the CPR, so presumably includes all and every type of property, save for immovable property outside the jurisdiction), being money and other liquid assets, which are almost all in the English jurisdiction, and are the main subject matter of the Scheme and the Scheme proceedings. However, none of these points arise for consideration because no defendant is to be joined.

C0016, and are discussed by Bolton 1 at paras 192-197 [C0083-C0085] (the proposed meeting), and 202-211 [C0087-C0089] (voting at the meeting).

76. It is proposed (subject to the Court) that:

(1) Notifications for the meeting are circulated by no later than 17 May 2024 for the meeting on 28 June 2024, by way of contacting Policyholders by email with instructions as to how the Scheme Documents (as referred to in paragraph 4 of the draft convening order, "**the Documents**") can be accessed on the website the Company has established for the Scheme [draft convening order, paras 2, 4 - 5 [C0012]].

(2) Paragraph 2 of the draft convening order [C0012] proposes that the Scheme Meeting be held on 28 June 2024 at, or as soon as reasonably practicable after 10am London time, (or such other time or date as the Company may decide and notify to the Policyholders) (in case there are any unforeseen difficulties in holding the meeting as originally planned).

(3) Since Policyholders are scattered over Italy, with two in Spain, and so as to allow all Policyholders to attend the meeting at least inconvenience to each of them, it is proposed that the meeting takes place by webinar (i.e. a virtual meeting), in Italian (with translation for the Policyholders based in Spain), to be chaired by Mr Michele Tavazzi [draft convening order, paras 2, 3 and 11; C0012-13; Bolton 1, para 193 (d); C0084]. There will also be an option to dial in by telephone [draft convening order, para 8; C0013]. Alternatively, Policyholders can appoint a proxy [draft convening order, para 8; C0013.]. A virtual meeting is a "meeting" for the purposes of Part 26 of the Companies Act 2006: see *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch) at [36-42], [Auths/483/36-42]. Whilst there are no longer any legal restrictions on holding meetings in person (c/f the position in *Castle Trust*), virtual meetings remain appropriate particular in circumstances where the creditors are located in

different places and cannot conveniently travel to a single physical meeting[10].

(4) To vote, Policyholders are invited to complete their Voting Forms and return it to the Company by 5pm (London time) on 25 June 2024. [draft convening order, para 9; C0013].

(5) The Chair has the power to oversee voting at the meeting, and have the discretions referred to at the draft convening order, paras 12-13 [C0014] as regards the vote. It is proposed the Chair make a determination of the value of each Scheme Claim, with Scheme Claims being calculated net of any known set-off or other relevant deductions. [Bolton 1, para 205; C0088.] There is provision in the draft convening order for the Chair to refer the checking of votes to an Independent Vote Assessor, who is Derek Newton (an expert in insurance assessment, his C.V. is at C0173), in circumstances referred to and explained at Bolton 1, paras 208 to 211 [C0089-90]. By this proposed process, there ought to be confidence in the overall result for voting purposes, both by the Policyholders, and by the Court at any sanction hearing.

(6) The draft order at paragraph 16 directs the Chair of the meeting to file a report with the Court.

77. The final drafts of the following are submitted to the Court for the purposes of the Scheme Meeting, if convened:

(1) The Notice of the Scheme Meeting;

(2) The Explanatory Statement;

(3) The Scheme; and

(4) The voting and claim forms.

[10] This is now relatively common place: see, for example, *Safari Holding Verwaltungs GMBH* [2022] EWHC 781 (Ch) at [70], [Auths/639/70]; *Smile Telecoms Holdings Ltd* [2022] EWHC 387 (Ch) at [90] per Miles J, [Auths/626/90].

J. Conclusion

78. For the reasons given above, the Company respectfully applies for relief in the terms of the draft convening/directions order.

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