THE HIGH COURT

COMMERCIAL

[2019 No. 190 COS]

IN THE MATTER OF

BALLANTYNE RE PLC

APPLICANT

AND

AND IN THE MATTER OF

THE COMPANIES ACT 2014

AND IN THE MATTER OF

A PROPOSAL FOR A SCHEME OF ARRANGMENT PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT 2014

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 6th day of June, 2019

Introduction

1. This is my ex tempore judgment in relation to an application heard by me yesterday, 5th June, 2019.

2. This is an application by Ballantyne Re Plc, an Irish Plc (the "Scheme Company"), for an order pursuant to Section 453(2) of the Companies Act 2014 (the "2014 Act"), sanctioning a proposed scheme of arrangement between that company and a number of its creditors (the "Scheme Creditors"), as defined in the Scheme (the "Scheme").

3. The application is opposed by one such creditor, namely ESM Fund I LP, a limited partnership formed in the United States. It is holder of some $5,000,000 of class A 3d notes. The application is supported by the overwhelming majority of the noteholders in the two relevant classes. As set out in the grounding affidavit of Mr. Masterson, sworn on behalf of the Scheme Company on 22nd May 2019, the overwhelming majority of the Scheme creditors have supported the Scheme, which provides for a compromise of the Scheme Company's obligations under the relevant notes and for the commutation of certain guarantees provided by the guarantors under those notes.

4. The Scheme Company and its directors have determined that the Scheme should be proposed. This is as a result of the fact that, due to significant investment losses, there is a net asset deficiency in the Scheme Company and this has led to events of default which are currently outstanding under the relevant provisions of an Indenture dated 2nd May 2006, as amended and supplemented subsequent to that date, under which the relevant notes were issued. The evidence establishes to my satisfaction that were the class A notes, as they are referred to later, to run to maturity, which is 2036, there would be no prospect of a full recovery by the relevant Scheme noteholders from the Scheme Company. Further, there is no prospect of any recovery by the junior noteholders or any subordinated liabilities or equities.

5. Against that background, Ambac Assurance UK Limited ("Ambac"), which is one of the two financial guarantors of the notes issued under the Indenture to which I have referred, engaged in certain discussions with certain of the Scheme noteholders to assess options to restructure the Scheme Company. Following those discussions and its assessment of the position, Ambac proposed a restructuring to the Scheme Company. While Ambac did propose the restructuring to the Scheme Company, the Scheme is nevertheless that of the Scheme Company itself and it is not Ambac's scheme.

6. The evidence establishes that the Board of Directors of the Scheme Company, having considered the proposal in detail and having taken legal and financial advice, formed the view that the restructuring provided for in the Scheme is in the best interest of all parties concerned, including the relevant Scheme noteholders and the Scheme Company itself. In addition, the evidence discloses that the Board of Directors considers that the Scheme is fair and equitable for all of the relevant Scheme noteholders.

7. Briefly stated, the objective of the Scheme is to restructure the Scheme Company's reinsurance obligations and its outstanding indebtedness under the Scheme notes such that the residual value in the Scheme Company can be distributed to the Scheme noteholders. I am also satisfied that the restructuring is for the benefit of the Scheme noteholders and that is clear from the fact that the Scheme encompasses not only what are called the Ambac Guarantee Notes and the Assured Guarantee Notes but, also, class A 1 notes, which, as we will see, do not have the benefit of any guarantee.

8. The benefits of the Scheme include:

> 1) An immediate return of capital as opposed to the status quo scenario, to which I will return.
>
> 2) The elimination of risk associated with the future performance and reinsurance cash flows of what is called the defined block of business.
>
> 3) The ability to monetise a distressed illiquid debt security.
>
> 4) In the case of the Ambac guaranteed noteholders, the elimination of future credit risk in relation to Ambac's ability to meet their claims under the relevant guarantees.

9. On the 29th April 2019, on the application of the Scheme Company, the court made the following orders and gave the following directions:

> 1) It entered the proceedings in the Commercial List.
>
> 2) It gave directions in relation to the summoning of meetings of two classes of creditors under section 250(3) of the

2014 Act, namely, the Ambac guaranteed creditors/noteholders and the Assured Guarantee/A 1 Scheme creditor/noteholders. They are referred to as the Scheme meetings.

3) The court gave directions in relation to the Scheme meetings, including the placing of advertisements in relation to those meetings.

4) Directions were given in relation to the issuing of an originating Notice of Motion to sanction the Scheme in the event that the requisite majority approved the Scheme at the Scheme meetings.

5) Directions were given that in the event that any person intended appearing at that hearing, it had to give notice of its intention to do so by a specified date, which was the 29th May 2019.

6) That the matter was then to be listed for further directions on the 23rd of May.

10. In accordance with the court's directions, the scheme meetings took place on the 22nd May 2019, following which this application was brought by originating Notice of Motion issued on 22nd May 2019, which was returnable for 23rd May 2019.

11. As appears from the report of the chairperson of those Scheme meetings, which is exhibited to Mr. Masterson's grounding affidavit, the Scheme was overwhelmingly approved by the Scheme noteholders, being 98.12% in value of the Ambac guaranteed scheme creditors present and voting and 100% in value of the Assured Guarantee/A 1 Scheme creditors present and voting at that meeting.

12. It is, perhaps, unsurprising that the Scheme was approved by the vast majority of the Scheme noteholders in circumstances where, on the evidence, I am satisfied that the proposed dividend payable by the company represents a materially better outcome than under what is called the "status quo scenario", and the commutation payment to Ambac Guaranteed Noteholders represents the net present value of the future payments that the holders of those notes would otherwise receive from Ambac.

13. The fact that such an overwhelming majority of the relevant noteholders/creditors voted in favour of the Scheme is not conclusive or determinative of the court's role in considering whether to sanction the Scheme. It is, obviously, of significance however.

14. Further directions were given by the court (Mr. Justice Haughton), on 23rd May 2019. On that date, amongst other things, he directed that the matter be listed for hearing on 5th June, 2019, by way of an application for the sanctioning of the Scheme. He directed the hearing to be advertised in various different media and he directed that if any person wished to appear at the hearing of the petition they had to give notice of their intention to do so and to provide any affidavit setting out the basis on which they intended appearing by the 31st May 2019.

15. ESM is the only creditor that has indicated an intention to object and, as indicated earlier, it is the holder of $5,000,000 of class A 3d notes. It voted against the Scheme at the relevant Scheme meeting.

16. On 30th May 2019, the day before the deadline for the provision of any affidavits opposing the sanctioning of the Scheme, ESM, through its Irish solicitors, sought a copy of the relevant papers in respect of the sanction hearing. On the 31st May 2019, ESM delivered affidavits sworn by Dr. Eric Meyer of ESM and by Mr. Jim Luby of McStay Luby. Further affidavits have since been sworn by Dr. Meyer and by Mr. James Bonner, a US lawyer, in support of ESM's opposition to the sanctioning of the Scheme.

17. In accordance with the directions of the court made on the 23rd May 2019, the Scheme Company delivered a supplemental affidavit of Mr. Masterson, which was sworn on 3rd June 2019. In addition, affidavits have been sworn on behalf of Ambac by Mr. John Tifft and by Mr. Alan Dee, which were both sworn on 3rd June 2019, and an affidavit was sworn by a creditor, Merced Capital LP ("Merced"), that affidavit being sworn by Mr. Vince Vertin on 2nd June 2019. Those parties are all supportive of the Scheme and urged that the Scheme be sanctioned by the court.

18. On foot of further directions made by Mr. Justice Haughton on the 31st May 2019, ESM delivered written submissions on the 3rd June 2019. And on the same date it also delivered an affidavit, sworn by Mr. Bonner, on certain issues of US and New York law. Written submissions were also provided by the Scheme Company.

19. The hearing of this application took place yesterday, the 5th June 2019. The parties represented at the hearing were the Scheme Company, Ambac, Assured Guaranty (Europe) and Assured Guaranty Corporation ("Assured Guaranty"), Merced Capital LP and ESM. I had the opportunity of reading all 13 affidavits sworn in respect of the application and the two sets of written submissions prior to the hearing. Further, I heard helpful and focused submissions from counsel for all of the parties involved in the hearing.

20. The principal protagonists at the hearing were the Scheme Company and Ambac, on the one hand, who advocated that the Scheme be sanctioned, and ESM, on the other, who urged the Court not to sanction the Scheme. As I say, submissions were also made by Merced and by Assured Guaranty in support of the sanctioning of the Scheme.

21. ESM raised a number of objections to the sanctioning of the Scheme, those objections were refined somewhat at various stages of the process, from the initial letter sent on ESM's behalf by its Irish solicitors on 31st May 2019 through to the affidavits sworn by ESM and on its behalf, and then through the written submissions and oral submissions made at the hearing. In the initial letter sent on behalf of ESM by its Irish solicitors on 31st May 2019 it was indicated that ESM would oppose the sanctioning of the Scheme on grounds relating to jurisdiction. They also alleged that the Scheme was deficient in containing materially incomplete information, that the Scheme was impossible on the basis it was calculated on an incorrect calculation of interest, that there was an incorrect class composition, and that the Scheme was unfair and unreasonable.

22. In the legal submissions which it delivered, ESM made a number of slightly different or varied contentions as follows:

1) It contended that the Scheme would be unlawful if proposed by the Scheme Company in New York.

2) It contended that if the Scheme was sanctioned by the Court, ESM would be precluded from pursuing its claim against Ambac in the United States District Court for the Southern District of New York, on foot of a complaint filed by ESM very recently.

3) It contended that the Court does not have jurisdiction to sanction a Scheme which provides for the release of third

parties.

4) It contended that ESM and other Scheme creditors had not been provided with clear and accurate financial information in relation to the financial strength of Ambac.

5) Finally, it was contended that the Scheme was inextricably linked to the financial instability of Ambac, in respect of which it was suggested that there was no satisfactory evidence.

23. In oral submissions made at the hearing, the objections advanced by ESM were boiled or refined down to three principal objections and they were as follows:

1) It was alleged that the Scheme Circular was materially deficient in terms of the information it provided to the noteholders/creditors and in terms of the impression it created concerning the financial position of Ambac. It was suggested that the court had the option or discretion to adjourn the hearing in the event that it felt that the state of the evidence was unsatisfactory or incomplete in any material respect.

2) The second ground of objection advanced in the oral submissions was that the court has no jurisdiction to sanction a Scheme which makes provision for third party releases. It was suggested that on the proper interpretation of the provisions of Part 9 of the 2014 Act, construed against the backdrop of the Constitution, it was not open to the court to sanction a Scheme which made provision for the release of third parties. And it was noted that the Scheme contains two relevant releases, namely, a Scheme Release Agreement and the Ambac Release Agreement, provided for, respectively, in Part C section 14.8.1 and section 14.8.2 of the Scheme Circular.

3) The third ground of objection advanced in the oral submissions was that the sanctioning of the Scheme would have the effect of extinguishing the complaint that ESM has made in the United States District Court for the Southern District of New York against Ambac, which complaint was filed on 30th May 2019. It was said that if the Scheme was sanctioned by me it would not be open to ESM either (a) to pursue the allegations which it has made under New York law, in the application for the recognition of the Scheme under Chapter 15 of Title II to the US Bankruptcy Code, or (b) to litigate its complaint against Ambac in the New York courts. Various other grounds were advanced under this general heading.

24. As I explain in detail in this judgment, having carefully considered all of the evidence and the helpful submissions received by all parties, I have reached the conclusion that I must reject all of the grounds of objection raised by ESM and that I should, in the exercise of my discretion, sanction the Scheme under Section 453(2) of the 2014 Act.

Structure of Judgment
25. In the course of this judgment I will adopt the following structure. First I will provide a little more detail about the background to and a more detailed description of the Scheme. Secondly, I will look at the relevant legislation. Thirdly, I will briefly consider the question of jurisdiction. Fourthly, I will consider the approach which the Court should take in considering whether to sanction the Scheme. Fifthly, I will consider in more detail the issues raised by ESM in its objection to the Scheme. Finally, I will offer some very brief conclusions.

Background
26. The detailed background in relation to both the Scheme Company and the Scheme is set out in the grounding affidavit of Mr. Masterson, sworn on 22nd May 2019. The Scheme Company is an Irish Plc and has its registered offices here in Dublin. It was formed as a special purpose vehicle for the purpose of entering into and performing a reinsurance agreement, pursuant to which Scottish Re (U.S.) ceded to it risks relating to certain business described in the papers as the Defined Block of Business.

27. In connection with the acquisition of that block of business, and in order to fund its obligations under an existing indemnity reinsurance agreement, the Scheme Company issued a number of notes pursuant to an Indenture dated 22nd May, 2016, as amended and supplemented from time to time. That Indenture is stated to be governed by the law of the State of New York. Those notes were: 1 Class A notes, which have a maturity date of 2036, and there are various subclasses of those notes, namely:

1) Class A 1 notes consisting of some €250 million, which are not guaranteed by Ambac or by any other entity;

2) Class A 2a notes consisting of $500,000,000, which are guaranteed by Ambac.

3) Class A 2b notes consisting of $500,000,000 which are guaranteed by Assured Guaranty.

4) Class A 3 notes consisting of $400,000,000, which are guaranteed by Ambac.

There is in turn a subclass of the class A 3 notes, including class A 3d notes, which are held by ESM with the par value of $5,000,000.

5) There are also class B notes, class C notes, class D notes and preference shares.

28. The class A notes are senior secured indebtedness and ranked *pari passu* with one another. Payment of schedule interest and the ultimate repayment of the principal at final maturity in respect of class A 2a notes and the class A 3 notes is guaranteed by Ambac. Payment of schedule interest and the ultimate repayment of principal in respect of the class A 2b notes is guaranteed by Assured Guaranty. The class A-1 notes do not benefit from any financial guarantee.

29. In 2006, the Scheme Company engaged JP Morgan as investment manager in respect of a number of its investment accounts. There were then significant investment losses, which had significant adverse effects on the Scheme Company. In 2009, proceedings were commenced against JP Morgan by Ambac in the name of the Scheme Company arising from its management of the Scheme Company's investment accounts. That litigation was settled in early 2017 and, ultimately, the Scheme Company received a sum of $325.6 million on 17th April 2017.

30. At the date of the Scheme Company's most recent audited financial statements, which is 31st December 2017, the Company reported significant net liabilities. At that date the Company reported total assets of just over $1.254 million and total liabilities of just over $2.4 million. There was therefore a deficit of just over $1.15 million in the available assets, compared to the amounts due to Scheme noteholders and other creditors.

31. Unaudited management accounts for the year to the 31st December 2018 are available and show that the Scheme Company has an increased total deficit of $1.228 million. The Scheme Company is, therefore, currently insolvent. There is no dispute about this.

32. As a result of the extent of the current deficit in value available to class A notes, there is no prospect of a full recovery to the Scheme noteholders were those notes to run to their maturity in 2036. In those circumstances, Mr. Masterson explained that the directors formed the view that a restructuring which realised the residual value in the Scheme Company would be preferable to what is described as the "status quo scenario", which I touched on briefly and to which I will make further reference later in this judgment.

33. It is necessary now to say something more about ESM and the circumstances in which it acquired its notes. As noted in the supplemental affidavit sworn by Mr. Masterson on the 3rd June 2019 and in the first affidavit sworn by Dr. Eric Meyer of ESM on the 31st May 2019, ESM bought $5,000,000 of class A 3d notes in May 2018. I accept that at that time the Scheme Company's difficult and deteriorating financial position was well known. ESM bought those notes for just over 58 cents per note, (a fact not revealed by Dr. Meyer in his first affidavit). A number of points can be made about this. First, ESM, as I have noted, did not reveal the acquisition price in its first affidavit and this was something that was revealed in the replying affidavits served on behalf of the Scheme Company. Second, as a result of the discounted purchase price, ESM's exposure under the notes is significantly less than the $5,000,000 value of those notes. Thirdly, in the event that the Scheme is approved, ESM will make a return on its investment. Nonetheless, ESM has voted against the Scheme and has opposed the sanctioning of the Scheme. It is entitled to do so in pursuance of its own commercial interests.

34. Reference should then be made briefly to a tender offer made by ESM in October 2018. The purpose of that tender offer was to acquire some $226,000,000 of class A 3 and class A 2 notes. The tender offer was launched at a price of $60,000 per $100,000 principal amounts of notes, in effect representing 60 cent in the dollar. The tender offer expired in December 2018. ESM did not increase the tender offer and did not extend the tender offer. It appears that there was very limited, if any, take up of this tender offer. It is noted that the price was less than the price which the noteholders will receive under the Scheme.

The Scheme

35. I should briefly set out a summary of the terms of the Scheme. Again as explained by Mr. Masterson in his grounding affidavit, and as appears from the Scheme Circular itself, the primary objective of the Scheme is to restructure the Scheme Company's reinsurance obligations and its outstanding indebtedness under the Scheme notes such that the residual value in the Scheme Company can be distributed to the Scheme noteholders.

36. The key features of the Scheme, as described by Mr. Masterson at paragraph 41 of his grounding affidavit, are briefly summarised below:

> 1) There will be a novation to a new reinsurer, namely, Swiss Re Life and Health Inc., of the Scheme Company's rights and obligations under what is defined as the existing indemnity reinsurance agreement in respect of the remaining Defined Block of Business.
>
> 2) Ambac will direct the Trustee to declare the notes as due and payable and will direct the Trustee to disperse a sum on the RTA withdrawal amount and other sums in another account, the surplus account, in accordance with the provisions of the Indenture.
>
> 3) Each financial guarantor will waive any rights to receive guarantee fees.
>
> 4) Scheme noteholders will consent to turn over a portion of their scheme principal consideration to satisfy certain amounts to effect the restructuring.
>
> 5) Since all class A notes rank *pari passu* they will all be paid at the same dividend by the Scheme Company, which equates to a dividend of about 51.1% of the par value of each class A note.
>
> 6) Scheme noteholders who signed up to a lock up support agreement and complied with certain procedures will receive an additional lock up fee of 1.25% of the par value of each class A note.
>
> 7) In addition, the Ambac guarantees will be commuted and the holders of the Ambac Guaranteed Scheme notes, namely, the A 2a notes and the A 3 notes, will receive Ambac commutation payments of 17.4% and 14.5% respectively. In essence, each Scheme Noteholder will receive the estimated present value of:
>
> > (i) The balance of the 47.6% of principal that would not have been paid by the Scheme Company pursuant to the Scheme and which would otherwise be payable on maturity on the 2nd May 2036 and (ii) the interest payable thereon.
>
> 8) The Assured Guaranty financial guarantees are not being commuted under the restructuring.

There are various other key features of the Scheme mentioned in Mr. Masterson's affidavit which I do not need to consider or refer to.

37. As appears from the above description and from the Scheme Circular itself, the Scheme proposes particular and distinct arrangements for the Ambac Guaranteed noteholders and the Assured Guaranty/A 1 noteholders, which I can briefly summarise as follows:

> 1) The arrangement by which the Assured Guaranty/A 1 Noteholders will be bound is a compromise of rights as against the Scheme Company alone. The arrangement by which the Ambac guaranteed noteholders will be bound is a compromise of rights as against the Scheme Company and rights as against Ambac.
>
> 2) The Scheme provides that the Ambac guarantees will be commuted. The Assured Guaranty financial guarantees will not be commuted.

38. Following the implementation of the restructuring provided for in the Scheme, if sanctioned, it is intended that the Scheme Company will be wound up by way of a solvent liquidation under Irish law.

39. Consideration must then be given as to the alternative situation. This has been described in the papers as the "status quo scenario". The Scheme Circular sets this out in Part D Section 15. The Scheme Company retained PwC to carry out a Scheme comparator analysis. In the event that the Scheme is not sanctioned and the restructuring cannot take place in accordance with the Scheme, a scenario arises which has been called the status quo scenario. Under that scenario, the class A notes will mature on 2nd May 2036, being the stated maturity date. The evidence indicates that the main expectations of the status quo scenario are as follows:

> 1) There is no prospect of full recovery for the Scheme noteholders and no prospect of recovery for junior noteholders or any other subordinated liabilities or equity. PwC have estimated that on majority the dividend that Scheme noteholders might be expected to receive in this scenario is in the order of 45.3%.
>
> 2) The Scheme Company's sole source of capital is the investment returns generated by and the capital held in what are called the Reinsurance Trust Account (RTA) and the Surplus Account.
>
> 3) Payments to the ceding insurer will rank in priority to class A notes. At December 2017, as indicated, the nominal projected cash flow liabilities for the Defined Block of Business was $230,000,000.
>
> 4) Payment of the Scheme Company's operating expenses which also rank in priority to the class A notes.
>
> 5) As a result of (a) the prior ranking of payments and (b) the deficit between the investment assets held in the RTA, there will be insufficient cash flow generated from investment income to enable the Scheme Company to make the scheduled interest payments on the class A notes. Payment of schedule interest will require periodic withdrawal of capital from the RTA, thus depleting the sole source of capital of the Scheme Company.
>
> 6) Ambac has instructed periodic withdrawal of capital from the RTA to fund payment of schedule interest in the class A notes historically and it is anticipated that this will continue in the event that the restructuring is not implemented.
>
> 7) Periodic withdrawals from the RTA will result in a depletion of assets over time and a substantial shortfall is projected on the maturity of the note, as indicated in the Scheme Circular.
>
> 8) The detailed analysis of the status quo scenario in the Scheme is set out in the Scheme Circular in Part D. It demonstrates that the principal redemption available to Scheme noteholders on maturity will not be greater than the return to the Scheme noteholders proposed by the Scheme. This is clearly set out in the table at section 9.3 of Part D of the Scheme Circular and is summarised at paragraph 115 of Mr. Masterson's grounding affidavit.

40. Mr. Masterson asserts at paragraph 72 of his grounding affidavit that it is highly unlikely that the status quo scenario would in fact continue until the final maturity of the class A notes in 2036. He asserts, and this is stated in the Scheme Circular, that there is a reasonable assumption that the parties, acting in accordance with their own financial interests, will look to implement some alternative restructuring or a novation of the Scheme Company's reinsurance obligation. That alternative may well result in a similar acceleration of the notes and the *pari passu* payment to the noteholders.

The Legislation: Part 9 of the 2014 Act

41. It is now necessary for me briefly to consider the relevant provisions of the legislation under which this application is brought and against which ESM's objections to the sanctioning of the Scheme must be viewed and I now do so.

42. The Scheme Company seeks sanction of the Court for the Scheme. In order for the Scheme to become binding it must be sanctioned by the Court under Section 453(2)(c) of the 2014 Act. The discretion of the Court in relation to the sanctioning of the Scheme is a wide discretion.

43. I should first of all note that Section 450 of the 2014 Act makes reference to "a compromise or arrangement being proposed between a company and (a) its creditors or any class of them, or (b) its members or any class of them." This case is concerned with a Scheme which is proposed between a company and its creditors and, in particular, with two classes of its creditors, namely, the holders of the relevant notes referred to earlier.

44. Section 453 of the 2014 Act provides that certain conditions must be satisfied before a Scheme becomes binding on the relevant creditors or class of creditors. The conditions which must be satisfied are set out in Section 453(2) and they are:

> a) There must be a "special majority" at the Scheme meeting, or where more than one Scheme meeting is held, at each of the Scheme meetings, with votes in favour of a resolution agreement to the compromise or arrangement;
>
> b) notice must be given of the passing of such resolution or resolutions at the Scheme meeting or Scheme meetings and that an application will be made to the Court in relation to the compromise or arrangement in, at least, two daily newspapers, and
>
> c) the court, on an application to it, must sanction the compromise or arrangement.

45. It is necessary only briefly to consider two aspects of these conditions, the first concerns the special majority and the second concerns the notice. There is no dispute between the parties that those conditions have been satisfied in the present case and I am satisfied and so find that the Scheme Company has clearly satisfied the condition in relation to the special majority at section 453(2)(a) of the 2014 Act and the condition in respect of notification provided for in section 253(2)(b).

46. In relation to the special majority, the report prepared by the chairman of the meeting and exhibited by Mr. Masterson, records the results of the polls taken at the Scheme meetings. As appears from that report, 98.12% in value of the Scheme claims of the Ambac guaranteed Scheme creditors present and voting, voted in favour of the Scheme 10 voted in favour, five voted against. The value of the 10 voting in favour was $585.3 million. The value of the five voting against was $11.2 million. Again as appears from the report, 100% of value of the Scheme claims of the Assured Guaranty/A 1 Scheme creditors present and voting voted in favour of the Scheme. It was nine to zero, with the value of $471 million in favour and zero against the Scheme. It is clear that the condition in relation to the requirement of a special majority was satisfied. There is no issue in relation to notification and that condition was also clearly satisfied.

Jurisdiction

47. I now want to turn very briefly to the question of jurisdiction as this was one of the grounds originally advanced by ESM by way of objection to the sanctioning of the Scheme.

48. It was initially contended for ESM that if the Scheme was to be made then it ought to have been proposed in New York. It was suggested on behalf of ESM that this is the case as it would allow certain legal agreements entered into by the Scheme Company containing choice of law and New York jurisdiction clauses to be considered in that context. It was further suggested that, notwithstanding that the Scheme Company was incorporated in Ireland, it had no real connection to this jurisdiction.

49. On the evidence, I am satisfied that not only is the Scheme Company incorporated in Ireland, all of its directors are Irish and all board meetings are and have been held in Ireland.

50. The Scheme Company is a public limited company ("PLC") for the purpose of the 2014 Act. Section 1002 of the 2014 Act provides that the provisions of Parts 1 to 14 of the 2014 Act apply to a PLC except to the extent that they are disapplied or modified by

Part 17 of the 2014 Act or section 1002 of that Act. Neither applies in the present case.

51. It is clear, therefore, from s1002 of the 2014 Act, that the provisions of Part 9 of the 2014 Act dealing with Schemes of Arrangement apply to PLCs and therefore, apply to the Scheme Company.

52. I am satisfied that, in accordance with those statutory provisions, the Irish courts do have jurisdiction to consider and sanction a scheme brought by the Scheme Company, in this case an Irish PLC.

53. This objection (on grounds of jurisdiction), whilst made initially on behalf of ESM, was, quite properly, not pursued at all in the course of the submissions before the Court. To the extent that it is being in any way maintained by ESM, I reject it.

54. I will next consider the approach which the Court should take in considering whether to sanction the Scheme. I will then deal with the three objections relied on by ESM in its oral submissions as its grounds for opposing the sanctioning of the Scheme.

The approach of the court in considering whether to sanction a scheme

55. The nature and extent of the Court's discretion in relation to the sanctioning of a scheme has been considered in a number of Irish and English and other cases. The principles are set out concisely by Courtney in his leading text on *The Law of Companies* (4th edn., Bloomsbury, 2016) at paragraphs 22 056 (p.1597) onwards. That discretion was considered by the former Supreme Court of Ireland in the case of *Re John Power & Son Ltd* [1934] IR 412 ("*Re John Power*"). In that case, Mr. Justice Fitzgibbon quoted with approval from the judgment of Lord Justice Lindley in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch. 213 and, in particular, he approved the following statement of principle:

> *"What the court has to do is to see, first of all, that the provisions of that statute […] have been complied with, and, secondly, that the majority have been acting bona fide. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority, whom they seek to coerce. Further than that, the Court has to look at the scheme, and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by businessmen. The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting bona fide and whether they are coercing the minority in order to promote interests adverse to those of the class they purport to represent; and then see whether the scheme is a reasonable one, or whether there is any reasonable objection to it, or such an objection to it that any reasonable man might say that he could not approve of it."*

Those observations, as I say, were approved by the former Supreme Court in *Re John Power.*

56. The approach to be applied in Ireland under the precursor to section 453 of the 2014 Act, namely, section 201 of the 1963 Act, can be seen in the leading Irish decision, namely the decision of the High Court (Mr. Justice Kelly) in *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("*Colonia*"). That involved a solvent insurance company. The company proposed a scheme of arrangement to establish a mechanism to shorten the time for qualifying and paying certain liabilities. Mr. Justice Kelly considered the position in a detailed reserved judgment and I must make reference to certain parts of that judgment now.

57. Mr. Justice Kelly considered the functions of the court in considering whether to sanction the scheme and noted that they were succinctly set out in a passage in Buckley on the Companies Acts (14th ed, Butterworth & Co, 1981) which he said was derived from a number of decisions. In Buckley, as quoted by Mr. Justice Kelly and as approved by him in *Colonia*, it was stated as follows:

> *"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 interests, 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."*

58. Mr. Justice Kelly then set out the words of Lord Justice Lindley in the case of Re *English, Scottish and Australian Chartered Bank* [1983] 3 Ch 385 and stated that they were also relevant to an assessment of whether the Court should consider whether to sanction a scheme. He approved of the following passage from the judgment of Lord Justice Lindley, where the Judge stated:

> *"Now, it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to be their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of*

view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some material oversight or miscarriage."

59. Mr. Justice Kelly then cited with approval the judgment of Mr. Justice Neuberger in the case of *Re Osiris Insurance Limited* [1999] 1 B.C.L.C. 182 ("*Osiris Insurance*"). Having done so, he then set out five criteria which Mr. Justice Kelly felt had to be satisfied in order to sanction the scheme and they are set out as follows:

"(1) The court must be satisfied that sufficient steps have been taken to identify and notify all interested parties […]

(2) The court must be satisfied that the statutory requirements and all directions of the court have been complied with […]

(3) The court must be satisfied that the classes of creditors are properly constituted […]

(4) The issue of coercion is one which the court must consider [...]

(5) I am satisfied that the scheme of arrangement is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interest might reasonably approve."

60. Mr. Justice Kelly then cited with approval a passage from the judgment of Mr. Justice Neuberger in *Osiris Insurance* and it is worth just quoting that here also. Mr. Justice Neuberger said:

"There is, indeed, a risk that any scheme creditor will receive less under the scheme than he would receive in the normal way. However, the concern that one has about that aspect appears to me to be outweighed by the following factors. First, as already indicated, this risk is greatest for the London market policy holders, who will either be the sort of people who will have been able to take an informed view on the scheme and/or will have had access to brokers who would have been able to give them appropriate advice: they either voted in favour of the scheme or abstained; none voted against. Secondly, scheme creditors are just as likely, pursuant to the scheme, to receive a larger sum, as opposed to a smaller sum, than they would have received if they had pursued their claims in the run off in the normal way. Thirdly, their claims are to be determined by independent and properly qualified persons. Fourthly, their claims will be settled more quickly, and they are likely to be paid significantly more promptly, pursuant to the scheme, than in the normal way. Fifthly, a scheme creditor will almost certainly save on the costs of pursuing a claim under the scheme than in the normal way."

61. Those factors were set out by Mr. Justice Kelly in *Colonia* in order to show the assessment by those attending the relevant meeting and voting on the scheme of the advantages and disadvantages of the terms of the scheme proposed.

62. Again, having set out those considerations and having set out the various principles which he indicated had to be applied, Mr. Justice Kelly was satisfied that the scheme the subject the application satisfied those criteria. The five criteria with which the court had to be satisfied in order to sanction a scheme were repeated by Mr. Justice Kelly in the case of *Re Depfa Bank Plc* [2007] IEHC 463 ("*Depfa Bank*").

63. In terms of those five criteria, in the present case, the first three criteria are not in issue at all there is no question but that those three criteria are satisfied in the present case. In the case of the fourth criteria, namely, the question of coercion, it seems to me that such coercion must involve improper coercion or pressure by one creditor or group of creditors in a class on another creditor or group of creditors where it is sought to promote interests adverse to the class which the alleged coercing creditor or group is purporting to represent. So the concept of improper coercion is what is relevant and that is what Mr. Justice Kelly was talking about. All schemes involve an element of coercion, in the sense of a dissenting member being rendered bound by the scheme, notwithstanding its disagreement with the scheme, and it seems to me that that is not the sort of coercion that Mr. Justice Kelly was referring in the fourth criteria which he identified which the Court had to be satisfied with before it could sanction a scheme. In any event, it is not suggested in the present case that there was any such improper coercion in the case of ESM.

64. The real issue concerns the fifth criterion which Mr. Justice Kelly indicated had to be satisfied, namely, that the scheme of arrangement must be such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her interest might reasonably approve, and it is to that question that I now turn.

65. There are a large number of authorities on this issue, it is not necessary to refer to them all. The Scheme Company relies, in particular, on a very recent decision of Mr. Justice Parker sitting in the Grand Court in the Cayman Islands in *Re Ocean Rig UDW Inc* (18 September 2017, Grand Court of the Cayman Islands, Parker J) ("*Ocean Rig*").

66. I agree that it is a case of considerable assistance and it is necessary, therefore, to refer to a number of passages from that judgment because it indicates the approach which I believe the court should take in considering this particular criterion from the list of criteria set out by Mr. Justice Kelly in *Colonia*.

67. At paragraph 85 of his judgment in that case Mr. Justice Parker set out in three paragraphs the relevant questions which the court had to consider at the sanction hearing, the third of those is the same as the fifth of the criteria identified by Mr. Justice Kelly in *Colonia*, namely, whether the scheme is one that an intelligent and honest scheme creditor, acting in respect of its interests might reasonably approve such that the court should exercise its discretion to sanction the Scheme.

68. Mr. Justice Parker quotes from the most recent edition of Buckley on the Companies Acts which he says provides a helpful synopsis of the relevant principles at paragraph 29, and he sets that out at paragraph 86 of his judgment where he quotes Buckley as follows:

"The sanction of the court is not a mere formality although the court has an unfettered discretion as to whether or not to sanction a scheme, it is likely to do so, as long as [the questions set out above] are satisfied."

69. And he continues at paragraph 87 to quote from Buckley as follows:

"Members and creditors are normally the best judges of what is in their commercial interest and are in a better place

than the court to decide where their best interests lie. The test is not whether the opposing members or creditors have reasonable objections to the scheme, because a member or creditor may be equally reasonable in voting for or against the scheme. The court can sanction a scheme notwithstanding that there are members or creditors who sincerely contend that the scheme is unfair. The court is not however bound by the decision of the meeting. A favourable resolution merely represents a threshold which must be surmounted before the sanction of the court can be sought. Parliament envisaged that the court's discretion whether or not to sanction would be a check or balance on the power of the majority to bind the minority…"

70. At paragraph 88 of his judgment Mr. Justice Parker continues:

> *"I take from this formulation and the authorities which give rise to it that the court's function at the sanction stage is to look carefully at the votes cast at the meeting, to ensure compliance with all the formalities, and to see whether the vote taken has been representative of the particular class and bona fide. The objective element to the test is then provided by the court seeing whether the scheme is one which an intelligent and honest creditor, acting in respect of its interest, could vote for."*

71. I completely agree with the views set out in that passage of the judgment of Mr. Justice Parker. He continues at paragraph 89:

> *"The court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme, and in that regard the court's own view as to whether the Scheme is reasonable or even the best scheme is not relevant."*

72. Again, I fully adopt and endorse the views set out in that paragraph of Mr. Justice Parker's judgment.

73. It is clear, therefore, that the court should be slow to differ from the vote at the relevant meeting. However, the court must be satisfied that the proposed Scheme is reasonable, viewed from the perspective of an honest, intelligent and experienced person of business who is familiar with the Scheme. The court should only differ from the majority if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the Scheme. The onus is on the objecting creditor, in this case ESM, to establish this and it must do so, in my view, to the standard of the balance of probabilities.

74. It is necessary before leaving *Ocean Rig*, to make reference to the views expressed at the conclusion of his judgment by Mr. Justice Parker. At paragraph 131 of his judgment he said:

> *"The vote at the UDW Scheme meeting was overwhelmingly in favour of the UDW Scheme. The purpose of the legislation is to give effect to the views of the large majority required by statute who approve schemes of arrangement, to proceed with implementation (and to release their rights in exchange for scheme consideration) in the manner prescribed, subject to the court's sanction applying the right tests to that exercise. Those tests should not be applied to enable minority creditors who have strongly opposing views to "hold to ransom" or "hold out" against the majority to prevent a Scheme from proceeding, or to force a modification of it, or indeed to opt out."*

75. I fully agree and endorse those views, which, in my view, have some resonance in the present case. I also agree that they fully represent the law in this jurisdiction.

76. In the case of *Re English, Scottish and Australian Chartered Bank*, to which reference was made earlier, Lord Justice Lindley further observed:

> *"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."*

77. That passage was approved by Mr. Justice Kelly in Colonia and I agree with it here. *Re English, Scottish and Australian Chartered Bank* was also approved and endorsed by the same judge in *Depfa Bank*. In that case, Mr. Justice Kelly stated that the Court will be slow to differ from experienced persons in the industry who are familiar with the subject matter of the scheme.

78. Similar sentiments can be seen in a number of the other decisions which are relied on in the submissions of the parties and, in particular, are set out in the written submissions of the Scheme Company in this case (at paragraphs 118 and 119).

79. Reference was made to one further case in the oral submissions of counsel for Ambac and I should make very brief reference to that case also. That is the decision of Mr. Justice David Richards in the Chancery Division of the Companies Court in England and Wales in the case of *Re Telewest Communications Plc (No. 2)* [2004] EWHC 1466 (Ch); [2005] BCC 36 ("*Telewest (No. 2)*"). My attention was drawn, in particular, to a passage from the judgment in that case, where again having quoted from the then version of Buckley on The Companies Act, along the lines which we have just seen, Mr. Justice Richards went on to say, and this is at paragraphs 21 and 22 of his judgment, on pages 777 and 778 of the report:

> *"This formulation in particular recognises and balances two important factors. First, in deciding to sanction a Scheme under s.425 [that was the relevant provision of the English Act] 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."*

80. And at paragraph 22 he said:

> *"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 [of the quotation from Buckley] the court 'will be slow to differ from the meeting'."*

81. Again, I endorse and approve the principles set out in those paragraphs from the judgment of Mr. Justice Richards in the *Telewest*

(No. 2) case.

82. Therefore, I accept the submission advanced by the Scheme Company as to the appropriate test and principles to be applied in considering whether to sanction this Scheme. I note that it is extremely rare that a court would refuse to sanction a Scheme where it has been approved by such an overwhelming majority and, in this jurisdiction, by the required special majority where the classes are correctly constituted and where there is no suggestion that the majority did not represent the views of the class. There is no suggestion in the present case now, or at least no suggestion is maintained, that the classes have not been correctly constituted and it is not suggested that the majority in this case did not represent the views of the relevant class. ESM does maintain that the information provided to the creditors was materially deficient in certain respects. I address this later.

83. I conclude this section of my judgment by making brief reference to another decision brought to my attention by counsel for the Scheme Company, namely, the decision of Mr. Justice Lewison, as he was, in the case of *Re British Aviation Insurance Co. Ltd* [2005] EWHC 1621 (Ch). There are just two paragraphs from that judgment that I want to refer to and I do so with approval. At paragraph 75 of his judgment in that case Mr. Justice Lewison, having referred to Buckley on The Companies Act to the effect that a court should normally sanction a scheme if it is one which an intelligent and honest person, a member of the class concerned and acting in respect of his or her interests might reasonably conclude, Mr. Justice Lewison went on to state at paragraph 75 of his judgment:

> *"Thus stated, the test is not whether the opposing creditors have reasonable objections to the scheme. A creditor may be equally reasonable in voting for or against the scheme. In such a case Mr. Moss submitted that creditor democracy should prevail. Where, as here, those who voted in favour of the scheme are large and sophisticated corporations, the rigid application of this test as the sole criterion would rarely, I think, enable the court to refuse to sanction a scheme. It is also not entirely clear to me how the rigid application of this test sits with statements that the court has an unfettered discretion."*

84. At paragraph 76 he said:

> *"Be that as it may, none of the very experienced counsel in the case was able to show me a case in this jurisdiction in which the court, having decided that it had jurisdiction to sanction a scheme, nevertheless refused, as a matter of discretion, to do so."*

85. And then he went on to say there was one possible exception and he referred to a decision from 1900 (*Re Canning Jarrah Timber Co (Western Australia) Ltd*. [1900] 1 Ch 708) in which the Court had refused to sanction the scheme, but after it had been amended it was ultimately sanctioned by the Court of Appeal.

86. I want to make clear that in concluding this section of my judgment I adopt and accept the principles set out in the cases and in the passages of the cases which I have set out earlier. They are the principles which I apply in considering whether to sanction the Scheme at issue here.

ESM's Objections
87. I now move on to the next section of the judgment, which is to consider the objections raised by ESM. In considering this it must be borne in mind that ESM must satisfy me that an honest, intelligent and reasonable member of the class could not have voted for the Scheme. ESM seeks to do so by making and advancing the three grounds of objection which I referred to earlier and which I now consider.

(1) Alleged Material Deficiencies
88. I now consider the first of those grounds of objection. The first of those grounds is that the Scheme Circular was materially deficient, with particular reference to the information it provided concerning the financial position of Ambac. It is that ground which really engages the test that we have seen concerning the honest, intelligent and reasonable member of the relevant class.

89. ESM accepts that it has to demonstrate to the Court that the information presented to the noteholders in the Scheme Circular was materially deficient. It relies on the two affidavits sworn by Dr. Meyer and on the affidavit of Mr. Luby and, also, on the two affidavits sworn by the representatives of Ambac, namely, Mr. Tifft and Mr. Dee. ESM also draws my attention to certain parts of the Scheme Circular itself, as well as material exhibited by Dr. Meyer and by Mr. Luby, including the Solvency and Financial Condition Report in respect of Ambac for the period to 31st December 2018 and, in particular, paragraphs 4.7.3 and 6.4 of that report. Essentially, ESM contends that the financial position of Ambac is not at all as bad as was presented in the Scheme Circular and that, therefore, there was a material deficiency in the material provided to the noteholders in the Scheme Circular in relation to the financial position of Ambac. Time does not permit me to recite in more detail the evidence relied upon by ESM to support this suggestion. However, I wish to make clear that I have considered it in full before reaching my conclusion.

90. ESM is critical of what is said, in particular, in Part B section 3.2 of the Scheme Circular (at page 26 of the Scheme Circular). The particular part of section 3.2 with which ESM takes issue is the second sentence, where it is said:

> *"Furthermore, there are concerns regarding the current regulatory and financial position of Ambac as outlined below and in Part D of this Scheme Circular which may impact the ability of the Ambac Guaranteed Noteholders to make a full recovery on the Ambac guarantees in the future."*

91. As I say, particular issue was taken in relation to that statement and, also, in relation to the information set out in Part D, section 13 of the Circular, where the Circular provides an overview of the financial position of Ambac.

92. ESM says that this does not fairly represent the true financial position of Ambac and it relies on Dr. Meyer's affidavits and on Mr. Luby's affidavit in that regard. The financial position of Ambac is clearly of significance, having regard to the provisions of the Scheme providing for the commutation of Ambac's guarantees and the risks presented concerning Ambac's ability to meet the guarantees on maturity of the relevant notes in 2036. The contention of material deficiency in the Scheme Circular, is strongly resisted both by the Scheme Company and by Ambac.

> *93. Ambac's counsel took me through a number of documents to demonstrate that the picture presented in the Scheme Circular concerning Ambac's financial position was fair and accurate. He referred to Ambac's annual report and financial statements for the year ended 31st December 2018, which were exhibited to Mr. Luby's affidavit, and in particular, to the reference at page 4 to Ambac having "*a significant capital shortfall*" under the relevant solvency rules, that the directors have had to take "*detailed legal, financial and accounting advice since ceasing to write

new business"*, and it ceased to write that new business in 2009, and that the run off of Ambac is subject to PRA supervisory requirements applicable to supervision of firms "in difficulty or run off", and, also, that Ambac is in close consultation with the PRA.*

94. Ambac's counsel referred to other provisions of those accounts also. He also referred to Ambac's quarterly operating supplement for Q1 2019 and noted that, as stated in that document, the top 7 of the 25 largest international finance exposures outstanding for Ambac as at 31st March 2017, each individually exceeded Ambac's net claims reserves of $687,000,000.

95. Ambac's counsel, like ESM's, also drew attention to aspects of the Solvency and Financial Condition Report for Ambac for the period to 31st December 2018 and referred, in particular, to the capital deficit which exists for the purposes of the "Solvency Capital Requirements" (the "SCR") of Stg£266,500,000 and the "Minimum Capital Requirements" (the "MCR") of Stg£29,000,000. He drew attention to the statement that Ambac has a "*significant capital shortfall as compared to its capital requirements*", on page 43 of that report. It must be said, as ESM notes, that the report also records that Ambac has sufficient resources to meet its obligations as they fall due and is, therefore, a going concern and solvent on a UK GAAP balance sheet and cash flow basis. In other words, it is not insolvent.

96. Ambac's counsel made the obvious point that Ambac would not be in run off if it was not in financial difficulty, nor would it have been prevented from writing new business, as it has been since 2009. He further drew attention to two matters, the first concerns the price for which ESM tendered for the Scheme Company's notes in 2018, which it did at a price representing 60 cent in the dollar, clearly indicating what it regarded as fair value for the notes, taking into account the risks involved including the risks attaching to Ambac. And he pointed out that the relevant noteholders, including ESM, will get more than this under the Scheme if sanctioned by the Court. Second, he noted that ESM had bought its notes in May 2018 at a discount, paying just over 58 cents per note. Both of these, he submitted, represented ESM's assessment of the value of the notes having regard to all the information out there in relation to the Scheme Company, including information relating to the financial position of Ambac. Finally, Ambac's counsel took me through the Scheme Circular to demonstrate that the information in relation to Ambac's financial position was accurate. Again, time does not permit me to recite all of the provisions relied on but I would mention, in particular, Part D section 13.2.3 and section 13.2.7, both on page 98 of the Scheme Circular.

97. In addition to all of this, it is necessary to refer to the evidence put forward by Merced in the affidavit sworn by Mr. Vertin on 2nd June 2019. Merced is the largest holder of class A notes in the Scheme Company, holding notes to the value of more than $510,000,000 across both classes of the Scheme notes, including $479.7 million of Ambac guaranteed notes. This is a multiple of more than 100 times of the value of the notes held by ESM. While this is relevant, it is not decisive to my consideration of the issues on this application. Merced strongly supports the Scheme. Of particular relevance for present purposes is the averment contained at paragraph 10 of Mr. Vertin's affidavit, where he said:

> *"I have reviewed the Scheme Circular, including in particular Part D (financial information). I do not yea with Mr. Meyer's contention that the information set out in the Scheme Circular is insufficient to enable a fully informed decision to be taken by Scheme Noteholders in respect of the Scheme. In particular, section 14 (Financial Impact of the Scheme on Ambac Guarantee Noteholders) of Part D sets out key factors to be taken into account in assessing the discount that must be applied to repayment of the Ambac guarantees at maturity. I believe that these are reasonable and appropriate factors to be considered."*

98. Succinct but powerful submissions were made to the Court by Merced's counsel in support of the Scheme which strongly disputed the contention that there was any deficiency in the material provided to the holders of the relevant notes. Similarly, brief but succinct submissions were made by counsel on behalf of Assured Guaranty in support of the Scheme.

99. I am not satisfied that there is or was any material deficiency in the information provided to the Scheme Noteholders in relation to the financial position of Ambac or otherwise. I would have reached that view irrespective of whether the burden of proof lay on ESM or on the Scheme Company itself. I find the evidence and submissions relied on by the Scheme Company and by Ambac, as well as the evidence and submissions of Merced to be convincing. Ambac is clearly in a difficult or distressed financial position, for all the reasons outlined by its counsel and in the affidavits sworn on its behalf.

100. ESM was well aware of this when it bought the $5,000,000 notes in June 2018 and when it launched its tender offer in late 2018. The Scheme Circular provided factual information in relation to Ambac's financial position much or all of it being publicly available. That information was available to all the Scheme noteholders. The vast majority of them in the relevant classes affected by the Ambac guarantees voted in support of the Scheme. Nobody except ESM complained about the financial information made available in the Scheme Circular relating to Ambac. Merced was satisfied with it. In the absence of any complaint from any other noteholder, apart from ESM, I infer that no other noteholder had any complaint about the information provided in relation to Ambac in the Scheme Circular.

101. Further, the suggestion by Dr. Meyer at paragraph 20 of his second affidavit that if Ambac obtained an injection of an additional $337,000,000 of equity its financial strength would be such as to enable it to write insurance again, is fanciful in the extreme and flies in the face of the Solvency and Financial Condition Report he himself exhibited at exhibit "2EM2" to his affidavit. And I refer in particular to the matters stated at pages 5 and 47 of that report, to which I will make a brief reference now. At page 5 of that report, which forms part of the executive summary of the report it is stated that:

> *"AUK* [i.e. Ambac] *is unlikely to be able to remediate any capital shortfall through additional capital issuance given that both AUK and its parent Ambac Assurance Corporation are in run off. Notwithstanding the fact that the segregated account of AAC exited from rehabilitation on the 12th February 2018, AAC remains under enhanced regulatory supervision by its regulator and there is no expectation of any injection of additional capital from AAC. It should be noted that regardless of this capital shortfall AUK have sufficient resources to meet its obligations as they fall due and is, therefore, both a going concern and solvent on a UK GAAP balance sheet and cash flow basis."*

102. It is also necessary then to refer to the body of the report on page 43, where it is repeated that there is no prospect of any additional capital coming into Ambac. At page 43, having referred to the significant capital shortfall of Ambac UK, it is then stated:

> *"AUK is unlikely to be able to remediate any shortfall through additional capital issuance given that both AUK and its parent AAC are in run off, and with AAC remaining under the close supervision of its regulator there is no prospect currently of any injection of additional capital from AAC."*

So it seems to me that the observations and suggestions made by Dr. Meyer at paragraph 20 of his second affidavit do not

accurately reflect the reality of the situation as appears from the very report which Dr. Meyer himself exhibited.

103. There is no suggestion that the Scheme Noteholders effected by the Ambac guarantees were not honest or intelligent. I am not satisfied that an honest, intelligent and reasonable member of the relevant class acting in its own interest could not have voted for the Scheme and, therefore, I reject this first ground of objection maintained by ESM.

(2) Third Party Release

104. I now turn to the second ground of objection. The second ground of objection is that Part 9 of the 2014 Act cannot be interpreted so as to enable third party releases to be provided for in a Scheme under that part of the Act. It is contended by ESM that the court has no jurisdiction to sanction a scheme of arrangement which provides for the release of claims, including contractual and tortious claims, which each Ambac Guaranteed Noteholder may have against, amongst others, the Scheme Company and Ambac. ESM contends that these claims have constitutional protection as property rights under Article 40.3 and Article 43 of the Constitution of Ireland, that as a matter of statutory interpretation the provisions of Part 9 cannot be interpreted to permit or provide for a scheme which contains for the release of third party claims, and that there is no warrant for applying a broad or expansive interpretation (or what may be called a "pro release interpretation") of the provisions of Part 9, which it says is the interpretation being advanced by the Scheme Company.

105. ESM relies on cases such as the decision of Mr. Justice Keane in the High Court in *Iarnród Éireann v Ireland* [1996] 3 IR 321 where it was held that corporations are entitled to protection under Article 40.3 of the Constitution for unjust attacks on their property rights. A number of other cases are mentioned in this regard in the footnotes to ESM's written submissions to the Court.

106. ESM also relies on a passage from the leading text on statutory interpretation, namely, Dodd, *Statutory Interpretation in Ireland* (Tottel Pub., 2007), and in particular, paragraph 11.51 of that text, concerning the need to give a strict construction to a statutory provision which interferes with a constitutional right. ESM says that Part 9 of the 2014 Act would be such a provision if it could be interpreted as permitting third party releases in a scheme.

107. ESM further contends that the Scheme Circular does not demonstrate that the releases provided for in Part C, section 14.8.1 and 14.8.2, namely, the "Scheme Release Agreement" and the "Ambac Release Agreement" are necessary for the success of the Scheme. It accepts that this contention is less strong in the case of the Ambac Release Agreement.

108. Finally, ESM contends that little weight should be attached to the various English and other cases which have held that similar or equivalent statutory provisions permit third party releases to be included in schemes which may be sanctioned by the Court.

109. The Scheme Company and Ambac submit that third party releases of the type complained of by ESM can properly form part of a scheme of arrangement under Part 9 of the 2014 Act. The Scheme Company is prepared to accept for the purpose of this application that a non Irish corporate entity such as ESM, which is a limited partnership established in the United States, can assert rights under Articles 40.3 and 43 of the Constitution. It says that properly interpreted, taking account of the comments of Dodd in his leading text, schemes of arrangement under Part 9 of the 2014 Act can include provision for third party releases, such as those at issue in the present case. It relies on several English cases and cases from other common law jurisdictions in support of this contention.

110. It says that the Oireachtas must have been aware of this line of case law when enacting the 2014 Act, praying in aid the *Barras* principle discussed in this jurisdiction by the Supreme Court in *Clinton v Dublin City Council* [2006] IESC 58 and most recently by the Supreme Court in 2018 in *MAK v The Minister for Justice and Equality* [2018] IESC 18.

111. I should say that I'm not entirely convinced that that principle or presumption applies where the interpretation in question is one given by courts in other jurisdictions in respect of statutory provisions in those other jurisdictions. The Scheme Company further contends that the involvement of the court in deciding whether to sanction a scheme of arrangement under Part 9 of the 2014 Act provides the appropriate protection and balance for any constitutional rights involved, including the constitutional right to prevent an unjust attack on property rights and, indeed, any constitutional including the right of access to the courts. The Court will not sanction the relevant Scheme unless it is satisfied that it is fair and meets the tests discussed earlier. It relies on cases such as *Moran v Valentia Telecommunications Ltd.* (High Court, Smyth J., 21 January 2002), *Re McInerney Homes Ltd*. [2011] IEHC 25 (Clarke J.) , and *Re Linen Supply of Ireland Ltd*. High Court [2010] IEHC 28 (McGovern J) ("*Re Linen Supply*") in support of its contention.

112. The Scheme at issue in the present case includes two release agreements, namely, the Scheme Release Agreement and the Ambac Release Agreement. The Scheme Release Agreement provides that each Scheme creditor releases any claims against the released parties in respect of the Scheme notes, the Indenture, the Ambac guarantees, the implementation of the Scheme and its restructuring, and any documentation relating thereto. The Scheme Company is authorised to execute the Scheme Release Agreement in respect of all of the released parties.

113. The Ambac Release Agreement provides, amongst other things, that any claims of the Ambac Guaranteed Noteholders and the Trustee in its capacity as a Scheme creditor against Ambac are to be waived. It is proposed that the Scheme Company will execute that agreement on behalf of the Ambac Guaranteed Noteholders and the Trustees.

114. It seems to me that, having reviewed and considered the case law opened to me and referred to in the written submissions of the Scheme Company third party releases are fairly common in schemes of arrangement which have come before the courts of other jurisdictions. A case which considers whether schemes of arrangement can encompass third party releases, and one which was opened to me by the Scheme Company at the hearing, is the decision of the Federal Court of Australia in *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 ("*Opes Prime*"). There are two relevant decisions of the Federal Court of Australia in this case. The first is the first instance decision of Mr. Justice Finkelstein and the second is a decision on appeal from the first instance judge. It is necessary briefly to refer to some passages in that case.

115. In the first instance decision of Mr. Justice Finkelstein, consideration was given as to whether a scheme of arrangement could include a bar on a claim against a third party. The judge commenced his consideration of that issue at paragraph 28 of his judgment. He noted that there was a real issue as to whether a scheme of arrangement could bar a claim against a third party. He stated that:

> *"The answer depends upon whether a scheme containing such a provision is, within the words of [the relevant statute], 'a compromise or arrangement....between a.... [company] and its creditors or any class of them'."*

And he said that that question raised two distinct points:

> *"(a) What is meant by a compromise or arrangement (neither being a defined term); and (b) If barring a claim amounts to, or may be an aspect of, either a compromise or an arrangement is it a compromise or arrangement between the company and its creditors?"*

116. He stated that:

> *"When considering these points it is necessary to keep in mind that the words "compromise" or "arrangement" must be construed liberally."*

He referred to a number of Australian and English decisions in that regard. He then turned, at paragraph 31, to note that there were some limitations on the meaning of "arrangement" and he referred to some authorities in that respect.

117. At paragraph 35, he addressed what he regarded as a difficult point, namely, whether or not a bar of a claim could be regarded as an aspect of a compromise or arrangement between a company and its creditors. He noted that there were, at that point in time, conflicting decisions on the point. He noted that the only Australian case was what he termed an "anti release" case was a case of *Re Buildmat (Australia) Pty. Ltd*. [1981] ACLR 689 ("*Re Buildmat*").

118. However, he went on to refer to the fact that in other jurisdictions, and in particular, in other common law jurisdictions, such as England and Wales, and in Ontario, the approach taken in *Re Buildmat* had not been followed. He said that where the point had been considered in those other jurisdictions, the Courts had adopted what he called a "pro release" approach. He referred to three cases, including the decision of Mr. Justice David Richards in *Re T & N Ltd. (No. 3)* [2007] 1 BCLC 563; a case from Singapore which he also described as a pro release case, *Daewoo Singapore Pte Ltd. v CEL Tractors* [2002] 2 LRC 66 and a decision from the Court of Appeal for Ontario in the case of *Re Metcalfe & Mansfield Alternative Investments II Corp* [2008] ONCA 587. Each of the those cases, he stated, were pro release cases.

119. At paragraph 55 of his judgment, Mr. Justice Finkelstein stated:

> *"Accepting that the approach to the construction of Section 411 should ensure that the section has a flexible operation, I have no doubt [..] that I should follow the approach in the pro release cases to which I have referred. In other words, provided that there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release. There is a sufficient nexus here for any number of reasons, including most importantly that the creditor's claims against the Opes companies and their claims against the banks largely (and in many cases completely) overlap, the schemes are in settlement of interlocking claims and in the absence of the release, none of the claims would be compromised."*

120. I should say that I agree with the conclusion reached by Mr. Justice Finkelstein in that case on this issue. His conclusion was upheld by the Federal Court of Australia on appeal. It is necessary to refer to a small number of paragraphs from that judgment. At paragraph 67 on page 22 of the judgment of the Federal Court of Appeal, the Court stated as follows:

> *"A purported scheme of arrangement must involve some arrangement in the sense that is to be construed liberally. No narrow interpretation should be given to the expressions "compromise" or "arrangement". An arrangement within the meaning of s411 connotes some element of give and take. A proposal that conferred no benefit on creditors and constituted the mere confiscation of interests would not be an arrangement within the meaning of s 411. An arrangement must involve some bargain giving benefit to both sides. However, there is no reason to construe the term in s411 as restricting in any way the nature of the bargain which might be made between company and creditors, […] subject only to the additional requirement that the arrangement must be within the power of the company and not in contravention of the Corporations Act."*

121. At paragraph 68, the Court stated:

> *"A scheme of arrangement between a company and its creditors, or class of creditors, is no more than a proposal to vary or modify the company's obligations in relation to its debts and liabilities owed to the creditors or class of creditors. There is nothing to prevent the company from posing, as part of the arrangement, a term to the effect that, in consideration of what the company has provided under the scheme, the creditors will discharge not only the debts and liabilities of the company but also the liabilities of, for example, sureties for the same debts and liabilities of company."*

122. Then at paragraph 69, the Court stated:

> *"It is permissible to incorporate in a scheme of arrangement an involvement or participation by an outsider, being a person or entity who is not a party to a scheme as a company or creditor […]. Such arrangements are commonplace in relation to schemes involving takeovers. A scheme of arrangement made between a company and its creditors under s411 binds only the company and the creditors. Nevertheless, there is no reason why a bargain might not be struck between a company and creditors whereby the creditors are bound to enter into an arrangement with third parties. So long as there is some element of give and take, such that the creditors receive something in return for the benefit conferred on a third party, there is no reason in principle why that term could not be part of the scheme of arrangement as contemplated by s411."*

123. I accept that these principles that are relevant to the exercise that I have to carry out in the present case.

124. A number of the so called pro release cases are referred to in the submissions of the Scheme Company in this case. Some of them have been touched on in the judgment of the Australian Courts in *Opes Prime*, namely *Re T & N Ltd. (No. 3)* [2007] 1 BCLC 563 ("*T & N*"). The principle was also considered and approved by the Court of Appeal in England in the case of *Re Lehman Brothers International (Europe) (in administration) (No. 1)* [2010] 1 BCLC 496 ("*Lehman Brothers*"). In that case, Lord Justice Patten, in giving the judgment of the Court, stated as follows (at paragraph 63):

> *"It seems to me entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which requires them to bring into account and release rights of action against third parties designed to recover the same loss. The release of the such third party claims is merely ancillary to the arrangement between the company and its own creditors."*

125. Having cited with approval the judgments in *Opes Prime* and the decision of Mr. Justice Richards in *T & N* and having at

paragraph 48 of his judgment quoted with approval a passage from the judgment of Mr. Justice Richards in *T & N*, Lord Justice Patten went on to set out the following conclusions at page 517, paragraph 65 of his judgment:

> *"It seems to me that an arrangement between a company and its creditors must mean an arrangement which deals with their rights inter se as debtor and creditor. That formulation does not prevent the inclusion in the Scheme of the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors. But it does exclude from the jurisdiction rights of creditors over their own property which is held by the company for their benefit as opposed to their rights in the company's own property held by them merely as security."*

126. Again, those principles are particularly relevant to the exercise that I have to undertake here. There are a number of other English cases to similar effect.

127. I turn now to look briefly at the provisions of Part 9 of the 2014 Act which replaced the old Section 201 of the 1963 Act to see the extent to which those principles can be applied and represent good law in this jurisdiction.

128. Section 450 of the 2014 Act refers, as I indicated earlier, to a compromise or arrangement being proposed between a company and, *inter alia*, its creditors or any class of them. The wording is very similar, if not identical to, the wording that was at issue in the Australian legislation considered in *Opes Prime* and in the English legislation considered in *T & N* and *Lehman Brothers*. All those cases accept that arrangements can include provision for the release of third party rights or obligations.

129. There was no attempt by the Oireachtas when enacting Part 9 of the 2014 Act to exclude third party releases from schemes of arrangement under that part or to define a compromise or arrangement in such a way as to exclude such releases. I agree that the principles and conclusions that we have seen from the decisions in *T & N , Lehman Brothers* and *Opes Prime* reflect the correct and proper interpretation of the relevant provisions of Part 9 of the 2014 Act and I am satisfied that it is appropriate to adopt the pro release interpretation referred to by Mr. Justice Finkelstein in the *Opes Prime* case and which is seen elsewhere in the authorities to which I have just referred, subject to any constitutional prohibition on my doing so and it is to that question that I now turn.

130. So what about the constitutional dimension? While there is some considerable controversy about the extent of the application of the constitutional rights contained in Article 40.3 and Article 43 of the Constitution to foreign corporations or corporate entities, it is not necessary to reach any concluded view on that issue in the present case, as the Scheme Company accepts for the purposes of this application that ESM, an American limited partnership, is entitled to protection from any unjust attack on its property rights under Article 40.3 of the Constitution. In my view, the requirement to obtain the sanction of the Court for a scheme of arrangement under Part 9, which sanction will not be granted if this scheme is unfair, inequitable, improperly coercive or unreasonable in the sense discussed earlier, combined with the requirement for a special majority at the relevant scheme meeting as a pre condition for such sanction under Section 453 of the Act, represents a fair, reasonable and proportionate balance by the Oireachtas of the various potentially competing interests involved in a scheme of arrangement. I do not believe that it is necessary to give a restrictive interpretation to the provisions of Part 9 of the 2014 Act. The involvement of the Court at the sanction stage, and indeed at the earlier stage provided for in Section 450 when summoning the scheme meetings, is sufficient to ensure the protection of any constitutional rights which may be involved, including any right to property or right of access to the court which may be engaged or potentially adversely affected in any scheme of arrangement. A balance has, therefore, been struck by the Oireachtas in the legislation which has provided for the important role of the court in terms of the sanctioning of a scheme. I note and agree with what was said in this regard by Mr. Justice McGovern in *Re Linen Supply*, which was an examinership case, in particular at paragraph 21 of his judgment in that case. Similar protections against the sanctioning of a Scheme which is not fair or equitable apply under Part 9 of the 2014 Act. I should add that I do not accept that there is any ambiguity or genuine doubt in Section 450 or elsewhere in Part 9 of the 2014 Act as to the matters which may be included in a compromise or arrangement proposed between a company and its creditors such as might require a strict interpretation of that provision or other provisions in Part 9.

131. Finally in this connection, I do not accept that the necessity for the releases contained in the Scheme has not been demonstrated. The Ambac Release Agreement is undoubtedly necessary having regard to the central involvement of Ambac as guarantor for a number of the classes of notes. I also accept that the Scheme Release Agreement is necessary to ensure that there is finality in relation to the affairs of the Scheme Company so that it may ultimately be wound up, as is the intention in the event that the Scheme is sanctioned, and so that there are no outstanding claims in circumstances where the dividends and payments provided under the Scheme are intended to cover and close off all such claims. It would make no commercial or legal sense to leave such claims hanging out there. I further note that schemes of arrangement often contain terms providing for the release of third parties from liabilities they may have or potentially have. The categories of third parties whose obligations or potential liabilities may be involved and which can present problems for or obstacles to a restructuring intended to be effected under a Scheme of Arrangement include guarantors as well as directors of the relevant Scheme company. This is clear from the leading text in the field, Pilkington on *Schemes of Arrangement in Corporate Restructuring*, (2nd edn. Sweet & Maxwell, 2017), from paragraph 9 001, p. 145 onwards. It is perfectly understandable, in my view, why the Scheme makes provision for both of the forms of release and specifically in this context for the Scheme release agreement.

132. I will deal separately with ESM's claims in relation to the New York proceedings.

133. In light of the foregoing, I reject all of the arguments advanced by ESM in support of its objection that a scheme of arrangement under Part 9 between a company and its creditors cannot include a provision providing for the release of third party claims. I am satisfied that, properly interpreted, the provisions of Part 9 can be interpreted so as to include such releases. Whether the Courts will ultimately sanction such a scheme will depend on the application of the test set out in the *Colonia* case and in the other cases referred to earlier.

(3) The New York Dimension

134. I now turn to consider the third and final set of objections advanced by ESM at the hearing. It is not entirely clear what objection is now being maintained by ESM under this heading as it has morphed and changed in the course of the affidavits, the written submissions and the oral submissions. As noted earlier, Dr. Meyer originally suggested that the Scheme, if proposed by the Scheme Company at all, ought to have been proposed and put forward in New York. I have rejected that contention. The Scheme is prepared in respect of an Irish company. All of the directors are Irish. All board meetings are held in Ireland. As I have held earlier and found earlier, the Irish courts clearly have jurisdiction to consider the sanctioning of the Scheme under Part 9 of the 2014 Act.

135. Next, reliance was placed by ESM on a number of grounds of objection set out and advanced in the affidavit of Mr. Bonner, a US lawyer, to the effect that the Scheme would be unlawful under New York law for various reasons. In his affidavit, Mr. Bonner suggested that the Scheme would be unlawful under New York law for effectively five reasons. Firstly, he said that the Scheme

company failed to conduct a robust market check to determine the market value of the notes and did not seek to negotiate the price of the ESM's tender offer. Secondly, he contends that the Scheme company entered into the lock up support agreement with the majority of Scheme creditors and this prevented the market check that the New York courts rely on to determine the actual intrinsic value of the securities. Thirdly, he contended that the lock up support agreement did not contain any "fiduciary out" clause. Fourthly, he contended that the Scheme is coercive in nature, providing higher consideration to those who sign up to the lock up support agreement. Fifthly, he said that price that the company had offered for ESM notes did not reflect the intrinsic value of those securities.

136. It seems to me that these issues do not really have to be addressed or considered in the course of this application before me. I note that it is contended on behalf of the Scheme Company, in an affidavit sworn on its behalf by Mr. Graulich, another American attorney, on 4th June 2019 (the third affidavit of Mr. Graulich) that in his view the fiduciary duties of a company and its directors are to be governed by the laws of the company's place of incorporation, which in the present case is Ireland and that this is the position under New York law. I do not have to decide this issue for the purpose of this application. However, in the event that it is necessary to offer a view in relation to Mr Bonner's contentions, I note the submissions advanced by the Scheme Company at paragraphs 49 - 53 of its written submissions. For brevity at this point and without repeating them, I agree that there is considerable merit to the submissions advanced in those paragraphs, and I accept them. Therefore I do not believe that Mr. Bonner has set out any good or valid reasons as to why the Scheme should not be approved on the basis set out or advanced by him in his affidavit.

137. I should also point out that as stated at paragraph 55 of the Scheme Company's written submissions, there are a number of cases decided by the English courts where those courts have sanctioned schemes of arrangement under equivalent statutory provisions to those contained in Part 9 which compromised New York governed debts conditional on Chapter 15 Recognition. The cases referred to there are *Re Magyar Telecoms BV* [2015] 1 BCLC 418; *Re Noble Group Ltd* [2018] All ER (D) 100; *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) and *Re Zlomerex International Financial SA* [2015] 1 BCLC 36.

138. As I have indicated, I accept the submissions advanced by the Scheme company in relation to these various points.

139. The written submissions of ESM to an extent repeat some of the points made by Mr. Bonner concerning the alleged unlawfulness of the Scheme under New York law. In particular, this is advanced at submission 1, paragraph 13, of ESM's written submissions. Submission 2 at paragraph 17 of those submissions then contends that if the Scheme is sanctioned by the court, ESM will be prevented from litigating its complaint before the New York court. This appeared to be the main point under the New York law heading advanced by ESM in its oral submissions to the Court, namely that it would be precluded from proceeding with its complaint in New York if the Scheme is sanctioned. In effect, this is largely a repetition of the second ground of objection relied on by ESM, on which I have just ruled.

140. It was further submitted by ESM that the Court should consider deferring sanctioning of the Scheme effectively to allow the New York complaint to be litigated in New York. However, I am not prepared to do that.

141. There appears to be agreement between the respective US lawyers, namely Mr. Bonner, who swore the affidavit on behalf of ESM, and Mr. Graulich who has sworn affidavits on behalf of the Scheme Company, that when seeking recognition of the Scheme, if sanctioned by the Court, which includes provision for the release of claims, including those the subject of the New York complaint filed by ESM against Ambac, under Chapter 15 of The Bankruptcy Code, the New York Court will not assess the position on a de novo basis and will only refuse to recognise the Scheme if it is manifestly contrary to US public policy. Mr. Bonner does not say that the Scheme, if sanctioned in its current terms, would be found to be manifestly contrary to United States public policy. Mr. Graulich expressly says at paragraph 20 of his second affidavit of the 24th April 2019 that the Scheme would not be found to be manifestly contrary to United States public policy.

142. I am not satisfied that ESM has demonstrated any good reason for me not to sanction the Scheme based on the existence of the New York complaint or any of the other grounds of objection advanced under this general heading. I regard it as significant that the complaint was only filed on 30th May 2019, i.e. last Thursday, more than four weeks after the Court gave its first directions in relation to convening of the Scheme meetings for the Scheme, which was on 24th April 2019, more than four weeks after the advertisements in respect of the Scheme meeting were published, including in The Financial Times (United States edition), which was on the 2nd May 2019, and notified to Scheme creditors through the DTC on the 30th April 2019, and more than a week after the Scheme meetings were held. I do not believe that there is any basis to adjourn the sanction hearing and I would query what the purpose of such an adjournment would be. I accept the case advanced by the Scheme Company that it is a matter of urgency that the Scheme be sanctioned and note that recognition is to be sought in New York with a hearing under Chapter 15 of The Bankruptcy Code scheduled in New York for next Tuesday, the 11th June 2019.

143. In ruling against this objection, I have also taken account of the issues considered earlier in my judgment, including the dividend and payment provided for in the Scheme, the amount which ESM paid for its notes in June 2018, the amount offered by ESM in its tender offer in late 2018 and the fact that this is not a case in which ESM will be making a loss on its notes, albeit that it may not be making as large a profit on those notes as it may have hoped for. I am satisfied that the Court has jurisdiction to deal with the sanction application and that it would not be appropriate for me not to defer the application. Therefore, I have proceeded to consider the sanction application. I reject all the objections raised by ESM under this heading.

Conclusions

144. In conclusion, before sanctioning the Scheme I must be satisfied that the preconditions in Section 453, subsection 2(a) and (b) have been satisfied. I have found that those conditions have been satisfied. I am required in accordance with the principles set out in the case law identified earlier, including the cases of *Colonia* and *Depfa*, to be satisfied that there was no coercion of the minority at the relevant Scheme meeting. I am so satisfied. I am also required to be satisfied that an honest and intelligent person acting reasonably in his or her own interests could support the Scheme. I am so satisfied.

145. The starting point is that the Scheme creditors have voted overwhelmingly in favour of the Scheme in the numbers and percentages referred to earlier. As sophisticated investors, it must be assumed that they have carefully considered all aspects of the Scheme and the financial return to them. I do not accept that there was any material deficiency in the information provided to them in the Scheme Circular. The financial return offered by the Scheme is, and I accept this, the net present value of the anticipated principal interest and is greater than the status quo and greater than the sum paid by ESM when it acquired the notes and offered by ESM in its tender offer.

146. I am also satisfied that it is clear on the evidence that the Scheme will bring certainty in circumstances where there is a real risk as to Ambac's ability to perform its obligations under the guarantees at the stated maturity date. I also accept that honest, intelligent and reasonable people of the type found in the class at issue would have concluded that such a risk existed.

147. While ESM has raised a number of objections to suggest that the Scheme is unfair and irrational and ought not to be sanctioned, I have not accepted any of those objections.

I accept the Scheme is fair and equitable to all of the Scheme Creditors and that it is one which an honest and intelligent person, acting in his or her own interests, would reasonably approve. Therefore I reject all of the grounds of objection raised by ESM and I will sanction the Scheme under Section 453(2) of the 2014 Act.