IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 15
ARCHER LIMITED,[1]	§	Case No. 17-33103
Debtor in a foreign proceeding.	§	

DECLARATION OF ANDREW MARTIN IN SUPPORT OF VERIFIED PETITION FOR RECOGNITION OF FOREIGN MAIN PROCEEDING AND GRANTING RELATED RELIEF

I, **ANDREW ALEXANDER MARTIN**, hereby declare under penalty of perjury as follows**:-**

I. Introduction

1. My name is Andrew Alexander Martin and I am a Barrister and Attorney in good standing and currently admitted to practice law in the Supreme Court of Bermuda. I am a Director of a legal practice carried on by a limited liability company under the name MJM Limited from premises at 4 Burnaby Street in Hamilton, Bermuda. My *curriculum vitae* is annexed at Appendix A. I submit this Declaration in the Support of Archer Limited's (the "Company") Verified Petition for Recognition of Foreign Main Proceeding and Granting Related Relief (the "Verified Petition").[2]

2. I have had extensive experience in the practice of international dispute resolution and insolvency matters during the course of my practice in Bermuda over the last 30 years. I have acted in relation to various schemes of arrangement, involving reorganizations and restructurings (both solvent and insolvent) of companies and their creditors. I have also acted for

[1] The "Debtor" in this chapter 15 case as defined in 11 U.S.C. §1502(1) is Archer Limited and the Debtor's Bermuda Company Registration Number is 40612. The Debtor's registered offices are located at 4th Floor, Par-la-Ville Place, 14, Par-la-Ville Road, Hamilton, Bermuda HM08.

[2] Capitalized terms used herein and not otherwise defined have the meaning set forth in the Verified Petition, Explanatory Statement and Scheme.

debtor companies, creditors, liquidators and administrators of companies in the context of enforcement of debts against companies in Bermuda and the presentation of petitions for the winding-up of companies registered in Bermuda.

3. I have been involved in a large number of cross border litigation cases and I am familiar with the practices and procedures of the Bermuda court in that context.

II. Instructions

4. I have been instructed by Andrews Kurth Kenyon LLP, 600 Travis Street, Houston, Texas, 77002 which is acting on behalf of the Company. The Company was incorporated and is registered in Bermuda as an exempted limited liability company, and has its registered offices at 4th floor Par-La-Ville Place, Par-La-Ville Road, Hamilton, Bermuda HM 08.

5. In support of the Company's Verified Petition, I have been requested to prepare an expert opinion to give an explanation describing the legal nature and effect of a Scheme of Arrangement under the Bermuda Companies Act 1981, as well as to verify a number of aspects of the procedure to obtain the approval of a Scheme of Arrangement by the Bermuda Court, and how it becomes effective to bind all members of the class of creditors to which it relates.

6. This application arises in connection with a restructuring of the debt obligations of the Company to the Lenders under a certain Loan Facility Agreement dated November 11, 2010 (as amended and restated thereafter) (referred to in these proceedings as the "Existing Facility Agreement").

7. My firm is acting as Bermuda counsel to the Company in the proceedings in Bermuda to convene the meeting of the relevant class of creditors to vote upon a Scheme of Arrangement, and will be making an application, assuming the Scheme of Arrangement is

approved by the relevant majorities, for the sanction of the Scheme (to which for convenience I will refer as the "Bermuda Scheme Proceedings"). I am the director of my law firm who has the overall responsibility for the Bermuda Scheme Proceedings on behalf of the Company.

III. Relevant Factual Background

8. I have been asked to express my opinion based upon the facts summarised in the Explanatory Statement, sent to all lenders on May 12, 2017 and the Practice Statement Letter sent to all lenders under the Existing Facility Agreement dated April 28, 2017. The details of the Existing Facility Agreement have been summarized in the Explanatory Statement, and so I will only shortly state the nature of the effect of the proposed re-structuring for the sake of completeness and to set out my opinions in that context.

9. The background for the need for the Scheme is set out in the Explanatory Statement, so I will not repeat here the various commercial reasons that lie behind the need for the Scheme, and I adopt and include by reference in this Declaration the details described in section 4 of Part B of the Explanatory Statement

10. The effect of Scheme is summarized in the Practice Statement Letter at paragraphs 4.1 to 4.3.

11. The core aspect of the Restructuring will be the amendment and restatement of the rights and obligations of the Lenders under the Existing Facility Agreement on the terms of the Amendment and Restatement Agreement. The key amendments are as follows:

(a) *Archer Limited as sole borrower:* The Scheme Company will be the sole borrower under the Existing Facility Agreement, provided that additional borrowers may be added with the consent of the Majority Lenders.

(b) *Increase of the Total Commitments and a re-tranching into three facilities:* The Total Commitments under the Existing Facility Agreement, as amended, shall be increased from a total of $601,750,000 to a total of $654,710,000. This will be divided between three tranches:

(i) a new super senior tranche revolving facility of $24,070,220.70 (Facility A) in which each of the Lenders may elect to participate;

(ii) the existing revolving facility of $245,516,250 (Facility B); and

(iii) a term loan of $385,123.529.30 (the Term Facility).

(c) *Inclusion of a guarantee facility of $10 million:* Provisions will be added into the Existing Facility Agreement which set out the terms of a new super senior guarantee facility in which each of the Scheme Creditors may elect to participate. This will replace the existing guarantee facility provided by DNB Bank ASA.

(d) *Extraordinary repayment of $1.3 million:* An extraordinary repayment in the amount of approximately $1.3 million (depending on exchange rates) will be made by the Scheme Company with a corresponding reduction of the Total Commitments under the Amended Facility Agreement upon the amendments to the Archer Tropaz Facility described in the Explanatory Statement becoming effective.

(e) *Maturity to be extended to September 30, 2020:* The final maturity date on which the borrowers must repay all amounts outstanding under the Finance Documents will be extended from May 11, 2018 to September 30, 2020.

(f) *Introduction of a PIK margin:* In addition to the current interest rate, a PIK margin of 1% per annum will accrue on each Loan during the period from January 1, 2019 to September 30, 2020 if certain debt-to-EBITDA thresholds have been exceeded. The PIK margin will be added to the principal amount of the Loan and become cash payable on the final maturity date.

(g) *A cash sweep mechanism:* There will be a new semi-annual cash sweep which will require the Scheme Company to procure that an amount equal to 90% of Available Liquidity (as defined in the Amended Facility Agreement) will be used to prepay the loans outstanding under the Amended Facility Agreement and the loans under the amended and restated Archer Topaz Facility pro rata to the amounts outstanding.

(h) *Changes to the quarterly reduction of the Total Commitments:* The Existing Facility Agreement provides that the Total Commitments will be reduced by $25 million quarterly starting on May 11, 2017. These reductions will be suspended. Instead the Total Commitments will be reduced by a lesser quarterly amount of $10 million starting on the later date of March 30, 2020.

(i) *Financial covenants to be amended:* The financial covenants in the Existing Facility Agreement will be amended as follows:

(i) the leverage ratio covenant, equity ratio covenant and total equity covenant in the Existing Facility Agreement will be removed;

(ii) to include a requirement on the Scheme Company to ensure that the Group maintains free liquidity, being, in broad terms, cash, cash equivalents and committed but undrawn facilities, of at least $30 million;

(iii) to include a requirement on the Scheme Company to ensure that the Group maintains a minimum 12 months rolling nominal EBITDA of $45 million during 2017, $55 million during 2018, $65 million during 2019 and $85 million during 2020;

(iv) to include a requirement that 12 months rolling reported EBITDA shall be at all times positive (above zero); and

(v) to include a requirement on the Scheme Company to ensure that the Group's capital expenditure does not exceed $25 million during 2017 and $40 million for each financial year thereafter with an adjustment for additional equity funds raised of above $75 million.

(j) *Change of control to be amended:* The change of control thresholds will be reduced to reflect the dilution of the share capital which results from the issuance of the Private Placement Shares and the Subsequent Offering Shares.

(k) *Undertaking in relation to restructuring of the Archer Topaz Facility:* The Debtor will undertake to ensure that the Archer Topaz Facility is amended so that it is consistent with the agreed terms described in paragraph 5.24 of Part B of the Explanatory Statement.

(l) *Additional security (Archer Emerald):* Archer Emerald (Bermuda) Limited owns the modular rig known as the "Archer Emerald". The Scheme Company will procure that security is granted over the shares of Archer Emerald (Bermuda) Limited and certain of its assets in favour of a joint security agent to be held on behalf the Scheme Creditors and BNP Paribas Fortis SA/NV in its capacity as lender under the Archer Topaz Facility. This security must be granted by the later of (i) the date the refinancing of the Archer Topaz Facility is concluded and (ii) May 15, 2017. The proceeds received or recovered by the joint security agent shall be split between the Scheme Creditors and BNP Paribas Fortis SA/NV in the order of priority set out in the Term Sheet. This arrangement will necessitate an intercreditor agreement between the Scheme Company, the Agent, BNP Paribas Fortis SA/NV and the joint security agent to set out the terms on which security is shared.

(m) *Removal of Seadrill:* As Seadrill Limited is no longer a guarantor of the Existing Facility Agreement, Seadrill will be deleted from all of the Events of Default in which it is currently referred to in the Existing Facility Agreement.

In addition, the Re-structuring will also involve (a) the cancellation of the overdraft facility which was made available under the group cash management agreement dated March 31, 2009

(as subsequently amended) between Seadrill Limited, Archer Norge AS and Danske Bank, Norwegian Branch (under its former name Fokus Bank); (b) the cancellation of the overdraft facility granted under the overdraft facility agreement originally dated September 5, 2011 (as subsequently amended) between Archer Management (US) LLC and DNB Bank ASA; and (c) the cancellation of the unsecured uncommitted guarantee facility agreement dated August 18, 2014 between Archer Norge AS and DNB Bank ASA.

IV. Bermuda Law

12. Bermuda is a British Overseas Territory which (with the exception of Defence, International Relations and Internal Security) is self governing and has its own Constitution, electoral system, and legislative body. Her Majesty Queen Elizabeth II is Sovereign in Parliament and is represented in Bermuda by His Excellency, The Governor. Members of the Lower House of Parliament are elected and the political party whose members form the majority in the Lower House governs in a Westminster style of democratic government. An Upper House of "Senators" is appointed pursuant to the Constitution. Together they have the power to pass legislation, subject to the formal assent of the Governor. Bermuda's constitution is set out in the Bermuda Constitution Order 1968, which is an Order in Council approved by the Parliament of the United Kingdom of England Wales, Northern Ireland and Scotland, and issued by Her Majesty in Council, and is contained in a form of delegated legislation of the United Kingdom.

13. An independent court system has been established by several statutes of the Bermuda legislature, the most important of which are described briefly below. In Bermuda, the Supreme Court of Bermuda is the Superior Court of Record, that is to say, Bermuda's trial court. The jurisdiction of the Supreme Court is set out in the Supreme Court Act, 1905. Appeals from lower courts are made to the Supreme Court. Appeals from the Supreme Court of Bermuda are

made to the Court of Appeal for Bermuda. The jurisdiction of the Court of Appeal is set out in the Court of Appeal Act, 1964. Appeals from decisions of the Court of Appeal of Bermuda may be brought to Her Majesty in Council (the Judicial Committee of the English House of Lords now called the Supreme Court of England and Wales, Northern Ireland and Scotland), which is usually referred to as the Privy Council (the "Privy Council"). The right of appeal and jurisdiction of the Privy Council is set out in the Appeals Act, 1911.

14. Bermuda is a common law jurisdiction which, for the most part, follows English law. Section 15 of the Bermuda Supreme Court Act 1905 expressly declares that the principles of common law of England apply in Bermuda. Bermuda also bases a significant number of her statutory enactments upon statutes which have been passed by the United Kingdom parliament, and which may be adopted in whole or in part or modified to suit the needs of an international financial jurisdiction, and any specific local conditions which apply in her application of those statutes "borrowed" from the United Kingdom.

15. Bermuda applies the English doctrine of precedent and will apply English case law, and where Bermuda has adopted an English statutory provision, the Bermuda court will regard itself as bound to follow the English cases decided on the meaning and effect of the relevant provision. The Supreme Court of Bermuda will be bound by decisions of the Privy Council.

V. The Companies Act 1981

16. The Bermuda Companies Act 1981 was brought into effect in July 1983 (and has been amended many times since its operative date). In large part the Bermuda Companies Act is modelled on the English Companies Act 1948 and many of its provisions have been adopted *verbatim* in the Bermuda Companies Act 1981. However, there are a number of provisions of

the Bermuda Companies Act which has been drafted specifically for the Bermuda jurisdiction and there are many provisions which have been adopted which have no equivalent under the English Companies Act 1948. In addition, the Bermuda Companies Act has adopted provisions modelled on provisions taken from other jurisdictions such as Canada and Australia.

17. However, for the purposes of this Declaration, the relevant point to note is that the Bermuda Companies Act includes section 99 and 100 which are based on the English equivalent of sections 206 and 207 of the English Companies Act 1948 which gives the court the jurisdiction to sanction a Scheme of Arrangement on terms similar to the provisions which apply under part 26 of the English Companies Act 2006.

18. Bermuda's public policy generally follows English public policy, although there have been some rare instances in which the court has held that Bermuda public policy differs from English public policy. However, the enforcement of schemes of arrangement and the mandatory binding effect of the terms of a scheme of arrangement on a dissenting minority is well recognized.

19. In my view there is nothing in the terms of the proposed Scheme of Arrangement of the type proposed which would give rise to any difference in public policy in Bermuda, so that a Bermuda court would be highly likely to sanction the Scheme according to its terms.

VI. Scheme of Arrangement

20. The principal legal purpose behind a Scheme of Arrangement under Bermuda law is to enable a company to vary, amend, discharge, or re-constitute an existing obligation by and/or between the company and its shareholders, and/or its creditors, and/or any class of them, and to replace it with another different, or new obligation, or right and bind any dissenting

minority of the class to the amendment and new and/or substituted right or obligation. The English court has summarised the purpose of a creditor's scheme as follows:

> *"It has been the legislative policy for well over a century to encourage compromises and arrangements between a company and its creditors or members. That has been achieved by the enactment of a statutory mechanism to enable the absence of consent of minority creditors or members to be overcome, provided that a sufficient number of the relevant creditors or members agree with the proposed compromise or arrangement and the court gives its approval. If that occurs, then the dissentient minority will be bound by that compromise or arrangement. That of course in the case of a creditor is an encroachment on his right to be paid what he is owed in accordance with the contractual terms. But the utility of the statutory mechanism is particularly obvious in a case where a company is in financial difficulties but can persuade most, but not all, of the relevant creditors that the company's debts should be restructured rather than that those creditors should exercise their rights, including the right to put the company into liquidation."*[3]

21. The statutory mechanism referred to has its origins in early company law and the provisions which have been adopted by the Bermuda Companies Act in sections 99 and 100 are replications of the provisions which were formerly contained in sections 206 and 207 of the English Companies Act 1948 and now under Part 26 of the English Companies Act 2006. Accordingly, all the case law generated in England concerning the meaning, scope and interpretations of these provisions will be followed by the Bermuda court, applying the doctrine of precedent described above.

22. The Bermuda court has recognised schemes of arrangements for the compromise for creditors' claims in insurance liquidations in various insolvencies since the mid 1980s. The acceptance and application of English law principles governing schemes have been reflected in a number of decisions of the Supreme Court of Bermuda including *Kempe -v- Ambassador Insurance Company (in liquidation)* [1998] 1 WLR 1271 PC, *Re APP China Group* (2003) Bda

[3] *Garuda Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penergangan Garuda Indonesia* [2001] EWCA Civ 1696 at para 2

LR 50 and *Re Dominion Petroleum Ltd* [2010] Bda LR8. Copies of these decisions are appended at Appendix B.

VII. Procedural Steps

23. Once the Scheme Company has determined the terms of the proposed Scheme and the documentation has been drafted, there is a three stage procedural process that must be followed in order to achieve approval and effectiveness of the Scheme according to its terms.

24. First there is an application to the court for permission to convene the relevant meeting(s) of the classes of creditors or members. This is achieved by making an application to the Supreme Court of Bermuda (the "Court") for an order under section 99 of the Companies Act 1981 convening the meeting at a time and place determined by the Scheme Company and approved by the Court, and directions are given for the circulation of all relevant materials to the relevant constituents of the class who will be called upon to vote on the terms of the Scheme. The Court will consider the general nature of the Scheme and will require the company to demonstrate that it has identified the relevant classes who will need to vote on the Scheme. The Court will be concerned to ensure that the meetings are properly constituted so that each meeting consist of creditors whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Although it will not second guess the commercial terms being proposed, the Court will wish to be satisfied that there is a reasonable prospect that the Scheme is one which is capable of being approved by the necessary majorities of both number and value, and that the information proposed to be circulated to the creditors fairly discloses the nature of the Scheme and its proposed effect.

25. The Court will also wish to be satisfied that the content of the Explanatory Statement is sufficient to enable the relevant creditor to exercise a reasonable judgment on

whether the Scheme is in his interest or not and to reach a sensible position on the pros and cons of the Scheme. This may depend on the level of sophistication of the relevant class members. In the present case the relevant class is the lenders under the existing Facility Agreement all of whom have identical rights and are treated in the same way under the terms of the Scheme. The Court was satisfied that this is the case when it made the Order convening the Scheme Meeting.

26. The Court will also wish to be satisfied that the relevant members of the class have been notified of the intention to promote the Scheme in advance. There is a Practice Statement under the Court's Commercial Jurisdiction giving directions to ensure that persons have been notified of the fact that a Scheme is being promoted, the purpose which the Scheme is designed to achieve, and the composition of the meeting of the creditors that will be proposed, in advance of the application to convene the Scheme Meeting so that the members of the class have an opportunity to raise any objections if they wish to do so. It is normal practice to send out a letter to the relevant class members to explain these issues and to inform them of their right to attend the application for the convening order in the event that they wish to do so. This has been done in this case.

27. The second stage, once the Court has satisfied itself that it is a proper Scheme and that it has a prospect of being adopted by the relevant members, the Notice and Explanatory Statement and draft Scheme together with related Proxy forms are then dispatched to the relevant class members according to the timetable and in a manner that the Court has approved. Usually this is a period of two to three weeks, but it may vary from case to case. At the Scheme Meeting, those members of the class who wish to attend in person may do so by producing the relevant authorisation and attending the meeting in person. Alternatively a member of the relevant class

can vote by using the Proxy form setting out a vote in favour or against the adoption of the Scheme.

28. The Scheme must be approved by a majority in the number of creditors who attend and vote at the meeting, and three-quarters in value of the creditors who attend and vote at the meeting. The vote is taken by way of a poll and the Chairman of the meeting has the duty to ensure that the proceedings of the meetings are conducted properly and fairly. Once the votes have been cast and calculated both as to number and value, the Chairman will declare the result of the meeting. The Chairman will then report back to the Court by way of supplemental affidavit explaining what the result of the meeting was.

29. The third stage of the proceeding is the grant of the Court's sanction to the Scheme at a separate court hearing by way of petition. At the sanction hearing the report of the meeting will be explained to the Judge and the Judge will consider the terms of the Scheme to ensure that there is no inherent unfairness or breach of any public policy in respect of the operative terms of the Scheme. At the sanction hearing any creditor who dissented at the Scheme Meeting may attend and object to the grant of the sanction. This is usually based on some allegation of oppression or inherent unfairness in the terms of the Scheme. The Court does not simply rubber stamp the decision of the meeting but must be satisfied that the provisions of the statute have been complied with, that the meeting was properly conducted and that the majority were acting bona fide and not seeking to oppress or coerce the minority or treat them in an unfair manner, and that an intelligent and honest person might reasonably approve the Scheme. The Court will not second guess the commercial terms which have been approved by the creditors.

30. Once the Court has granted the sanction order, the Scheme does not become effective until it is registered on the public file at the Registrar of Companies. This usually done following the grant of the sanction order, but there may be some delays in registering the Scheme to allow for the fulfilment of conditions contained in the Scheme.

31. In this case, there is only one class of creditors affected by the terms of the Scheme, namely the lenders under the Existing Facility Agreement. Of those, 5/6 in number and 94.275% in amount of those who are entitled to vote at the meeting have given undertakings to do so and to support the Scheme. Therefore it is overwhelmingly likely that the Scheme will be approved at the Scheme meeting. Although it is not possible to predict the sorts of grounds for challenge that may be raised by a dissentient creditor, there is on the face of the terms of the Scheme no basis on which to suggest that one creditor has been targeted for unfair or oppressive treatment in a manner which is likely to prevent the sanction of the Scheme being granted by the Bermuda Court.

VIII. Conclusion

32. The Bermuda Scheme, when it has been approved by the relevant majorities, sanctioned by the Court, and registered on the public file at the Registrar of Companies, will take effect and its terms will bind all members of the class, namely all the lenders under Existing Facility Agreement.

IX. Declaration

33. I understand that it is the duty of an expert to assist the Court on matters within the expert's expertise. I understand that this duty overrides any obligation to the person from whom I have received instructions or by whom I am paid. I understand that, in providing this Declaration, I owe this duty to the Court, and I certify that I have complied with that duty. I

believe the facts that I have stated in this affidavit are true and that the opinions that I have expressed are correct.

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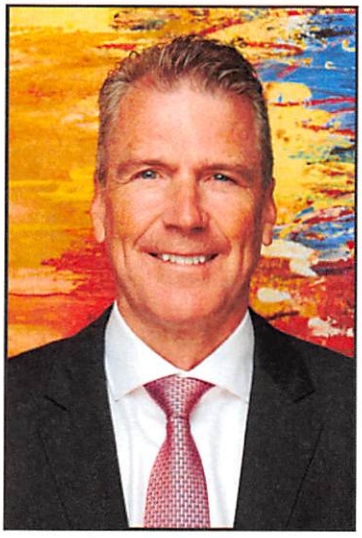
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: May 17, 2017

Andrew A Martin

APPENDIX A

MJM BARRISTERS & ATTORNEYS



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TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2016 ANDREW A MARTIN

Andrew Martin has 'tremendous depth of understanding of the relevant law and the practice of the Bermudian courts. He also has a commercial approach, which ensures his advice assists clients with achieving objectives'.

— Legal500, 2016

Andrew Martin is a popular choice amongst clients, one of whom

ANDREW A. MARTIN

Director

Areas of Practice

Andrew's practice includes complex international corporate dispute resolution, commercial litigation and arbitration, insolvency, corporate reconstruction, substantial trust litigation and complex employment matters.

Andrew has appeared in a number of significant cases in Bermuda, featuring company and commercial law issues, trust and insolvency issues. He has been involved in a number of schemes of arrangement for multi-national companies and has advised creditors, secured lenders and insolvents and court appointed liquidators.

He served as managing director of the firm from 1998 to 2003 and 2005 to 2007.

Andrew has been involved in a significant number of cases reported in the Bermuda Law Reports – View

Professional Activities

Andrew served for several terms on the Law Reform Committee for Bermuda. In the 1990s he chaired the Sub-Committee of the Law Reform Committee which proposed the introduction of the Control of Exemption Clauses Act. In the 1980s Andrew participated as a member of the Sub-Committees of the Law Reform Committee which recommended the amendments to the Rules of the Supreme Court 1985 and the Bankruptcy Act 1989. He was a member of the Bermuda Bar Council from 1987–1992. Other professional memberships include the Hon. Society of Lincoln's Inn and the Chartered Institute of Arbitrators.

Andrew's pro bono and community activities also include:

- Legal Advisor, Bermuda Hospitals Charitable Trust (2003 to present)
- Director, Bermuda Health Alliance (1998–2000)
- Chairman, Friends of Hospice (1992–1998)
- Legal Advisor, Physical Abuse Centre (1985–1990)

Bar Admissions

Andrew was called to the Bar of England & Wales (Lincoln's Inn) in 1983. Upon his return to Bermuda in 1984 he was called to the Bermuda Bar, and was appointed as a Notary Public in 1989.

Education

- LL.B. (Hons) University of Southampton (Southampton, England), 1981
- Lincoln's Inn, (London, England), 1983

highlights his "very thoughtful and no-nonsense advice." His impressive experience extends to insolvency, trust and employment disputes, in addition to general commercial litigation. He has undertaken numerous major disputes in all these fields throughout his career. His high-profile client list includes such notable names as Ernst & Young and HSBC (Bermuda).

— Chambers Global, 2016

Andrew Martin is an esteemed litigator who offers a "combination of technical knowledge and commercial application" and is "very pleasant and friendly, engaging and great to work with,"according to clients.

— Chambers Global, 2015

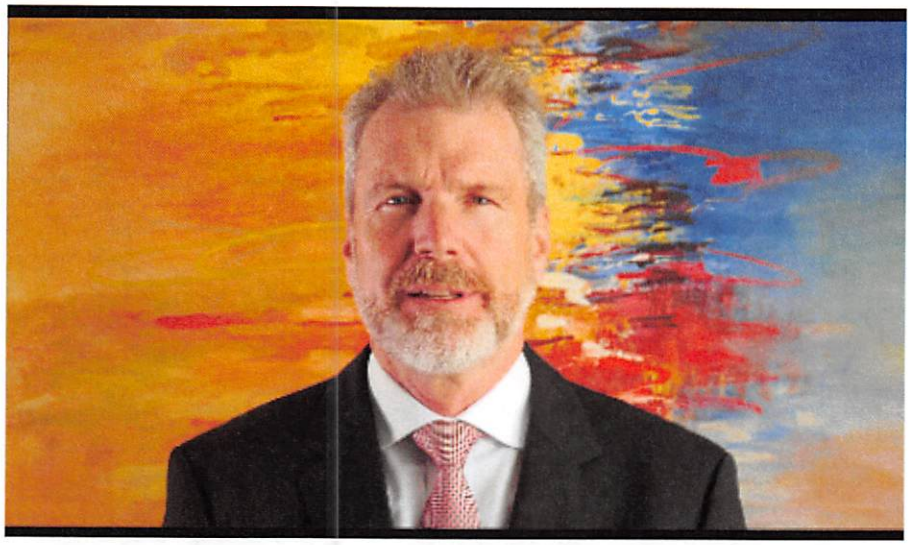
Andrew Martin has established a reputation as one of the top litigators in Bermuda, with tremendous experience in various courts. Sources say: "He's tough and tenacious, and a good man to have on your side in a fight."

— Chambers Global, 2014

Publications

- Lexology Navigator – Restructuring & Insolvency in Bermuda Q&A – **View**
- Getting the Deal Through – Mergers & Acquisitions – Bermuda Chapter – 2016 – **View**
- Getting the Deal Through – Restructuring & Insolvency 2016 – **View**
- Getting the Deal Through – Mergers & Acquisitions 2015 – **View**
- Getting the Deal Through – Restructuring & Insolvency 2015 – **View**
- Getting the Deal Through – Restructuring & Insolvency 2014 – **View**
- The International Comparative Legal Guide to Business Crime 2015 Edition – **View**
- "Cross-border insolvency" in Global Insolvency & Restructuring Review 2014/15 – **View**
- "The Islands that could – and do" in South Square Digest – August 2014 – **View**
- Getting the Deal Through – Mergers & Acquisitions 2014 – **View**
- "Creditors under Bermuda Law" in Offshore Commercial Law in Bermuda (2013) – **View**
- Andrew is a regular contributor to the **Bermuda Law Blog**

Directors' Duties (2016)



A – E F – J K – Q R – Z

APPENDIX B

[PRIVY COUNCIL]

*KEMPE AND ANOTHER (AS JOINT LIQUIDATORS OF MENTOR INSURANCE LTD.) . . . . . APPELLANTS

AND

AMBASSADOR INSURANCE CO. (IN LIQUIDATION) RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF BERMUDA]

1997 Oct. 15; Nov. 19

Lord Steyn, Lord Hoffmann, Lord Cooke of Thorndon, Lord Saville and Gault J.

Insolvency—Winding up—Distribution of assets—Scheme of arrangement—Fixed time limit laid down in scheme for challenging liquidators' decisions—Creditor applying for extension—Whether jurisdiction to extend time limits—Whether scheme created by order of court—Companies Act 1981 (Bermuda), s. 99—Companies (Winding-Up) Rules 1982 (Bermuda S.I. B.R. 50/1982) (1989 Revision), rr. 75, 157

The joint liquidators of a Bermudian company which had been ordered to be wound up proposed a scheme of arrangement under section 99 of the Companies Act 1981[1] with the objective of imposing a strict deadline for filing claims after which creditors would be barred from participating in the liquidation. The scheme imposed a 21-day time limit for filing applications to reverse or vary any rejection by the liquidators of creditors' claims which corresponded with the time limit for filing such applications laid down by rule 75 of the Companies (Winding-Up) Rules 1982[2] and stated that any such applications should be in the manner provided by the Rules. The creditors approved the scheme and it was sanctioned by the court. The applicant filed a notice of claim the bulk of which was rejected by the liquidators. The applicant failed to file a summons challenging the liquidators' decision within 21 days and sought an order that the time limit be enlarged pursuant to rule 157 or the inherent jurisdiction of the court. The Court of Appeal of Bermuda extended the time for making the application.

On the liquidators' appeal to the Judicial Committee:—

Held, (1) allowing the appeal, that the time limit laid down in the scheme was not appointed by the rules but was appointed by the scheme itself; that the requirement that applications be in the manner provided by the Rules meant only that the form of application should be in accordance with the Rules and could not mean that the application should be treated as if it was for all purposes an application under rule 75; and that, accordingly, the scheme dealt exhaustively with the right of appeal and could not be assimilated to rule 75 (post, p. 275B–C, D–E, F).

(2) That under section 99 it was for the liquidators to propose, for the creditors to approve and for the court to sanction the

[1] Companies Act 1981, s. 99: see post, p. 273C–F.

[2] Companies (Winding-Up) Rules 1982, r. 75: "If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision; but, subject to the power of the court to extend the time, no application to reverse or vary the decision of the liquidator in a winding-up . . . shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection."
R. 157: see post, p. 275A.

scheme so that, when there had been a combination of those three acts, it was the statute which gave binding force to the scheme; that while the sanction of the court was no mere formality and the court had an inherent jurisdiction to correct any obvious mistakes it could not alter the substance of the scheme and impose an arrangement upon the creditors to which they had not agreed; and that, accordingly, although the sanction of the court was necessary for the scheme to become binding, the scheme had not been fixed or created by an order of the court and the court had no power, either under rule 157 or its inherent jurisdiction, to extend the time limit for filing applications to reverse or vary the liquidators' decisions (post, p. 276B–E, G–H).

Decision of the Court of Appeal of Bermuda reversed.

The following cases are referred to in the judgment of their Lordships:

Bond Corporation Holdings Ltd. v. State of Western Australia (No. 2) (1992) 7 W.A.R. 61

Caratti v. Hillman [1974] W.A.R. 92

Devi v. People's Bank of Northern India Ltd. [1938] 4 All E.R. 337, P.C.

Garner's Motors Ltd., In re [1937] Ch. 594

Reg. v. Bloomsbury and Marylebone County Court, Ex parte Villerwest Ltd. [1976] 1 W.L.R. 362; [1976] 1 All E.R. 897, C.A.

The following additional cases were cited in argument:

Barclays Bank Plc. v. British & Commonwealth Holdings Plc. [1995] B.C.C. 19

Bickford Joinery Pty. Ltd., In re (1974) 7 S.A.S.R. 438

Chief Commissioner of Pay-Roll Tax v. Group Four Industries Pty. Ltd. (1984) 8 A.C.L.R. 973

Elric Pty. Ltd. v. Taylor (1986) 4 A.C.L.C. 327

Hill v. Anderson Meat Industries Ltd. [1971] 1 N.S.W.L.R. 868; [1972] 2 N.S.W.L.R. 704

Sun Alliance Insurance Ltd. v. Inland Revenue Commissioners [1972] Ch. 133; [1971] 2 W.L.R. 432; [1971] 1 All E.R. 135

Terri Co. Pty. Ltd., In re (1987) 12 A.C.L.R. 457

The following additional cases, although not cited, were referred to in the skeleton arguments:

Bank of Credit and Commerce International S.A. (No. 3), In re [1993] B.C.L.C. 1490, C.A.

Dane v. Mortgage Insurance Corporation Ltd. [1894] 1 Q.B. 54, C.A.

Finlay v. Mexican Investment Corporation [1897] 1 Q.B. 517

Jacobs, Ex parte; In re Jacobs (1875) L.R. 10 Ch.App. 211, C.A.

Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, C.A.

London Chartered Bank of Australia, In re [1893] 3 Ch. 540

Nicholl v. Eberhardt Co. (1889) 59 L.J.Ch. 103; 61 L.T.N.S. 489, C.A.

Petch v. Gurney [1994] 3 All E.R. 731, C.A.

Trix Ltd., In re [1970] 1 W.L.R. 1421; [1970] 3 All E.R. 397, C.A.

APPEAL (No. 24 of 1997) with leave of the Judicial Committee of the Privy Council (Lord Nicholls of Birkenhead) on 5 November 1996 by the liquidators of Mentor Insurance Co., Charles W. Kempe Jr. and Nigel Hamilton, from the judgment of the Court of Appeal of Bermuda (Astwood P., da Costa and Kempster JJ.A.) given on 14 March 1996 allowing the appeal of the applicant, Ambassador Insurance Co., a company in liquidation, from a decision of Ground J. delivered on 1 May 1995 in the Supreme Court of Bermuda, whereby he had struck out the applicant's summons seeking an extension of the time allowed for appeals

to be made against rejection by the liquidators' of claims made under the scheme of arrangement for Mentor Insurance Co.

The facts are stated in the judgment of their Lordships.

Robin Potts Q.C. and P. A. Shandro, solicitor advocate, for the liquidators.

Michael Crystal Q.C., Lloyd Tamlyn and *Andrew Martin* (of the Bermuda Bar) for the applicant.

Cur. adv. vult.

19 November. The judgment of their Lordships was delivered by LORD HOFFMANN.

This appeal raises a question on the effect of a scheme of arrangement under section 99 of the Bermuda Companies Act 1981, corresponding to section 425 of the U.K. Companies Act 1985. The relevant subsections read as follows:

> "(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. (3) An order made under subsection (2) shall have no effect until a copy of the order has been delivered to the registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of association of the company issued after the order has been made."

On 21 June 1985 Mentor Insurance Ltd. ("Mentor") was ordered to be wound up. Mr. Kempe and Mr. Nigel Hamilton were appointed joint liquidators. They gave notice under rule 73 of the Companies (Winding-Up) Rules 1982 that proofs should be filed by 31 May 1989. On the basis of these proofs, they declared an interim dividend of 25 cents in the dollar and paid out $78·2m. Despite the deadline, creditors in a liquidation are in principle entitled to file new or revised proofs at any time before the assets are finally distributed, subject only to not disturbing distributions which have already been made. The liquidators took the view that if this rule was allowed to prevail, the liquidation was likely to go on for many years. They therefore proposed a scheme of arrangement under section 99, the principal feature of which was to impose a strict deadline for filing claims, after which creditors would be altogether barred from participating in the liquidation.

The scheme defined a "scheme claim" as any non-preferential claim provable in the liquidation. It prescribed a "final filing deadline," which in the event was 30 June 1993 and provided in clause 2.1.2:

> "No scheme claim in respect of which a claim form has not been duly lodged shall be entitled to rank for any dividend payable under the scheme unless, on or before the final filing deadline, a notice of claim in respect of such scheme claim shall have been submitted to the joint liquidators in accordance with clause 2.1.3."

Clause 2.1.3 prescribed a form of notice of claim and said that it "must, on or before the final filing deadline" be submitted to the joint liquidators.

Clause 2.2 dealt with the assessment of claims by the liquidators. By clause 2.2.1 they were to determine the reasonableness of scheme claims and reject them to the extent which they considered unreasonable. If they rejected a claim, a written statement of the reasons was to be sent to the creditor within 21 days of such rejection. Section 2.3 dealt with appeals from the rejection of a claim by the liquidators. The first two sub-clauses read:

> "2.3.1 Any scheme creditor which receives a written statement in accordance with clause 2.2.1 may apply to the court in the manner provided by the Rules for an order that any decision of the joint liquidators relating to the assessment of that scheme creditor's claim be reversed or varied, but only on the ground that such decision was unreasonable. Such application must be made by a summons filed with the court within 21 days of the scheme creditor receiving the written statement mentioned in clause 2.2.1. . . .
>
> "2.3.2 Save as provided in the scheme, no scheme creditor shall have any right to appeal any decision of the joint liquidators relating to the assessment of scheme claims including, for the avoidance of doubt, any right to apply to the court under rule 77 of the Rules."

Clause 2.4.1 dealt with rejected claims:

> "2.4.1 Each scheme creditor having a scheme claim or portion thereof which is rejected in whole or in part by the joint liquidators pursuant to clause 2.2.1 shall, unless a summons is filed in accordance with clause 2.3.1, have no further right to participate in the scheme, to the extent of the rejection."

Finally, clause 8.1.1 provided that Mentor should continue to be a company in liquidation and that "subject to the terms of the scheme" the liquidation should be governed by the principles and procedures applicable to liquidations in Bermuda.

Ambassador Insurance Co. ("Ambassador") filed a notice of claim on 25 June 1993, within the final filing deadline, in the sum of $1,158,140·27. The liquidators rejected all but $79,075·24 and delivered a written statement of reasons in accordance with clause 2.2.1 on 17 November 1994. The time for appealing under clause 2.3.1 expired on 8 December 1994. Owing to an administrative lapse in its offices, Ambassador did not file a summons until 16 December. The summons sought an order that the time for appealing be enlarged pursuant to rule 75 of the Companies (Winding-Up) Rules 1982 or the inherent jurisdiction of the court.

Ground J. held that neither rule 75 nor the inherent jurisdiction had any application to appeals under the scheme. He struck out the summons

on the ground that the court had no jurisdiction to entertain it. The Court of Appeal reversed his decision and enlarged the time for appealing. Against this decision the liquidators appeal to Her Majesty in Council.

Rule 157 provides:

> "The court may, in any case in which it shall see fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding."

The time for appealing under clause 2.3.1 is plainly not "appointed by these Rules." It is appointed by the scheme, even though it happens to be the same 21-day period as a creditor is given under rule 75 for applying to reverse or vary the decision of a liquidator rejecting his proof in the liquidation. Mr. Crystal, who appeared for Ambassador, submitted that the Rules should be regarded as operating alongside the scheme. He gave two alternative reasons. One was that they had been incorporated in the scheme by the provision in clause 2.3.1 that the scheme creditor should apply to the court "in the manner provided by the Rules." The other was that the effect of clause 8.1.1 was to leave the Rules in operation except so far as expressly excluded. An example of express exclusion was clause 2.3.2, which said that no scheme creditor should have any right to apply to expunge another creditor's proof under rule 77. On the other hand, clause 2.2.3 contemplated that the liquidator would have the right to invoke rule 76 to apply to expunge the proof of a creditor which he considered to have been improperly admitted.

Their Lordships are unable to accept either of these arguments. The requirement that the application should be "in the manner provided by the Rules" means only that the form of application should be in accordance with the Rules. It cannot mean that the application should be treated as if it was for all purposes an application to vary or reverse the decision of a liquidator under rule 75. Their Lordships note that although clause 2.3.1 is based upon rule 75, the period of 21 days prescribed by the rule is expressly said to be "subject to the power of the court to extend the time." There are no such words in clause 2.3.1 and their Lordships consider that the omission must have been deliberate. As for the other way in which the argument has been put, their Lordships express no view on whether there are provisions of the Rules which the scheme has not excluded. But for the reasons already stated, they consider that clause 2.3.1 deals exhaustively with the right of appeal and cannot be assimilated to rule 75.

Since the period in clause 2.3.1 has not been "appointed by the Rules," the next question is whether it has been "fixed by any order of the court." On the answer to this question depends not only whether the court can act under rule 157 but also whether it has inherent jurisdiction to do so, the latter being, as Lord Denning M.R. said in *Reg. v. Bloomsbury and Marylebone County Court, Ex parte Villerwest Ltd.* [1976] 1 W.L.R. 362, 365, a power "to enlarge any time which a judge has ordered." Is the period of 21 days in clause 2.3.1 a time which was ordered by the Chief Justice when he approved the scheme? In the Court of Appeal, Kempster J.A. thought that it was. He said that the clauses of the scheme would have been "without effect" but for the order of the Chief Justice giving the sanction of the court on 23 March 1993 and the subsequent delivery of that order to the registrar. Although the case was not cited to him, his view has the support of the decision of the Supreme Court of Western Australia in *Caratti v. Hillman* [1974] W.A.R. 92. Jackson C.J.

said, at p. 94, that the scheme was "an integral part of the court's order" and Burt J. said, at p. 95, that "the rights [under the scheme] are . . . in my opinion created by the order and the procedure whereby those rights are to be established or ascertained is a procedure which is also created by the order." Accordingly, the court could extend any period prescribed by the scheme under its power to extend periods fixed by its orders. The case has since been followed at first instance in Australia and in *Bond Corporation Holdings Ltd. v. State of Western Australia (No. 2)* (1992) 7 W.A.R. 61, 68 Anderson J. said its reasoning was that "once the order is made, it is the order, 'speaking in terms of the scheme' [*per* Burt J. in *Caratti v. Hillman*, at p. 95] that has effect, not the resolution of the creditors and not the statute."

Their Lordships respectfully disagree. It is true that the sanction of the court is necessary for the scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the registrar. But this is not enough to enable one to say that the court (rather than the liquidators who proposed the scheme or the creditors who agreed to it) has by its order made the scheme. It is rather like saying that because royal assent is required for an Act of Parliament, a statute is an expression of the royal will. Under section 99 it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the court to sanction it. It is the statute which gives binding force to the scheme when there has been a combination of these three acts, just as the rules of the constitution give validity to acts duly passed by the Queen in Parliament: see *In re Garner's Motors Ltd.* [1937] Ch. 594, 598–599 and *Devi v. People's Bank of Northern India Ltd.* [1938] 4 All E.R. 337, 343.

It is of course true that the sanction of the court is by no means a formality. Furthermore, in giving its sanction, the court has an inherent jurisdiction to correct any obvious mistakes in the document which sets out the scheme. But it cannot alter the substance of the scheme and impose upon the creditors an arrangement to which they did not agree. The question of whether the time limits in the scheme are fixed or flexible is in their Lordships' opinion one of substance. Mr. Crystal accepts that if there is jurisdiction to enlarge the period for filing an appeal against the rejection of a claim, there must also have been jurisdiction to extend the final filing deadline for filing the original claims. But their Lordships think that this would have been a material alteration, detracting from the certainty and expedition which were the chief objects of the scheme. If creditors felt that in providing fixed time limits the scheme was creating traps into which the unwary might fall, the time to raise this question was when the scheme was under consideration or by way of objection when the court was asked to give its sanction.

Their Lordships are therefore in full agreement with the careful judgment of Ground J. They will humbly advise Her Majesty to allow the appeal and restore his order striking out Ambassador's summons. Ambassador must pay the liquidators' costs in the Court of Appeal and before their Lordships' Board.

Solicitors: Clifford Chance; Frere Cholmeley Bischoff.

B. L. S.

In The Supreme Court of Bermuda

Companies (Winding-Up) Jurisdiction 2003 No. 381

BETWEEN:

RE APP CHINA GROUP, LTD.

Dated the 24th November 2003

Mr. N. Hargun for the Company/Petitioner

Mr. D. Kessaram for the Objectors

Objections to sanction of scheme of arrangement - Whether classes of shareholders were fairly represented - Whether provisions of statutes complied with - Whether arrangement would be reasonably approved by man of business

The following cases were referred to in the judgment:

Re Alabama, New Orleans, Texas and Pacific Junction Railway Co. [1891] 1 Ch 213

Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385

Re Wedgwood Coal and Iron Co (1877) 6 ChD 627

Re Allied Domecq plc [2001] 1 BCLC 134

Re Osiris Insurance Ltd. [1989] 1 BCLC 182

JUDGMENT of KAWALEY, PUISNE JUDGE

Background

By Originating Summons dated September 23, 2003, the Company applied for leave to summon a meeting in connection with a proposed Scheme of Arrangement ("the Scheme") between the Company and its creditors, and for related directions.

The application was granted by me, in accordance with the standard practice, on an ex parte basis in Chambers. The Scheme was proposed on the basis that the Company was hopelessly insolvent, the liquidation return to creditors was estimated at nil, and that if creditors accepted shares in return for their debt, there was modest prospect of some future recovery.

The First Affirmation of Alex Goh stated that the application was urgent, because the "PRC Banks" would absent the Scheme enforce their security over the operating subsidiaries, depriving the company of any future sources of earnings. It also stated that the Scheme documents had been prepared in consultation with Gabriel Moss Q.C., the leading authority on insolvent schemes of arrangement.

By its Petition dated October 31, 2003, the Company sought this Court's sanction for the Scheme under section 99 of the Companies Act 1981, on the basis that at the meeting of creditors held in Bermuda at 10.00 am on October 30, 2003 ("the Court Meeting") the Scheme had been approved by the requisite majority in number representing three-quarters in value of voting creditors.

Fidelity and John Hancock objected to the Scheme being sanctioned, and asked the Court to adjourn the hearing and to compel the Company to disclose further particulars of the creditors who voted in favour of the Scheme, based on their suspicions that affiliates of the shareholders might have recently acquired shares and not voted bona fide in the interests of the single creditor voting class.

After a hearing that lasted a little less than a full day at which both Counsel tendered written submissions and authorities, on November 7, 2003 I decided to sanction the Scheme over the Objectors' objections, and indicated that Reasons would be given later for this decision. At the sanction hearing, as on the Chambers application for leave to summon the meeting of creditors to consider the Scheme, The Company stressed that the viability of the Scheme required that it be implemented on an urgent basis.

The Petition

The background facts as set out in the Petition were mostly not in dispute. The Company is an indirect subsidiary of Asia Pulp and Paper Company Limited ("APP"), the ultimate holding company of companies involved in the manufacturing of paper and pulp products in China and Indonesia ("the APP Group"). The Company is the holding company for the China-based limb of the Group's operations ("the APP China Group").

The APP Group announced a standstill on the payment of certain debts on March 1, 2001 due to a liquidity crisis, triggered largely by the Asian financial crisis and a major decline in the prices of the Group's products. Restructuring negotiations with creditors have been pursued over the last two years. The APP China Group is dependent for working capital on the Chinese Bank Creditors. The Company's debt falls into three main categories:

1. US$403 million notes guaranteed by APP;
2. US$142 million in bank loans from a related party (BII Bank Ltd.), also guaranteed by APP;
3. US$7.5 million to related entities, including in respect of Scheme costs.

The PRC operating subsidiaries are, like the Company, insolvent, and the Chinese Bank Creditors have security over most of their assets. If they followed through with their threat to enforce such security, there would be no prospect of any recovery for the Company's creditors at all. The verified Petition asserts in paragraph 12 that after "*a detailed and extensive consideration of the options available to the Company, it was determined that it was in the best interests of Creditors to implement a scheme of arrangement whereby Creditors would receive shares in the Company in exchange for their debt thereby giving them some chance of recovering their debt over time should the APP China Group become profitable*". Although the merits of the conclusion are not accepted by the Objectors, there is no doubting that the Scheme was put forward on this basis.

179 creditors attended the Court meeting and voted by proxy, with claims worth $659,334,256.14. Of these, 169 with claims worth $587,145,058.34 voted in favour of the Scheme, and 10 creditors with claims valued at $72,189,197.80 voted against. In percentage terms, the unchallenged Petition asserts, 94.4% in number and 89.1% in value voted in favour of the Scheme. This includes the vote of the arguably conflicted BII Bank, worth $143,429,839.94, although the objectors are bound to concede that if this claim is subtracted, there is no impact on the validity of the vote in terms of whether the statutory bar (50% plus in number and 75% in value) has been met.

The detail behind this summary may be found in the meeting report dated October 30, 2003, and the actual voting results exhibited to the Second Affidavit of Theodore Bloch of the same date.

As a prima facie case for the Court's sanction was clearly made out and the real controversy was on the merits of the objections, I summarize the evidence and Counsel's submissions below, reversing the order in which the respective cases were actually put.

The objectors' evidence

The substantive case of the Objectors in evidential terms is to be found in the November 5, 2003 Affidavit of Nathan Van Duzer ("the Van Duzer Affidavit"), sworn by Fidelity's Senior Legal Counsel. John Hancock's Arthur Calavritinos supports the Van Duzer Affidavit in his own November 5, 2003 Affidavit.

The objectors together hold bonds worth US$ 25,790,000. Fidelity's claim could have been larger, but for an administrative error by their own bankers which prevented claims worth in

excess of $14 million from voting (it is accepted this would not have affected the prima facie validity of the vote).

The main complaints made by the Objectors may all be distilled into one: the Scheme was approved not by the company's creditors voting bona fide in the interests of their creditor group, but by creditors motivated by a desire to advance the interests of the Controlling Shareholders in retaining control of the Company and achieving the benefit of being released from the guarantee obligations of APP. However, this assertion is not made as a matter of positive fact, but rather on the basis of suspicion and belief.

The first basis for these contentions is set out in paragraph 8 of the Van Duzer Affidavit: "*the patent unattractiveness of the Scheme to an 'independent' creditor also goes to suggest that those creditors who approved the Scheme may have had an ulterior interest or affiliation encouraging them to do so which is not made clear on the face of the Scheme Document*". In paragraph 14 of the Van Duzer Affidavit, it is suggested that the BII Bank advanced monies in 2003 at a time when no bona fide lender would have done so.

The second basis for these contentions is that the Scheme Document itself reveals that a select group of creditors have had detailed discussions about their post-Scheme role in the management of the Company (paragraphs 17-20 of the Van Duzer Affidavit, and subsequent paragraphs 21-27 complaining of inadequate responses at the Court Meeting to queries on this topic on the identity of noteholders issue).

The third basis for this complaint is Mr. Van Duzer's awareness "of there being significant market activity in purchasing the Existing Notes" (paragraph 28). The suspicion that the APP Group interests have been involved in buying bonds to protect their interests is supported by a speculative story appearing on October 8, 2003 in the Shangai Daily edition, and a similar article appearing in the International Herald Tribune on October 6, 2003 which discusses the proposed Scheme. Complaint is then made that at the Court Meeting, Mr. Goh on behalf of the Company was was able to confirm that none of the noteholders were affiliated while all present on behalf of the Company were unwilling to disclose their identities.

The second broad, and arguably more substantive, point made Mr. Van Duzer is that insufficient information was provided on the identity of noteholders to enable the Objectors and reasonable independent creditors to make an informed decision when voting on the Scheme (paragraphs 31-34). This point is buttressed by the contention that on two grounds, independent creditors would not have supported the Scheme as proposed. The first ground is that the prospects under the Scheme are so bleak; the options of extending the debt or a liquidation should have been considered as alternatives, and it is worrying that the only available accounts are unaudited (paragraphs 35-43). The second ground is that no reasonable creditor would ever approve a Scheme under which they were asked not only to release their primary debt, but also their rights under a parent guarantee (paragraphs 44-52). This only benefited APP, and the explanation given at the Court Meeting that this release feature was due to "cultural differences" was unsatisfactory. Further, the statement that the Scheme was a response to the Chinese Bank Creditors desire to see continuity in the Company's management constituted an admission that "the majority of the debt owed by the Company is now in the hands of entities affiliated or controlled by the APP Controlling Shareholders" (paragraph 51) . This last, very tenuous, forensic point was not seriously pursued in oral argument.

A further point which was not seriously pursued was the complaint, which on an analysis of the votes was academic, that the BII Bank's vote should not have been counted.

The Company's evidence in response

The Robin Mayor November 6, 2003 Affidavit refuted the suggestion that the BII Bank loan was made as recently as this year. In fact, it was made in 2001, as stated in the Scheme Document.

The November 6, 2003 Affirmation of Indra Widjaya, an APP Controlling Shareholder, deposed to the fact that (a) the APP Controlling shareholders are not affiliated in any way to the creditors (including the Supporting Noteholders) who voted in support of the Scheme), (b) he was personally involved in pre-Scheme discussions, and only broad concepts were discussed,

with no agreements concluded on the future management of the Company, and (c) Supporting Noteholders had insisted on their identities being kept confidential and breach of such confidentiality would prejudice future dealings with them.

The November 6 Third Theodore Bloch Affidavit lists examples of "Note Investors" who voted in favour of the Scheme under their own (as opposed to under nominees') beneficial names: Credit Suisse (Boston, Zurich and Singapore), Clariden Bank (Zurich), HSBC Republic Bank (Suisse) (Singapore), Goldman Sachs Asia Finance (Hong Kong) and Guggenheim Partners (New York).

The Objector's submissions

Mr. Kessaram declined to refer the Court to any specific authorities in his bundle, accepting that they supported general principles which were not in dispute.

Instead he focussed on the evidence, namely the Van Duzer Affidavit and the relevant portions of the Scheme Document.

In paragraph 3 of his Written Submissions, Counsel made the following point of principle: "*The court is not a mere rubber stamp. Sanctioning a Scheme is by no means automatic, and a court may impose conditions on its sanction to a scheme. The court has complete discretion to adjourn the hearing to allow additional evidence to be called.*"

It was submitted that the Court normally had to be satisfied of three matters, and in paragraph 5 of Counsel's Written Submissions they were described as follows: "*These three matters for consideration are that :*

a) *the class must have been fairly represented;*

b) *the provisions of the statute have been complied with;*

c) *the arrangement must be such as a man of business would reasonably approve.*"

On the fairness of the class representation issue, Mr. Kessaram pointed out, where there were conflicting interests, the Court would exercise care to see if the votes of those in conflict could be properly counted:

> "For instance, in Re Wedgwood Coal and Iron Co. (1877) 6 Ch.D. 627, it was held that a court "before it gives its sanction (without which the resolution cannot be acted upon), must be satisfied that the resolution has been carried bona fide by persons who really have regard to the interests of the company, and who have not voted merely for the purpose of exonerating themselves from a liability which they have incurred." (Written Submissions, paragraph 23)

The analogy here, he continued, was that there were reasonable grounds for suspecting that substantial creditors affiliated with shareholders voting to advance interests which clearly conflicted with those of true creditors such as the objectors. Paragraph 26 of Counsel's Written Submissions read as follows:

> "Where there appears to be a possible conflict of interest, the attitude of the court to this principle is indicated in the case of Re Alabama, New Orleans, Texas and Pacific Junction Railway Co., [1891] 1 Ch 213. This case concerned a scheme for binding creditors and, it was stated by Bowen L.J.:
>
> > "A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his

> rights. Its object is to enable compromises to be made which are for the common benefit of some class of creditors as such. Now, it is very important to observe that creditors of the company may have other interests besides those of creditors, and that there may be a class of creditors composed of many individuals – some of whom have only interests as members of that class but others of whom may have interests of a predominant kind which they hold, not as members of that class, but because they belong also to some other class of creditors, or because they also belong to the body of shareholders of the company. Therefore, although in a meeting which is to be held under this section it is perfectly fair for every man to do that which is best for himself, yet the court, which has to see what is reasonable and just as regards the interests of the whole class, would certainly be very much influenced in its decision, if it turned out that the majority was composed of persons who had not really the interests of that class at stake."

Counsel submitted that page 87 of the Scheme Document admitted a potential conflict between Supporting Noteholders and Controlling Shareholders, and in effect that there was a conflict of interest within the class and that the Scheme might not be in the best interests of the Company.

Mr. Kessaram then defined another key principle and set out his second principal point in paragraphs 31-33 of his Written Submissions as follows:

> "31. It is accepted that the Scheme was passed by statutory majority in value and number in accordance with the legislation at a meeting duly convened and held in accordance with the court order convening the meeting. However, the Court also needs to assess whether the Scheme Document together with the Court Meetings gave creditors reasonably sufficient information so as to be able to vote in a properly informed manner.
>
> 32.An explanation of the effect of the Scheme requires, if the class of creditors (or shareholders) called to vote on it is to be able to exercise a reasonable judgment on whether the scheme is in their interest or not, an explanation of how the scheme will affect them commercially. A court may then be reluctant to approve a Scheme if certain information not being sufficiently spelt out to the class in time, a reasonable creditor would have taken a different course in regard to their decision whether or not to vote for the Scheme.
>
> 33.The Scheme before this Court is opposed on the basis that at the time the Scheme was approved, insufficient information was provided to the creditors in so far as the Company:
>
> a) failed to identify the Supporting Noteholders referred to at page 12 of the Scheme Document;
>
> b) failed to confirm whether or not these Supporting Noteholders were affiliated to the Controlling Shareholders of the Company;
>
> c) if different, failed to identify the noteholders referred to at page 87 of the Scheme Document who had already indicated their approval of the Scheme and with whom the future policies relating to the management and business affairs of the Company were to be agreed;
>
> d) if different, failed to confirm whether or not these noteholders were affiliated to the Controlling Shareholders of the Company".

It is then submitted that the Scheme Document does not disclose that the Controlling Shareholders will continue to exercise managerial control and that had such disclosure been made, no reasonable unaffiliated shareholder would have voted in favour of the Scheme: "*There is no more important consideration than for the creditors to know whether the Scheme*

proposed represents a removal or consolidation of the present Controlling Shareholders from their position of managerial control." (paragraph 34)

By way of conclusion, Mr. Kessaram contended that no arrangement could be reasonable in which you can "get nothing and give up everything": *Re Alabama, New Orleans, Texas & Pacific Junction Railway Company* [1891] 1 Ch 213 at 243. Creditors were being asked to give up everything in terms the guarantee from APP with nothing in return. He submitted that the notes and the guarantee were governed by US law and that under its governing law the discharge of the principal debt would not discharge a related guarantee (after the hearing an Affidavit was filed sworn on November 7, 2003 by Mark Polebaum to make good this point, although which state's law applied was not specified).

Counsel submitted that the Court should decline to sanction the Scheme or, alternatively, to "*adjourn the hearing pending further disclosure by the Company. Such disclosure would involve disclosing the identity of the Supporting Noteholders as described at page 12 of the Scheme Document and, if different, those noteholders referred to at page 87 of the Scheme Document. Confirmation would also be provided as to whether or not each of those noteholders were affiliated to the Controlling Shareholders in any way and the extent of such affiliation.*"

The Company's Submissions

The Company filed Outline Submissions detailing the principles on which the Court should act (which I was able to read prior to the hearing) together with Supplemental Outline Submissions to respond to the Van Duzer Affidavit. These principles are no different to those relied upon by the Objectors in this case. Rather, the Company relies on the same principles with different emphasis in suggesting how the agreed law should be applied to the present facts.

Perhaps greatest emphasis was placed by Mr. Hargun on the following principle set out in paragraph 9 of his Written Submissions:

> "In considering whether to sanction the Scheme the Court works on the assumption that the creditors are the best judges of their own interests and the Court would be slow to interfere with the creditors' decision. The relevant principles governing the exercise of the Court's discretion were described by Lindley, L.J. in *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch.385 (Tab 2) at page 409 on the following terms:-
>
> "If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a Scheme which had passed that had been unobserved and which was pointed out later.
>
> While, therefore, I protest that we are not to register their decisions, but to see that they had been properly convened and had 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 judgement unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage."

Counsel submitted as far as the Court's discretion is concerned, that the high level of support for the Scheme made it impossible to properly contend that no intelligent and honest man in the position of Scheme Creditors could reasonably support. Moreover, the concept of swapping debt for equity in the case of hopeless insolvency "*is a reasonably established mode of restructuring insolvent companies and makes reasonably good financial sense*" (Outline Submissions, paragraph 19).

In terms of responding to the merits of the objections, Mr. Hargun put forward two broad points. Firstly, there was no substantive merit to the attacks made against the Scheme and,

secondly, there was no evidential foundation for the criticisms which would justify the Court giving credence to them in any event.

On the broad concept of the Scheme, the evidence of the Company that, in a liquidation, creditors would get nothing was essentially uncontradicted. Any reasonable creditor would opt for the possibility of some long-term return rather than the certainty of nothing. Not only had the Objectors failed to adduce evidence of a beneficial liquidation return; it was unclear whether funding could be obtained as there were no available assets to fund a liquidation. The Company had been pursuing debt restructuring for at least two years, and the whole rational behind the Scheme was that the debt could not be extended further without cooperation from the Chinese Banks.

Mr. Van Duzer was only able to put forward suspicions that the Supporting Noteholders were affiliated and that the Widjaya family had been purchasing the notes. These suspicions had been positively denied in paragraph 4 of the Indra Widjaya Affirmation.

In paragraph 10 of his Supplemental Submissions, Counsel responded robustly to the attack on the release of the guarantee: *"It is a matter of elementary law that if the guarantor remains liable, he will, as Mr Van Duzer himself accepts, have a contingent right over against the principal debtor. In all such cases, as a matter of simple law and logic, the principal debtor cannot become undoubtedly solvent unless the guarantee, and with it the contingent claim over the principal debtor, are released. Nor is it right for Mr Van Duzer to suggest that the creditors are "getting nothing in return", since they are getting shares in what will be a solvent company as a result of the release."*

Mr. Hargun also pointed out that the suggestion that APP as a single contingent creditor would lack standing to wind-up the Company as an "elementary" error of Bermudian law. While a single contingent insurance creditor of an insurer needed nine other co-petitioners of similar standing to petition for an insurer's winding-up under section 34 of the Insurance Act 1978, there was no similar restriction applicable to companies generally under section 163 of the Companies Act 1981.

Counsel also contended that there was simply no substance to the lack of information complaint. The only real criticism was that the identities of the Supporting Noteholders had not been revealed, and this was irrelevant as the Company's uncontradicted evidence was that they were not affiliated with the Controlling Shareholders.

As there was no credible suggestion of a "blot" on the Scheme and the need for its implementation was urgent, the Court was requested to render a decision immediately, even if reasons were delivered later.

Statutory regime applicable to schemes of arrangement

No Bermudian precedents were cited by Counsel so it is possible that this is the first occasion on which this Court has had to consider an opposed application to sanction a scheme of arrangement.

Section 99-100 of the Companies Act are based on provisions previously found in the United Kingdom Companies Act 1948 sections 206-207 (and in earlier legislation), and now found in section 425 of the 1985 Companies Act.

Section 99 mandates that a meeting be convened of the relevant creditors (or members), or class of creditor, and that a scheme will only be capable of being sanctioned if passed by a majority in number representing three-quarters in value of those voting at the relevant meeting. It takes effect once a copy of the sanction order is delivered to the Registrar of Companies, and once effective is binding on dissenting members of the class who approved it, whether the dissenters voted or not. The key sanction aspects of Section 99 provide as follows:

> "(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or of

any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditor or class of creditors, or of the member of the company or class of members, as the case may be, to be summoned in such matter as the Court directs;

(2) If a majority number representing three fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall as sanctioned by the Court, be binding on the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company".

Section 100 complements section 99 by requiring the Company to send with meeting notices a statement explaining the effect of the Scheme, and to state in any advertisements of the meeting where a copy of the explanatory statement can be obtained free of charge by the creditors or members to whom the meeting relates. Directors and officers are under a duty to supply this and any other relevant information to those asked to consider a scheme under section 99. The key provisions of section 100 are as follows:

"Information as to compromise with creditors and members

100 *(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 99 there shall —*

(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

The modern practice of drafting scheme documents, convening meetings to consider them and obtaining the court's sanction where an arrangement is approved by the requisite statutory majorities, is based on these remarkably short statutory provisions. However, it is also informed by the more voluminous English and Commonwealth caselaw dating back to the 19th century based on a similar (if not identical) statutory regime. Such technically non-binding caselaw must be regarded as highly persuasive, not just because of the similarity of the statutory soil in which its roots are firmly planted. These principles have been consistently applied by this Court, without argument, in sanctioning a wide array of section 99 schemes, primarily in the context of insolvent companies, over the last 10 years.

The whole object of section 99 schemes is to allow a significant majority of creditors or members of a company (or a particular class thereof) to vary not only their own pre-existing rights with a company, but the rights all similar positioned persons as well. The rationale underlying the scheme framework is that if an overwhelming majority of a class of persons dealing with a company form the view that a particular course is in the interests of them all, an obstinate minority should not be entitled to sink the ship on which the majority have decided to sail. The relevant creditors or members will have founded a relationship with the company with an essentially common goal in mind: to profit from those dealings. They are assumed to be the best judges of what their commercial best interests are; accordingly, assuming the scheme is not promoted for fraudulent purposes and those who vote are adequately informed and not materially misled, if the majority in number representing 75% in

value support the scheme, it is not for the Court to "second-guess" them and tell them what their best interests are.

The Court's role, then, on the hearing of a sanction petition (and indeed, in directing the summoning of the scheme meeting(s)), is more akin to that of a football referee, than to a football player. It is not for a referee in a match where a goal is validly scored to disallow the goal because, if he had had been the goalkeeper, he would have prevented a goal from being scored, or, because he supports the team against which the goal was scored. Equally, it is not for the Court to decline to sanction a scheme because it would have found it unpalatable as a scheme creditor and would have voted against. If the statutory requirements have been met, and the guiding principles set out in the caselaw have been adhered to, it is not open to the Court to decline to sanction the scheme on what may be called "merits" grounds.

Indeed, the caselaw cited by both Counsel made it clear that the burden on an objector is quite a heavy one, once it is conceded (as it was here) that the Scheme was approved by the requisite statutory majorities, which, incidentally, are higher (as regards value) than the two-thirds majority in value required to bind dissenters in respect of a plan of reorganization under Chapter 11 of the United States Bankruptcy Code. It is to this caselaw, that I will now turn.

Key requirements for exercising the discretion to sanction a scheme

It was agreed that the three key requirements must be satisfied to justify the scheme being sanctioned are (a) the class must have been fairly represented, (b) the provisions of the statute must have been complied with, and (c) the arrangement must have been such as a man of business would reasonably approve.

As to the first, I accept the principle relied upon by Mr. Kessaram as stated in *Re Wedgwood Coal and Iron Co.* (1877) 6 Ch.D. 627 at 637, to the effect that the Court must be satisfied that the resolution *"has been carried bona fide by persons who really have regard to the interests of the company"*.

As to the second requirement, I also accept the principle relied upon by Mr. Kessaram. This was that the explanatory statement must enable the creditors to understand how the Scheme would affect them commercially so they can exercise a reasonable judgment as to whether the proposal in their interests or not; and that if information which might have altered a reasonable creditor's vote is omitted, the Court should be reluctant to alter the Scheme: *Re Allied Domecq plc* [2001] 1 BCLC 134 at 143, 146.

As to third requirement, I think the best statement of the law is to be found in the passage relied upon by Mr. Hargun in a case also cited by Mr. Kessaram, which I have set out in full above. I agree with Lindley, L.J. that the Court's role with respect to the Court Meeting and the creditors is *"to see that they had been properly convened and had 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 judgement, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage": In re English, Scottish and Australian Chartered Bank*[1893]3 Ch 385 at 409. This passage, and the earlier reference to the need for objectors to point to a "blot" on the scheme, has been approved in modern times by both judges and textwriters: see, e.g. *Re Osiris Insurance Ltd* .[1989] 1 BCLC 182 at 189; Gabriel Moss Q.C. in Moss et al (eds.), *'Cross-Frontier Insolvency of Insurance Companies'* (Sweet & Maxwell: London, 2001) at page 16.

The evidence in the present case must be looked at illuminated by the light of the foregoing principles.

Constitution of classes

One of the main challenges facing promoters of schemes of arrangement is ensuring that the proposed scheme cannot be impugned on the grounds that the classes are improperly constituted. This is often problematic. In the present case, however, the attack is not launched on the decision to have one class of creditors-all unsecured creditors-as such. Rather, the suggestion is that certain unspecified creditors because of their affiliations with the Controlling

Shareholders (or, perhaps, because they are Controlling Shareholders) have conflicting interests which disqualifies them from voting in the same class as "independent" creditors.

This point was, on its face, plainly arguable. If it could be established that a significant number of creditors were not voting in the interests of creditors, but really to advance shareholder interests, this would constitute grounds for declining to sanction the Scheme. The press speculation that the controlling Shareholders may have been buying notes with a view to protecting their interests in the Scheme does provide a basis for genuine suspicions in this regard. And the bare denial of these allegations, combined with the Company's use of the cloak of confidentiality obligations as a basis for not disclosing the identities of the beneficial noteholders, was not the most impressive of responses. Was the application of the Objectors to order the Company to disclose the identity of the Supporting Noteholders, and adjourn the sanction hearing in the interim, not a reasonable one?

The real question is whether what amounted to no more than mere suspicions were sufficiently cogent to warrant refusing and/or delaying the sanction, and possibly derailing the Scheme. It was obvious that the Company's position was that no conflict of interest existed. One of the Controlling Shareholders filed an Affirmation to this effect. In addition to the direct evidence, three additional factors tipped the scales against refusing to grant the urgent sanction application based on the Objectors' speculative "facts".

Bearing in mind that the trouble was taken to engage eminent Leading Counsel to draft a clearly expensive Scheme Document, care was to taken to ensure that APP did not vote by way of acknowledgement of its conflict , and taking into account the fact that it was obvious to the Company that the creditor pool included large and sophisticated entities such as Fidelity and John Hancock capable of funding an investigation into any suspicious activities, I consider it improbable that any blatant manipulation of the Court Meeting vote took place. If the Supporting Noteholders do include in their number persons with less than obvious connections to the Controlling Shareholders, proving their lack of independence would have been a time-consuming and potentially inconclusive task. Moreover, the fact that the Company claimed to have entered into confidentiality agreements with certain Supporting Noteholders was not implausible, with Far Eastern investors notorious for their love of privacy.

Secondly, I found the contention that a majority of creditors must have voted to achieve non-creditor shareholder objectives lacking in substance, though superficially arguable. The main consequence of the Scheme is to cancel the existing debt together with the related APP guarantees, with the result of the new shares being issued to creditors leaving creditors with 99.1% of the new shareholding of the Company. The Controlling Shareholders do not, in my view, obviously benefit from the cancellation of the existing debt, in that in the restructured Company, on the face of it they have (even counting the shares of the BII Bank) a minority position. Their shareholding position is weakened by the Scheme. Creditors share a broadly common interest with the Controlling Shareholders in hoping that the operating subsidiaries prosper and produce dividends in which (as new post-Scheme shareholders) they will all share.

The Objectors were unable to put any flesh on the bares bones of their suggestion that creditors affiliated with the Controlling Shareholders would have had some ulterior motives for approving the Scheme, the release of the guarantees point aside (which I deal with separately below). Over two years after the Company entered restructuring negotiations with its creditors, there was no evidence that allegations of misappropriation of assets or breach of directors' duties were responsible for the Company's plight, and that substantial causes of action against directors were being improperly released by way of the Scheme. In short, what "interests adverse to those of the class whom they purport to represent" (to use the words of Lindley, L.J. in *In re Alabama* at page 239) were the allegedly affiliated noteholders promoting? The commercial interests of the creditors and the Controlling Shareholders were not shown to be adverse ones. Counsel for the Objectors suggested that such adverse interests were admitted by the Company in the following statement at page 87 of the Scheme Document: "*A group of holders of notes and our controlling shareholders will, directly or indirectly, have voting power over a substantial amount of the Company's shares upon the consummation of the Scheme, and those holders may have conflicts of interest with the Company and you.*" In my view, this passage in the Explanatory Statement is obviously part of

a standard disclosure included to enable the Company to obtain a US Securities Act exemption in relation to the issue of the new shares, and does not in any plausible manner support the notion that:(a) affiliated creditors must have supported the scheme, and (b) such creditors did so for motives adverse to the interests of creditors generally.

Thirdly, I placed reliance on the fact that the basis for the Objectors' suspicions surrounding market dealings in the notes was not some recently discovered "secret" fact, but newspaper articles appearing in prominent business publications just over three weeks before the Court Meeting took place, and just under two weeks after this Court authorized the summoning of the Court Meeting. These articles must be deemed to have come to the attention of some independent creditors before they nevertheless voted in favour of the Scheme. In these circumstances, it did not seem to me to be right for the Court to take steps which could jeopardize the entire Scheme based on suspicions which substantial institutional investors such as Credit Suisse and HSBC Bank were seemingly willing to ignore.

Adequacy of information given

The main complaint made by the Objectors was that, having regard to the need for the creditors to be able to vote in a sufficiently informed manner, the Scheme Document was deficient in failing to disclose the true extent to which the existing management would, post-Scheme, retain control.

As noted above, this was not a case where the existing directors were blamed by the creditors for the Company's plight, or not trusted to remain at the helm at what is essentially a holding company. In my view it is obvious that the Scheme was approved on the basis that the existing management would likely remain in place, subject to the right of the creditors as new shareholders holding 99.1% of the Company's restructured capital to elect new directors and officers. The largest single creditor entitled to nearly 25% of the new share capital would be, it was openly disclosed, be the affiliated BII Bank. Moreover, as is customary with schemes of arrangement to be voted on by a large creditor body, the promoters of the Scheme consulted with creditors on the broad concept of the proposals in advance to ensure the necessary support was there. Had the creditors not been able to stomach any possibility of the existing management retaining control, this would have been reflected in the Scheme Document. It is necessary to remember, that this was not a liquidating scheme where independent scheme administrators would manage the winding-up of the Company's affairs. The purpose of the Scheme was to return the company to solvency, and the position (share capital apart) before its financial troubles began.

I reject the suggestion that the Explanatory Statement is deficient in failing to adequately explain who the management would be post-Scheme. In fact, adequate disclosure was made that the majority of new shareholders, together with the Controlling Shareholders, would be able to control the restructured Company:

> " In addition, holders of a majority of the outstanding principal amount of the notes have informed the Company that they intend to vote for the Scheme and to agree among themselves policies relating to the management and business affairs of the APP China Group...These holders and our controlling shareholders will, therefore, have significant influence over APP China Group and may be able to direct the affairs and business of APP China Group, including the appointment of directors and the approval of most actions requiring the approval of shareholders." (page 87)

Far from suggesting some form of sinister collusion as Mr. Kessaram contended in oral argument, the above-cited passage merely states the obvious: that the majority of shareholders had indicated their support in principle for the Scheme, and will be able to control the Company as restructured after its implementation. Not only is the information supplied adequate and unremarkable; it also consistent with the creditors rights in a liquidation. The Scheme distribution formula provides for shares to be distributed pro rata based on the size of creditors' claims, with an Adjudicator appointed to adjudicate any disputes in a cost-effective manner. In a liquidation, the provisional liquidator usually consults with the largest creditors in advance of the first meeting of creditors, and the largest creditors are elected onto the committee of inspection to help control the direction of the liquidation. All

available assets are distributed on a pro rata basis to creditors. I see nothing in the complaint that the only accounts were unaudited ones.

Since full disclosure was made that the Controlling Shareholders would continue to wield some influence together with creditors under the Scheme, and in the absence of any credible evidence that a significant percentage of creditors have concealed affiliations with the Controlling Shareholders, the inevitable conclusion must be that the information given was adequate. In any event, it is not any deficiency in information supplied that is fatal to a scheme being approved. The basic requirement is, as the Objectors' own authorities make clear, that "*the person called to vote on it is to be able to exercise a reasonable judgment on whether the scheme is in his interest,* [and the explanatory materials must contain] *an explanation of how the scheme will affect him commercially*": *Re Allied Domecq plc* [2000] 1 BCLC 134 at 143.

In my view the Explanatory Statement in this case very clearly passed this information test. The Scheme was not a novel concept, but a well established debt for equity plan proposed to creditors of a hopelessly insolvent company as offering the meagre, yet best, chances of some possible recovery. The alternative options were argued to be non-options, and the Objectors were unable to credibly suggest that this judgment was wrong. Faced with such stark choices, and in light of the fact that the Company had erred on the side of caution in seeking to prepare a flawless proposal, it is not surprising that the Objectors found it hard to find a plausible omission which, if cured, might be said to have caused a reasonable creditor to take a different course.

Would a reasonable man approve the arrangement?

The Objectors complained that the Scheme would not be approved by a reasonable creditor for two main reasons. Firstly, as regards the APP guarantees, they were in effect being asked to "give up everything for nothing". Secondly, in terms of the arrangement generally, it was so pessimistic that any alternative (liquidation, or extending the debt) had to be more viable.

At first blush, it appeared to me to be entirely logical that if the principal debt was being discharged under the Scheme, any related guarantees should also fall away. The suggestion that the creditors were giving up everything for nothing seemed astonishing. The guarantees must have been given as part of the consideration offered by the Company in return for the money the noteholders invested in the Company on the terms set out in the notes. If the obligations of the Company were to be discharged in respect of the notes under the Scheme, on what basis could APP as guarantor thereafter be liable to the relevant creditors? Is the essence of a guarantee not that the guarantor's liability is triggered by default on the principal debtor's part? If the Scheme discharged the debt in full in consideration for the issue of shares, it seemed to me bizarre to contend that any rights against the guarantor were being given up "for nothing".

Mr. Hargun sought to justify the release of the APP guarantee obligations on less prosaic grounds. If the release was not given to APP, he argued, APP would have had a contingent claim against the Company which could found a winding-up petition, which it was in the interests of the Company to discharge. While this argument may perhaps be right as a matter of one of the more technical areas of the law, it is hardly one which the average businessman would readily understand. Perhaps the sophistry of Counsel is to blame for unsatisfactory explanation given at the Court Meeting when the reason for the release of the APP guarantee was said to be attributable to "cultural differences". However, it matters not, because in my view the release of the APP guarantee obligations in all the circumstances of the present Scheme are clearly justifiable as a matter of common business sense.

While the Objectors have asserted that under the (unspecified) governing law of the notes, the discharge of the principal debt would not automatically discharge the obligations of a guarantor, no expert evidence was adduced to this effect. The Court is in these circumstances entitled to presume that foreign law is the same as Bermudian law. The position under Bermuda law appears to be as follows:

> "If the creditor discharges the debtor by a binding legal agreement, the surety will also be discharged unless the original contract expressly preserves the

> surety's liability, or the creditor reserves his remedy against the surety at the time of discharging the debtor. So if a person enters into a deed of arrangement for the benefit of his creditors and they all agree to discharge the debtor from his liabilities, it is necessary to preserve the liabilities of any sureties or they will be discharged...The reason why the surety is discharged if the principal debtor is discharged is that the courts took the view that any other rule would lead to one or other of two strange results, having regard to the surety's normal right to an indemnity from the debtor. If the surety were compelled to meet the liability, any attempt by him to sue the debtor for an indemnity might be met by the plea that the debt had gone and the debtor was no longer liable...On the other hand, if the debtor remained liable to indemnify the surety despite his own discharge, the effect would be to render the discharge largely nugatory": Chitty on Contracts 27th ed., Vol. II, paragraph 42-044.

Thus, the practical rationale underlying the legal theory is that if a debtor wishes to be fully discharged from a debt, it must also be discharged from its obligation to indemnify any guarantor. Because in the event that a creditor sought to enforce its rights under a guarantee in respect of the discharged debt, the debtor would remain just as liable as against the guarantor as if the debt had not been discharged. It is true that the creditors here could have sought to negotiate a bargain in which they retained their rights against APP, but such a package would probably not have made commercial sense as the whole purpose of the Scheme was to cancel the existing debt and return the company to solvency. Retaining a contingent liability to APP would possibly have left the Company insolvent on a balance sheet basis, and would certainly have immediately exposed it, theoretically at least, to a winding-up petition filed by APP as a contingent creditor.

On these facts, it is impossible to conclude that no reasonable creditor would have approved this aspect of the Scheme package. In analyzing the reasonableness of the Scheme, the Court is "*not, however, considering whether there has been the loss of a merely nominal legal right, but whether what has been done is beneficial in a business sense*": *In re Alabama* , per Bowen, L.J. at page 244.

Even weaker is the complaint that the Scheme is so pessimistic that no reasonable independent creditor would have supported it. On the evidence, several substantial and independent institutional investors have supported the Scheme. But more fundamentally, it seems peculiar to attack the promoters of the Scheme for being overly frank. Had their motives been truly impure, the promoters of the Scheme would surely have exaggerated, not understated, the prospects of any recovery being made by creditors.

It is clear on the face of the Scheme Document that it has been prepared not only to meet the standards of section 99-100 of the Companies Act, but also with a view to meeting the evidently rigorous requirements for an exemption from registration under the United States Securities Act 1933 of the shares to be issued. Moreover, the central commercial thrust of the proposal is that the admittedly slender prospects of recovery at some uncertain future date under the Scheme is preferable to the certainly empty prospects offered by a liquidation. No weight could be attached to the Objectors' suggestion that a liquidation with independent liquidators must be preferable, because this suggestion was supported by not a jot of evidence. This Court has in the past not infrequently grappled with the respective merits of a traditional liquidation and a debtor-managed restructuring, but usually in the context of contested winding-up proceedings. The best evaluation of how seriously the Objectors regard the alternative option of a winding-up may well be that they themselves declined to pursue the option of enforcing their debts through winding-up proceedings.

The suggestion that some vague form of debt deferral option should have been pursued instead of the Scheme was equally lacking in substance. It must be remembered that the Company has been grappling with its crisis since March 2001. Moreover, the Scheme was triggered by a threat that the Company's only valuable assets, themselves insolvent, might be lost. The case for urgency was made at page 13 of the Scheme document in paragraph 1.5 of the Explanatory Statement, in the following passage to which the Company's Counsel referred:

> "It is, in the opinion of the Directors, imperative that the Scheme be approved and implemented as a matter of urgency as the Chinese bank creditors have taken the position that they are unwilling to accept the continuing uncertainty facing the PRC Operating Subsidiaries...The Chinese bank creditors have been informed of the steps being taken to file and implement the Scheme and have indicated a willingness to withhold action if the Scheme is to be implemented on an urgent basis. In the circumstances, the Company faces considerable time pressure to implement."

Again, on these facts, it is impossible to rationally conclude that that the Scheme was one that no reasonable creditor would have approved. Nor indeed was it possible for me to justify adjourning the sanction hearing to afford the Objectors an opportunity to make further inquiries with a view to substantiating their suspicions and concerns about possible affiliations between Supporting Noteholders and the Controlling Shareholders and / or APP. Should facts later emerge which bear out their concerns, I am satisfied that adequate alternative remedies will be available to them, including the right to seek to adduce fresh evidence on appeal, the usual minority shareholder rights, and the ability to seek regulatory action against the Company. An awareness of these options did influence my rejection of Mr. Kessaram's adjournment and discovery applications, but having considered the matter more fully, I am no less convinced that the underlying merits of the Scheme are sound and that the Company's management have at all material times acted in the best interests of the Company as a whole.

Style of Court Meeting Report

The Scheme was promoted in this case with an impressive degree of completeness, yet also in undoubted haste. The Meeting Report was signed on the day of the meeting, and essentially summarizes the results. The sanction Petition was filed the day after the Court Meeting, together with voluminous supporting materials.

While the format of the Meeting Report met the requirements of the statute and nothing turned on it in this case, the following suggestions are made as to the format in future cases where schemes are not unanimously approved.

Where creditors or members personally or through representatives attend a meeting to consider a scheme and questions are asked, it would assist the Court for minutes to accompany a more frugal report of the voting results. Such minutes should indicate how many voters attended in person or through representatives, what Company representatives attended and should record any material questions raised and answers given. In cases where the conduct of the meeting is an important consideration, such minutes would likely be of great assistance.

Conclusion

For the above reasons, I decided on November 7, 2003 to grant an Order sanctioning the Scheme under section 99 of the Companies Act 1981 and to award the costs attributable to the objections raised to the Company.

In The Supreme Court of Bermuda

Commercial Jurisdiction 2011 No. 428

In the Matter of Dominion Petroleum Ltd

And in the Matter of the Companies Act 1981, section 99

Dated the 3rd February 2012

Shareholders' Scheme of Arrangement – Application for sanction of the Court – Whether Board of Directors properly constituted – Single class of shareholders – Material non-disclosure

Mr C Luthi for the Company/Petitioner

Mr C Seidl, an Objecting Shareholder, in person

The following cases were referred to in the judgment:

Re APP China [2003] Bda LR 50
In re Industrial Equity (Pacific) Ltd [1991] 2 HKLR 614
Re BTR plc [2000] 1 BCLC 740
In re Wedgwood Coal and Iron Co (1877) 6 ChD 627
Re Alabama, New Orleans, Texas and Pacific Railway Co [1891] 1 Ch 213

JUDGMENT of KAWALEY, J

Introductory

1. The Company seeks the Court's sanction in respect of a scheme of arrangement approved by over 90% in both number and value of the Company's shareholders. The Scheme proposes the cancellation of the existing shares, which are listed on the Alternative Investment Market in London in return for shares in the purchasing company (Ophir). For each share in the Company, shareholders will receive 0.0244 Ophir shares. The Company will become a wholly owned subsidiary of Ophir, a publically-listed English company.

2. Mr Seidel is a former Deputy Chief Executive who was summarily dismissed by the Company in or about January 2007. His claim for wrongful dismissal filed in the High Court in London proceeded to trial but was settled on terms of a Compromise Agreement. His historical grievances against the Company include an apparently abortive attempt, in connection with his dismissal, to strip him of his 4% shareholding in the Company. I did not consider it necessary to familiarize myself with the full particulars of his wide-ranging objections to the Scheme, many of which were clearly either (a) irrelevant to the application before the Court, or (b) matters of business judgment which it was not properly open to this Court to determine in the context of the present application at the behest of a member who was also a disgruntled former member of the Company's management.

3. That the formalities for convening the Court Meeting had been satisfied and that the requisite majorities had been achieved was not in dispute. In his concise oral submissions, Mr Seidel addressed three points which did potentially impact on the Court's discretion to sanction the Scheme:

   i. the Board of Directors was said to have been admittedly improperly constituted since November 2008 and not capable of validly promoting the Scheme;

   ii. the constitution of a single class for voting purposes was said to be erroneous in law having regard to the distinctive interests of noteholders;

   iii. the Company had failed to disclose material facts in the Scheme documentation.

General principles applicable to the exercise of the Court's discretion to sanction a Scheme of Arrangement

4. Mr Luthi referred this court's own previous observations about the role of the Court when asked to sanction a scheme of arrangement under section 99 of the Act:

> "The modern practice of drafting scheme documents, convening meetings to consider them and obtaining the court's sanction where an arrangement is approved by the requisite statutory majorities, is based on these remarkably short statutory provisions. However, it is also informed by the more voluminous English and Commonwealth caselaw dating back to the 19th century based on a similar (if not identical) statutory regime. Such technically non-binding caselaw must be regarded as highly persuasive, not just because of the similarity of the statutory soil in which its roots are firmly planted. These principles have been consistently applied by this Court, without argument, in sanctioning a wide array of section 99 schemes, primarily in the context of insolvent companies, over the last 10 years.
>
> The whole object of section 99 schemes is to allow a significant majority of creditors or members of a company (or a particular class thereof) to vary not only their own pre-existing rights with a company, but the rights all similar positioned persons as well. The rationale underlying the scheme framework is that if an overwhelming majority of a class of persons dealing with a company form the view that a particular course is in the interests of them all, an obstinate minority should not be entitled to sink the ship on which the majority have decided to sail. The relevant creditors or members will have founded a relationship with the company with an essentially common goal in mind: to profit from those dealings. They are assumed to be the best judges of what their commercial best interests are; accordingly, assuming the scheme is not promoted for fraudulent purposes and those who vote are adequately informed and not materially misled, if the majority in number representing 75% in value support the scheme, it is not for the Court to "second-guess" them and tell them what their best interests are.
>
> The Court's role, then, on the hearing of a sanction petition (and indeed, in directing the summoning of the scheme meeting(s)), is more akin to that of a football referee, than to a football player. It is not for a referee in a match where a goal is validly scored to disallow the goal because, if he had had been the goalkeeper, he would have prevented a goal from being scored, or, because he supports the team against which the goal was scored. Equally, it is not for the Court to decline to sanction a scheme because it would have found it unpalatable as a scheme creditor and would have voted against. If the statutory requirements have been met, and the guiding principles set out in the caselaw have been adhered to, it is not open to the Court to decline to sanction the scheme on what may be called "merits" grounds.
>
> Indeed, the caselaw cited by both Counsel made it clear that the burden on an objector is quite a heavy one, once it is conceded (as it was here) that the Scheme was approved by the requisite statutory majorities, which, incidentally, are higher (as regards value) than the two-thirds majority in value required to bind dissenters in respect of a plan of reorganization under Chapter 11 of the United States Bankruptcy Code..."[1]

5. As far as the constitution of classes of shareholders is concerned, it was clearly settled law that the need for separate classes "*is to be determined by dissimilarity of* [share] *rights not dissimilarity of interests*": per Nazareth J (as he then was), *In re Industrial Equity (Pacific) Ltd* [1991] 2 HKLR 614 at 624; *Re BTR plc* [2000] 1 BCLC 740 at 747-748.

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[1] *Re APP China* [2003] Bda LR 50 at pages 8-9.

6. In addition to being satisfied as to the due convening of the meeting and constitution of the classes, Mr Luthi rightly submitted that the Court must also conclude that (a) the class was fairly represented at the meeting and acting bona fide in the interests of such class[2], and (b) that the compromise must also be one which "*can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it...*"[3]

7. As regards what information should be supplied to those voting on a scheme, I applied the principles stated by this Court in *Re APP China* [2003] Bda LR 50 at page 12: "The basic requirement is, as the Objectors' own authorities make clear, that 'the person called to vote on it is to be able to exercise a reasonable judgment on whether the scheme is in his interest, [and the explanatory materials must contain] an explanation of how the scheme will affect him commercially': *Re Allied Domecq plc* [2000] 1 BCLC 134 at 143." So where it is contended that a scheme ought not to be sanctioned because material facts were not disclosed, the non-disclosure complained of must be sufficiently serious to undermine the ability of those voting to make a reasonable decision on the merits of the scheme.

Constitution of the Board

8. The Board was admittedly improperly constituted for over two years by reason of non-compliance with certain residential requirements for directors under the Bye-Laws. The evidence shows beyond any serious argument that this defect was cured at a special general meeting held on July 25, 2011 (the SGM) when:

   i. the shareholders appointed two Bermuda resident directors and the SGM was adjourned for the Board to meet;

   ii. the Board met and ratified all actions taken during the period when it was improperly constituted;

   iii. the adjourned SGM resumed with the Board reporting to the members its ratification decision;

   iv. the members rejected a proposed amendment to the Bye-Laws to remove the residential requirements for the Board and a placement proposal, but implicitly approved the Board's ratification of all actions taken since November 28, 2008.

9. I was satisfied that the Board was at all material times competent to apply to this Court for leave to convene the Court Meeting at which the members approved the Scheme.

The constitution of classes

10. The Company conceded that those members who were also Noteholders both had the capacity to block the Scheme and had different commercial interests to other members who were not Noteholders. The special interests of directors were also disclosed in the Scheme documents. As a matter of law these differences of interest (as opposed to shareholder rights) did not warrant constituting two separate classes.

Was class fairly represented and was the Scheme one which a reasonable shareholder would approve?

11. Mr Seidel's alternative complaint may be formulated in legal terms as follows. Even if separate classes were not required, the benefits offered them under the Scheme meant that their support for the Scheme was not given *bona fide* based on their interests as shareholders. Under the Scheme, they were to receive 101% of their claims. This argument, on superficial analysis, was quite persuasive in purely commercial terms. As Mr. Seidel pointed out in oral argument, the mere fact that the Notes were due in 2012 did not exclude the possibility that an extension could have

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[2] *In re Wedgwood Coal and Iron Company* (1877) 6 ChD 627 at 637.
[3] Per Bowen LJ, *Re Alabama, New Orleans, Texas and Pacific Railway Co* [1891] 1 Ch 213, cited in *Re APP China* (*supra*) at page 4.

been negotiated by the Company, and the market value of the Notes might well have been less than 100%.

12. The Company refuted these complaints with two arguments that I found to be compelling. Most importantly, the Notes themselves in clause 7.2 ("*Mandatory prepayment-change of control*") guaranteed the Noteholders, *inter alia*, 101% of the principal and accrued interest. Without a full analysis of the Notes, it seemed to me on the balance of probabilities and based on the material before the Court that the Noteholders were not receiving in that capacity any incentive to vote for the Scheme because all the Scheme gave them, *qua* Noteholders, was their express contractual rights. The Notes were "off-market" instruments, so their value to third parties would not come into the Company's contractual dealings with the Noteholders.

13. The second point advanced by the Company was that the Scheme clearly attracted significant support from those members who were not Noteholders. Some 93% in number and 91% in value (of those voting) and 75 in number supported the Scheme. Noteholders represented perhaps 65% in value of those members voting, but a further roughly 26% in value (of whom it appeared that no more than roughly 3% could have been directors and management) also voted in favour. The Scheme was opposed by some 9% in value and six in number, with the five members other than Mr Seidel representing roughly 0.1% of those who voted at the Court Meeting and some 0.04% of the total shareholder value[4]. This was strong circumstantial evidence that the Scheme was one which a shareholder (lacking the fully disclosed incentives of which the Objector complained and having regard to his interests as such) would reasonably approve.

14. The rationale for the Scheme and commercial bargain placed before the members appeared to be quite straightforward. The Company which was still in the early exploratory stages required more capital. The Scheme gave members an opportunity to acquire potentially more valuable shares in a larger entity which would not only own the Company's assets but had similar and more extensive assets of its own.

Material non-disclosure

15. I found the complaints of material non-disclosure in relation to unsubstantiated allegations of corruption dating back to 2006 and the Company's UK tax status to be wholly lacking in substance. These complaints appeared to me to have been advanced more because of Mr Seidel's unique hostile relationship with the Company flowing from the termination of his employment than because of his common interest with other members of the Company and/or his desire to second guess the judgment of the management team from which he had been unceremoniously removed.

16. If the Court is required to analyse whether those who voted in favour of the Scheme were acting in accordance with their interests as members, it must be permissible in assessing opposition to a Scheme to evaluate whether such opposition is or appears to be motivated primarily by shareholder or other interests.

17. I was satisfied that the Company supplied its members with sufficient information to make a reasonable decision on whether the Scheme was consonant with their commercial interests.

Costs

18. I indicated that I would give my decision on costs together with my reasons for sanctioning the Scheme.

19. The Company undoubtedly incurred additional costs in preparing for the opposition mounted by Mr Seidel. Costs follow the event. In the exercise of my discretion I award the Company the costs of the sanction hearing, but make no order as to the costs of

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[4] According to the Petition, the issued share capital is approximately 1.6 billion shares. Approximately 760 million shares voted on the Scheme, or 47.5%. The proportionate stake of those who voted at the Court Meeting was accordingly just over twice their stake in the share capital as a whole.

preparing for the hearing. This award is perhaps overly generous to Mr Seidel, in light of the view that I have taken of the motivations behind his opposition. However, I have regard to the public interest element of the role performed by the Court in deciding whether or not to sanction a scheme of arrangement combined with the fact that the objector appeared in person.

Conclusion

20. For the above reasons on February 1, 2012 I decided to sanction the Scheme between the Company and its members.

APPENDIX C

PRACTICE STATEMENT LETTER

From: Archer Limited
4th Floor, Par-la-Ville Place
14 Par-la-Ville Road
Hamilton HM08
Bermuda

To: Each of the Lenders
(as defined in the Existing Facility Agreement)

Cc: Danske Bank A/S, in its capacity as the Agent (as defined in the Existing Facility Agreement)

THIS LETTER CONCERNS MATTERS WHICH MAY AFFECT YOUR LEGAL RIGHTS AND ENTITLEMENTS AND YOU MAY THEREFORE WISH TO TAKE APPROPRIATE LEGAL ADVICE ON ITS CONTENTS

28 April 2017

Dear Sir/Madam

Proposed scheme of arrangement in relation to Archer Limited (the "Scheme Company") under section 99 of the Companies Act 1981 of the laws of Bermuda (the "Scheme")

1. **PURPOSE OF THIS LETTER**

1.1 The Scheme Company and certain of its subsidiaries entered into a USD 625 million multicurrency term and revolving facility agreement with, amongst others, the Lenders which was dated 11 November 2010 as amended and restated on various dates and most recently on 22 December 2015 (the **"Existing Facility Agreement"**).

1.2 The Scheme Company is proposing a scheme of arrangement under section 99 of the Companies Act 1981 of the laws of Bermuda. The Scheme Company is writing to you in your capacity as Lenders under the Existing Facility Agreement.

1.3 In accordance with the guidelines of the Supreme Court of Bermuda, Commercial Division, (the **"Court"**) in its circular issued on 8 October 2007 (the **"Practice Statement"**), the purpose of this letter is to inform you of:

(a) the fact that the Scheme is being promoted;

(b) the purpose which the Scheme is designed to achieve; and

(c) the meeting of creditors which the Scheme Company considers will be required and the class composition of that meeting (the **"Scheme Meeting"**).

1.4 If you have assigned, sold or otherwise transferred all or part of your interests in the Existing Facility Agreement or you intend to do so, you are requested to forward a copy of this letter to the person or persons to whom you intend to or have assigned, sold or otherwise transferred such interests.

1.5 Capitalised terms used but not defined in this letter shall have the meaning given to them in the Existing Facility Agreement.

2. THE COURT HEARING

2.1 The Scheme Company will apply to the Court commencing the application for permission to convene the Scheme Meeting (and direction for a further hearing for the sanction of the Scheme if it is approved by the Scheme Creditors) and file at Court the supporting witness statement made by a director of the Scheme Company, including statutory information about the Scheme Company, the wider restructuring and the terms and conditions of the Scheme and exhibiting the draft Scheme.

2.2 The date and time of the first hearing of the Court for permission to convene the Scheme Meeting (the **"Convening Hearing"**) will be confirmed by announcement by the Agent via Debtdomain once it is known.

3. BACKGROUND TO THE SCHEME

The Scheme Company

3.1 The Scheme Company is an exempted limited company which was incorporated in Bermuda on 31 August 2007 and conducted operations as Seawell Ltd until 16 May 2011 when shareholders approved a resolution to change the name to Archer Limited. The Scheme Company is listed on the Oslo Børs.

3.2 The Scheme Company and its subsidiaries (the **"Group"**) operate a global oilfield services business helping customers produce more oil and gas. The Group provides a broad range of services for the oil and gas industry with an aim to help its customers by delivering better wells to maximise production of hydrocarbons from their reservoirs.

3.3 The oilfield services industry is currently in a downward cycle which creates a challenging environment for the Group. One of the key drivers behind this downward cycle has been the fall in oil prices which happened in the second half of 2014. These difficult trading conditions across the industry have been reflected in the Group's falling revenues and net losses in successive financial years. The Scheme Company anticipates that, as a result of these financial difficulties, it will breach the financial covenants under the Existing Facility Agreement unless the Lenders agree to waive these requirements. It is unrealistic to expect that the Lenders will continue to provide waivers indefinitely.

3.4 In order to find a long term solution to these issues the Scheme Company has proposed a restructuring of the Group's financing arrangements as described at paragraph 3.9 of this letter (the **"Restructuring"**) of which the Scheme forms an integral part.

Background to the Scheme and Lender support

3.5 In this context, the Scheme Company has been in discussions with its shareholders and financial creditors since July 2016 to agree certain amendments of the Group's financing arrangements.

3.6 Following an extensive period of engagement and negotiation with its financial creditors, the Scheme Company agreed a term sheet with a majority of the Lenders and the Overdraft Facility Lenders on 28 February 2017.

3.7 Subsequently on 28 April 2017, 5 of the 6 Lenders representing 94.275% by value of the Lenders, each of the Overdraft Facility Lenders, each of the Hedging Banks, (together the **"Consenting Lenders"**), the Agent and the Scheme Company entered into a lock-up agreement pursuant to which the Consenting Lenders have agreed, among other things, to attend the Scheme Meetings in person, or by proxy, and to vote in favour of the Scheme and to take all other reasonable actions to support, facilitate, implement, consummate or otherwise give effect to the Scheme.

3.8 All Consenting Lenders that consent to the Restructuring on these terms on or before 5 May 2017 will be entitled to a consent fee of 0.50% of the amounts outstanding under the Existing Facility Agreement, the Danske Bank Overdraft Facility Agreement and the DNB Overdraft Facility Agreement (as defined below) (as applicable) immediately prior to the Restructuring, payable on the date falling 30 days after the Amendment and Restatement Agreement (as defined below) becomes effective subject to satisfaction of certain conditions that are described in the lock-up agreement.

Overview of the Restructuring

3.9 The key terms of the Restructuring are:

(a) certain amendments to the Existing Facility Agreement described at paragraph 3.12 below which will be effected by way of an amendment and restatement agreement (the **"Amendment and Restatement Agreement"**) and certain ancillary documents referenced therein, drafts of which have been sent to each of the Lenders separately;

(b) cancellation of the overdraft facility which was made available under the group cash management agreement dated 31 March 2009 (as subsequently amended) between Archer Limited, Archer Norge AS and Danske Bank, Norwegian Branch (under its former name Fokus Bank) (the **"Danske Bank Overdraft Facility Agreement"**);

(c) cancellation of the overdraft facility granted under the overdraft facility agreement originally dated 5 September 2011 (as subsequently amended) between Archer Management (US) LLC and DNB Bank ASA (the **"DNB Overdraft Facility Agreement"**); and

(d) cancellation of the unsecured uncommitted guarantee facility agreement dated 18 August 2014 between Archer Norge AS and DNB Bank ASA.

3.10 Based on its discussions with creditors the Scheme Company anticipates that it may not be possible to obtain the consent of all of the Lenders to the proposed amendments to the Existing Facility Agreement and as such the Scheme will be required to implement this aspect of the Restructuring.

3.11 In parallel, the Group is negotiating a separate restructuring of its facility agreement dated 6 December 2013 (as subsequently amended) between, amongst others, Archer Topaz Limited and BNP Paribas Fortis SA/NV (the **"Archer Topaz Facility"**). This is not a condition of the Restructuring.

Outline of the amendments to the Existing Facility Agreement

3.12 A core aspect of the Restructuring will be the amendment and restatement of the rights and obligations of the Lenders under the Existing Facility Agreement on the terms and in the form appended to the Amendment and Restatement Agreement (the **"Amended Facility Agreement"**). The key amendments are as follows:

(a) *Archer Limited as sole borrower:* The Scheme Company will be the sole borrower under the Existing Facility Agreement, provided that additional borrowers may be added in accordance with the Amended Facility Agreement.

(b) *Increase of the Total Commitments from USD 625 million to USD 654,710,000 and a re-tranching into three facilities:* The Total Commitments under the Existing Facility Agreement shall be increased from a total of USD 625 million to a total of USD 654,710,000. This will be divided between three tranches:

(i) a new super senior tranche revolving facility of USD 24,070,220.70 ("**Facility A**") in which each of the Lenders may elect to participate;

(ii) the existing revolving facility of USD 245,516,250 ("**Facility B**"); and

(iii) a term loan of USD 385,123,529.30 (the "**Term Facility**").

(c) *Inclusion of a guarantee facility of USD 10 million:* Provisions will be added into the Existing Facility Agreement which set out the terms of a new super senior guarantee facility in which each of the Lenders may elect to participate. This will replace the existing guarantee facility provided by DNB Bank ASA.

(d) *Extraordinary repayment of USD 1.3 million:* An extraordinary repayment in the amount of approximately USD 1.3 million (depending on exchange rates) will be made by the Scheme Company with a corresponding reduction of the Total Commitments under the Amended Facility Agreement upon the amendments to the Archer Topaz Facility becoming effective.

(e) *Maturity to be extended to 30 September 2020:* The final maturity date on which the borrowers must repay all amounts outstanding under the Finance Documents will be extended from 11 May 2018 to 30 September 2020.

(f) *Introduction of a PIK margin:* In addition to the current interest rate, a PIK margin of 1% per annum will accrue on each Loan during the period from 1 January 2019 to 30 September 2020 if certain debt-to-EBITDA thresholds have been exceeded. The PIK margin will be added to the principal amount of the Loan and become cash payable on the final maturity date.

(g) *A cash sweep mechanism:* There will be a new semi-annual cash sweep which will require the Scheme Company to procure that an amount equal to 90% of Available Liquidity (as defined in the Amended Facility Agreement) will be applied in prepayment of the loans outstanding under the Amended Facility Agreement and the amended and restated Archer Topaz Facility and cancellation of Commitments (as defined in the Amended Facility Agreement). The relevant part of the Available Liquidity to be applied towards prepayment under this provision of the Amended Facility Agreement, shall be applied pro rata between (i) Facility A and (ii) Facility B and the Term Facility (but in respect of (ii) to be applied in prepayment of the Term Facility ahead of Facility B until the Term Facility has been repaid in full).

(h) *Changes to the quarterly reduction of the Total Commitments:* The Existing Facility Agreement provides that the Total Commitments will be reduced by USD 25 million quarterly starting on 11 May 2017. These reductions will be suspended. Instead the Total Commitments will be reduced by a lesser quarterly amount of USD 10 million starting on the later date of 30 March 2020.

(i) *Financial covenants to be amended:* The financial covenants in the Existing Facility Agreement will be amended as follows:

(i) the leverage ratio covenant, equity ratio covenant and total equity covenant in the Existing Facility Agreement will be removed;

(ii) to include a requirement on the Scheme Company to ensure that the Group maintains free liquidity, being, in broad terms, cash, cash equivalents and committed but undrawn facilities, of at least USD 30 million;

(iii) to include a requirement on the Scheme Company to ensure that the Group maintains a minimum 12 months rolling nominal EBITDA of USD 45 million during 2017, USD 55 million during 2018, USD 65 million during 2019 and USD 85 million during 2020;

(iv) to include a requirement that 12 months rolling reported EBITDA shall be at all times positive (above zero); and

(v) to include a requirement on the Scheme Company to ensure that the Group's capital expenditure does not exceed USD 25 million during 2017 and USD 40 million for each financial year thereafter with an adjustment for additional equity funds raised.

(j) *Change of control to be amended:* The change of control clause will be amended, including a reduction of the thresholds to reflect the dilution of share capital which results from the issuance of new shares by the Scheme Company by way of private placement and a subsequent public offering.

(k) *Undertaking in relation to restructuring of the Archer Topaz Facility:* The Scheme Company will undertake to ensure the amendment of the Archer Topaz Facility so that it is consistent with the terms set out in the Amendment and Restatement Agreement.

(l) *Additional security (Archer Emerald):* Archer Emerald (Bermuda) Limited owns the modular rig known as the "Archer Emerald". The Scheme Company will procure that security is granted over the shares of Archer Emerald (Bermuda) Limited and certain of its assets in favour of a joint security agent to be held on behalf of the Scheme Creditors and BNP Paribas Fortis SA/NV in its capacity as lender under the Archer Topaz Facility. This security must be granted by the later of (i) the date the refinancing of the Archer Topaz Facility is concluded and (ii) 15 May 2017. The proceeds received or recovered by the joint security agent shall be split between the Scheme Creditors and BNP Paribas Fortis SA/NV in the order of priority set out in the Term Sheet. This arrangement will necessitate an intercreditor agreement between the Scheme Company, the Agent, BNP Paribas Fortis SA/NV and the joint security agent to set out the terms on which security is shared.

(m) *Removal of Seadrill:* As Seadrill Limited is no longer a guarantor of the Existing Facility Agreement, Seadrill will be deleted from all of the Events of Default in which it is currently referred to in the Existing Facility Agreement.

3.13 The Agent and the Lenders have been involved in the negotiation of the Amendment and Restatement Agreement and the summary of terms above is not intended to substitute the need to review the detail of the drafts.

Outline of the Scheme

3.14 The Scheme will:

(a) authorise and instruct the Scheme Company to execute on behalf of Lenders the Amendment and Restatement Agreement and certain ancillary documents to which they are party (the **"Scheme Restructuring Documents"**);

(b) authorise and instruct the Scheme Company to execute on behalf of Lenders any other documents that may be necessary or desirable to release and/or otherwise give effect to the Restructuring;

(c) authorise and instruct the Agent to take all steps necessary or desirable to give effect to the Scheme and to allow for the Amendment and Restatement Agreement to become effective; and

(d) ratify everything done by the Scheme Company and the Agent pursuant to the authority conferred by the Scheme.

3.15 Danske Bank A/S in its capacity as the Agent, Danske Bank, Norwegian Branch, in its capacity as Overdraft Lender and DNB Bank ASA in its capacity as Overdraft Facility Lender and Issuing Bank are required to perform certain actions and enter into certain documents in accordance with the terms of the Scheme. Accordingly they will enter into undertakings prior to the sanction hearing in favour of the Scheme Company to appear by counsel on the petition to sanction the Scheme and to undertake to the Court to, among other matters, perform those obligations which they are required to perform in accordance with the terms of the Scheme and, where necessary, be bound by the terms of the Scheme as sanctioned by the Court at the sanction hearing.

3.16 The Scheme will become effective and legally binding on the Obligors and the Scheme Creditors on the date on which an office copy of the order of the Court sanctioning the Scheme is delivered to the Registrar of Companies in Bermuda. The Amendment and Restatement Agreement will become effective as soon as possible thereafter once the conditions precedent set out therein have been satisfied.

4. OBJECTIVE OF THE SCHEME

4.1 The primary objectives of the Restructuring and the Scheme are to:

(a) ensure that the Scheme Company can continue to operate on a going concern basis which is in the best interests of all stakeholders, including the Lenders;

(b) ensure a stable and sustainable Group debt structure, so that the Group will possess a strengthened balance sheet and more appropriate debt service and maturity profile in light of the current market environment, including the prevailing depressed oil price;

(c) improve the ongoing liquidity position of the Group, putting it in a stronger position to withstand a period of low oil prices;

(d) avoid the adverse consequences of the Group, or parts of the Group, going into a formal insolvency process, and in particular, the value destruction which would result from any such insolvency process, noting that the recoveries of the Lenders, amongst others, in such a scenario would be significantly less than if the Restructuring is successfully completed; and

(e) avoid the adverse consequences of an accelerated marketing and forced sale process of the Group, or parts of the Group, which may prove value destructive to the operating business with any sale being at a lower value than would otherwise be obtainable for the Scheme Company as a going concern, following completion of which the directors expect the Scheme Company would be placed into insolvent liquidation. It should be noted that the recoveries of the Lenders, amongst others, in such a scenario would be unpredictable and may be significantly less than if the Restructuring is successfully completed.

4.2 The directors of the Scheme Company anticipate that the amendments contemplated by the Restructuring will, if approved and if the Scheme is sanctioned, enable the Scheme Company and the Group to continue to trade.

4.3 If the Restructuring is not completed and the directors of the Scheme Company are not able to satisfy themselves that an alternative financial restructuring would be successful, the directors may ultimately have little alternative but to petition for some form of insolvency proceeding in order to protect the Group's assets for the benefit of all creditors, including the Lenders.

5. SCHEME MEETING AND PROPOSED VOTING CLASS

Who is a Scheme Creditor?

5.1 Under the provisions of section 99(1) of the Companies Act 1981 of Bermuda, a scheme of arrangement may be made between a company and its creditors or a class of its creditors.

5.2 The Scheme is being proposed by the Scheme Company in respect of the Lenders under the Existing Facility Agreement (each, a **"Scheme Creditor"**). The Scheme only applies to the Lenders in that capacity and not any other capacity in which they are party to the Existing Facility Agreement.

5.3 If the Scheme is approved by the requisite majorities of Scheme Creditors at the Scheme Meeting and sanctioned by the Court then, upon filing the Scheme with the registrar of companies in Bermuda, all of the Scheme Creditors will be bound by the terms of the Scheme along with the Scheme Company and certain third parties who have separately undertaken to comply with the terms of the Scheme.

Proposed class composition for the Scheme Meeting

5.4 Under the provisions of section 99 of the Companies Act 1981 of Bermuda, a scheme of arrangement must be agreed by a majority in number representing at least three fourths in value of each class of scheme creditors present and voting either in person or by proxy at the relevant class meeting ordered to be summoned by the Court. A scheme must then be sanctioned by the Court at a subsequent court hearing (the **"Sanction Hearing"**) and a copy of the order delivered to the Bermuda registrar of companies before it can become effective in accordance with its terms.

5.5 If the rights of creditors are so different or would be affected so differently by the Scheme as to make it impossible for them to consult together with a view to their common interest, they must be divided into separate classes and a separate meeting must be held for each class of creditor.

5.6 Under the terms of the Practice Statement, it is the responsibility of the Scheme Company to formulate the class or classes of creditors for the purpose of convening meetings to consider and, if thought fit, approve the Scheme.

5.7 The Scheme Company has considered the rights that the Lenders have presently against the Scheme Company and the rights that those Lenders would have against the Scheme Company following implementation of the Scheme. Having received advice from its legal counsel in Bermuda and David Chivers QC, the Scheme Company has concluded that it is appropriate to treat the Scheme Creditors as forming a single class of creditors to vote at the Scheme Meeting.

5.8 The Scheme Company considers that the rights of the Scheme Creditors are sufficiently similar so as to make it possible for them to consult together with a view to a common interest because:

(a) as equal-ranking secured creditors under the Existing Facility Agreement, the Lenders have the same rights against the Obligors and, if such companies were to become subject to any insolvency proceedings, would receive the same level of recovery in proportion to their existing interests in the Existing Facility Agreement; and

(b) if the Scheme is implemented, the rights of the Lenders will be the same and will be affected by the arrangement in the same way by the changes implemented by the Amendment and Restatement Agreement.

5.9 Accordingly, it is proposed that a single meeting of the Scheme Creditors is convened for the purposes of voting on the Scheme.

Proposed calculations of votes

5.10 For the purpose of voting on the Scheme, from both a value and numerosity perspective, each Lender is a separate creditor for the purpose of voting at the Scheme Meeting and the votes cast by them (in person or by proxy) will be taken into account both for value and numerosity purposes in relation to the Scheme.

6. SCHEME CREDITOR ISSUES

6.1 At the Convening Hearing, the Scheme Company will draw any issue raised by Scheme Creditors to the Court's attention. Scheme Creditors have the right to attend in person or through counsel and make representations at the Convening Hearing.

6.2 This letter is intended to provide Scheme Creditors with sufficient information regarding the Scheme and the Restructuring, so that, should they wish to raise any issues that relate to the jurisdiction of the Court to sanction the Scheme, or argue that the proposals outlined above for convening the Scheme Meeting are inappropriate, or to raise any other issue in relation to the constitution of the Scheme Meeting or which might otherwise affect the conduct of such Scheme Meetings, they may attend and be represented before the Court at the Convening Hearing. If any Scheme Creditors wish to raise any such issues, they should do so prior to or at the Convening Hearing.

6.3 The Scheme Creditors should be aware that the Court has indicated that issues which may arise as to the constitution of meetings of creditors or which otherwise affect the conduct of those meetings or which affect the jurisdiction of the Court to sanction a scheme of arrangement should be raised at the first court hearing seeking leave to convene the scheme meeting. If creditors do not do so, it will still be possible for creditors to raise objections on the question of classes (as well as other matters) at the Sanction Hearing. However, in that event, the Court is likely to expect such Scheme Creditors to show good reason why they did not object to the constitution of the class of Scheme Creditors or the issues that otherwise affect the conduct of the scheme meeting or the jurisdiction of the Court to sanction the Scheme at an earlier stage. For that reason it is recommended that any issues are raised at as early a stage as possible.

7. CONTACT DETAILS AND FURTHER INFORMATION

7.1 Following the Convening Hearing, provided the Court gives permission to convene the Scheme Meeting of Scheme Creditors to vote on the Scheme, the Scheme Company will notify you in accordance with the direction of the Court, of the time, date and venue of the Scheme Meeting, set out how you may vote at that meeting and provide further detail of the terms of the proposed Scheme.

7.2 In particular, you should expect to receive the following documents:

(a) a notice convening the Scheme Meeting;

(b) an explanatory statement relating to the Scheme;

(c) the Scheme, which will be included in the explanatory statement; and

(d) a form of proxy and election that you need to complete in order to vote at or to appoint a proxy to attend the Scheme Meeting and/or to make elections in relation to participation in certain new facilities,

(together, the **"Scheme Documents"**).

7.3 The Scheme Documents and other information and documentation (including this letter) relating to the Scheme will be made available to the Lenders by the Agent via Debtdomain.

8. **CLOSING COMMENT**

For the reasons set out in this letter the Scheme is an integral part of the Restructuring, which the directors of the Scheme Company believe is fundamental for the continued operation of the Group's business. All of the Lenders are encouraged to support and vote in favour of the Scheme.

Yours faithfully

ARCHER LIMITED