Neutral Citation Number: [2023] EWHC 1931 (Ch)

Case No: FL-2019-000015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST

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

Date: 28/07/2023

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

GALAPAGOS BIDCO S.A.R.L	**Claimant**
- and -	
(1) DR FRANK KEBEKUS **(2) GLAS TRUST CORPORATION LIMITED** **(3) GLOBAL LOAN AGENCY SERVICES LIMITED** **(4) GLOBAL LOAN AGENCY SERVICES LIMITED** **(5) GLAS TRUSTEES LIMITED** **(6) DEUTSCHE TRUSTEES LIMITED** **(7) SIGNAL CREDIT OPPORTUNITIES (LUX) INVESTCO II S.A.R.L** **(8) GALAPAGOS S.A**	**Defendants**

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DAVID ALLISON KC and **RYAN PERKINS** (instructed by **Kirkland & Ellis International LLP**) for the **Claimant**
BEN SHAW KC (instructed by **Keidan Harrison LLP**) for the **First Defendant**
TOM SMITH KC and **HENRY PHILLIPS** (instructed by **Sidley Austin LLP)** for the **Second to Fifth Defendants**
ALAIN CHOO CHOY KC and **BEN GRIFFITHS** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Seventh Defendant**

Hearing dates: 9, 10, 13, 14, 16, 21 and 22 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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THE HONOURABLE MR JUSTICE TROWER

Mr Justice Trower :

Introduction

1. The claimant, Galapagos Bidco S.à r.l. ("Bidco"), and the seventh defendant, Signal Credit Opportunities (Lux) Investco II S.à r.l. ("Signal"), both seek declaratory relief in relation to the effectiveness of the restructuring of the financial indebtedness of the group of companies of which Bidco forms part (the "Group"). Bidco seeks the court's confirmation that the restructuring was effective, while Signal, a junior creditor and a minority holder of certain high yield notes, contends (for various reasons) that it was not. The purpose of these proceedings is to resolve the uncertainties which have arisen.

2. Bidco is incorporated in Luxembourg. It is an intermediate holding company in the Group, the business of which was divided into two operational segments: Kelvion, which specialised in the supply of heat exchangers and Enexio, which specialised in the supply of cooling systems. Bidco has several direct and indirect subsidiaries incorporated in a number of jurisdictions.

3. At all material times prior to 9 October 2019, Bidco was the wholly owned subsidiary of the eighth defendant, Galapagos S.A. ("GSA"), itself a wholly owned subsidiary of Galapagos Holdings S.A. ("GHSA"). On that date, the entirety of GSA's shareholding in Bidco was sold to Mangrove LuxCo IV S.à r.l. ("Mangrove IV"). Both GSA and GHSA are incorporated in Luxembourg. GHSA is ultimately owned by a consortium of private equity funds managed by Triton Investment Management Limited, along with certain minority co-investors. Mangrove IV was the wholly owned subsidiary of Mangrove Luxco III S.à r.l. ("Mangrove III") which, in turn, was ultimately owned by a Triton managed fund, Triton Fund IV ("Triton").

4. Prior to October 2019, the Group was financed as follows (the "Original Debt"):

    i) A €99.8 million multi-currency English law revolving credit facility (the "SSRF") comprised of €75 million under a super senior revolving facility agreement, and €24.8 million under an additional revolving facility under which GSA, Bidco and Kelvion Finance GmbH ("Kelvion Finance") were borrowers and guarantors.

    ii) A €375 million English law super senior guarantee facility (the "SSGF") under which GSA, Bidco and Kelvion Finance were borrowers and guarantors. Under the SSGF, the borrowers were entitled to request the lenders to issue a letter of credit ("LoC") in favour of third party beneficiaries in respect of which the borrower then indemnified the lenders in the event of any claim.

    iii) Two series of senior secured noted ("SSNs") issued by GSA with an aggregate face value of €525 million due in 2021. The SSNs were issued under a New York law indenture dated 30 May 2014 guaranteed by (amongst others) Bidco and Kelvion Finance.

    iv) A series of high-yield notes ("HYNs") issued by GHSA with a face value of €250 million due 2022. The HYNs were issued under a New York law indenture

dated 30 May 2014, guaranteed by (amongst others) GSA, Bidco and several subsidiaries and/or affiliates of Bidco including Kelvion Finance.

5. The rights of creditors (the "Primary Creditors") in respect of the Original Debt were protected by certain security (the "Transaction Security"). This included pledges granted by GSA over the share capital of Bidco, certain preferred equity certificates issued by Bidco and the intercompany receivables owing to GSA by Bidco and Kelvion Finance (the "Key Secured Assets"). The holders of the HYNs were only entitled to benefit from such parts of the Transaction Security as constituted shares and other equity or debt instruments issued by an entity to its shareholders, including the security over the Key Secured Assets. They also benefited from a pledge granted by GHSA over the shares in GSA (the "HYN Pledge"), which did not form part of the Transaction Security.

6. The rights of the Primary Creditors in respect of the Original Debt were governed by an English law intercreditor agreement dated 30 May 2014 (the "ICA") to which GSA and Bidco (amongst others) were also party. Under the terms of the ICA, GSA was called the Parent and Bidco was called the Company, and they both qualified as a "Debtor" (as defined). The ICA made provision for the ranking of the rights of the Primary Creditors inter se and the terms on which those rights could be enforced and discharged. The Key Secured Assets were ultimately vested in the second defendant, GLAS Trust Corporation Limited (the "Security Agent") as security agent. Its role under the ICA was to hold, administer and (if appropriate) release the Key Secured Assets on behalf of the Primary Creditors in accordance with the terms of the ICA.

7. The first defendant, Dr Frank Kebekus ("Dr Kebekus"), is the German insolvency administrator of GSA. He was appointed by order of the Düsseldorf Insolvency Court on or about 9 September 2019. That appointment, and his authority to act on behalf of GSA in these proceedings, has not been recognised in England. On 30 June 2022, Bacon J determined that the German insolvency proceedings in relation to GSA did not constitute main proceedings for the purposes of Article 3 of the Recast Insolvency Regulation (Regulation (EU) 2015/848 of 20 May 2016) and made a winding up order against GSA (*Re Galapagos S.A., Barings (UK) Limited v Galapagos S.A.* [2022] BCC 1113). An appeal against that order was dismissed by consent on 16 January 2023. GSA is now represented in England by the official receiver, who did not contest the claim. Neither she nor GSA was represented at the trial.

8. Although Bacon J had concerns about Dr Kebekus' neutrality in the winding up proceedings, she recorded that he was neutral on the central issues raised in these proceedings (i.e., the questions of construction of the ICA), a position which he maintained at the trial. However, he opposes the grant of any declaratory relief and the making of any findings of fact on issues which are before the German courts in certain insolvency claw back proceedings he commenced in Germany in September 2020 against Mangrove IV and the Security Agent (the "Claw Back Action"). Since the conclusion of the trial in these proceedings the Claw Back Action has been dismissed by the Regional Court of Düsseldorf, although Dr Kebekus is exercising his right to appeal; since the trial, I have been supplied with translations of the judgment and the notice of appeal.

9. The Security Agent and the third to fifth defendants (the "GLAS Defendants") are all affiliated entities within the GLAS group, the members of which primarily operate a

debt administration business. Each of the GLAS Defendants was appointed as agent or trustee pursuant to a global resignation and appointment deed dated 12 July 2019:

i) the Security Agent was appointed the security agent under the ICA;

ii) the Third Defendant, Global Loan Agency Services Limited (the "Revolving Agent"), was appointed the agent for the lenders under the SSRF;

iii) the Fourth Defendant, Global Loan Agency Services Limited (the "Guarantee Agent"), was appointed the agent for the lenders under the SSGF; and

iv) the Fifth Defendant, GLAS Trustees Limited (the "SSN Trustee"), was appointed the agent for the noteholders under the SSNs.

10. Prior to the execution of this appointment deed, Unicredit Bank AG (London Branch) had been the Security Agent, the Revolving Agent and the Guarantee Agent, and Deutsche Trustee Company Limited had been the SSN Trustee. The GLAS Defendants supported Bidco's application for relief and opposed that for which Signal contended.

11. The sixth defendant, Deutsche Trustees Limited (the "HYN Trustee"), was, as it remains, the agent for the holders of the HYNs. It did not play any part in these proceedings, other than to confirm that it was content to be bound by the final decision of the court. Bidco relied on the fact that the HYN Trustee, as Signal's creditor representative, did not play a role in supporting Signal's case that the steps taken by the Security Agent were not in accordance with the terms of the ICA.

12. The seventh defendant, Signal, is a hedge fund specialising in the acquisition of distressed debt and is one of the holders of HYNs. It holds or purports to hold a beneficial or economic interest in HYNs with a face value of approximately €73.3 million of which €1 million is in the form of a definitive note. It opposed the declaratory relief sought by Bidco and counterclaimed seeking alternative declarations that the steps taken by the Security Agent were not in accordance with the terms of the ICA, and that the liabilities and security in respect of the HYNs were not validly released. Its defence and counterclaim in these proceedings is one of a series of legal challenges to the restructuring of the Group it has made in a number of jurisdictions, including Germany and the USA.

13. The events out of which these proceedings arise involved what is described in the ICA as a Distressed Disposal, pursuant to which the Security Agent sold or disposed of the entire share capital of Bidco (and certain other assets) to Mangrove IV for €424,631,585. It then applied the proceeds of that disposal towards repayment of the Group's liabilities to the Primary Creditors in the order of priority mandated by the distribution waterfall in the ICA and released those liabilities (and associated security) by exercising its powers under clause 17 of the ICA, thereby enabling Mangrove IV to acquire the Group's business debt-free.

14. The central question is whether the releases said to have been granted pursuant to clause 17 of the ICA were effective to achieve the result for which Bidco and the GLAS Defendants contend. For a number of interlinked reasons, Signal asserts that the steps taken by the GLAS Defendants and Bidco did not achieve that result, essentially because some of the applicable provisions of clause 17 of the ICA permitting their

claims under the HYNs to be released by the Security Agent without their specific consent were not complied with. Bidco contended either that those provisions were complied with, or that it was unnecessary to do so on the grounds that the holder of the HYNs for whose benefit they were included in the ICA were out of the money and had no continuing economic interest in the Group.

The terms of the ICA

15. Although the principal issues arise on the true construction of clause 17 of the ICA, it is convenient to describe the ICA rather more generally at this stage. It is governed by English law (clause 31) and, by clause 32.1, the courts of England have exclusive jurisdiction over any dispute arising out of or in connection with it.

16. The ICA has primacy over any other Debt Documents (clause 29.12), which in summary comprise all documents governing the Primary Creditors' claims against members of the Group in their capacity as such and the security for such claims over, amongst other things, the Key Secured Assets. There is a regime for creditors in respect of new facilities and new debt securities to accede to the ICA as a Credit Facility Lender, for each arranger to accede to the ICA as a Credit Facility Arranger and for the facility agent in respect of that credit facility to accede to the ICA as a relevant Creditor Representative. This requires (amongst other formalities) GSA to designate the relevant facility or debt issue as such: see clauses 23.12 and 23.13.

17. By clauses 2.1 and 2.2, the holders of the HYNs are subordinated in right and priority of payment to the other Primary Creditors. Those clauses place the holders of the HYNs at the lowest level of ranking, immediately above a return to the relevant debtor. This is reinforced by the fact that clause 6 precludes the holders of the HYNs from taking any steps towards enforcement before the more senior claims have been paid in full.

18. By clause 21.1(a) of the ICA, the Security Agent declares that it holds the Transaction Security, which includes the security over the Key Secured Assets, on trust for, amongst others, the Primary Creditors on the terms contained in the ICA. The duties of the Security Agent are solely "mechanical and administrative in nature" (clause 21.9) and there are a number of other clauses of the ICA which limit the circumstances in which its acts or omissions can be challenged, including ones which allow for an instructing group of creditors to direct how the Security Agent should exercise any right, power, authority or discretion vested in it.

19. In particular, clause 21.8(a)(i) places an obligation on the Security Agent to act in accordance with any instructions given by the "Instructing Group" (as defined). If such instructions are given, clause 21.13(a)(ii) allows the Security Agent to assume they are compliant with the terms of the ICA, and clause 21.8(a)(ii) prevents it from being held accountable for any consequences of their implementation. In all but an enforcement context, the Instructing Group is constituted by the Majority Super Senior Creditors (meaning 66.7% of the SSRF creditors and the SSGF creditors) and the Majority Pari Passu Creditors (meaning 50% of the holders of the SSNs).

20. Separate rules applied in the context of "Enforcement", which is defined in the ICA to include (a) the enforcement or disposal of any Transaction Security (including that over

the Key Secured Assets), (b) the requesting of a Distressed Disposal and (c) the release or disposal of claims or Transaction Security on a Distressed Disposal under clause 17. A Distressed Disposal is defined in the ICA to include:

> "a disposal of any Charged Property which is:
>
> (a) being effected at the request of the Instructing Group in circumstances where the Transaction Security has become enforceable";
>
> … or
>
> (c) being effected, after the occurrence of a Distress Event, by a Debtor to a person or persons which is, or are, not a member, or members, of the Group."

21. A Distress Event means the acceleration of payment obligations under the Debt Documents and the enforcement of any Transaction Security. For these purposes, the Group means GSA and its subsidiaries, but not any entity further up the corporate chain. Enforcement also includes the giving of instructions as to actions in relation to the Transaction Security and the taking of consequential actions following an Insolvency Event (as defined). In that context, the ICA does not require the Security Agent to take any action unless instructed to do so by the relevant Instructing Group. That must be done by way of "Enforcement Instructions" (clause 15.3(a)) and is governed by clause 15.2 of the ICA.

22. In summary, clause 15 provides that when either the Majority Super Senior Creditors or the Majority Pari Passu Creditors wishes to issue Enforcement Instructions, the relevant Creditor Representative (i.e., one of the agents referred to in the description of the GLAS Defendants above) is required to send a copy of proposed instructions to the Security Agent at least 10 business days before issue (clause 15.2(b)). Upon receiving the notice, the Security Agent is required to forward it to the other Creditor Representative for consideration. If the other Creditor Representative subsequently gives conflicting instructions, both Creditor Representatives are required to liaise with the Security Agent for a period of at least 30 days (unless a different timeframe is agreed), in an attempt to resolve the conflict (clause 15.2(b)). A failure to give instructions amounts to a conflicting instruction. Once that consultation has taken place (or, if the Representatives agree it is not necessary), the Security Agent is released from its obligation to consult. It is then free to act in accordance with the instructions previously received.

23. Enforcement instructions are required to be consistent with the Enforcement Principles contained in Schedule 5 of the ICA. To that end Schedule 5 paragraph 2 provides that "the primary and over-riding aim of any Enforcement is to achieve the Enforcement Objective". The Enforcement Objective is defined as:

> "maximising the recovery of the Secured Parties, to the extent consistent with (a) a prompt and expeditious Enforcement (to the extent reasonably possible); and (b) the rights and obligations of the Security Agent under the terms of this Agreement and under applicable law".

24. Enforcement Instructions may direct the Security Agent on the manner in which a Distressed Disposal of the Transaction Security is to be effected. The ICA contains

several provisions aimed at facilitating a Distressed Disposal, most of which are contained in clause 17. They go to the heart of the matters in dispute.

25. The starting point is clause 17.1, by which, in the event of a Distressed Disposal, the Security Agent is irrevocably authorised to release certain identified categories of liability (including the claims of the Primary Creditors in respect of the Original Debt) and the Transaction Security:

> "17.1 Subject to Clause 17.4 …, if a Distressed Disposal is being effected, the Security Agent is irrevocably authorised …:
>
> (a) … to release the Transaction Security or any other claim over the asset subject to the Distressed Disposal and execute and deliver or enter into any release of that Transaction Security or claim … in each case on behalf of the relevant Creditors and Debtors;
>
> (b) … if the asset subject to the Distressed Disposal consists of shares in the capital of a Debtor, to release:
>
> (i) that Debtor and any Subsidiary of that Debtor from all or any part of:
>
> (A) its Borrowing Liabilities;
>
> (B) its Guarantee Liabilities; and
>
> (C) its Other Liabilities;
>
> (ii) any Transaction Security granted by that Debtor or any Subsidiary of that Debtor over any of its assets …on behalf of the relevant Creditors and Debtors…"

26. The remainder of clause 17.1 (and particularly clauses 17.1(d) and 17.1(e)) contains detailed provisions which enable the Security Agent to dispose of liabilities (by which is meant the benefit of claims) owed under the Debt Documents by the Debtor whose shares are being sold as part of the Distressed Disposal. There is also provision permitting the Security Agent to transfer obligations of the disposed entity or any of its subsidiaries where they constitute one of a listed category of intra-group liabilities. There is no reference in clause 17.1 to any right to transfer any obligations under the Debt Documents.

27. The net proceeds of a Distressed Disposal are required by clause 17.2(a) to be "paid or distributed to the Security Agent in accordance with Clause 19". This is a reference to an application of the proceeds in accordance with the distribution waterfall for which provision is made by clause 19.1. This stipulates an order of priority which ranks the creditors under the SSRF and SSGF first (together with certain hedging liabilities), the holders of the SSNs second and the holders of the HYNs third. The ICA therefore places the holders of the HYNs on the lowest rung of the security ladder, immediately above a return to the relevant debtor. In that respect, the HYNs were also subject to a slightly different security structure from that of the other Primary Creditors.

28. The authorities to release granted by clause 17.1 are subject to the qualifications and restrictions referred to in the circumstances in which one or more of the three

paragraphs to clause 17.4 apply. Two are applicable in the present case. The first applies (pursuant to clause 17.4(a)) if a Distressed Disposal, amongst other things, is being effected. In that circumstance:

> "(i) the Security Agent is not authorised to release any Debtor, Subsidiary or Holding Company from any Borrowing Liabilities or Guarantee Liabilities owed to any Primary Creditor except in accordance with this Clause 17 …; and
>
> (ii) no Distressed Disposal, Liabilities Sale, or Debt Disposal may be made for consideration in a form other than cash except to the extent contemplated by Schedule 5 ..."

Schedule 5 contains the Enforcement Principles I have already mentioned.

29. Clause 17.4(b) is not relevant, but the second applicable circumstance (clause 17.4(c)) is. It is at the heart of the matters in dispute and provides as follows:

> "At any time when any High Yield Liabilities are outstanding, if a Distressed Disposal is being effected such that the High Yield Guarantees and the High Yield Debt Shared Security will be released under clause 17.1 … it is a further condition to any such release or disposal that either the Majority High Yield Creditors have approved the release and/or the disposal or, where such shares or assets are sold or disposed of:
>
> (A) the proceeds of such sale or disposal are in cash (or substantially in cash);
>
> (B) all claims of the Primary Creditors against any member of the Group and any Subsidiary of that member of the Group whose shares that are owned by a Debtor are pledged in favour of the Primary Creditors are sold or disposed of pursuant to such Distressed Disposal are unconditionally released and discharged concurrently with such sale (and are not assumed by the purchaser or one of its Affiliates), and all Security under the Security Documents in respect of the assets that are sold or disposed of is simultaneously and unconditionally released and discharged concurrently with such sale provided that in the event of a sale or disposal of any such claim (as opposed to a release or discharge)
>
> (I) the Instructing Group determines acting reasonably and in good faith that the Secured Parties (taken as a whole) will recover more than if such claim was released or discharged; and
>
> (II) the Creditor Representatives (and, if applicable, Hedge Counterparties) representing the Instructing Group serve a notice on the Security Agent notifying the Security Agent of the same, in which case the Security Agent shall be entitled immediately to sell and transfer such claim to such purchaser (or an Affiliate of such purchaser) and
>
> (C) either
>
> (I) such sale or disposal is made pursuant to a Public Auction, or
>
> (II) a Financial Advisers' Opinion is obtained."

30. A Financial Advisers' Opinion is defined in Schedule 5 of the ICA as "an opinion from a Financial Adviser (a) that the consideration for any disposal is fair from a financial point of view taking into account all relevant circumstances, (b) on the optimal method of enforcing the Transaction Security so as to achieve the Enforcement Objective and maximise the recovery of any such Enforcement Action; and (c) that such sale is otherwise in accordance with the Enforcement Principles." So far as relevant, a Financial Adviser is any independent internationally recognised investment bank or accountancy firm which is regularly engaged in providing valuations of businesses or financial assets or advising on competitive sales processes. If a Financial Advisers' Opinion is obtained, Schedule 5 paragraph 9 provides that it "will be conclusive evidence that the Enforcement Objective has been met".

31. In the remainder of this judgment I shall refer to the requirements to comply with the provisions of clause 17.4(c)(A), (B) and (C) of the ICA as condition (A), condition (B) and condition (C) respectively.

Summary of the dispute on construction

32. It was common ground that the sale of GSA's shareholding in Bidco to Mangrove IV on 9 October 2019 amounted to a Distressed Disposal and that on the same day the Security Agent executed a deed of release purporting to release all claims of the Primary Creditors against members of the Group. It was also common ground that the Security Agent's authority to execute the releases contemplated by clause 17.1 was subject to the restrictions and conditions set out in clauses 17.4(a) and 17.4(c).

33. The main dispute as to the effectiveness of the releases revolved around satisfaction of conditions (A) and (B), because there was no dispute that condition (C) was satisfied. A Financial Advisers' Opinion was obtained from Grant Thornton ("GT") prior to the Distressed Disposal and as the requirements of (C)(I) and C(II) were alternatives, there was therefore no need to assess whether the sale in the present case was made pursuant to a valid Public Auction. However condition (C) continues to have relevance to the dispute, because it was at the heart of the submissions of both Mr David Allison KC for Bidco and Mr Tom Smith KC for the GLAS Defendants that conditions (A) and (B) were directed towards the same commercial purpose as condition (C).

34. Signal did not agree that each of the conditions (A) and (B) was satisfied, with the consequence that these releases were of no effect. These can conveniently be called the initial construction arguments:

    i) As to condition (A), Signal argued that the proceeds of the sale to Mangrove IV were not "in cash or substantially in cash" nor did that phrase encompass payment by way of set-off, which was how the obligation to pay a material part of the purchase consideration was satisfied. Bidco did not dispute that the actual payment was partially effected by way of set-off, but it did not accept that this meant that the proceeds of the sale were not in cash or substantially in cash.

    ii) As to condition (B), it was agreed that the general tenor of the clause was (1) that the Security Agent was required to release both the Transaction Security and all claims of the Primary Creditors as against Bidco as well as any of its

subsidiaries; (2) that the release had to be unconditional; and (3) that the release must be concurrent with the sale. However, it was said by Signal that this did not occur in the present case because the substance of what occurred left a significant number of entities which qualified as Primary Creditors (within the meaning of the ICA) as creditors of the new purchaser group of which Mangrove IV forms part.

35. Bidco also advanced an additional construction point to cover the possibility that its preferred construction of clause 17.4(c) was wrong. It submitted that, on the true construction of the ICA, the conditions laid down by that clause were not required to be satisfied if the holder of the HYNs were "out of the money", by which it meant that they had:

> "no economic interest in the High Yield Debt Shared Security or the other assets of the Debtors and would receive no return if the Distressed Disposal did not occur"

Although the pleading averred that there was no need to satisfy any of conditions (A), (B) or (C) in the event that the holders of the HYNs were out of the money, the argument concentrated on whether in this context it was necessary for a relevant Distressed Disposal to satisfy conditions (A) and (B).

36. Bidco's argument on this additional construction point, which was disputed by Signal, was that, if the holders of the HYNs were out of the money, they had no legitimate interest in enforcing compliance with clause 17.4(c) since compliance or non-compliance would not affect the question of whether they would receive any return and if so how much. It was then said that the holders of the HYNs were in fact out of the money as at 9 October 2019 and that this meant that the conditions contained in that clause were not required to be satisfied.

37. The effect of this argument was to expand the ambit of the trial into the investigation of a factual dispute of some complexity on which detailed expert evidence of valuation was adduced. Although that is what occurred, Mr Ben Shaw KC for Dr Kebekus submitted that the court should refrain from making any determination on issues of fact which might also arise in the Claw Back Action, and which still might arise if he were to be successful on his appeal. I shall revert to this issue later in the judgment.

38. In these circumstances, it is necessary to explain the Group's financial difficulties and the background to the restructuring in a little more detail than would otherwise have been necessary for the purpose of putting the initial construction arguments in their proper context. It is convenient to do so before explaining the initial construction arguments and the additional construction point and my conclusions on them.

39. This explanation is drawn from (a) the evidence of Dr Max Mayer-Eming, who was at the time a managing director at Macquarie Capital (Europe) Limited ("Macquarie") and (b) the List of Common Ground and Issues on the basis of which the trial was conducted. Dr Mayer-Eming was the only witness of fact whose evidence was adduced at the trial. He gave his evidence with clarity and conviction and, while Signal submitted that much of what he said was of limited utility, it agreed that he was an honest witness who sought to assist the court.

40. The reason that Signal submitted that his evidence was of limited utility was that it went to what occurred as part of the Distressed Disposal which did, as a matter of fact, take place. It was said that it did not assist on the only factual issue between the parties, which is what would have occurred if the Distressed Disposal had not taken place. As will appear, I do not agree with Signal's submission on this point.

The Group's Financial Difficulties

41. The Group was acquired by Triton in 2014 for €1.062 billion. Following the purchase, the Group performed significantly below expectations and, by early 2018, was in what Dr Mayer-Eming called "serious financial trouble". Net income was what the evidence called significantly negative (at €-274 million), leading to a further deterioration of the Group's equity position to €-489 million, and a decline in its adjusted EBITDA from €131 million in 2015 to €69 million.

42. In 2018, an alternative corporate strategy was implemented but had only moderate success. While Kelvion managed to increase its nEBITDA from €7 million in 2017 to €37 million by the end of 2018, Enexio's performance continued to decline, principally due to a dip in the dry cooling market. It had become clear, by that stage, that the only part of the business which held any value was Kelvion.

43. Meanwhile, as the Original Debt approached maturity (May 2020 for both the SSGF and SSRF, June 2021 for the SSNs and June 2022 for the HYNs), the Group faced substantial pressure from customers, suppliers and credit insurers. These difficulties were known to the market, which, by the end of 2018, had priced in a high probability of default on some of the Group's debt. At that stage, the SSNs were trading at around €0.70/€1 and the HYNs were trading at around €0.20/€1. The HYNs were rated by Moody's and Standard and Poor's as Caa3 and CCC respectively. These were junk ratings, reflecting a perception that they carried a very high risk of default. One of the phrases which Dr Mayer-Eming used on a number of occasions in his evidence was that, by the time he became involved at the very end of 2018, the Group's business was a burning platform. He said that pre-payments were constantly being sought by suppliers and "credit insurers basically complained and wanted to set limits". The picture he gave was of a group on the brink of collapse.

44. This perception was accurate because, by the end of 2018, the Group was overleveraged, close to breaching its minimum EBITDA covenant, and expected significant costs in 2019 none of which it had the ability to meet. The Group's management therefore took the view that a restructuring was the only solution. To that end, on 24 December 2018, the Group approached Macquarie for financial advice on the way forward. Macquarie was not formally instructed until March 2019 although it had provided informal advice to the Group since December 2018 given its distressed state. The instructing parties were GHSA, GSA, Bidco, Kelvion and Enexio (but not Triton).

45. Macquarie's mandate was to "find a solution for the Group's over-leveraged capital structure to enable the business to continue as a going concern". Their immediate advice was that the Group needed (1) to refinance or extend the maturity of the SSRF, the SSGF and the SSNs (2) to restructure the HYNs and (3) to secure a significant

amount of new money to ensure the continuing operations of the business. Dr Mayer-Eming explained that, in giving this advice, he regarded Macquarie's task as to act in the best interests of all stakeholders. He took the view that the best way to achieve survival of a going concern was by consensus with and between the Primary Creditors.

46. More particularly, Dr Mayer-Eming told Triton early on that its equity interest in the Group was out of the money and that if it wished to retain its shareholding, it would need to inject new money into the Group. This became a more significant consideration once the lenders under the SSRF declined to do so. The Group was also advised by various other parties, including the German specialist restructuring law firm Görg Partnerschaft von Rechtsanwälten mbB ("Görg"), who advised Group management on insolvency matters, and Kirkland & Ellis International LLP who provided legal advice on the financial restructuring.

47. In January 2019, the Group also instructed the Boston Consulting Group ("BCG") with a mandate to review and (if appropriate) validate the Group's mid-term business plan by producing an IDW S6 opinion to set out an expert view on whether a company in financial distress is likely to be successfully restructured in the long term. It is used in Germany as a way of mitigating potential lender liability. This was a different role from advising on the restructuring. BCG ultimately produced three reports in March, June and October 2019, the conclusions of which are explained in further detail below.

48. In furtherance of Macquarie's initial advice, there were a number of meetings in early 2019 with ad hoc groups of Primary Creditors (for whom the Group agreed to fund the provision of legal and financial advice):

i) an ad hoc group of the SSRF and SSGF lenders, which ultimately instructed Deloitte as financial advisers, and Linklaters LLP as legal advisors;

ii) an ad hoc group of the holders of SSNs, which retained Moelis & Company as financial advisers, and Akin Gump Strauss Hauer & Field LLP as legal advisors; and

iii) an ad hoc group of the holders of HYNs, which retained Milbank LLP ("Milbank") as legal advisors and Gleacher Shacklock LLP ("Gleacher") as financial advisors. Signal was a member of the HYN ad hoc group.

49. One of the first steps taken by Macquarie was to seek a way to refinance the SSNs. In February and March 2019, they approached a group of leading investments funds with relevant experience, including GSO Capital Partners, KKR & Co Inc, Hayfin Capital Management, Ares Management LP, HPS Partners and Pemberton Capital. At Gleacher's request, Macquarie also approached two Canadian pensions funds (PSP and CPPIB), and a financial services firm (Cantor Fitzgerald). Only GSO and KKR showed an interest in refinancing the SSNs, but GSO indicated that it would require lengthy due diligence, and that it expected a yield of approximately 15%. As the holders of the SSNs were only willing to consent to the issue of new instruments at a rate of 8% or 9%, GSO was therefore not a good fit. KKR, on the other hand, conducted further due diligence, but was ultimately unable to obtain internal credit approval for a deal.

50. In parallel to Macquarie's attempts to refinance the SSNs, Gleacher contacted twelve leading fund managers as part of a "contingency planning exercise": Apollo, Cantor

Fitzgerald, DK, HPS, Anchorage, KKR, EQT, Golden Tree, York, Searchlight Capital, Carlyle and Sun Capital. As far as Macquarie and the Group were concerned, nothing came of those conversations.

51. Finding a way to refinance the SSNs (or indeed the HYNs) was not, in itself, enough to solve the Group's problems. Bidco still required a substantial injection of cash in the short term to avoid default – Macquarie's April cash flow analysis showed that the Group would run out of money by June with a short term funding shortfall of €11 million. This state of affairs was accepted by Gleacher (advisors to the HYN ad hoc group), who estimated in April 2019 that the Group had a longer term new money requirement of €100 million.

52. After that, two significant events occurred. The first was that, on 1 May 2019, both GSA and GHSA failed to deliver audited consolidated financial statements to the relevant Trustee, which they were required to do by section 4.03 of the SSN and HYN indentures. The consequence of this failure was that it was then open to 25% or more of the noteholders to crystalise the breach into an event of default ("EoD"). In the event, this was a step which was taken by members of the HYN ad hoc group on 18 June 2019, when they gave notice of an EoD under section 6.01(4) of the HYN Indenture.

53. The second, was that, just under a week later, on 7 May 2019, Standard & Poor's provided the Group with a shadow post-restructuring credit rating. The shadow rating was prepared in an attempt to gauge the likely rating of a refinanced tranche of the SSNs upon restructuring. The rating proceeded on the assumption that the HYNs would be written off in full, and that €130 million of new equity would be provided by Triton. Ultimately, and even with the benefit of the write-off of the HYNs (with a face value of €250 million) and the injection of equity, Standard & Poor's concluded that the refinanced SSNs would still only have a rating of B- (being at the lower end of the non-investment grade category).

54. Dr Mayer-Eming's evidence, which was not challenged and which I accept, is that from the end of February, and through into the summer of 2019, he and his team at Macquarie, were in an almost daily dialogue with Gleacher and the HYN ad hoc group as they sought to negotiate a consensual solution. These were part of the wider negotiations between the Group, Triton, the ad hoc groups and their respective advisers. Dr Mayer-Eming said that the HYN ad hoc group did not offer to assist in the refinancing of the SSNs, but in the course of their discussions, several other offers were made to and from the HYNs.

55. The following gives some flavour of the negotiations:

   i) On 16 May 2019, Gleacher put forward a proposal which provided for Triton to maintain economic and 100% voting control of the Group, a full release of the HYNs, Triton and the HYN ad hoc group to invest €65 million in the business and new notes to be issued to the holders of HYNs with a face value of €112.5 million.

   ii) On 17 May 2019, Triton responded with its own proposal which provided for €9 million in cash to be paid to the holders of HYNs in respect of missed interest payments, the holders of HYNs to be given the option to receive either their share of a further €12 million or an instrument providing 8% of the post-

restructuring economic upside of the Group and the holders of HYNs to be given an option to subscribe in cash for the same ownership rights Triton received in an aggregate amount of €10 million on the same economic terms as Triton's investment.

iii) On 30 May 2019, Triton improved its 17 May offer by increasing the amount the holders of HYNs could invest alongside Triton from €10 million to €12 million.

iv) On 14 June 2019, Gleacher put forward a counter-proposal which provided that the HYNs would be released and replaced by €225 million of new notes on terms that Triton would pay €105 million for €105 million of the new notes, the holders of HYNs would pay €35 million for €120 million of notes to rank *pari passu* with Triton's notes, the holders of HYNs would receive 27% of the equity interest in the Group with another 48% to follow depending on the economic performance of the Group and the holders of HYNs would receive €9 million in cash plus a consent fee.

v) On 20 June 2019, Triton put forward a further proposal to the holders of HYNs which envisaged Triton advancing €140 million in cash with the holders of HYNs to receive €8.75 million in cash, the ability to participate in the €140 million Triton was to invest on the same terms as Triton, subject to a cap of €25 million and either their pro rata share of €12,173,913 or a contingent value right which entitled the holder to the benefit of certain of the economic upside if the Group performed well.

The Initial Lock-Up Agreement and the Sales Process

56. On 6 June 2019, Bidco, GSA and certain other members of the Group and Triton entered into a lock-up agreement (the "Initial Lock-Up Agreement") with all the SSRF and SSGF lenders, and just over 90% of the holders of the SSNs (but not the holders of the HYNs). One of the catalysts for this was that, from early 2019 onwards, the Group was under significant pressure from its German operating companies to find an immediate way forward. The concern expressed by the directors of Kelvion in particular was reflected in their view that, if a solution could not be found quickly, they would be required to file for insolvency in order to avoid potential personal liability under German law. This led to an ultimatum to the Group: either the Primary Creditors reached a consensual agreement which both cured the holes in the Group's liquidity and allowed the operating companies within the Group to continue as going concerns, or those operating companies would file for insolvency.

57. The Initial Lock-Up Agreement set out the basic commercial terms for a financial restructuring of the Original Debt and required the acceding parties to support its implementation. By clause 5.1(a), the parties agreed that a sales process would be commenced as soon as reasonably practicable to sell the Key Secured Assets for a fair market price in the prevailing market conditions. It then provided for two different scenarios.

58. The first scenario was a consensual transaction to be agreed between the Group and all the Primary Creditors (including the holders of the HYNs), the structure of which included proposals in the form of the 20 June 2019 offer by Triton I have outlined above.

59. The second scenario was an alternative transaction, by which there would be a sale of the Key Secured Assets pursuant to the Distressed Disposal provisions in the ICA. If pursued, the alternative transaction was to involve the taking of a number of steps. These were that an EoD would be brought about under the SSN Indenture, the SSN holders would accelerate repayment and issue Enforcement Instructions to the Security Agent to release the Key Secured Assets and the Security Agent would enforce the Transaction Security and sell the Key Secured Assets. Thereafter, the SSRF and SSGF lenders would be repaid in full, the SSN holders would assign the right to recoveries to the purchaser in exchange for new secured notes, the remaining claims of the Primary Creditors (i.e., the claims of the HYNs) would be released and the restructured group would enter into a restructured revolving credit facility agreement with SGF lenders.

60. As a condition to the effectiveness of the Initial Lock-Up Agreement, Triton agreed to support the sales process by committing €140 million of new money (by way of equity and/or subordinated debt) on the completion of the financial restructuring. A proportion of these funds was to be used to repay the SSRF in accordance with the terms of the ICA. In addition, Triton provided a €24.8 million additional revolving facility under the SSRF to ensure the Group had sufficient working capital to complete the restructuring, thereby increasing the size of the SSRF from €75 million to €98 million. The evidence established that, without this injection of €24.8 million, the Group would have run out of cash before the restructuring could be completed, and Dr Mayer-Eming said that Triton was the only party willing to lend for that purpose.

61. On 7 June 2019, GSA issued a public announcement to the market concerning the Initial Lock-Up Agreement. The announcement noted the Group’s desire to pursue a consensual transaction but noted that the Initial Lock-Up Agreement provided for an alternative transaction which could proceed in the absence of the consent of the holders of the HYNs. It was Signal’s case that this was the first time the holders of the HYNs became aware of the Initial Lock-Up Agreement.

62. The need for a significant injection of new money was confirmed by the June draft of BCG’s IDW S6 opinion, which was produced shortly after the Initial Lock-Up Agreement had been signed, and was based on the implementation of the transaction described in that agreement. It described how the Group had suffered from declining operating performance, negative net income and declining cash flow, and needed to find a way of refinancing its debts. It concluded that there was a real prospect of a successful restructuring and made detailed recommendations in relation to what was called a measures plan, but made clear that a restructuring was only achievable because the Group’s short-term liquidity needs (for the next 13 weeks) were met by interim financing of €24.8 million to be provided by Triton. BCG also emphasised that the opinion was based on an injection of additional equity of €140 million, and the implementation of the proposed transaction, including amendment and restatement of the SSRF and the SSGF, the issue of new SSNs and what was called a “deleveraging solution” for the HYNs in the form of a “write-off of nominal amount, taking into account the pre-transaction capital structure”.

63. On 12 July 2019, a sales process was commenced by the Security Agent as contemplated by the Initial Lock-Up Agreement. This process occurred contemporaneously with the appointment of the GLAS Defendants to their various positions as trustees and agents and was initiated at or shortly after the time it had become apparent that efforts to agree a compromise with the holders of the HYNs had failed. It commenced a few days after Görg had expressed the view in a letter to Bidco and GSA dated 9 July 2019 that, while there should be a sufficient timeframe for a fair market process, legal and commercial constraints did not allow it to be lengthy; indeed that the Group might be destabilised by a lengthy sales process. I agree with Bidco's submission that, read in its proper context, this was clear confirmation that Görg's conclusion was that "the operations of the business were in severe financial distress with key suppliers and counterparties close to walking away".

64. Macquarie took overall control of the sales process, although PricewaterhouseCoopers LLP ("PwC") were retained by the Security Agent to advise on market conditions, procedures, and price. On or around 2 August 2019, Macquarie circulated a phase I process letter in which it invited 79 parties to submit indicative bids. The initial deadline for doing so was 9 August 2019, and all bids were to be made "in cash". All Primary Creditors were entitled to participate in the sales process, but it was provided that their bid would be assessed against the same criteria as any other bid.

65. Of the 79 parties invited to bid, 17 elected to sign a non-disclosure agreement and receive initial materials. There was no admissible evidence in these proceedings that the way this was done was other than in accordance with normal practice or otherwise in a manner that did not have regard to the position of the holders of HYNs. As I shall explain, Signal's expert valuer (who agreed that he was not an M&A expert) expressed the view that aspects of the process were unsatisfactory. However, both Gleacher and Milbank had had access to the virtual data room since February 2019, having agreed an earlier non-disclosure agreement with Macquarie. Furthermore, both PwC and Macquarie, who were responsible for the process, were experts in the area and they confirmed that no interested party had asserted to them that the timetable or nature and extent of the information provided was a stumbling block to submitting a bid.

66. Ultimately, the only bid which was actually submitted was an indicative bid from Triton to acquire the Key Secured Assets through a new holding company (Mangrove IV), which was submitted on 9 August 2019. This bid was then revised and ultimately accepted for implementation on 8 October 2019. None of the holders of the HYNs submitted a bid nor did they introduce any third party who was willing to do so. PwC said that there were a number of reasons for the absence of an offer from potential bidders, including the challenging and declining nature of the industry, the complexity of the Group, the lack of strategic fit, the turnaround required and interest only in part of the Group.

67. At some stage in July 2019, Triton withdrew all its previous offers to the holders of the HYNs, although it said it remained committed to exploring the possibility of a consensual agreement. Further offers were made (on both sides) in early September 2019, but in the event no agreement was reached.

<u>Events of default and steps taken by the HYN ad hoc group</u>

68. Between July and September 2019, certain EoDs occurred which ultimately led to the Transaction Security becoming enforceable. First, the EoD caused by the failure to deliver audited accounts for the 2018 financial year which I have already mentioned occurred under the HYN indenture. Secondly, GSA (and its guarantors) failed to make an interest payment on the SSNs and GHSA (and its guarantors) failed to make an interest payment on the HYNs.

69. As to this second category of EoD, while the SSN and HYN Indentures allowed for an additional 30-day grace period, neither GSA, GHSA nor any of their guarantors sought to make payment. As a result, an EoD arose under both indentures on 17 July 2019. It is common ground that the failure automatically engendered a further EoD under the cross-default provisions in the SSRF and the SSGF. The significance of these developments was that the holders of the HYNs were then able to take steps towards accelerating their debts. Dr Mayer-Eming explained that these events exacerbated the concerns of the directors of Kelvion that, if a solution could not be found quickly, they would be required to file for insolvency in order to avoid potential personal liability under German law.

70. Meanwhile, Signal and other members of the HYN ad hoc group took a number of steps in Germany and England, which seem to have been directed at interfering with the process of restructuring contemplated by the Initial Lock-Up Agreement. On 26 July and 1 August 2019 respectively, the District Court of Frankfurt dismissed two ex parte applications by Signal (and another member of the HYN ad hoc group, NN Investment Partners BV) to commence insolvency proceedings against GHSA in Germany. The German court concluded that GHSA did not have its centre of main interests ("COMI") in Germany. It found that, for this reason, it had no jurisdiction to open main proceedings in relation to GHSA under Article 3 of the Recast Insolvency Regulation. An appeal by NN Investment Partners BV was dismissed.

71. On 1 August 2019, Milbank (acting for the HYN ad hoc group) wrote to Görg and asserted that an Insolvency Event within the meaning of the ICA had occurred. In particular, they alleged that each guarantor under the HYNs had become insolvent and was unable to pay its debts. The letter concluded that "the continuance of this Insolvency Event has resulted in the end of the Standstill period with regard to the Guarantors and the Noteholders are now entitled to take or direct any Enforcement Action against the Guarantors immediately." Görg responded four days later stating that the Kelvion companies were "not unable, but rather unwilling" to pay the interest owed to noteholders.

72. This letter was relied on by Signal as evidence that the German operating companies were not then insolvent. On one level, that is correct, but only in the sense that Kelvion then had theoretical access to sufficient resources to pay the interest owed on the HYNs and the SSNs. That does not however detract from the fact that they were in severe financial distress and, as Görg advised, might not have survived a sales process which lasted a few months.

73. In its closing submissions, Signal invited the court to find that the Group's default in paying interest in June 2019 arose because it decided not to make those payments for the purposes of creating an EoD to enable the alternative transaction for which the Initial Lock-Up Agreement provided to proceed, and not because the Group was unable to make those payments at that time. I think that is an incomplete description of what

occurred. An unwillingness to pay interest on notes due to subordinated creditors such as the holders of the HYNs was a readily understandable decision in circumstances in which a restructuring in the immediate short term was not sufficiently assured. Indeed Dr Mayer-Eming explained in his evidence that his recollection was that Görg had given advice to that effect to Kelvion's board, a recollection which seems to have been confirmed by the recent decision of the Regional Court of Düsseldorf.

74. On 16 August 2019, Signal made an application to the Luxembourg Court for an administration order in respect of GHSA. That application was dismissed. Six days later, on 22 August 2019, the directors of GSA applied to this court for an administration order in respect of GSA, an event which triggered a further EoD under section 6.01(9) of both the SSN indenture and the HYN Indenture. The administration application was listed for hearing on 23 August 2019 before Fancourt J, but shortly after counsel for GSA had begun his opening submissions, he was informed that the directors of GSA had been removed from office by the HYN Security Agent acting on the instructions of the HYN ad hoc group in accordance with their rights under the HYN Pledge. A new director, Mr Jan D Bayer, was then appointed and, on his appointment, instructed counsel for GSA to cease acting (although the SSNs continued with the administration proceedings).

75. Immediately thereafter, Mr Bayer applied to the Düsseldorf District Court to commence main insolvency proceedings in Germany against GSA. It was said that GSA's COMI was in Germany. It seems from a judgment of Norris J ([2019] EWHC 2355 (Ch), referred to by Bacon J in *Re Galapagos S.A., Barings (UK) Limited v Galapagos S.A.* [2022] BCC 1113 at [12]) that the holders of the HYNs engaged in "some very smart moves" and it was probable that the German court was not informed that GSA was already subject to an administration application in England. Be that as it may, Dr Kebekus was then appointed as preliminary insolvency administrator of GSA on the same day. The consequence of this development was that there was a stay of the English administration proceedings and a further EoD occurred under the SSN and HYN indentures.

76. Two weeks later, the relief granted by the Düsseldorf District Court was set aside, but on the same day (9 September 2019), on the application of certain members of the HYN ad hoc group in their capacities as holders of SSNs, a further provisional appointment of Dr Kebekus was made. This triggered a yet further EoD under the SSN and HYN indentures and constituted an Acceleration Event under the ICA. On 31 October 2019, the Düsseldorf District Court expressed itself satisfied that GSA's COMI was in Germany, opened main proceedings against GSA and appointed Dr Kebekus as insolvency administrator.

77. This order was appealed by Bidco. On 8 December 2022, and after a reference to the CJEU, the Bundesgerichtshof dismissed the appeal on the grounds that the English High Court had not given its judgment in respect of the winding up of GSA in England by 31 December 2020, which was the date of the United Kingdom's exit from the European Union. The consequence of this was that the barring effect that the application to wind-up GSA pending before the English Court had on the opening of insolvency proceedings in Germany then ceased to have effect. It is agreed by the parties that, as a consequence of the decision of the Bundesgerichtshof, as a matter of German law, the Düsseldorf courts have international jurisdiction over the insolvency of GSA.

The Supplemental Lock-Up Agreement, Restructuring Deed and Implementation

78. By September 2019, it had become clear that the Initial Lock-Up Agreement could not be implemented as initially envisaged, in large part because of the steps taken in Germany that I have just described. Accordingly, on 8 September 2019, a number of parties to the Initial Lock-Up Agreement (including Bidco and certain of the holders of SSNs) entered into a supplemental lock-up agreement (the "Supplemental Lock-Up Agreement"). On the same day, the Security Agent wrote to the SSN Trustee, the Revolving Agent, the Guarantee Agent and the HYN Trustee to inform them that an acceleration event had occurred on Dr Kebekus' appointment. It therefore sought instructions from the Instructing Group on enforcement of the Transaction Security.

79. Two days later, on 10 September, a group of SSN holders constituting the Majority Pari Passu Creditors wrote to the SSN Trustee. They noted that (1) an Acceleration Event had occurred under the terms of the ICA and that the Transaction Security had therefore become enforceable; and (2) instructed the SSN Trustee, pursuant to Section 6.05 of the SSN Indenture, to deliver an initial enforcement notice to the Security Agent. The initial enforcement notice proposed to instruct the Security Agent to enforce the pledges over the Key Secured Assets by selling them to a new holding company controlled by Triton. At the same time, Milbank (still then acting for the HYN ad hoc group) referred to the fact that their clients were unable to assist in avoiding what they described as an insolvency of the operating companies. It is common ground that shortly thereafter, the Majority Pari Passu Creditors became the relevant Instructing Group for the purposes of Enforcement, and that the Security Agent was therefore entitled to act in accordance with their instructions.

80. On 13 September 2019, these proceedings for declaratory relief were issued by Bidco. By this stage, Dr Kebekus had been appointed by the Düsseldorf District Court as provisional insolvency administrator of GSA for the second time, but he was not initially joined as a defendant. The form of the relief then sought was not identical to the relief now contained in the amended claim form, and some of the original defendants have now dropped out, but in essence it covered the same ground. At this stage, the nature of the challenge which would be advanced by Signal to the restructuring proposed in the Supplemental Lock-Up Agreement was clear, but the restructuring itself had not yet been implemented.

81. On 7 October, BCG issued its final report in which it concluded, *inter alia*, that there was a "liquidity crisis" in the business and that "a refinancing is needed to secure funding and to realign the balance sheet". It proceeded to validate the Group's business plan, but did so on the assumption that the refinancing as set out in the Lock-Up Agreements would be executed, an assumption which it described as crucial:

> "The Galapagos Holding Group is capable of being restructured (restructuring period 2019-2021) from the point of view of an objective third party and the measures underway for a restructuring are altogether objectively suitable to restructure the Company sustainably in a reasonable period of time. These measures justify a positive going concern prognosis. Crucially, we emphasize that this requires a rigorous and timely implementation of the measures described in here and set out in detail in the restructuring concept."

82. The Instructing Group therefore issued instructions to both the SSN Trustee and the Security Agent to enter into a restructuring deed, which was then executed on 8 October 2019 ("the Restructuring Deed"). The Restructuring Deed set out several closing steps, which the contracting parties were required to take in order to give effect to the restructuring. Clause 5 provided for those closing steps to take place in a particular order on the same day with each to occur immediately following completion of the preceding closing step. In his closing submissions, Mr Alain Choo Choy KC for Signal accepted (in my view correctly) that all of these steps, although taken in a particular identified sequence, were seen by the parties as being concurrent, and I am satisfied that that is what they were. Those steps were to include, by Closing Step 2, the dating and effectiveness of the sale and purchase agreement pursuant to which the Key Secured Assets were sold to Mangrove IV (the "SPA") and, as part of Closing Step 5, the dating and effectiveness of a deed of release and discharge of all claims of the Primary Creditors against Bidco and its subsidiaries and all Transaction Security in accordance with the ICA (the "Global Deed of Release").

83. Meanwhile, in preparation for enforcement, the Security Agent had exercised its power to engage GT as Financial Adviser within the meaning of condition (C) and Schedule 5 to the ICA. GT produced a Financial Advisers' Opinion on 8 October 2019 in respect of the proposed enforcement.

84. It did so in accordance with a letter of understanding dated 1 October 2019, which made a number of important points as to GT's understanding of the context. In particular it explained the nature of the "substantial headwinds against the business" with which the Group was faced, the fact that its distressed position was increasingly public knowledge in Germany and the fact that the directors of the operating companies (who had separate legal representation) had been advised that the transaction needed to be completed within the coming days in order to preserve its going concern status. The letter also referred to the Group's difficult liquidity position and the fact that, because the proposed transaction had a sufficient likelihood of success, the directors considered the Group's business to be operating as a going concern. It was for this reason that the directors had decided for the time being not to file for the commencement of insolvency proceedings.

85. GT also recorded that:

> "Should the directors resolve to place a member of the Group into an insolvency process, it is likely that liquidity will quickly evaporate as suppliers begin to demand advanced payments, cash collateral will be required to cover guarantees and satisfy trade credit insurers (which has already happened but which would be exacerbated in an insolvency scenario), cash receipts will quickly slow down as customers are not certain of delivery of components or project work and the directors can no longer trade the business. In this scenario, the Financing Case has little prospect of being executed and an insolvency of the Group would be likely".

86. The reference to the Financing Case was to a set of projections contained in the October BCG report, which was also the basis of a 27 June 2019 valuation produced by Gleacher, (an updated version of which prepared for the purposes of the Claw Back Action was in evidence). Gleacher valued the Group at €759 million. As with the BCG conclusion that the Group was capable of being restructured as a going concern, Gleacher's valuation was predicated on the assumption that €140 million of new money would be invested in the Group in order to repay the €75 million advanced under the

SSRF, to fund the winding down of Enexio and to pay costs. I am satisfied that there is no basis for concluding that this money would have been available in a counterfactual scenario in which the Distressed Disposal in accordance with the terms of the proposed transaction with Mangrove IV did not occur. This is a critical factor in analysing the answer to the additional construction point.

87. The GT letter of understanding also recorded (as was the case) that approximately €545 million of Original Debt ranked ahead of the HYNs and included a liquidation analysis, based on work carried out by Görg the latest iteration of which was dated 25 September 2019 but which remained in draft form, showing that the holders of the HYNs would recover nothing in a liquidation scenario. In such an event, the HYNs would be out of the money.

88. GT's Financial Advisers' Opinion concluded (a) that the consideration for the proposed sale (on the terms of Triton's revised bid on 8 October 2019) was fair from a financial point of view, taking into account all relevant circumstances, (b) that the proposed sale was the optimal method of enforcing the Transaction Security so as to achieve the 'Enforcement Objective' under the ICA and maximise recovery for the creditors and (c) that the sale was otherwise in accordance with the Enforcement Principles as defined in the ICA.

89. It is common ground that the GT Opinion constituted a Financial Advisers' Opinion within the meaning of Schedule 5 of the ICA. It follows that the protection for the holders of the HYNs contemplated by the need to satisfy condition (C) was achieved. It also operated as conclusive evidence that the Enforcement Objective was satisfied. This meant that the parties to the ICA were bound by contract to accept that the enforcement which led to the sale maximised the recovery of the Secured Parties "to the extent consistent with (a) a prompt and expeditious Enforcement (to the extent reasonably possible); and (b) the rights and obligations of the Security Agent under the terms of this Agreement and under applicable law" (see Schedule 5 paragraph 9 of the ICA referred to above). This gave rise to an estoppel argument to which I will revert later in this judgment and is said to justify one of the declarations sought by Bidco.

90. Also on 8 October 2019, PwC provided the Security Agent with a Public Auction Process Report (the "PwC Report"), which summarised the recommendations given by PwC in respect of the sales process. Attached to the report was a letter addressed to the Security Agent which confirmed PwC's view that the sales process had been conducted in line with the market practice procedures of a Public Auction for the purposes of the ICA.

91. The following day (9 October 2019), the Instructing Group gave Enforcement Instructions to the Security Agent to accept and implement the Triton bid, and the steps contemplated by the Restructuring Deed were implemented. In particular, the Security Agent was instructed (a) to enforce the Transaction Security in respect of the Key Secured Assets, (b) to sell the Key Secured Assets to Mangrove IV by executing the SPA and (c) to enter into the Global Deed of Release.

92. Acting in accordance with those instructions, the Security Agent executed the SPA, pursuant to which, and subject only to the challenge made by Signal to the satisfaction of conditions (A) and (B), it sold the Key Secured Assets to Mangrove IV for €424,631,585. It was common ground that this figure implied an enterprise value for

the Group of €520 million. The consideration was to be paid directly by Mangrove IV to the Security Agent, for application in accordance with the distribution waterfall set out in clause 19.1 of the ICA. In conjunction with the SPA, the Security Agent executed the Global Deed of Release, pursuant to which it irrevocably and unconditionally released and discharged with effect from closing under the SPA both the claims of the Primary Creditors in respect of the Original Debt and the Transaction Security in respect of the Key Secured Assets and the other assets of the Group.

93. It was not said by Signal or anyone else that the Global Deed of Release was a sham nor that it was not intended to take effect in accordance with its terms. The heart of Signal's argument was that it did not in fact do so, because the requirements of conditions (A) and (B) were not met with the consequence that clause 17.4(a)(i) was engaged so as to negate what would otherwise have been the Security Agent's authority pursuant to clause 17.1 to execute the Global Deed of Release on behalf of (amongst others) the holders of the HYNs.

94. On completion of the Distressed Disposal, Mangrove III issued a series of new 7.775% senior secured notes (the "New Notes") with a face value of €356,233,492. A substantial proportion of the New Notes were issued to holders of the SSNs who wished to re-subscribe. Those re-subscribing noteholders were entitled to receive a total of €274,676,540 pursuant to the operation of the clause 19.1 distribution waterfall, but also had to pay an amount equal to the SSN waterfall proceeds by way of consideration for the New Notes.

95. As well as the difference in Issuer, the terms of the New Notes were not the same as the terms of the SSNs. They had a maturity of 6 years not 7 years, they were only fixed rate notes (unlike the SSNs which also included floating rate notes), the interest was 7.775% which was c.2% higher than that payable on the SSNs, they included a PIK option which was not included in the SSNs and the covenant package was different to the covenants applicable to the SSNs.

96. Clause 5.8 of the Restructuring Deed operated to require the Security Agent to pay the SSN waterfall proceeds to Mangrove IV in satisfaction of each re-subscribing noteholder's obligation to pay the subscription price for the New Notes. In order to implement those arrangements, the Security Agent was directed (by clause 5.11(v) of the Restructuring Deed) to enter into a settlement confirmation with Mangrove IV, which confirmed that the Security Agent's obligation to pay Mangrove IV €274,676,540 on behalf of the re-subscribing noteholders would be discharged by way of set-off against Mangrove IV's obligation to pay the same proportion of the consideration to the Security Agent under the SPA.

97. The remaining amount of the purchase price (€149,955,045) was then to be distributed by the Security Agent in accordance with the ICA's distribution waterfall. This is what occurred with the consequence that the consideration for the sale was paid by Mangrove IV partly by way of funds transfer (as to approximately 35%), and partly by way of set-off (as to approximately 65%).

98. On the same day, and in addition to the issue by Mangrove III of the New Notes, certain members of the restructured group entered into the new financing arrangements, including (a) a new €65 million revolving credit facility, provided under a new facility agreement by the parties that had been lenders under the SSRF and (b) a new €260

million guarantee facility, provided under a new facility agreement by the parties that had been lenders under the SSGF. In the light of a discrete argument made by Signal, it is necessary to explain in a little more detail the way in which the SSGF was dealt with in the restructuring.

99. Immediately prior to the execution of the SPA and the Global Deed of Release, the borrower's liabilities under the SSGF were accelerated by the Guarantee Agent, which then demanded the provision of cash collateral for their contingent liabilities in respect of the outstanding LoCs. Some of the lenders then entered into a €86,640,713 guarantee refinancing agreement ("GRA"), which discharged the liabilities under the SSGF and replaced them with new liabilities. Mangrove IV then borrowed €233.2 million from the SSGF lenders (the "Cash Collateral Loans") to fund the provision of cash collateral in respect of the borrowers' contingent LoC-related liabilities under the SSGF and the GRA.

100. The provision of cash collateral was achieved by creating a charge over the cash deposit from the Cash Collateral Loans in favour of the relevant lender, which itself constituted a security financial collateral arrangement under the Financial Collateral Arrangements Regulations 2003 (the "FCAR"). The final stage was that those SSGF lenders who were not party to the GRA exercised their rights under regulation 17 of the FCAR to appropriate the cash collateral which took effect as a discharge of the borrower's liabilities to them to the extent of the appropriation. The effect of the Global Deed of Release was to release and discharge any remaining liabilities under the SSGF that had not been released in accordance with the steps that I have just described.

101. A new €260 million guarantee facility was then entered into on different terms to those applied by the SSGF. The term was for four not six years, the LoC fees were different, as were the financial covenants and information undertakings and there was no longer any provision for additional facilities to be available from individual lenders on a bilateral basis. Like the New Notes, this facility was not governed by the ICA and neither it, nor the GRA, nor any of the Cash Collateral Loan was designated as a Credit Facility under clause 23.12 of the ICA. None of these essential requirements to make the new €260 million guarantee facility a Credit Facility for the purposes of the ICA was satisfied.

The course of these proceedings

102. Although these proceedings had been issued prior to completion of the restructuring, it was only in February 2020 that they took their current form when the claim form was reissued on amendment. In April 2020, Signal issued an application challenging the jurisdiction, a course which was also taken by Dr Kebekus in June 2020. Both of these applications came before Zacaroli J on 17 December 2020 and were dismissed by him for the reasons given in a judgment handed down on 19 January 2021 (*Galapagos Bidco S.à r.l. v Dr Frank Kebekus & Ors* [2021] EWHC 68 (Ch) (the "Jurisdiction Judgment")). Zacaroli J was satisfied that there was clear utility in the English court granting the declaratory relief sought by Bidco.

103. By the time of the hearing before Zacaroli J, Dr Kebekus had commenced the Claw Back Action against Mangrove IV and the Security Agent (but not Bidco). He sought

an order that Mangrove IV transfer the shares in Bidco to GSA pursuant to sections 133 and 134 of the German Insolvency Code. As Zacaroli J explained in the Jurisdiction Judgment at [41], section 31 provides that a transaction undertaken by a debtor within the period of 10 years prior to commencement of insolvency proceedings, which was intended to prejudice its creditors, may be avoided if the counterparty to the transaction was aware of the debtor's intention.

104. I was not taken to any evidence on the form of the Claw Back Action, although it was referred to in Mr Shaw's skeleton argument, and he showed me parts of the pleadings in his closing submissions. He explained that the case advanced by Dr Kebekus in Germany was that the restructuring of which the Distressed Disposal formed part was the means by which Triton appropriated the assets of Bidco and the Group by injecting €140 million of new money while shedding €250 million in liabilities under the HYNs. This is said to have amounted to an enrichment of Triton at the expense of GSA's creditors in a manner contrary to basic principles of German insolvency law. It is said to have been achieved by inducing a payment default by GSA and by the carrying out of an auction that was neither free nor competitive and which ensured that Mangrove IV would be the only bidder.

105. Mr Shaw also said in his skeleton that Dr Kebekus relies in the Claw Back Action on expert evidence which supports an allegation that the sale of Bidco to Mangrove IV suffered from substantial flaws and was unlikely to have maximised the potential sale proceeds. This is said to include such matters as an attack on the independence of Macquarie, a remuneration structure for Macquarie which substantially disincentivised a successful sale, the withholding of key financial information from potential bidders and the imposition of a restrictive non-disclosure agreement. It is also said that Dr Kebekus has expert valuation evidence which concludes that the enterprise value of the Bidco Group was €1,052 million, i.e., very substantially more than the amount for which the Key Secured Assets were sold to Mangrove IV and the €520 million enterprise value which that bid implied.

106. The consequence of the decision by the Bundesgerichtshof in December 2022 is that, as a matter of German law, Dr Kebekus was entitled to proceed with the Claw Back Action. Bidco is not a party to the German proceedings. An initial application by Mangrove IV and the Security Agent to suspend the Claw Back Action pending the determination of these proceedings was resisted by Dr Kebekus and was unsuccessful. As I explained earlier in this judgment the Claw Back Action has now been dismissed, but the dispute in Germany has not been finally disposed of because Dr Kebekus has filed a notice of appeal.

107. The basis on which the Claw Back Action was dismissed was that Dr Kebekus had not proved that there was any creditor disadvantage sufficient to justify an avoidance of the SPA as a matter of German insolvency law. The German court held that, even though Dr Kebekus had "sufficiently and plausibly substantiated irregularities in the process of selling" the Key Secured Assets, there was insufficient evidence to establish that the sales process was the reason why no bids higher than the Triton bid were received. In other words the claim seems to have failed on causation grounds.

108. Signal has also commenced proceedings relating to the restructuring in the Supreme Court of the State of New York. It is alleged that Bidco and a number of other parties engaged in a conspiracy to defraud the holders of the HYNs. It was said in the List of

Common Ground and Issues that the New York proceedings were originally commenced in September 2019 and make allegations of impropriety against the financial and legal advisers of the Group, but I was not addressed on their content. The New York proceedings have been stayed since 22 July 2020 pending the outcome of these proceedings.

109. It is of some significance to Dr Kebekus' case at the trial that it was argued by Bidco and the GLAS Defendants on the hearing of the jurisdiction challenge that these proceedings raise points of law not fact (see [98] and [100] of the Jurisdiction Judgment). This point arose in the context of a submission made to Zacaroli J by Signal and Dr Kebekus that there was no real or genuine dispute between Bidco and any of the anchor defendants with the consequence that, if they had been the only parties before the court the declarations sought would not have been granted ([54] of the Jurisdiction Judgment).

110. In that context, Zacaroli J was satisfied that it was open to the court to grant declaratory relief if it was satisfied that the opposing arguments were made available to it by one means or another although that "would be a more challenging prospect if the court was required to determine substantial disputes of fact" ([96]). He also concluded not only that there was clear utility in the English court granting the declaratory relief sought but also that, because Bidco was not a party to the German proceedings, Germany was not the jurisdiction in which the dispute between the parties to these proceedings is to be resolved.

Construction of the ICA: general principles

111. The leading authorities on the general approach to construing a contract were reviewed and summarised by Lord Hodge, delivering the unanimous judgment of the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 at [10] to [13]:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning …
>
> "11. … Interpretation is … a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest.
>
> "12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated …

> "13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements …"

112. There was no disagreement that these principles apply. However, Mr Choo Choy made an additional point with which Mr Allison took issue. He relied on a passage from the judgment of Arden LJ in *Re Coroin (No 2), McKillen v Misland (Cyprus) Investments Limited* [2013] EWCA Civ 781 at [65] to [67] in support of a submission that, where a contractual provision is expropriatory in nature, it should operate only where there is satisfactory clarity. He said that ambiguity in the provision should be resolved against taking away rights of property and that this was pertinent in the present case because the effect of a release under clause 17 would be to deprive the holders of the HYNs of their contractual rights against the guarantors and their security over the Key Secured Assets.

113. Mr Allison did not accept that clause 17 was expropriatory in the sense contemplated by Arden LJ, but on the applicable principles, he submitted that Mr Choo Choy's concept of "satisfactory clarity" did not reflect the essence of what Arden LJ had said. Mr Allison submitted that the principle with which Arden LJ was concerned presupposed that the language of the relevant provision was ambiguous, which was the context in which she said (at [67]) that "rights in property should not be taken away by a side wind and without warrant".

114. On the view I take of clause 17.4, I do not think that very much turns on what is essentially a difference in emphasis. The concept of satisfactory clarity reflects Arden LJ's citation with approval (at [65]) of what Lord Greene MR had said in *Re Smith v Fawcett* [1942] 1 Ch 304 in relation to a shareholder's right to deal freely with their shares:

> "that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity."

115. However, this does not mean that ambiguity should be resolved against taking away rights of property per se. The question which matters is which construction is more consistent with business common sense. Where an agreement such as the ICA regulates the relationship between creditors, business common sense may well point to a construction which preserves the rights of the senior creditors as against the junior creditors, even if in so doing the junior creditors are no longer able to enforce their claims against the debtor or receive the benefit of security to which they would otherwise be entitled.

116. This points up the reason why the provisions of clause 17 do not take away rights in the sense referred to by Arden LJ in the first place. The rights of the holders of the HYNs to initiate enforcement and receive any proceeds from the operation of the payment waterfall have always been restricted by their ranking. I consider that the release provisions, which have always formed part of the bundle of rights and obligations constituting the HYNs, fall some way short of operating in a manner that might be regarded as taking away a property right in the context contemplated by Arden LJ.

The initial construction arguments

117. The first of the initial construction arguments arises because Signal contends that the requirement that the proceeds of the sale or disposal are in cash or substantially in cash within the meaning of condition (A) was not satisfied. As is common ground, the consideration for the sale was paid by Mangrove IV partly by way of funds transfer and partly by way of set-off through the means I have already described. The payment by set-off occurred because some of the Primary Creditors who were entitled to receive a share of the sales proceeds under the ICA's distribution waterfall opted to lend money back to Mangrove III for the purpose of funding the business after the sale. This obligation to make payment under the waterfall was then discharged by way of set-off. Signal submitted that, because a substantial part of the payment of the consideration was effected by way of set-off, the proceeds of the disposal were not "in cash or substantially in cash".

118. The second of the initial construction arguments arises because Signal contends that the unconditional release and discharge provisions required by condition (B) were not satisfied. It said that the Security Agent did not give effect to an unconditional release both of the Transaction Security and all claims of the Primary Creditors against Bidco and its subsidiaries concurrently with the sale, because the substance of what occurred left a significant number of entities, who qualified as Primary Creditors within the meaning of condition (B), as creditors of the new purchaser group of which Mangrove IV forms part.

119. In its written and oral submissions Signal dealt first with the argument on condition (B), having submitted (in my view correctly) that it would be wrong to seek to construe condition (B) as parasitic on condition (A). It did so because part of its argument on non-compliance with condition (A) reflected submissions which are best considered in the context of its argument on condition (B). In order to do justice to Signal's arguments, I shall adopt the same course.

Condition (B)

120. It is accepted by all parties that, given the lack of approval by the majority of holders of the HYNs to their release on the Distressed Disposal, each of conditions (A), (B) and (C) must be satisfied. This means that there is no dispute that compliance with the obligation in condition (B) to effect an unconditional release and discharge is engaged.

121. It is common ground that Bidco was a debtor (either as borrower or guarantor) under or in respect of each of the SSRF, the SSGF and the SSNs. It therefore follows that, if condition (B) is to be satisfied, all of Bidco's liabilities (and those of its subsidiaries) were required to be unconditionally released and discharged concurrently with the sale of the shares in Bidco to Mangrove IV. In practical terms the effect of this provision was to prevent the Security Agent from selling the Key Secured Assets for a nominal consideration but subject to the existing indebtedness, which, in the absence of contractual provision to the contrary, was a course that it was open to a security agent

to take: *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm) ("*Stabilus*") at [122].

122. Bidco submitted that the effect of the Global Deed of Release was straightforward and satisfied the requirements of condition (B). It was executed by the Security Agent concurrently with the SPA on 9 October 2019 and operated to release the claims of all the Primary Creditors in respect of the Original Debt. This was achieved by clause 2.1 of the Global Deed of Release, which provided that the release and discharge contemplated by condition (B) would take effect at the time the Distressed Disposal took effect, i.e., the time subsequent to completion of Closing Step 4 under the Restructuring Deed, which itself was simultaneous with Closing under the SPA (see also clause 4.1 of the SPA). The effect of these provisions was that the release and discharge effected by the Global Deed of Release and Closing under the SPA occurred at the same time and were therefore effective to comply with the concurrence requirements of condition (B).

123. Mr Allison submitted that this form of release was entirely consistent with the commercial purpose of the power of release conferred by clause 17.1, which itself is critical to the structure of the ICA. He said that the commercial purpose was similar to the commercial purpose of the release provisions considered by the Court of Appeal in *Barclays Bank plc v HHY Luxembourg S.à r.l.* [2010] EWCA Civ 1248 ("*European Directories*"), in which Longmore LJ accepted, at [18] to [25], their characterisation as directed towards the objective of maximising the value of a disposal. Mr Allison accepted that clause 17.4 was a provision for the protection of the more junior creditors, but said that the court should seek to construe clause 17.4(c), and condition (B) in particular, in a manner which provides for a reasonable degree of commercial certainty and predictability in the process of maximising value. That objective is one to which the drafter is particularly likely to have aspired because the clause will typically be engaged in circumstances of great urgency, when the obligors are in financial difficulty and a Distressed Disposal needs to take place quickly.

124. Mr Allison submitted that a release of existing debt was considered desirable because a subject-to-debt bid in the form contemplated by *Stabilus* can give rise to difficulties if, as in the present case, a Financial Adviser is required to give a fairness opinion (whether the consideration received for the disposal is "fair from a financial point of view"). This is particularly the case if the opinion is given in circumstances in which there are competing bids, one or more of which is made on a debt-free basis and the other or others of which are advanced on the basis that the security remains in place. There is also a greater likelihood of a Public Auction being unfair if a debt-inclusive sale of the business is permitted because the senior creditors may then be the only realistic bidders, thereby opening up a challenge on the basis that the auction was insufficiently competitive to qualify as such.

125. He and Mr Smith both accepted that clause 17.4(c) is clearly intended to create some form of protection for the holders of HYNs, a point which was rightly stressed by Mr Choo Choy. However, Mr Smith in particular submitted that the important protection was in condition (C), while the focus of conditions (A) and (B) is on promoting the effectiveness of the mechanism for which condition (C) provides. The purpose of conditions (A) and (B) is to enhance that mechanism without introducing a restriction on existing creditors providing replacement finance, which was the intended effect for which Signal argued. That would be a consequence for which there is no commercial

justification, and indeed no rational explanation, apart from an enhancement of the negotiating position of the holders of the HYNs, despite their position at the bottom of the distribution waterfall.

126. It was said that the fact that the holders of the HYNs are the most subordinated tranche of external financial indebtedness under the ICA means that it is most unlikely that the parties intended to place them in a position of exceptional or unreasonable bargaining power, to allow them to extract a ransom payment or to block a fair and reasonable transaction. This was more particularly the case in the context of a Distressed Disposal in which they are or might be out of the money and in which the effect of Signal's case on conditions (A) and (B) would be to impose restrictions on the use to which creditors ranking higher in the distribution waterfall were able to put the monies which they were entitled to receive under that waterfall.

127. In short, the purpose of clause 17.4(c) in general and condition (B) in particular is to protect the holders of the HYNs from abusive or unfair treatment, but otherwise to recognise their subordinated status. Its focus is on ensuring that full value for the underlying business is achieved in a manner which is predictable and relatively straightforward to apply, not on imposing restrictions on the identity of those entitled to participate in a restructuring through ongoing funding. As Mr Smith put it in his closing submissions, the basic purpose to which each of conditions (A), (B) and (C) is directed is to secure a transparent, robust and effective price discovery process.

128. Signal submitted that this was the wrong approach because the Global Deed of Release could not be viewed in isolation. It was one in a series of pre-ordained steps by the parties to the Lock-Up Agreements (as by then recorded in the Restructuring Deed), which involved the provision of new revolving and guarantee facilities to the purchaser of the Key Secured Assets by Primary Creditors who had previously lent to the Group pursuant to the SSRF and the SSGF and a subscription for the New Notes by Primary Creditors who had been holders of the SSNs. It followed on Signal's case that condition (B)'s requirement for an unconditional release and discharge (and Mr Choo Choy emphasised the word "unconditional") concurrently with the Distressed Disposal was not satisfied.

129. Signal also submitted that Bidco's approach was unduly formalistic. It said that the commercial reality of the situation was that the claims of the Primary Creditors were not in substance released, but rather continued. It was said that they were assumed by the Mangrove group and Bidco and its subsidiaries within the meaning of the words in parentheses in condition (B), which was another reason why that condition was not satisfied. This construction did not facilitate the ability of the holders of the HYNs to maintain a ransom or hold-out position, but rather reflected a deliberate decision to align the interests of the senior and junior creditors by ensuring the sale proceeds are the Primary Creditors' only means of recovery, which, as Mr Choo Choy put it in his closing argument, "encourages everyone to pull together and in the same direction".

130. In support of these arguments, Signal stressed that the substance of the position was what mattered not its form. It pointed out that the Global Deed of Release and the new lending by those of the Primary Creditors who participated were fundamentally interdependent, because the Global Deed of Release would not have been executed unless the new lending agreements had been concluded at the same time.

131. It was also Signal's case that, to the extent that any of the liabilities to the Primary Creditors ranking in priority to the HYNs were released and discharged pursuant to the restructuring, such release and discharge was not unconditional for a slightly different reason. The argument was that the Restructuring Deed provided that further financing for the new group would only be available if the SPA was concluded. This meant that the whole restructuring was predicated on such financing being available and, if it had not been, the restructuring would not have taken place in the manner and form it did. As Mr Choo Choy explained in his closing submissions, this meant that there were multiple forms of conditionality which went directly to the question of whether there was in reality a release of the Group debt.

132. By way of further amplification of his arguments on conditionality, Mr Choo Choy said that the claims under the SSRF were only released and discharged subject to, and therefore conditional upon, a replacement revolving facility being entered into between the Mangrove group entities and the same Primary Creditors which had been the lenders under the SSRF. Similarly the claims under the SSGF were only released and discharged conditional upon (a) the execution of a new guarantee refinancing agreement between the entities which were at the time of the restructuring agreement SSGF Primary Creditors and the Mangrove group, (b) the grant of cash collateral loans by those Primary Creditors to Mangrove group entities and (c) the execution of a new €260 million guarantee facility for the benefit of the Mangrove group. He also said that the claims of the holders of the SSNs were only released and discharged subject to and conditional upon the majority of those holders re-subscribing for what he called "new SSNs" issued by Mangrove III.

133. Mr Choo Choy also relied on the fact that, by the time the restructuring came to be effected on 9 October 2019, those of the Primary Creditors who were participating in the advance of funding to the Mangrove group under the new financing arrangements were contractually obliged to do so. He also pointed to the fact that the restructuring steps annexed to the Supplemental Lock-Up Agreement included the execution of the Global Deed of Release and the new financing arrangements as integral and inter-conditional parts of the restructuring. They were all interdependent and were all intended to be part of the same inter-conditional process culminating in the completion of the Distressed Disposal.

134. All of this reflected Signal's overarching submission that the apparent purpose of clause 17.4(c) went much further than that for which Bidco and the GLAS Defendants argued. It said that the clause was intended to preclude any of the senior creditors from effecting a Distressed Disposal and releasing the guarantee liabilities owing (and related security) in respect of the HYNs, while themselves undertaking further or replacement lending to the Group. In this sense, while it was certainly the case that conditions (A) and (B) operated in support of condition (C), that was not the limit of their role. They had extra and significant roles to play in their own right.

135. Indeed Mr Choo Choy said that the whole of clause 17.4(c) provided a valuable protection to the holders of the HYNs because it then aligned their interests with those of the senior creditors in the context of a Distressed Disposal. This result was said to be achieved by a construction of the clause which concentrated more on the substance of the position which pertained after the Distressed Disposal was complete than it did on the mechanics by which the result for which Bidco contends was sought to be achieved.

136. The principal difficulty with Signal's submission is that its case as to the purpose of the clause 17.4 restrictions is not supported by the language chosen by the drafter of the ICA to describe the claims that are required to be released to ensure compliance with condition (B). It is also of note that there is nothing in the language of condition (B) which spells out any form of prohibition restricting some or all of the Primary Creditors from agreeing to lend money to the purchaser to enable it to fund the purchase consideration. To accept Signal's submission would be to accept the imposition of a highly significant restriction on the rights of senior creditors by a side-wind.

137. The language makes clear that the release required by condition (B) is that of the claims of the Primary Creditors. A reference in the ICA to a Primary Creditor is "a reference to it in its capacity as such and not in any other capacity" (clause 1.2(a)(i)). The definition of Primary Creditor does not include a creditor under the New Notes or a creditor under the new guarantee facility. The claims arising under the New Notes and under the new guarantee facility are held by the re-subscribing noteholders and the relevant lenders (as the case may be) in a different capacity and under different debt documents with different terms. The creditors in respect of the facilities and debt issues did not accede to the ICA in that capacity and nor were they designated in accordance with clauses 23.12 or 23.13 as the case may be.

138. The necessary consequence of this is that their existing creditor rights do not give rise to any claims by them as Primary Creditors within the meaning of condition (B). Those rights have all been released by the Global Deed of Release. I do not accept that this is a formalistic approach to construction, nor do I accept that it involves considering the documents by which the restructuring was implemented in isolation from each other. It is the simple and straightforward result of the words used in condition (B).

139. Signal pointed out that reference to a Primary Creditor in its capacity as such and not in any other capacity is qualified by the phrase "unless a contrary indication occurs". I do not agree that there is any contrary indication in the use of the description in condition (B). The only one that was suggested by Mr Choo Choy was based on his analysis of the words in parentheses at the end of the following citation from condition (B):

> "all claims of the Primary Creditors against any member of the Group and any Subsidiary of that member of the Group whose shares that are owned by a Debtor are pledged in favour of the Primary Creditors are sold or disposed of pursuant to such Distressed Disposal are unconditionally released and discharged concurrently with such sale (and are not assumed by the purchaser or one of its Affiliates) …"

For reasons to which I will now turn, I do not agree that those words bear the meaning for which Mr Choo Choy contends.

140. There was a debate at the trial as to whether the reference to something being assumed was to an assumption by the purchaser of all or some of the obligations of members of the Group to Primary Creditors (which was Signal's argument) or an assumption by the purchaser of the claims of Primary Creditors against members of the Group (which became the primary position adopted by the GLAS Defendants and, albeit somewhat belatedly, by Bidco). Signal then went on to submit that what occurred when the New Notes were issued and the new guarantee facility was executed was an assumption by the purchaser (by way of novation) of the Primary Creditors' claims against members

of the Group. This debate was enlivened by Mr Choo Choy's reliance on the fact that Bidco had originally made a positive case which was consistent with the one he advanced, a position which it only modified at a fairly late stage, albeit maintaining that the shift did not make any difference to the result.

141. Even if Signal's construction were to be correct, I do not consider that what occurred amounted to an assumption by the purchaser of the liabilities of the Group to the Primary Creditors for similar reasons to those I have already explained in relation to the argument that as a matter of substance the claims of the Primary Creditors continued to subsist and were not released. The new financing arrangements including the issue of the New Notes which were issued by a different debtor (Mangrove III) from the debtor under the SSNs (GSA) were legally distinct from the SSNs. The same can be said of the guarantee agreements. There was no assumption of an existing liability (i.e., all or part of the Original Debt) by the purchaser or anybody else. What occurred from the purchaser's perspective was that it and the restructured Group incurred new liabilities under the New Notes and the other new financing arrangements, none of which was governed or affected by the terms of the ICA.

142. However, I do not think that Signal's argument on construction is correct in any event. The assumption that is referred to in condition (B) is an assumption of the claims in respect of the Original Debt under the existing Debt Documents, i.e., the benefit of those claims, not their burden. While at first blush the language of assumption is consistent with a person assuming a liability, the benefit of a claim can be assumed as well and it is the phrase "claims of the Primary Creditors", which is the subject of the relevant clause. The syntax of the clause is inconsistent with Signal's argument and there is no language referring to the liabilities of any member of the Group which is capable of being the subject of the assumption.

143. This construction is therefore more consistent with the grammar of the clause which describes the claims as being the things that are both "released" and "not assumed". Signal's construction of what the words "assumed" is intended to refer to also cuts across two other aspects of clause 17.

144. The first is that there is no general power given to the Security Agent by clause 17.1 to transfer the burden of obligations owed to a Primary Creditor. The power to transfer the burden of an obligation is limited to intra-group liabilities and the like under clause 17.1(f), which is irrelevant to the context in which condition (B) applies. By contrast the Security Agent is authorised to transfer the benefit of claims owed by a Group member to a Primary Creditor under clause 17.1(d) and (e).

145. Mr Choo Choy submitted that this was a red herring, but was constrained to accept that this was because Mangrove IV and the Group did not accept fresh liabilities at all but simply assumed what was in substance the same debt. For the reasons I have given I do not accept that this is what occurred. It follows that, as clause 17.4 (including condition (B)) is concerned to control the exercise by the Security Agent of powers which are granted by clause 17.1, and is not drafted as a provision which grants powers in its own right, I consider that the more likely context with which the assumption wording in condition (B) is concerned is when the clause 17.1(d) and (e) powers are being exercised.

146. The second aspect relates to the proviso to condition (B). This proviso is concerned with the situation in which the Security Agent is authorised to sell or dispose of the claims of Primary Creditors (which in my view means pursuant to the powers granted by clauses 17.1(d) or (e)) rather than release them pursuant to the powers granted by clause 17.1(b). In that eventuality, a different regime applies and the power to release pursuant to clause 17.1(b) is not required to be exercised by condition (B) so long as paragraphs (I) and (II) of the proviso are complied with. In other words, where a claim of a Primary Creditor is proposed to be sold, that power can still be exercised notwithstanding condition (B) so long as paragraphs (I) and (II) of the proviso are complied with.

147. This is a clear pointer to the language in parentheses being concerned to clarify that there is no obligation to release a claim if it is intended to sell or dispose of it. It reflects the fact that, where a claim is assumed on disposal of its benefit, the obligation to release contained in condition B does not apply (so long as the proviso is complied with) for the obvious reason that there would be nothing left to sell or dispose of if that were to be required. In other words, the phrase spells out what is implicit in the proviso, namely that the mere fact that condition (B) is engaged does not of itself mean that the power to dispose of a claim pursuant to the powers granted by clauses 17.1(d) and (e) cannot be exercised.

148. Paragraph (II) of the proviso also refers to the purchaser and its Affiliates. A natural reading of that language points to the reference to a purchaser and its Affiliates as being a reference to the same circumstance in both the main part of condition (B) and in paragraph (II) of the proviso.

149. Signal also said that, if Bidco's construction were to be correct, the words in parentheses would be superfluous as it would not be possible for the benefit of claims which have been unconditionally released and discharged to be sold or disposed of. I do not think that this argument goes anywhere on the point with which I am concerned because, as Mr Smith submitted, the same point could be made about Signal's own argument. The transfer of an associated obligation or liability (which is the thing that on Signal's case is prevented from being assumed by the words in parentheses) cannot be given effect once the benefit of the claim has been unconditionally released and discharged. However, for the reasons that I have already given, I do not think that Signal's construction is right in any event.

150. Initially, Signal had a further discrete argument in relation to the SSGF. It contended that, irrespective of the discharge of the liabilities under the SSGF, the GRA was a Credit Facility within the meaning of the definition in clause 1.1 of the ICA, because it amounted to a refinancing of the SSGF within the contemplation of paragraph (c) of that definition. It pointed out that the SSGF was capable of being refinanced for this purpose by clause 11.2 of the ICA and that was what occurred when the GRA was executed. It was then said that, as a Credit Facility, the GRA was required to be released for condition (B) to be satisfied.

151. In the event, Mr Choo Choy did not pursue that submission, and I think he was right to take that course. It is clear from clause 23.12 of the ICA that, for a facility to amount to a paragraph (c) Credit Facility within the meaning of the ICA (including a facility to refinance the SSGF which Signal says is the proper characterisation of the GRA), it must be designated as such by GSA and otherwise comply with the accession provisions

of that clause. None of these steps occurred, with the consequence that the GRA cannot be a Credit Facility as defined and the creditors under it are not Primary Creditors in respect of their claims for the purposes of the ICA.

152. It follows that Signal's approach finds no support in the language of condition (B). It is also unattractive from a commercial perspective. While I accept that clause 17.4(c) was intended to achieve a level of alignment of interests between the holders of the HYNs and the senior creditors, I think that this alignment was concerned with their collective interest in maximising their recoveries through the distribution waterfall. I do not think that it goes any further than that, more particularly because to do so would amount to a significant incursion on the senior creditors' rights of priority, for which greater clarity of expression is to be expected.

153. Mr Choo Choy submitted that there was in fact a misalignment of interests if Bidco was correct, because the parties would no longer be aligned in relation to recovery through the ICA waterfall at all. The effect of Bidco's case was to enable the senior creditors to defer recovery on their claims, so that this was only achieved through the performance of the new loans. I do not agree that that is the correct way of approaching the meaning of condition (B). Bidco's construction is consistent with the alignment of existing interests in relation to the maximisation of value for the underlying business. Any deferral of recovery through the waterfall flows from the separate decision by some (indeed most) of the existing senior creditors to continue to support the business through the advance of new finance.

154. I also think that, while it is plain that the purpose of condition (B) was to ensure that, in the context of a Distressed Disposal of the type with which these proceedings are concerned, the release of existing liabilities was obtained, it is an unjustified leap in the logic to say that it therefore follows that all or some of those lenders can no longer be creditors of the Group under alternative financing arrangements once the Distressed Disposal is completed. I consider that this is the case even where the re-lending is not just concurrent with the sale but is also made in a pre-arranged manner in conjunction with the sale, which Mr Choo Choy stressed was the situation in the present case.

155. In my view this would be a wholly uncommercial consequence, because it would "seriously restrict the ability of the Lenders to obtain a recovery on their claims particularly in times where there is a shortage of liquidity in the market" as Eder J put it in *Stabilus* at [122]. It would remove from the potential pool of refinancing lenders those who are most likely to have an appetite to continue to support the Group with new finance, which as a matter of practical necessity would have to be available at the time the restructuring is being put in place.

156. It is also a consequence which it is illogical for any of the parties to have intended, because the only legitimate interest which anyone with a continuing economic interest in the Group can have had in an enforcement context would be to maximise the realisation value of the underlying business. It would also have a very significant adverse impact on the rights of the senior creditors to utilise the funds to which they were entitled under the distribution waterfall in their own interests and would give the holders of the HYNs a very significant negotiating position extending well beyond any legitimate interest they may have in ensuring that the value of the underlying business is realised in full.

157. Signal made a further submission based on the fact that the steps in the restructuring were all pre-ordained, inherently interlinked and contractually required to be taken in accordance with the terms of the Restructuring Deed. It was always intended that a material number of Primary Creditors would provide immediate funding to Bidco and the Mangrove group in place of the funding which had been provided to the Group prior to the restructuring. Signal said that the releases were not therefore unconditional because:

 i) from the time they entered into the Restructuring Deed, those of the Primary Creditors who had agreed to participate in the refinancing of the Mangrove group were contractually bound to accept the release of their claims against Bidco and the other members of the Group under the SSRF and the SSGF; and

 ii) at that stage, Bidco's right to the release was conditional on the occurrence of the other restructuring steps to which each of the parties to the Restructuring Deed was contractually bound to give effect.

158. I do not agree that this means that each release, when executed as one of the restructuring steps, was anything other than an unconditional release and discharge in accordance with the requirements of condition (B). The answer to that question does not depend on whether the release and discharge is one of a series of inter-conditional steps. It simply depends on whether, at a stage that can properly be regarded as concurrent with the sale effecting the Distressed Disposal, the claims of the Primary Creditors against the member of the Group whose shares are being sold as part of the Distressed Disposal, were unconditionally released and discharged. In other words the question is whether, at a time that is concurrent with the sale, the Global Deed of Release operated to effect an unconditional release and discharge of the claims.

159. It follows that, notwithstanding some infelicities in the drafting, neither the language of the clause nor its apparent purpose supports Signal's submission that "a Distressed Disposal is required to bring to an end, as a matter of substance as well as form, all claims of the Primary Creditors", if by that is meant any claims which may arise other than in their capacity as such. It would lead to great uncertainty as to the precise circumstances in which a Primary Creditor might be disabled from participating in the future funding of the Group at any stage after the completion of a refinancing.

160. This would be a particularly surprising consequence in circumstances in which the most fruitful source of finance for a business in distress will often be the funders with existing commitments. While it is understandable that the parties might negotiate an intercreditor agreement which contains provisions designed to protect the interests of the junior creditors by the manner in which it ensures that full value for the underlying business is achieved, there is little commercial sense in restricting the ability of the senior creditors to contribute finance to fund its survival and future development, whether by the restatement of their existing exposures on new terms, or by the advance of wholly new money.

161. In summary, I consider that Signal's reliance on what it referred to as the substantial continuation of the claims of those Primary Creditors who were creditors of the Group after the restructuring was misplaced. The claims which some but not all of the same entities had post-restructuring were in all respects different, arising as they did out of the choice made by them to be creditors of the restructured group, not as Primary

Creditors but as creditors under new debt documents and on new terms. In my judgment condition (B) was therefore satisfied.

Condition (A)

162. The SPA provided for the shares in Bidco (together with the preferred equity certificates and shareholder instruments) to be sold to Mangrove IV for a consideration of €424,631,585, called the Offer Amount, payable in cash. The consideration was to be paid directly by or at the direction of Mangrove IV to the Security Agent for application in accordance with the clause 19 distribution waterfall. On the face of it, this promise to pay a figure in cash, contained as it was in clause 3.1 of the SPA, described the proceeds of the Distressed Disposal. The discharge of the obligation undertaken by the promise, through the mechanism I have already described, amounted to satisfaction of Condition (A).

163. However, Signal argued that one of the purposes behind condition (A) was to prevent the payment of deferred consideration. This purpose was not fulfilled because Mangrove IV's obligations under the Restructuring Deed and the other obligations under the new financing arrangements, including the issue of the New Notes which on any view were not cash, were to be treated as substantial consideration for the sale of the Key Secured Assets. The root of this argument was very similar to Signal's argument on the failure to satisfy condition (B) in that it depended on treating the SPA as part of a broader set of arrangements and based itself on a submission that Bidco's case was a triumph of form over substance.

164. I do not think that is correct for similar reasons I have rejected Signal's argument on condition (B). The consideration for the Distressed Disposal was Mangrove IV's promise to pay the sum of €424,631,585. It is this promise which generated "the proceeds of such sale or disposal" for the purposes of condition (A). Even if there were other aspects of the restructuring without which the promise to pay in the SPA would not have been made, that does not mean that the proceeds were anything other than that which is to be treated in law as payment in discharge of the promise.

165. The fact that a majority of the holders of the SSNs chose to reinvest their share of that sum in the New Notes does not mean that the issue of the New Notes, or other aspects of the restructuring, were themselves to be treated as consideration for the disposal. There is no reason in principle why the holders of the SSN's should not be entitled to do whatever they liked with the money they received through the waterfall under the ICA, including for the purpose of subscribing for new debt securities. I think that Signal's argument conflates the proceeds of the disposal with the use to which some part of those proceeds was put by those entitled to receive the proceeds through the ICA waterfall. They are not the same thing.

166. I therefore agree with Bidco's submission that the proceeds of the sale or disposal which are required by condition (A) to be in cash is a reference to the consideration for the Distressed Disposal. The consideration for the Distressed Disposal was Mangrove IV's promise to pay the purchase price. Likewise, that consideration gave rise to the proceeds referred to on the face of condition (A). This construction is consistent with the wording of clause 17.4(a)(ii), which prohibits "consideration in a form other than

cash" except to the extent contemplated by Schedule 5. Clause 17.4(a) applies to all of the circumstances in which a Distressed Disposal is being effected, whereas clause 17.4(c) only applies if the HYN guarantees and shared security is to be released, but I consider that both clauses are addressing the same concept and should be construed in the same manner as the phrase "the proceeds of the such sale and disposal are in cash" where that language is used in condition (A).

167. Signal's second argument was that the proceeds were not substantially in cash because the promise to pay in cash was in large part (to the extent of c.€275 million) discharged by set-off in the manner I have already described. The consequence was that only c.€150 million of the total c.€425 million was actually received in cash.

168. Bidco did not contend that the element of the purchase consideration which was actually received in cash amounted to substantially the whole of the proceeds of the disposal. Its argument was more straightforward. It submitted that, as a matter of construction of the clause, the proceeds of a sale or disposal "are in cash" where the obligation to pay a specific amount in cash is discharged not by an actual transfer in cash, but by the exercise of a contractual right of set-off which is sufficient in law to discharge the obligation to pay. I should add that it must also be possible to see that the proceeds are applied by the Security Agent in accordance with the waterfall (as contemplated by clause 17.2(a)).

169. The background to the argument is that, where there is nothing in an inter-creditor agreement which prevents a sale or disposal from being made for non-cash consideration, there is no reason in principle why the parties might not have wished to leave open the possibility of a sale or disposal under which a security trustee might accept a bid to purchase either for a nominal consideration subject to the retention of existing debt or in exchange for the issue by the purchaser of non-cash consideration such as debt or equity. This is well recognised in the market (see e.g., the discussion of Eder J in *Stabilus* at [122]). A restriction which provides for payment to be actually received in cash will normally be uncommercial because it will restrict the ability of lenders to obtain a recovery on their claims, particularly where there is a shortage of liquidity in the market.

170. However, there will be reason nonetheless to make provision for the proceeds of a sale or disposal to be "in cash" or "substantially in cash", whether or not the obligation is actually discharged by a cash payment or through some other means, if there is a need to provide immediate certainty as to the value of the consideration, so long as those proceeds are applied in accordance with the distribution waterfall. This factor will increase in importance where (as in the present case), the waterfall might lead to full recovery for some groups of secured creditor and only a partial or even no recovery for others.

171. It will also facilitate the reliability of a Financial Advisers' Opinion because, if the purchaser has agreed to pay a sum of money in consideration for the sale, the process of opining on whether the price is fair is relatively straightforward. The same can be said about a Public Auction, which will not function effectively unless bids can be compared. In both instances, the exercise will be more difficult if more than an insubstantial part of the consideration can take the form of a non-cash instrument or other payment in kind, the inherent value of which may be uncertain.

172. As Mr Allison pointed out, the Restructuring Agreement could have required Mangrove IV to cause the €424,631,585 purchase consideration to be credited to a bank account in the name of the Security Agent and then for the Security Agent to transfer back the €274,676,540 it was obliged to pay on behalf of the re-subscribing noteholders. There could then have been no dispute that the proceeds were not just "in cash" but were also actually paid and received in cash. However, it would have been a somewhat uncommercial and impractical way of settling the parties' payment obligations, when a straightforward set-off was available to no legitimate disadvantage of any of the Primary Creditors, including the holders of the HYNs. It would have required money to go round in a circle for no discernible purpose.

173. However uncommercial it may have been, it is of course possible that the drafter of the ICA made provision for a method of discharge of an obligation which excluded the exercise of any right of set-off. The question is whether the requirement for the proceeds of the Distressed Disposal in the present to be "in cash (or substantially in cash)" had that effect.

174. The starting point is that a clause of this character will not normally exclude a right of set-off as a method of discharging an obligation to pay in cash. The point is pithily expressed in Derham on Set-Off (4th edn) at paragraph 16.01 fn 2: "… Set-off is regarded as payment in cash. See *Owens v Denton* (1835) 1 CM&R 711, 712, 149 ER 1266, 1267 ('the parties are in the same situation as if payment in cash had been made') …". Statements to the same effect can also be found in Wood on English and International Set-Off (1st edn, 1989) at paragraph 12-53: "It is suggested that an exclusion of set-off will not generally be implied from a statement that payment is to be made in cash …" and in Mann and Proctor on the Legal Aspect of Money (8th edn) at paragraph 7.15.

175. This line of reasoning was applied by Eder J in *Federal-Mogul Asbestos Personal Injury Trust v Federal Mogul Ltd* [2014] EWHC 2002 (Comm), where the question was whether a payment by way of set-off was a payment in cash or a payment in kind. Eder J held that the reference to a payment being made in cash was not to be treated as meaning only payment in money bills or other legal tender. Payment could be made "in cash" through the exercise of a contractual right of set-off. He concluded his analysis as follows, in a passage which concentrated on the disadvantage of payments in kind for valuation purposes:

> "176. ... For present purposes, the only question is whether the undoubted payment made by set-off is to be treated, under the ALP, as a payment in "cash", or whether it is a payment "in kind" which requires valuation. For the reasons just stated, I agree with Mr Stanley's submission that it is the former."

176. Eder J's approach reflected a line of authority of which *In Re Harmony and Montague Tin and Copper Mining Company, Spargo's Case* (1873) 8 Ch App 407 is one of the oldest, to the effect that payment in cash can be made by set-off. In *Spargo's Case* the obligation arose under s.25 of the Companies Act 1867 to pay for shares in cash. The point is illustrated by the following passages from the judgments of James and Mellish LJJ:

> "In truth it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within

> the meaning of this provision. … if a transaction resulted in this, that there was on the one side a bona fide debt payable in money at once for the purchase of property, and on the other side a bona fide liability to pay money at once on shares, so that if bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it … does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other, the shares have been paid for in cash." (per James LJ at p.412).
>
> "Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." (per Mellish LJ at p.414).

177. In the present case, I think that the mere fact that a substantial part of the consideration for the Distressed Disposal was applied by way of set-off does not mean that the proceeds were not "in cash (or substantially in cash)" for the purposes of condition (A). The proceeds of the Distressed Disposal are what is generated from the promise to pay in cash and there is nothing to restrict any holder of the SSNs from relending those proceeds by directing that the cash which would otherwise have been received under the distribution waterfall should be applied as a set-off against the subscription price for the New Notes. In short there is no reason in principle why the proceeds in the present case cannot be treated as being "in cash" if what occurs has the legal effect of discharging by set-off the obligation which arose under the promise to pay.

178. A transfer of cash in the traditional form of legal tender is obviously one means by which the promise to pay "in cash" could have been satisfied, but a restriction to that form of cash would be a most improbable stipulation in a structure of this sort. The transfer of money between bank accounts is another means by which the discharge of an obligation payable "in cash" could be achieved. There would be no room for taking a narrow and literal view of the phrase "in cash" such that the making of counter-balancing book entries which would then be involved was insufficient.

179. Likewise, and in the light of the authorities I have cited, I think that the operation of a legal set-off should be regarded for the purposes of condition (A) as having precisely the same effect. The consequence is identical to what would occur if there had been a circular payment of cash in the manner I have described, and it has not been suggested that there is any good reason for such a circular payment to have been the drafter's intention. So long as the original obligation is to pay in cash, it does not matter that the proceeds of the disposal are generated by the discharge of that obligation by way of set-off in circumstances in which both sums are both liquidated and ascertained.

180. In my judgment, the real purpose of condition (A) is to ensure that the proceeds of the Distressed Disposal are identified and valued in cash. For the reasons I have given, that is a valuable but not excessive protection for the holders of the HYNs. The only

argument to the contrary is that it is intended to prevent those entitled to receive under the distribution waterfall from incurring any new creditor rights against Bidco or other members of the Group. For the reasons I have already explained in relation to condition (B), I do not consider that clause 17.4 of the ICA was intended to have such a significant and far-reaching effect. It follows that I am satisfied that the construction advanced by Bidco and the GLAS Defendants is the correct one and that condition (A) was satisfied in this case.

<u>The Authority Point</u>

181. Finally in relation to the initial construction arguments, Signal originally sought a declaration in paragraph 98.6 of its Re-Amended Defence and Counterclaim that:

> "In purporting (1) to release the Borrowing Liabilities, the Guarantee Liabilities and the Other Liabilities of the Claimant Group in respect of the High Yield Notes and (2) to dispose of the Key Secured Assets, the Second Defendant therefore acted in breach of the Intercreditor Agreement.

182. Mr Smith submitted that, if Signal's argument on conditions (A) or (B) had succeeded, which is a necessary prerequisite to the allegation of breach by the Security Agent, there was in fact no breach of the ICA, because on that hypothesis what the Security Agent purported to do was of no legal effect. Mr Choo Choy countered with a submission that, a Security Agent who seeks to procure a release which by reason of clause 17.4(a)(i) is in excess of his authority, acts in breach of the ICA, even if there are no material consequences so far as the Security Agent is concerned because of the way that the enforcement instruction provisions in clause 15 and the provisions dealing with the role and duties of the Security Agent in clauses 21.8 to 21.17 of the ICA operate.

183. However, in the event Mr Choo Choy informed me during the course of his closing submissions that Signal no longer pressed for a declaration on the question of breach. I therefore say no more about it.

<u>Construction of the ICA: should the court decide the additional construction point?</u>

184. It was also part of Bidco's case that, on the true construction of the ICA, the conditions laid down in that clause did not have to be satisfied if the holders of the HYNs had no economic interest in the High Yield Debt Shared Security, or the other assets of Bidco and the Group, and would receive no return if the Distressed Disposal did not occur. This argument was advanced on the basis that, in those circumstances, the holders of the HYNs would have no legitimate interest in enforcing compliance with clause 17.4(c) because compliance with the conditions would not provide them with any return.

185. Bidco called this its fallback position and said that it would be necessary to consider the point if either condition (A) or condition (B) was not satisfied. This is also the position in relation to the related question of fact, viz. whether or not the holders of the HYNs would in fact have received no return if the Distressed Disposal had not occurred.

For obvious reasons, the points go hand in hand – Bidco has no need to have the question of whether the holders of the HYNs were in fact out of the money determined if its construction point were not to be correct, and it would have no need to have the construction point determined if the holders of the HYNs were not in fact out of the money.

186. The additional construction point was introduced at a relatively late stage, some two years into the dispute, and after Dr Kebekus had failed in his jurisdiction challenge before Zacaroli J. It was pleaded as a new paragraph 17(c) to Bidco's Amended Reply and Defence to Counterclaim dated 3 November 2021 as follows:

> "Further or alternatively, it is averred that, on the true construction of the Intercreditor Agreement, the conditions laid down by Clause 17.4(c) are not required to be satisfied if the High Yield Creditors are "out of the money" (in that the High Yield Creditors have no economic interest in the High Yield Debt Shared Security or the other assets of the Debtors and would receive no return if the Distressed Disposal did not occur). This is because, if the High Yield Creditors are "out of the money", then the High Yield Creditors have no legitimate interest in enforcing compliance with the conditions laid down by Clause 17.4(c), including (in particular) the conditions laid down by Clauses 17.4(c)(A) and (B), since compliance with those conditions would not provide any return to the High Yield Creditors. It is averred that the High Yield Creditors were "out of the money" as at 9 October 2019 for the reasons set out in paragraphs 53 to 57, 71 and 117 of the Amended Particulars of Claim, together with the additional factual background pleaded in paragraphs 31 to 72. For the same reasons, the High Yield Creditors suffered no loss by reason of any non-compliance with Clause 17.4(c)."

187. It was not suggested that the argument could not be run because it was too late, but, the fact that it was first raised at the stage it was, gave support to a submission by Dr Kebekus that I should not decide the point at all. The context in which this submission was made was the commencement by Dr Kebekus of the Claw Back Action, the dismissal of which is now subject to an appeal.

188. Mr Shaw, for Dr Kebekus, submitted that this court should not make declarations or findings of fact on issues which are before the German court. It was said, at a time before the Claw Back Action was dismissed, that even if this court did make any such findings, any declaratory relief should make clear that matters which will be the subject of determination in those proceedings have not been determined in these proceedings. He also submitted that, if the court was otherwise minded to make a declaration that the Enforcement Objective has been satisfied, it should only do so by reference to the conclusive evidence provisions in Schedule 5 paragraph 9 to the ICA, without regard to the question of whether or not the Enforcement Objective was in fact satisfied.

189. Dr Kebekus' Defence and Issue 3(c) in the List of Common Ground and Issues reflected his position. Issue 3(c) is: "Should any declaratory relief granted by the Court be limited in the manner suggested in paragraph 13 of the Defence of the First and Eighth Defendants?" Paragraph 13 of the Defence of the First and Eighth Defendants was as follows:

> "… if and insofar as the Court in these proceedings is minded to grant any declaratory relief, in the exercise of its discretion, then:

(1) such relief should be formulated in a manner which makes clear that each of the matters referred to at paragraphs 12(l)-(4) of this Defence above (i) have not been determined as part of these proceedings and (ii) are matters for determination by the German Court (to the extent that they are the subject of dispute in the Claw Back Action); and

(2) such relief should go no further than is necessary for the purposes of these proceedings as articulated by Bidco and the Second Defendant before Zacaroli J (namely to determine the question of whether, under the terms of the Intercreditor Agreement and as a matter of contract, Bidco has been released from its liabilities to pursuant Clause 17 of the Intercreditor Agreement)."

190. The particular reasons why it was said that the English court should not make declarations or findings on the question of whether the HYNs were out of the money can be summarised as follows:

i) Bidco's value as at the date of the sale of the Bidco shares is a central issue in the Claw Back Action, and if this court were to determine Bidco's value in these proceedings, this would create the risk of irreconcilable judgments in England and Germany.

ii) If this court rejects Bidco's argument on the additional construction point (i.e., that each of conditions (A) and (B) are impliedly qualified by reference to whether the HYNs were out of the money), the factual question becomes academic.

iii) At the hearing of the jurisdiction challenge before Zacaroli J, which was before the additional construction point was first raised, Bidco and the GLAS Defendants emphasised that the purpose of the declaratory proceedings was to determine whether, as a matter of contract, the restructuring was carried out in accordance with the ICA, and the judge noted that there was a real prospect that Bidco's claim could be determined without the need to decide substantial issues of fact.

iv) It would therefore be manifestly unfair to Dr Kebekus for the court now to determine the out of the money issue. Bidco should be held to the position that it took before Zacaroli J, which was that these proceedings were initiated to determine the construction arguments in relation to the ICA. It was no part of their purpose to obtain factual findings for use in foreign proceedings.

191. As to the first point, I think that Mr Shaw established that there was some overlap and the contrary was not seriously disputed by Bidco. Even a superficial reading of the recent judgment of the Regional Court of Düsseldorf demonstrates that is the case. Indeed Bidco pointed out in its closing submissions that some of the criticisms of the sale process conducted in July 2019 bore what it itself described as an uncanny resemblance to similar criticisms made by Dr Kebekus in the Claw Back Action. Mr Shaw showed me parts of the German pleadings in which evidence from M&A experts is referred to as having identified defects in the sales process. There were also other examples of instances in which matters which have been aired at the trial have also been raised in the Claw Back Action, such as the question of whether or not any of the EoDs were artificially or abusively procured.

192. Based on this relatively superficial look at what was in issue in Germany, Mr Shaw submitted that, if I were to go into the weeds and decide the valuation question, that would carry with it all of the factual issues which arise in the Claw Back Action. I think that this overstates the position. The issues which have been pleaded in the Claw Back Action cover a much wider spectrum than those which arose on the narrow question of whether, if the additional construction point is concluded in Bidco's favour, conditions (A), (B) and (C) have to be complied with.

193. In any event, confirmation that the question of whether the holders of the HYNs were out of the money as at 9 October 2019 was an issue for determination by the court is contained in the formulation of Issue 2(b) albeit affected by Issue 3(c), which identifies that very question. It was also the subject of very detailed evidence from expert valuers Mr Tim Giles, a partner in Independent Economics and Finance LLP, for Bidco and Mr Mark Bezant, a senior managing director at FTI Consulting LLP, for Signal, none of which would have been necessary if the court was not going to decide the factual point.

194. Despite Mr Shaw's well structured arguments, I have concluded that it was appropriate for me to make findings of fact on the out of the money issue for a number of reasons.

195. The question which I am asked to determine is whether, on the true construction of an English law contract subject to an English exclusive jurisdiction clause, the Security Agent's authority to release the Primary Creditors' claims against members of the Group had arisen. There are two bases on which Bidco argues that it has. Merely because I have decided that the first of these bases (i.e., that each of conditions (A) and (B) was satisfied) is well-founded does not mean that there is no utility in determining the additional construction point.

196. If I were not to express my conclusions on the additional construction point and the Court of Appeal were then to disagree with the conclusions I reached on the initial construction arguments, the dispute would not have been fully determined and there is a danger that much time and expense would have been wasted. I have heard full argument on the question of whether or not the holders of the HYNs were out of the money at the time of the Distressed Disposal and considered extensive evidence both from a witness of fact and from two experts, all of whom were cross-examined at the trial. I was also told that extensive disclosure on the out of the money issue has been given.

197. The position might have been different if a preliminary issue on the initial construction arguments had been ordered at an earlier stage in the proceedings, e.g., at the time that expert evidence was being ordered in January 2022. It would then have been possible for the construction issues to be argued out in full, with any appeal being determined before the factual questions which arise on the out of the money issue are addressed. However, by the time a preliminary point came to be sought, as it was in September 2022, Falk J concluded that it was too late to take that course (indeed the expert evidence was on the point of being served) and her decision to that effect was not appealed.

198. This was some time after the out of the money issue was first pleaded by Bidco by amendments to its Reply and Defence and Counterclaim dated 3 November 2021. Signal then denied in its Reply to Defence to Counterclaim that the holders of the HYNs were out of the money as at 9 October 2019 and went on to plead "That will be a matter

for disclosure and expert evidence in due course". Although Dr Kebekus did not plead to this new allegation, it was not said that the allegation was in any sense abusive or ought not to have been made, and Mr Shaw said that his client was neutral on the construction point from which it flows. As it remains in issue it should on the face of it be determined.

199. I should emphasise that, in reaching this conclusion, I am not persuaded that these proceedings were commenced before the Claw Back Action has any real weight. The factual question of whether or not Bidco was out of the money when the Distressed Disposal was made was not raised at the outset and indeed had still not been raised by the time that Zacaroli J was concerned with the jurisdiction challenge in December 2020 and January 2021.

200. But nor do I place much weight on the fact that, at the time of the hearing before Zacaroli J, Mr Allison and Mr Smith submitted that the issues raised in these proceedings are legal ones, pointing in particular to the conclusiveness of the Financial Advisers' Opinion on the issue of whether the Enforcement Objective had been met (see [98] of the Jurisdiction Judgment). As it is not said (and rightly so) that any estoppel arises, Zacaroli J's conclusion is more important than what was said by counsel. He simply said (at [99]) that he was not in a position to determine the extent to which, if at all, questions of fact will need to be determined at trial. There was no suggestion from this that Bidco was not entitled to advance an expanded case. I do not think that the court should decline to determine a pleaded issue by making appropriate findings merely because it had thought on an earlier jurisdiction challenge that it was probable that those findings would not have to be made; the position remained open. In particular, I do not agree that it would be unfair to Dr Kebekus to take that course.

201. I also think it is relevant that the question the court is asked to consider does not of itself give rise to issues of German insolvency law, which might be better deferred pending final resolution by the German court. Furthermore, there is no evidence that the German court has any concerns about the unsurprising circumstance of an English court resolving disputed issues in relation to the construction and effect, on the facts of this case, of an English law agreement governed by an English jurisdiction clause.

202. The additional construction point, concerned as it is with the effectiveness of the Security Agent's exercise of its power to release, depends on the construction of an English law contract and the correct factual findings having regard to the court's conclusion on that issue of construction. Even if English law were to recognise the German insolvency proceedings in relation to GSA as main proceedings for the purposes of Article 3 of the Recast Insolvency Regulation (which it does not) and even if English law were to recognise the Claw Back Action as proceedings in respect of which the German court has jurisdiction by reason of Article 6(1) (which it does not) and notwithstanding that an appeal against the dismissal of the Claw Back Action has now been launched, the question of whether the releases were effective in accordance with clause 17 as a matter of contract is a separate and distinct question from the matters which arise in Germany.

203. This also illustrates a further reason why I do not consider that, even if the Claw Back Action had not been dismissed, this court should be concerned about determining the issues of fact which arise in relation to the additional construction point. As will appear, there was overwhelming evidence in these proceedings that there would be no return to

the holders of the HYN's if (as at 9 October 2019) Bidco were to be subject to formal insolvency proceedings as an alternative to a successful completion of the restructuring through the process agreed in the Supplemental Lock-Up Agreement. A fire sale would have left the holders of the HYNs significantly out of the money. The real issue was whether a formal insolvency was the correct counterfactual.

204. I shall explain my conclusions on this point a little later, but this was not the context in which the value of the group's underlying business arose in the Claw Back Action. It is clear from the German judgment that one of the central issues with which the Regional Court of Düsseldorf was concerned was whether any deficiencies in the marketing of the underlying business caused any disadvantage to creditors. As will appear, an issue in that form does not arise in these proceedings, even though some of the questions of fact are of relevance to both. Thus, while the Claw Back Action focused on the alleged failings of the sale process, the issue in these proceedings is not the reason for the Group's failure to attract a bid from anyone other than Triton, but rather the consequence of its failure to do so on the prospects that a further sales process immediately after 9 October 2019 might achieve a return for the holders of the HYNs. That is a different question.

205. Mr Shaw also advanced an alternative argument. He said that, if the court was minded to determine the additional construction point and the out of the money issue on the facts, the price should be that Dr Kebekus is removed as a defendant to these proceedings. The argument was that this would mitigate the unfairness to him of being bound by the English court's determination of any issues which might be relevant to the Claw Back Action.

206. Bidco had a short answer to this argument which I accept. All of the issues in these proceedings are governed by the English exclusive jurisdiction clause in the ICA by which GSA is bound. The German law evidence was that, if Dr Kebekus as well as GSA is not a party to these proceedings, any judgment will not be effective against GSA in Germany, because as a matter of German law (although not English law) he is the insolvency administrator.

207. I agree with Mr Allison's submission that this means that removing Dr Kebekus from the proceedings would be fundamentally unsatisfactory. In particular, it is necessary for GSA to be bound by any determination made in these proceedings, in order to ensure that Bidco is released from any contribution claim that GSA may have against it arising out of their capacities as co-guarantors of the HYNs, a point which was addressed by Zacaroli J in the Jurisdiction Judgment (see [21] and [111]).

208. I was not addressed on the approach that German law takes to findings made by a foreign court, but I do not accept that this court should refrain from granting declaratory relief merely because there are common issues which also arise in the Claw Back Action. However, although I have reached that conclusion in principle, I accept that the court should take care to ensure that it does not make findings which might affect the final resolution of proceedings in Germany, unless the proper determination of the issues which are raised in these proceedings make it desirable to do so, having regard to proper case management considerations.

The additional construction point

209. On the substance of the additional construction point, Bidco's formulation of what is meant by the holders of the HYNs being "out of the money" (paragraph 17(c) of its Amended Reply and Defence to Counterclaim) bears a close similarity to the circumstances in which it is not necessary to permit a creditor to participate at a meeting summoned under section 901C of the Companies Act 2006 (the "2006 Act") to approve a restructuring plan. The construction for which Bidco argues is that conditions (A), (B) and (C) do not have to be satisfied if the holders of the HYNs "have no economic interest in the High Yield Debt Shared Security or the other assets of the Debtors and would receive no return if the Distressed Disposal did not occur". Section 901C provides:

> "(3) Every creditor … of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned under subsection (1).
>
> (4) But subsection (3) does not apply in relation to a class of creditors … of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company."

210. The concept of a genuine economic interest is then repeated in section 901G of the 2006 Act where it is used for the purposes of describing the conditions in which the cross class cram down power can be exercised as part of the process of sanctioning a restructuring plan. Condition A is that the court must be satisfied that, if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative, defined as whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F. Condition B is that the plan has been agreed by a number representing 75% in value of a class of creditors, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

211. In the context of a statutory restructuring plan, the question of whether or not the relevant class of creditor has a genuine economic interest in the company is to be determined by reference to what would occur if the plan were not to be sanctioned. As Miles J explained in *Re Smile Telecoms Holdings Ltd* [2022] EWHC 387 (Ch) at [77] a determination of that issue involves the court asking itself two substantive questions:

> "a. First, in considering whether a creditor or member, or class of creditors or members, has a genuine economic interest in the company, the court considers the position by reference to the relevant alternative for the company if the plan is not sanctioned.
>
> b. Second, the court should address the question by applying the civil standard of balance of probabilities: see *Virgin Active* at [134] and [239]."

212. This is therefore an exercise which is to be carried out by reference to what the position would be if the plan were not to be sanctioned, i.e., if the court were to refuse the application for the relief sought. For this purpose, the court is not concerned with the background to why the company finds itself in the position that it does, save to the

extent that this is part of the process of assessing on the balance of probabilities what will in fact happen on the hypothesis that the plan is not sanctioned.

213. This reflects an established approach in the area. The principles had been developed in the context of identifying the proper comparator primarily for class purposes in relation to creditor schemes of arrangement under part 26 of the 2006 Act, well before the enactment of the new part 26A of the 2006 Act by the amendments introduced by the Corporate Governance and Insolvency Act 2020. As Snowden J explained in *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) at [247], when discussing the decision of Mann J in *Re Bluebrook Ltd* [2010] BCC 209:

> "It is, I consider, tolerably clear that this test of a "genuine economic interest" reflects the observations of Mann J in *Bluebrook* that what the court must ascertain is whether a purported class "actually has an economic interest in a real, as opposed to a theoretical or merely fanciful, sense", and that it is to be applied to the plan company by reference to the relevant alternative for the company if the plan is not sanctioned."

214. Mr Choo Choy submitted that the court could derive no assistance from this line of authority. He pointed out that the simple question for me is one of contractual construction and has nothing to do with the statutory mechanisms for which provision is made by parts 26 and 26A of the 2006 Act. I certainly agree that there can be no direct read-over from a separate legislative scheme, albeit one which is operational in circumstances which are very similar to those with which clause 17.4 of the ICA is concerned. However, I think that the comparison is of assistance in at least one limited sense. It shows that the legislature has contemplated that the court may need to carry out a similar exercise when sanctioning a restructuring plan to the one for which Mr Allison argues in determining the additional construction point. It may therefore reflect what Bidco urges on the court as a construction of the ICA which is reasonable, commercial and consistent with good business sense and explains why Bidco has formulated its term in the way that it has.

215. Mr Allison said that, although the ICA did not expressly say what should happen in the event that the holders of the HYNs were out of the money, the construction for which he contended followed as a matter of business common sense. Why should the form of the proceeds of the sale or the extent of the release be a matter for the holders of the HYNs if they will not receive any part of the consideration in any event? He relied on *European Directories* as a case in which the Court of Appeal concluded, in the context of a similar release provision in an inter creditor agreement, that a narrow interpretation which gave excessive negotiating power to the subordinated creditors would be wrong.

216. Mr Allison submitted that his answer to the additional construction point, introducing as it does a qualification to the need to satisfy conditions (A), (B) and (C), is either the consequence of the proper reading of the ICA or an implied term on the grounds that it is so obvious as to go without saying or necessary for business efficacy. I do not agree. In summary, while there is in theory a logical justification for reading the clause in the way Mr Allison suggests, I consider that any such reading would be inconsistent with the remainder of clause 17 and will give rise to practical difficulties in implementation, which are unlikely to have been intended by the drafter of the ICA.

217. So far as concerns what Mr Allison called a proper reading of the ICA, I was unable to identify anything in the clause which could be construed as confirming the qualification for which Bidco contends. Mr Allison did not advance any specific arguments as to how the language which was used by the drafter might mean that conditions which are required on the face of the clause to be satisfied are not required to be satisfied in the circumstances identified. Simply to say that business common sense supports their inclusion is not sufficient for this purpose. As Mr Choo Choy submitted, such an argument offends the basic principle that the process of interpretation is not to be used to rewrite a contract on the grounds that it would be more commercial if it were to be rewritten in the manner alleged.

218. Nor do I consider that the suggested qualification to the circumstances in which conditions (A), (B) and (C) have to be complied with should be implied into the ICA. In particular it is not so obvious that such a term should be implied as to go without saying and its implication is not necessary for business efficacy. For the latter, it is normally necessary to establish that, without the term, the contract would lack commercial or practical coherence (per Lord Neuberger in *Marks and Spencer PLC v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72 at [21]). I think the argument falls well short of satisfying this test. There are a number of reasons for this, some of which also relate to why the process of construction does not lead to the conclusion for which Mr Allison contends.

219. The first is the language of the opening words of clause 17.4(c). I agree with Signal's submission that the phrase "At any time when the High Yield Liabilities are outstanding" (emphasis added) is inconsistent with there being some implicit but unidentified time when, even though liabilities to the holders of the HYNs are outstanding, conditions (A), (B) or (C) are not required to be complied with. The same can be said about the fact that the drafter has identified one circumstance in which that is not the case, but the conditions do not have to be complied with, viz. when the majority High Yield Creditors have approved the release. In my judgment, the suggested construction runs contrary to the express language of the clause.

220. Secondly, the ICA is a complex document in which the drafter has sought to provide for a range of different eventualities, but does not give any hint in the language that the application of conditions (A), (B) and (C) is to be limited in the manner suggested by Bidco. Whilst it is doubtless the case that there will be occasions on which drafters of such documents fail to see the wood for the trees (see e.g., Lord Mance in *Re Sigma Finance Corpn* [2010] BCC 40 at [12]), it is to be expected that such a significant limitation on the application of a clause which was designed to protect one class of Primary Creditors was not spelt out in terms.

221. On this point, I think there is substance in Mr Choo Choy's submission that the ICA should not be construed as introducing what amounts to a third disposal regime (viz. a Distressed Disposal without the need to comply with conditions (A) and (B)) where the drafter had already given careful consideration to the formulation of two others. The drafter had explicitly provided not just for a Distressed Disposal regime which quite specifically required compliance with conditions (A) and (B) but also explicitly provided for a non-distressed disposal regime under clause 16. I agree that, in those circumstances, it would be surprising to find that what amounted to a third regime had been introduced either through a process of what on any view is a rather ill-defined process of construction or by way of implied term.

222. Thirdly, I think that Mr Allison's submission places too much emphasis on the logic of excluding the ability of a creditor to influence the means by which an outcome in which it has no economic interest is achieved, and not enough on the disadvantages of having a structure which requires the value of a creditor's interest (if any) to be established before the parties can determine whether or not a particular type of Distressed Disposal must satisfy each of conditions (A), (B) and (C). It is one thing to introduce a bespoke method for establishing that a creditor has no economic interest in an asset (which is one of the issues with which condition (C) was concerned through the mechanism of a Financial Advisers' Opinion and a Public Auction). It is quite another to leave for determination at large the factual question of whether that is or is not the case. As Mr Choo Choy explained, the existence of conditions (A) to (C) obviates the need for an uncertain and potentially litigious enquiry into value. I agree that this points against the introduction of the more cumbersome mechanism for determining whether or not appropriate protection has been afforded to the holders of the HYNs, which the answer to the additional construction point for which Mr Allison argues would entail.

223. It is no answer to this point to say that the court is accustomed to dealing with such issues in the context of applications to sanction restructuring plans and schemes of arrangement under parts 26 and 26A of the 2006 Act. It is inherent in the process of obtaining the sanction of a plan or a scheme that a determination by the court is required, a situation far removed from the one contemplated by the parties when dealing with an enforcement in accordance with the ICA. Indeed, if anything the terms of condition (C) and the process contemplated by Schedule 5 both demonstrate that the drafters were concerned to facilitate a restructuring which avoided if at all possible the intervention of the court.

224. Fourthly, I do not think that Mr Allison's argument gives sufficient weight to a consideration which he relied on in another part of his argument, viz. the importance of construing the ICA in a way which provides for a reasonable degree of commercial certainty and predictability. Bidco's case on the additional construction point raises the spectre of a dispute both as to the precise test to be applied, and (more importantly) as to whether or not the holders of the HYNs are or are not out of the money at a stage in the process when it is likely that a Distressed Disposal will have to take place quickly, and there is real urgency for the parties to know whether the Security Agent can act under clause 17.1 to give effect to a compulsory release. I do not consider that the need for an open enquiry as to value at that stage (as distinct from one structured in accordance with Schedule 5) would be consistent with business common sense.

225. Fifthly, the ICA can operate perfectly satisfactorily without implying the suggested term. The importance of commercial certainty and predictability in resolving any issue relating to the economic interest of the holders of the HYNs is dealt with by a different and more practical drafting technique, adopting a more commercial solution than the limitation on the application of conditions (A), (B) and (C) for which Bidco's answer to the additional construction point provides. As Bidco itself explained in its written argument, the provisions of condition (C) are:

> "designed to ensure that the High Yield Guarantees are only released to the extent that a Public Auction or a Financial Advisers' Opinion shows that they are "out of the money". The drafter considered that a Public Auction or a Financial Advisers' Opinion would be an appropriate way to identify where the value "breaks"."

226. I agree with this description of the purpose of condition (C), and that it was the means by which the drafter intended the Security Agent (and an Instructing Group) to be able to ascertain in a relatively simple, certain and predictable way whether or not the holders of the HYNs continued to have an economic interest and, if so, whether the way in which they are treated in connection with the release of their claims is fair from a financial point of view. It is a requirement which operates in addition to conditions (A) and (B) and it must always be satisfied. It provides the structure within which the parties have agreed that the issue of where value should break, and its consequences, is to be determined.

227. In my judgment, these factors point against the implication of the suggested term and more generally a construction of the ICA which introduces a disapplication of the need to satisfy conditions (A), (B) and (C) if the holders of the HYNs are out of the money. It follows that the additional construction point fails on construction grounds, but the issue which remains is whether, if I am wrong on the point of construction, the HYNs were in fact out of the money in the sense pleaded by Bidco in paragraph 17(c) of its Amended Reply and Defence to Counterclaim.

Were the HYNs out of the money as at 9 October 2019?

228. Bidco's first argument was that, because GT's opinion was a valid Financial Advisers' Opinion within the meaning of the ICA, the holders of the HYNs are contractually estopped from denying that the sale maximised the recovery of the Secured Parties. The argument was that the price of €424,631,585 agreed with Mangrove IV was conclusively determined by the Financial Advisers' Opinion as having satisfied the Enforcement Objective (this much was common ground). This meant that the figure achieved on the sale was contractually agreed to be a maximisation of the recovery of the Secured Parties to the extent consistent with a prompt and expeditious enforcement, but was insufficient to deliver any return on the HYNs. It must therefore follow that they were out of the money.

229. Signal submitted that this argument was misconceived, because the question of what would have been received on a Distressed Disposal conducted in accordance with Schedule 5 to the ICA is only relevant where there is to be a Distressed Disposal. It has no relevance to the counterfactual of what would have occurred if the Distressed Disposal had not taken place, which is the context in which the estoppel argument is now advanced by Bidco.

230. As the Court of Appeal explained in *First Tower Trustees Limited v. CDS Superstores International Limited* [2019] 1 WLR 637 at [47], parties to a contract can bind themselves to a particular state of affairs even if they know that state of affairs to be untrue. However, the circumstances in which the deemed state of affairs is agreed to apply is also a matter of construction of the contract. It follows that, merely because the parties have agreed that the production of a Financial Advisers' Opinion is conclusive evidence that the Enforcement Objective was satisfied for the purposes of complying with the Enforcement Principles irrespective of whether or not there was in fact a maximisation of recoveries, does not mean to say that the parties have bound themselves to that effect on the issue of whether the holders of the HYNs are out of the money for the purposes of the additional construction point.

231. I agree with Signal on this point, although I would explain it rather differently. The hypothesis on which this dispute arises is one in which the additional construction point has been answered in favour of Bidco, which means that the requirement for a Financial Advisers' Opinion for the purposes of satisfying condition (C) does not have to be met if the holders of the HYNs are out of the money (as defined). In those circumstances, it makes little sense for the parties to have intended that the provision in Schedule 5 paragraph 9, which deems the Enforcement Objective to have been met when such a Financial Advisers' Opinion is obtained, should apply in the context of determining whether the holders of the HYNs are in fact out of the money. In short it seems to me that this argument is inconsistent with Bidco's answer to the additional construction point in the first place, which is the hypothesis on which this part of the case proceeds.

232. However, although I do not accept Bidco's argument based on a contractual estoppel, I think that the conclusion expressed by GT in the Financial Advisers' Opinion is relevant evidence in support of its case that the holders of the HYNs were in fact out of the money. I shall revert to it briefly in that context. The experts agreed that, as at the time of the Distressed Disposal in October 2019, the amount of the liabilities to be discharged ahead of the HYNs outside a liquidation scenario was €553 million.

233. Turning then to the other evidence, Mr Allison submitted that the factual question which arises is what would have been most likely to have happened on 9 October 2019 if the sale constituting the Distressed Disposal had not occurred. Mr Allison stressed in his closing argument that the construction for which he contended meant that the question of whether clause 17 applies is only engaged as at the date on which the Distressed Disposal takes place, i.e., 9 October 2019. He said that, if the Distressed Disposal had not then taken place, Bidco and the Group would have entered formal insolvency proceedings. If, in that counterfactual, the holders of the HYNs would not have received any payment, they would then have been out of the money for the purpose of Bidco's additional construction point.

234. Signal did not disagree that there are those two stages to the process of assessing the relevant counterfactual. Signal also accepted that, if the appropriate counterfactual which flowed from Bidco's implied term was a liquidation, there would have been no return to the holders of the HYNs. Mr Bezant also agreed that there was no other available form of insolvency proceeding which might have led to a return on the HYNs and there was no evidence to suggest that he might have been mistaken about that. However, Signal submitted that the evidence did not justify a conclusion that a liquidation with some form of piecemeal or fire sale would have occurred, nor did it accept than an accelerated sale in any context other than a formal insolvency would have led to no return. It follows there was a fundamental disagreement between the parties on the answer both at stage one and at stage two.

235. Mr Choo Choy submitted that the expert evidence was of limited assistance in answering stage one. I agree in the sense that, if the Distressed Disposal had not occurred on or about 9 October 2019, the experts' opinions as to what would then have happened would not be based on their specialist expertise. However, their opinion on stage two, i.e., once the proper counterfactual has been identified, is relevant. As to stage two there was agreement, as I have already explained, that if a liquidation was the appropriate counterfactual, there would have been no return to the holders of the HYNs. There was also agreement that, if there was any form of extra-liquidation sale the appropriate methodology for a valuation in general terms was a discounted cash flow

("DCF") of the enterprise value of the Group. However, Mr Bezant and Mr Giles took very different approaches on how to apply that methodology, a disagreement to which I shall revert at the end of this judgment.

236. In answering the stage one question, Signal submitted that Bidco's approach to the counterfactual was unreal because it avoided examining the real question which was why the SPA would not have been executed on 9 October 2019. This led it to submit that the only remotely realistic "out of the money" term was what would have happened not just if the SPA had not been executed when it was, but what would have happened if Bidco and the senior creditors had not embarked on the process of the restructuring and the Distressed Disposal as a whole, a process which started nine months earlier at the beginning of the year. As it said in its closing submissions:

> "In other words, what would have been likely to follow had the Galapagos Group, Triton and the Senior Lenders not embarked upon the course that they did between January and October 2019 culminating in the execution of the Sale and Purchase Agreement and other Restructuring Documents?"

237. The difficulty with this submission is that there would be much uncertainty in identifying when the course which Bidco and its senior creditors followed should be treated as having commenced for this purpose and (perhaps more importantly) it ignores the formulation of the term for which Bidco contends. As Mr Allison made clear, Bidco did not argue for an alternative construction of clause 17.4 or a different term to be implied in the alternative. It simply said that the question is whether the holders of the HYNs would have been out of the money on the date the Distressed Disposal took place if it had not occurred. It follows that whether or not this gives some support to Signal's argument that the term relied on should not be implied in the first place, I agree that many of Mr Choo Choy's arguments (and most of Mr Bezant's evidence) were aimed at the wrong target.

238. Signal then submitted that the court can in any event conclude on the balance of probabilities, that, if the Distressed Disposal had not proceeded on 9 October 2019, it is more likely than not that the Group would not have become the subject of formal insolvency proceedings. It said that there would still have been an orderly sale extending over a period of three or four months rather than a sale which was (or amounted to) a liquidation fire sale. In summary, the reason for this is the inherent probability that the interested parties would have acted in pursuit of their own interests which would have caused them to find a way to ensure that the value-destructive process of a liquidation or other fire sale would not have occurred. As Mr Choo Choy put it in his oral closing submissions "So I do therefore say even as late as 9 October if the senior lenders and Triton had wanted it they could have done it."

239. The whole thrust of Signal's argument was therefore directed at the suggestion that there was no prospect of the restructuring failing to deliver in accordance with the Supplemental Lock-Up Agreement on 9 October 2019, because the stakeholders with a prospect of making a recovery had committed too much to allow that to happen. Even if that were to be the case, and I agree that there is real substance in Signal's argument that great efforts were made by Triton and the senior creditors to attempt a going concern restructuring, I do not think it follows that by 9 October 2019 any alternative transaction giving a return to the holders of the HYNs was likely to have been agreed, rather than allowing the Group to go into liquidation. Signal did not point to any

evidence that there was an alternative scenario waiting in the wings, or that one was feasible at this later stage, and in cross examination Mr Bezant accepted that he had seen no evidence to suggest one either.

240. However, the consequence of Signal's position was that Mr Bezant was instructed to give his evidence as to the value of the Group's assets on a going concern basis. He therefore accepted that his valuation was not on the basis that the Group was in distress and he proceeded on the assumption that there was no form of compulsion in any sale. Everything he had to say was based on the assumptions which he was instructed to make, including the fact that the assets to be realised were to be valued as a going concern.

241. As will appear, I consider that these assumptions were misplaced. I consider that there was very clear evidence that, in the absence of the Distressed Disposal proposed by the Supplemental Lock-Up Agreement, a formal insolvency was likely to occur. Signal protested that there are no contemporary materials which advanced that as a likely outcome. In large part that is true, but it is a factor of little relevance, because the essence of the proponents' focus was that the Distressed Disposal was the right way forward. It would only have been if the Distressed Disposal did not proceed, which was not thought to be at all probable, that the alternative of a formal liquidation would have come to the forefront of their thinking.

242. The principal reason why Signal said that a going concern sale could have happened if the contemplated Distressed Disposal did not occur was that the BCG report contemplated that the Group could have survived until June or July 2020 by which time it would have had a positive net cash flow. Mr Choo Choy also submitted that, even if some form of accelerated sale had taken place, it would have been a sale that would have been sufficiently orderly to rectify what he called the shortcomings of the sale process which occurred in July and August 2019. This would have meant that any discount would not have been such as to leave the holders of the HYNs wholly out of the money.

243. The difficulty with this submission is that BCG's financing case presupposed an injection of €140 million of new equity (not debt). There was no evidence that anyone other than Triton was prepared to provide new money of that magnitude and there was no evidence that this would have been made available by Triton if the Distressed Disposal on the terms of the Initial or Supplemental Lock-Up Agreements were not to occur.

244. Mr Choo Choy was therefore driven to submit that the inherent likelihood was that Triton, the senior lenders and the holders of the HYNs would have done whatever was necessary to ensure that the Group would continue as a going concern. He said that this was both because Triton was committed to the Group and because it would have been in nobody else's interests to allow liquidation to occur, not least because a liquidation fire sale would not just have left the holders of the HYNs out of the money, but would have left the holders of the SSNs substantially out of the money as well.

245. Triton's commitment to saving the Group was said to be apparent from a number of indications at the beginning of the process from which it appeared that Triton was supportive of the Group and wanted to find a solution for it to continue as a going concern. I agree that this underpinned Triton's approach and I also agree that Triton

was keen to ensure that the Group remained in its ownership and control, but I think that the indications are that this was only if that could be achieved on acceptable terms. The fact that it was prepared to agree in July 2019 to commit a further €140 million of new money is a good indication that this remained its position throughout the restructuring process.

246. But none of this of itself justifies a conclusion that, if the transaction which Triton had been so deeply involved in planning, were not to proceed, there would have been any return for the holders of the HYNs. Even the most enthusiastic commitment has its limits. In my view, some of Signal's submissions paid insufficient regard to the circumstances in which that was likely to have been the case so far as Triton was concerned, more particularly in circumstances in which there were many other interested parties (creditors with interests ranking senior to the HYNs) who would have had to be on board. In my judgment, the strong likelihood was that, by 9 October, there was no real prospect of a sale other than on the terms or substantially the terms of the Distressed Disposal being agreed. Even if consent for some changes to the proposed restructuring might have been obtained from all stakeholders whose consent was required, it is not possible to infer that those changes would or might have led to an increase in the purchase consideration sufficient to give a return to the holders of the HYNs.

247. Signal pointed to a number of things that Triton and the senior creditors could have done to improve the Group's prospects of survival. But one way or the other they all involved either an advance of substantial further funding or, as a minimum, the further deferral by different groups of creditors of their right to enforce if they regarded it as in their interests to do so. In my judgment, this is an unrealistic position for Signal to have maintained. Its real complaint is that it would have been in the interests of the holders of the HYNs for other groups of stakeholders to have taken a different position from that which they were prepared to adopt. The fact that they could have done so is irrelevant. There is no evidence that they wished to do so and there is no evidence that they would have done so if the restructuring on which so much effort had been expended were to have failed.

248. In particular, there is no basis (and no evidence) for assuming that Triton or any other party would have agreed to an alternative transaction. Furthermore, in response to the suggestion by Mr Choo Choy that it would not have been rational for the lenders to enforce or pursue an accelerated sale if the Distressed Disposal did not occur, Mr Giles gave a convincing explanation as to why that was unlikely to have been the case:

> "For a start, the company was facing insolvency and wasn't able to meet its debts, and I think that's quite clear; and, secondly, we have got multiple parties here. You can't just set this up as an equity company borrower -- lender. You have got the revolving credit facilities, super senior creditors, senior creditors. All these people actually have different interests and some of them can get paid out more quickly and more thoroughly and in different processes. Some might prefer a liquidation because they will be fully paid out and other situations -- so it is not -- there is no sort of clear economic answer, as you've sort of tried to outline in these situations. It's always much more complicated."

249. Mr Bezant agreed that he had not identified any such evidence and Signal's argument to the contrary gives insufficient weight to the fact that Dr Mayer-Eming's evidence

was that Macquarie's focus was on saving the Group as a going concern rather than devising a solution which involved Triton remaining as owner come what may. More importantly, by the time the counterfactual comes to be assessed at the conclusion of the transaction, it runs up against some of the same difficulties which were addressed almost 20 years ago by Mann J in *Re MyTravel Group Plc* [2005] 1 WLR 2365 at [60]:

> "Mr Crystal sought to avoid this conclusion [that the bondholders were "out of the money"] by saying that an alternative to winding up would be a consensual restructuring. It is impossible to determine the likelihood of that (though attempts to do so with the bondholders have so far proved fruitless) but even if it were possible that does not make the winding up an any less appropriate measure of the value of the bondholders' economic interest. The fact that the creditors might be prepared to do a deal does not confer an economic interest in the company. It means that, as between the parties, the bondholders might be able to extract some value, whether as a matter of bargaining, ransom, conscience or otherwise, but that is a different question. That value does not necessarily reflect an economic interest in the company. This latter question involves assessing what the bondholders would receive if they enforced their bonds against the company. Since the facts show that that would occur [in] a winding up, then a winding up is the appropriate hypothetical scenario."

250. In the event, the Court of Appeal set aside Mann J's declarations in relation to the economic interest issue (see the judgment of Chadwick LJ in *Re MyTravel Group Plc* [2004] EWCA Civ 1734). It did so (without prejudice to the question of whether or not his conclusions on the facts were correct), because it was not necessary for him to determine the point at the convening stage and there were reasons for him not to have done so. But nothing said by Chadwick LJ had any impact on [60] of Mann J's judgment, and his approach to the economic interest point has been cited with approval in a number of cases since (see for a summary of the position the judgment of Snowden LJ in *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) at [33ff]).

251. Indeed, one of these cases was Mann J's own decision in *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch), where the judge said at [25] the following about the question of whether a class of creditors had any economic interest in the company:

> "If there is a dispute about this, then the court is entitled to ascertain whether a purported class actually has an economic interest in a real, as opposed to a theoretical or merely fanciful, sense, and act accordingly—see the reasoning in *Re MyTravel Group Plc* [2005] 2 BCLC 123 at first instance. Where things have to be proved, the normal civil standard applies. The same case indicates that the mere fact that the possibility of establishing a negotiating position and extracting a benefit from a deal is not the same as having a real economic interest (though obversely a real economic interest may establish, or enhance, a negotiating position). The basis on which the assessment of that interest is to be carried out will vary from case to case."

252. In part this reflects a concern by the court that a stakeholder's potential ability to extract a ransom payment through the leverage of a holdout position should not be misconstrued as an economic interest. In that context I agree with Signal's submission that the court will often be reluctant to be drawn into a commercial evaluation of the parties' negotiations (e.g., per Adam Johnson J in *Re Steinhoff International Holdings*

NV [2021] EWHC 184 (Ch)). But the more substantive point is the light that both *Bluebrook* and *Steinhoff* sheds on the need for clear evidence sufficient to prove on the balance of probabilities that there would be a return for the junior creditors (such as the holders of the HYNs in the present case) in the event that the restructuring, often to be imposed through the mechanics of a scheme of arrangement or a restructuring plan, does not proceed.

253. I have reached the conclusion that the evidence substantiates Bidco's case on this point. I think that the cumulative effect of the circumstances I shall explain in the following paragraphs explains very clearly why such evidence as there is does not demonstrate that, on the failure of the proposed Distressed Disposal, the Group would somehow have been supported for sufficient time to enable another orderly sale to proceed. This support would have needed to extend over a long enough period of time (during which all stakeholders maintained confidence in the Group) to enable its business to be sold as a non-distressed going concern and for the proceeds of that sale to give a return to the holders of the HYNs.

254. The first reason is the period of time over which extensive efforts had already been made to implement a restructuring outside an insolvency. This factor feeds straight into the attitude of the German directors and the erosion of market confidence which is referred to in much of the contemporary advice. The position of the directors of the operating subsidiaries (in particular Kelvion) in Germany gave rise to particularly acute issues. As I have already explained, they had for some time been expressing the view that, if a solution could not be found quickly, they would be required to file for insolvency in order to avoid their potential personal liability under German law. They had their own independent legal representation and their position was explained in the unchallenged evidence of Dr Mayer-Eming and further substantiated by the GT letter of understanding, produced after discussion with Kelvion's CEO. This made clear that, while management believed as at 1 October 2019 that the proposed transaction was likely to succeed, it was only the belief in the success of that transaction, which enabled them to conclude that the Group could continue to operate as a going concern.

255. It follows that the directors of the operating subsidiaries had made clear to GT that, if the proposed restructuring was no longer regarded as likely, then given the liquidity position of the Group and impending maturities, they would no longer be able to confirm a going concern position for the operating Group. I am satisfied that, in that eventuality, it is likely that German directors would have filed for insolvency in Germany, and given the time which had already expired, the liquidity problems faced by the Group and the outcome of the sale process, the probabilities are that this would have happened the moment it became likely that the proposed restructuring pursuant to the Supplemental Lock-Up Agreement would not proceed.

256. Another reason I am satisfied that, if the proposal had not proceeded in accordance with the agreed terms on or about 9 October 2019, formal insolvency is likely to have followed, is the way in which Görg had expressed their concerns about the Group in their July 2019 letter to Bidco and GSA. They said that while there should be a sufficient time for a fair marketing process to be carried out (i.e., the process which then proceeded with the assistance of Macquarie and PwC), legal and commercial constraints did not allow it to be lengthy and that the Group might be destabilised if it was. As I explained earlier in this judgment the letter was clear confirmation that Görg's conclusion was that the operations of the business were in severe financial

distress and, more importantly for this part of the case, its key suppliers and counterparties were close to walking away. In my judgment, the probabilities are that, if the proposed transaction was not consummated by the early part of October, the destabilisation which Görg anticipated might eventuate through the legal and commercial constraints to which it referred would have been likely to occur. The attitude of the directors of the operating subsidiaries was such that this destabilisation would then have driven the Group into formal insolvency proceedings.

257. Görg's views to this effect were reiterated in the liquidation analysis they prepared in mid-September 2019. I accept their explanation as to how the businesses of the Group would unravel very rapidly once customers started to cancel existing orders and suppliers started to make demands for advance payments. It is entirely credible that, against the background of a planned reorganisation which did not proceed, and without the security of an existing plan for the future, formal insolvency would follow very rapidly.

258. Against this background, I think it is improbable that the directors of the German operating companies would have enabled an accelerated sale of the businesses outside the envelope of formal insolvency proceedings. It was submitted by Signal that an extra-liquidation sale was an appropriate counterfactual and it adduced evidence from Mr Bezant to the effect that, in that counterfactual, there would have been a return to the holders of the HYNs. Bidco's expert, Mr Giles, took a different view on value in that situation but in any event, I do not consider that such an eventuality would have been at all likely. The evidence points to a conclusion that the directors of the German operating subsidiaries would have forced everybody's hands in the absence of a substantial injection of new liquidity, which the evidence does not show would have been made available other than through the planned Distressed Disposal. Even if such a sale had occurred in the very short time that was available, the probabilities are that the market would have regarded it at this stage of the process as equivalent to a value-depleting liquidation style fire-sale, with the consequence that the holders of the HYNs would be out of the money.

259. The next reason why the Group would not have been supported for sufficient time to enable an orderly sale to proceed is that the entirety of its financial indebtedness was in default, EoDs having been committed on a number of occasions during the course of August and September 2019. There is no evidence that, if the restructuring which had taken a considerable period of time to put together, had not proceeded as proposed, the creditors bound by the Supplemental Lock-Up Agreement would have been prepared to continue their forbearance. It is not sufficient to assert, as Signal does without any hard evidence, that Triton or the senior creditors would have come up with something because it was not in their interests for a formal insolvency to intervene.

260. The instability which would have been caused by the existence of current EoDs and the need to continue with efforts to hold the line on creditor forbearance is relevant for another reason. The likely attitude of the other stakeholders has to be seen in the context of the steps which had already been taken by the holders of the HYNs to force members of the Group into insolvency proceedings in Germany, which had been proceeding for some time (as I have already explained). As the holders of the HYNs themselves were already relying on the Group's insolvency for that purpose, if the Distressed Disposal had not taken place on or about 9 October, the probabilities are that the other stakeholders would have wished to participate in the German insolvency process, for

which the holders of the HYNs were continuing to press, in order to limit the influence of creditors ranking junior to them in the distribution waterfall.

261. There are a number of further reasons why it is not sufficient for Signal to assert that Triton or the senior creditors would have come up with something because it was not in their interests for a formal insolvency to intervene. Most importantly, they include the fact that Triton was the only entity which had submitted a bid during the course of the sales process. This is a powerful reason why the directors of the German operating companies would have been unlikely to consider that, absent implementation of the proposed transaction, a going concern determination could no longer be justified and therefore gives rational evidential support for a conclusion that the operating subsidiaries would have been forced into liquidation in any event (see above). It also supports a conclusion that a more advantageous bid than that made by Triton was unlikely to emerge and that, in the absence of any further liquidity being made available, the intervention of a formal insolvency was the only way forward.

262. This would have been a less significant factor if Signal had been able to adduce admissible evidence to the effect that the sales process was materially deficient. Although it appears that this was an argument which Dr Kebekus had sought to advance in the Claw Back Action, neither he nor Signal adduced evidence in these proceedings in support of that complaint. Thus, there was no evidence from any of the 79 parties invited to submit indicative bids to the effect that the sales process took a form which discouraged or inhibited them from doing so, and nor was there any admissible expert evidence that there were problems with the process which might reasonably have been thought to detract from the ability of the process to generate a market price for the assets to be sold.

263. In his report, Signal's expert valuer, Mr Mark Bezant, appeared to be criticising the sales process. He referred to the timetable, the omission of certain trading updates, the fact that the Financing Case had been risk adjusted, the strict nature of the non-disclosure agreement which restricted bidders from engaging with potential funders without the Group's consent and the fact that it was public knowledge that Triton was engaged in the process. He said that all of this "may mean that the price paid for Galapagos by Triton may be inconsistent with" the accepted definition of market value.

264. In the event, I did not find Mr Bezant's evidence on this point to be of any real assistance, because he accepted that he is not an expert in M&A transactions and that he could not opine as to whether these features acted to discourage bidders or prevent a sale to a party other than Mangrove IV. What he had to say on the impact of these factors, even if established, was therefore of little probative value. Although Mr Shaw showed me pleadings in the Claw Back Action referring to expert evidence which was also critical of the sales process, he only did so for the purposes of demonstrating the overlap between the two sets of proceedings and the underlying evidence was not adduced in these proceedings.

265. I also recognise that some parts of the judgment of the Regional Court of Düsseldorf (as to which see above) are consistent with it treating some of Dr Kebekus' criticisms of the sale process as having had some substance. However, the evidence on which it reached those conclusions was not explored at the trial and, in the event, those criticisms went nowhere because the German court also held that there was insufficient evidence

to establish that the sales process was the reason why no bids higher than the Triton bid were received.

266. It would be possible to leave the point there, but as the criticisms were not withdrawn, I think it is right to address in summary Bidco's explanation of why they were in any event misplaced. The reason I do so is not to make express findings one way or the other for the purposes of any insolvency claim to set aside the sale, but rather to set in its proper context my conclusion that it is improbable that the Group would have been in a position to embark on another sales process outside a formal liquidation subsequent to 9 October 2019.

267. As to the challenge to the timetable, Signal submitted in closing that, taking the timetable in the round, it was plain that potential bidders had very little time with the relevant financial information in which to produce an indicative bid, and relied on the fact that Mr Giles characterised the sales process as having been under "some time pressure and accelerated". That may have been the case but Mr Bezant said in cross-examination that, while he had identified in his report that the tight timetable was "a feature which may have been likely to affect the price that a third party was willing to pay", this was an observation rather than a criticism.

268. This was obviously an equivocal position for him to maintain, but more importantly, while there is no doubt that the timetable was tight, Dr Mayer-Eming's evidence substantiates that it was not just feasible, but also that it was necessary because of the need to "calm down" suppliers, customers and credit insurers and for it to be run and completed while the Group had sufficient liquidity and "a stable platform to run a process". I also accept that the approach adopted by PwC and Macquarie was sufficiently flexible to ensure that the process would not be shut down if there was any reasonable prospect of unlocking higher bids. This conclusion is supported by PwC's clear evidence that nobody at the time mentioned that the tight timetable was a limiting factor when deciding whether to bid. Signal has not established that the approach adopted with the assistance of these two professional service firms was inappropriate in the circumstances which then pertained, nor that the Group's trading counterparties would have countenanced what on its case would have been a more extended sales process at this stage, whether before the 9 October Distressed Disposal or thereafter if any attempt were to be made to try again.

269. As to the omission of trading updates, the thrust of what Mr Bezant had to say related to what was called the Tortoise Teaser which he criticised for only including financial information to the end of 2018. However, Dr Mayer-Eming's view was that PwC and Macquarie adopted a balanced approach to the disclosure of the appropriate figures at the teaser stage. There was a concern that the last 12 months figures reflected a number of high margin contracts in the last quarter of 2018 which were unlikely to be repeated. In short they were concerned to ensure that information contained in the teaser documentation disclosed a realistic picture without falling into the trap of overselling.

270. In any event, the evidence is that further financial information was made available for those potential bidders who signed up to a non-disclosure agreement. As PwC confirmed that no potential bidder indicated that the nature and extent of the information provided was a stumbling block to submitting a bid, there is no evidence in these proceedings to substantiate a criticism that the way in which information was

provided to potential bidders was likely to have contributed to third parties' willingness to make a bid or to pay more than Mangrove IV.

271. As to the non-disclosure agreement itself, Mr Bezant contended that the restrictions on potential bidders from engaging with potential funders without the Group's consent appeared onerous, but he also accepted that he was unable to opine as to whether terms of that nature were standard in transactions such as these. Dr Mayer-Eming described them as entirely commonplace, and there is no proper basis for this court to conclude that they were not.

272. I also consider that the fact that it was public knowledge that Triton was engaged in the sales process is of little material significance. PwC gave this aspect of what occurred a clean bill of health confirming that all parties in the process, including Triton, were treated equally to ensure that access to information was consistent for all potential bidders. As it was not contended that Triton could not be prevented from bidding, and there is no evidence that there were any potential bidders who were put off by Triton's participation, it is difficult to see how the fact that it was involved can have operated to deter those who might otherwise have been minded to make a more advantageous bid, let alone which would have given the holders of the HYNs some form of return.

273. The final point alluded to by Mr Bezant related to BCG. He said that it was not disclosed that the financial forecasts provided in the teaser documentation reflected the financing case forecasts in the June BCG report. It was not therefore explained that the figures represented the risk adjusted and sensitised forecasts that were subject to challenge and review by BCG as part of the IDW S6 restructuring process. It was submitted by Signal that potential bidders would therefore have assumed that this was unverified management information and not that it had been validated by an IDW S6 restructuring opinion.

274. I am not persuaded that the evidence in these proceedings proves that this point has any substance either. As Dr Mayer-Eming explained, the usual approach is that management forecasts will have been considered by an accounting firm which has validated the numbers, but more significantly, it seems that potential bidders were informed of the existence of the BCG work and were informed that its product would be made available if they progressed to phase II of the process. It follows that the fact that the sales process which led to the Mangrove IV bid did not lead to any other bids is a persuasive reason why a further sales process outside the confines of a formal insolvency is unlikely to have generated a better return. In the absence of any further short-term funding, this also leads to the conclusion that it is improbable that a further period of time would been contemplated by either the Group or its senior creditors in the event that the proposed transaction were not to have proceeded.

275. In its closing argument, Signal relied on materials from the early part of 2019 (the BCG March validation of the Group's business plan and the Macquarie April discussion materials) to demonstrate that their forecasts showed that the level of cash shortfalls by the end of the year would be limited. That may be correct, but they were cash shortfalls nonetheless and critical in the light of the attitude of the German directors to a continuation of trading when a going concern approach was no longer justified. I do not consider it to be more likely than not that enough short term funding would have been made available to enable a further period of delay to occur sufficient to facilitate a sale outside an insolvency.

276. More importantly, however, by the time of the BCG report in June, the evidence suggests that the only potential source of sufficient liquidity to enable the Group to continue as a going concern until the end of the year was through the provision of interim funding by Triton. Signal said in a number of different contexts that the liquidity shortfall would not have been the case in the absence of very significant transaction costs. That may have been the case, but that does not affect the fact that such costs were a necessary evil in the light of the Group's financial position and were always going to have to be incurred and paid.

277. The liquidity crisis was also apparent from the BCG October report, which forecast that the ability of the Group to survive outside a formal liquidation was predicated on the critical assumptions that the Distressed Disposal would occur, that the HYNs would be written off in full and that a further €140 million of new money would be provided. Mr Bezant agreed that he had seen no cash flow forecast which supported an argument that there would be sufficient liquidity to fund continued trading while a further sales process was carried out in circumstances in which the restructuring contemplated by the Lock-Up Agreements failed.

278. This factor is also relevant to an alternative scenario suggested by Mr Bezant, which was an accelerated sale, in which the relevant Group companies did not first go into liquidation. This gives rise to the stage two analysis I have referred to above. In support of his opinion on this alternative, Mr Bezant placed reliance on the financing case he adopted from the BCG October report. In particular, it underpinned the discounted cash flow (DCF) model he used to demonstrate that there was sufficient value in the Group to give a return to the holders of the HYNs.

279. I do not think it is necessary to examine this last aspect of the evidence in any detail because, during the course of his cross-examination Mr Bezant accepted that the financing case made the assumptions that I have just identified. The assumptions demonstrate why the BCG report does not support Signal's counterfactual, because there is no evidence (whether from Mr Bezant or otherwise) that Triton would have been prepared to put in a further €140 million of new money in a context other than the Distressed Disposal, and I do not think it would have done so.

280. Signal may have been correct to contend that, in a sale outside a liquidation, there are in theory three key inputs which would have driven the Group's value - the cash flow projections and the weighted average cost of capital ("WACC") to find the Group's enterprise value, followed by an appropriate discount to reflect the need for an accelerated sale. But it follows from my earlier conclusions that I think that Mr Bezant's evidence to the effect that the enterprise value of the Group was €792 million was based on the wrong assumptions. His approach presupposed a going concern valuation because that is what he was instructed to carry out. As he said in his evidence "I do not take into account financial distress in the exercise that I've conducted".

281. So far as the cash flow projections were concerned, I think that Mr Bezant was wrong to ground his conclusions in the BCG financing case and that alone, on the basis that the business risks were already incorporated in BCG's views. This carried with it an assumption that a prospective purchaser would assume that the projections would be met, which, as Mr Giles said, is less likely where the projected cash flows are several years away.

282. I prefer Mr Giles' approach, and in particular his conclusion that the BCG projections were too optimistic to use as a stand alone case for a valuation of the enterprise value (i.e., debt free) but on an accelerated basis. He based his conclusions on what he called a positive recovery case, a flat recovery case and a trend case, a blend of which I found to be more compelling. I accept Mr Giles' summary of why he considered that Mr Bezant's use of cash flows several years away from the valuation date does not give the right answer in this case:

> "This highlights the risk in the cash flow projections utilised by Mr Bezant, who assumes that a hypothetical buyer would pay €792 million for a company that had poor financial performance up to the Valuation Date, required debt restructuring and turnaround, and would not, even if all this was successful, return positive cash flows for a further two years. The negative free cash flows to the firm (i.e., to both debt and equity holders) mean that no return would be made to any investor until 2021. Further, 82% of Mr Bezant's EV is derived from cash flows from 2025 onward (i.e., the terminal value)."

283. As to the WACC, the difference between the experts was significant. Mr Bezant calculated the figure at 7.2%, while Mr Giles concluded that the right figure was 10.11%. Mr Giles' application of his percentages to the cash flows led to an enterprise value of €544 million in the positive recovery case, €59 million in the flat recovery case and €20 million in the trend case, none of which would be sufficient to produce any return to the holders of the HYNs. Giving equal weight to each of them he came up with an average enterprise value of €207.5 million. Self-evidently, this was very significantly different to Mr Bezant's figure of €792 million.

284. There was a lengthy debate at the trial as to the application of the correct WACC, which it is unnecessary for me to resolve, largely because of the conclusions I have reached on the discount for accelerated sale. Mr Giles said that 10.11% was the right figure while Mr Bezant gave evidence that the figure should be 7.2%. There were respectable arguments on both sides and I think it likely that, if the court were required in these proceedings to reach a point figure valuation (which it is not), the percentage would have been determined to be somewhere in the middle, but closer to Mr Giles' percentage than to that advanced by Mr Bezant.

285. However, resolving this dispute is unnecessary because of the conclusion I have reached on the discount for accelerated sale, on which the experts also had very different views. Mr Giles' evidence was that the normal range for lack of marketability is 30-50% and that an application of the upper end of the range was appropriate because of the absence of an available and liquid market, a factor which would be magnified by the need to sell quickly. Mr Bezant suggested 10% to 20%, but recognised that this was a judgment call to which there was no clean answer.

286. I prefer Mr Giles' evidence on this issue, in large part because Mr Bezant's whole approach was skewed by the assumptions he had been instructed to make. I agree with Bidco's submission that, because any post-9 October 2019 sale would have been a second attempt under very considerable time pressures to sell the businesses of a group with very significant liquidity issues, the market would have treated it as a fire sale. On the basis of my conclusion that the more probable outcome in any event would have been a liquidation, and that the period for an accelerated pre-liquidation sale would have been very telescoped, I have concluded that the right discount is the upper end of

Mr Giles' range, i.e., 40-50%. It is not in issue that anywhere within this range would leave no return for the holders of the HYNs even if Mr Bezant's DCF valuation based on his view of the right cash flow projections and the most accurate WACC were to be treated as correct. Applying a 40% discount to Mr Bezant's €792 million leaves a figure of €475 million which is very substantially less than the €553 million required before the holders of the HYNs start to make a return. As the probabilities are that Mr Bezant's cash flow projections are too optimistic and his WACC percentage was too low, the extent of the shortfall before the holders of the HYNs came into the money was in fact greater, but for present purposes the precise extent to which that was the case does not matter.

287. I also think that Bidco was correct to submit that there were a number of other known facts which were not taken into account by Mr Bezant when performing the going concern valuation he was instructed to undertake, and which undermined his DCF model, based as it was on the BCG financing case and the accelerated sale discount he selected which was not in my judgment sufficient. These included the fact that the financial debt of the Group was in default, that the holders of the HYNs had asserted insolvency EoDs, that GSA was subject to insolvency proceedings in Germany on the application of some of the holders of the HYNs, that there was no further funding available from any of the Group's creditors, that the Group had already failed in its efforts to refinance the SSNs, and that there was a likelihood that cash collateral would be required by lenders under the SSGF.

288. It seems to me that all of these factors undermine the likelihood of Mr Bezant's DCF model being accurate or of their being a return to the holders of the HYNs in the event of an accelerated sale outside an insolvency. However, the most substantial reason for that result is that a rounded assessment of all the circumstances of the case supports a conclusion that a liquidation sale was the likely counterfactual in the absence of the planned Distressed Disposal, in which case it is not in issue that the holders of the HYNs would have been out of the money.

289. In short, I accept Bidco's submission that Mr Bezant's valuation was premised on cash flow projections which were themselves based on an assumption that the restructuring contemplated by the Lock-Up Agreements would be implemented. This was despite the fact that the purpose of the valuation exercise was to determine what would have happened if the Distressed Disposal had not occurred. I agree that, put simply, this approach makes no sense. In my view, it is likely that liquidation would have followed almost immediately once it became apparent that any one or more of those assumptions was misplaced or unjustified, and even if the German directors had been persuaded to stay their hand for a very short period of time to facilitate a sale outside a liquidation, given the history of the pressure to which the Group was subject, it would have had to have happened immediately in circumstances in which it would have been no more likely to produce a return to the holders of the HYNs than would have been the case on a formal insolvency.

290. Finally, despite Signal's submissions to the contrary, I think it is relevant that GT's Financial Advisors' Opinion expressed the view that the Mangrove IV bid was fair from a financial point of view taking into account all relevant circumstances. Signal submitted that the court could take little from this because of the timetable within which they assumed that the restructuring had to be completed. As I accept that the timetable was tight and that GT were entitled to assume that enforcement action was required to

be prompt and expeditious not just because this was required by Schedule 5 of the ICA, but also because that was what was in fact required, I also think that their view on fairness reflected the Group's market value at the time.

291. For all of these reasons, I am satisfied that if, contrary to my view, it is a term of the ICA that conditions (A), (B) and (C) were not required to be met if the holders of the HYNs were out of the money at the time of the Distressed Disposal, that state of affairs did indeed exist as at 9 October 2019.

Disposition

292. In the light of the conclusions I have explained in this judgment, I am satisfied that it is appropriate to make the declarations sought in paragraphs 127 a, b, c, e, f, g, h, i, k and m of the re-amended particulars of claim and the prayer for relief. Signal contends that I should not make the declaration in paragraph 127 m, (viz. that the Enforcement Objective under Schedule 5 of the ICA was satisfied), because it is in issue in the Claw Back Action. I do not agree, but the declaration will be limited to confirmation that it is based on the fact that Schedule 5 paragraph 9 of the ICA applies. Even though the GT Financial Advisors' Opinion was confirmatory of the fact that the holders of the HYNs were out of the money at the time of the Distressed Disposal, whether the Distressed Disposal did in fact maximise recovery for the Secured Parties has not been determined in these proceedings.

293. My present view is that the declarations sought in paragraphs 127 d, l and n are either insufficiently precise to be justified or unnecessary in the light of the other relief that I propose to grant. As Signal did not contend that the declaration made under paragraph 127 i should not be made, the declaration sought in paragraph 127 j is otiose and was not in any event argued. I refuse the application for each of the declarations sought by paragraph 98 and the prayer for relief in Signal's counterclaim.