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Case No: CR-2023-005565

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

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 9 February 2024

Before :

MR JUSTICE RICHARDS

- -

IN THE MATTER OF LINK FUND SOLUTIONS LIMITED

- and -

IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

Felicity Toube KC, Adam Al-Attar and Imogen Beltrami (instructed by **Clifford Chance**) for **Link Fund Solutions Limited**
Tom Smith KC and Marcus Haywood for the **Financial Conduct Authority**
Charlotte Cooke for the **Investor Advocate**
Edward Crossley (instructed by **Harcus Parker Ltd**) for **certain objecting creditors**
Damian Falkowski for **Transparency Task Force Limited**
Cliff Weight, Anthony Etkind, Alan Pyatt, Karen Baldwin and Graham Dickenson in person

Hearing dates: 18th and 19th January 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 9 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE RICHARDS:

1. This is my judgment on an application by Link Fund Solutions Limited ("LFSL") for an order sanctioning its proposed scheme of arrangement (the "Scheme") under Part 26 of the Companies Act 2006.

BACKGROUND

2. The background to the Scheme is set out in the judgment (the "Convening Judgment") of Bacon J in *Re Link Fund Solutions Limited* [2023] EWHC 2641 (Ch) following the hearing that convened a single meeting of creditors to be held on 13 December 2023 (the "Court Meeting"). So that this judgment can straightforwardly be read together with the Convening Judgment, I will try to use the same defined terms as are used in the Convening Judgment.

3. LFSL is a wholly owned subsidiary of Link Administration Holdings Limited ("LAHL"). LFSL is regulated by the Financial Conduct Authority (the "FCA"), and it acted as the Authorised Corporate Director ("ACD") of, among other investment companies, the LF Equity Income Fund, formerly known as the LF Woodford Equity Income Fund, (the "Fund").

4. From mid-2017, the liquidity profile of the Fund deteriorated. On 3 June 2019 (the "Suspension Date") in circumstances where investors in the Fund had made significant requests to redeem their investments, LFSL suspended the Fund with effect from 12 pm. As a result, investors in the Fund on the Suspension Date ("Suspension Date Investors") were unable to redeem their investments. On 15 October 2019 LFSL decided to wind up the Fund. Investors in the Fund have, to date, received capital distributions totalling some £2.56 billion in respect of their investments but this represents materially less than the net asset value ("NAV") of the Fund on the Suspension Date.

5. On 17 June 2019, the FCA notified LFSL that it was commencing an investigation into the events that led to the suspension of the Fund. The FCA's preliminary conclusions following its investigation were as follows:

    i) Investors who left the Fund from 1 November 2018 onwards benefited disproportionately from the sale of the most liquid assets in the Fund compared to the Suspension Date Investors.

    ii) The Suspension Date Investors were treated unfairly because they were left with a disproportionate share of less liquid assets.

    iii) The situation described in (i) and (ii) above arose because LFSL was in breach of various regulatory obligations from 31 July 2018 until the Suspension Date.

6. The FCA proposed that LFSL pay a restitution sum (the "FCA Total Amount") to Suspension Date Investors of around £298 million. It also indicated that it considered a penalty of £50m would be appropriate. LFSL does not accept those preliminary conclusions. If they became final conclusions, LFSL would have the right to challenge them before the FCA's Regulatory Decisions Committee and, following that, the Upper Tribunal.

7. The FCA Total Amount has been calculated as the sum necessary to compensate Suspension Date Investors for the fact that they did not enjoy the "first mover advantage" described in paragraphs 5.i) and 5.ii) above.

8. Some Suspension Date Investors have also issued civil claims against LFSL (together "Litigation Claims"). These claims are summarised at [17] and [18] of the Convening Judgment. The Litigation Claims go further than asserting that Suspension Date Investors were denied a "first mover advantage". They also make claims for loss of capital and lost investment opportunity arising out of what are said to be defective investments made by the Fund. The Litigation Claims are brought primarily by investors advised by three firms of solicitors, one of which is Harcus Parker Limited ("Harcus Parker").

9. On 19 April 2023, LFSL and LAHL entered into a conditional settlement agreement with the FCA (the "Settlement"). That settled the outcome of the FCA's investigation. It did not, and could not, settle the Litigation Claims. Under the terms of the Settlement:

    i) LFSL agreed to propose the Scheme and to take all reasonable steps to implement it.

    ii) Provided the Scheme is approved, LFSL and LAHL agreed to establish a Settlement Fund of up to £230 million that was to be raised from a variety of sources including a) the proceeds of sale of its business of around £79.5 million, b) its cash and capital resources of around £45 million, c) insurance proceeds of around £48 million, d) a voluntary contribution made by LAHL of around £60 million and e) a contribution of £2.5m by LAHL to the costs of the scheme, but less f) a deduction of up to £5 million for those costs. Out of the £230 million, an amount of up to £46.5 million would be ring fenced as a "Reserve Amount" to settle liabilities that are not released pursuant to the Scheme. Accordingly, an amount of somewhere between £183.5 million and £230 million would be available to pay redress to relevant investors. The actual amount available within this range would depend on the ultimate determination of the Reserve Amount.

    iii) In return, the FCA agreed that the final notices issued following its investigation would require LFSL to pay the FCA Total Amount (or such lower sum as may be payable under the Scheme) to the Fund for the benefit of Suspension Date Investors. The FCA will not seek a penalty of £50 million if the Scheme goes ahead.

THE SCHEME

10. The Settlement settles the dispute between LFSL and the FCA and is conditional upon approval of the Scheme. The Scheme effects a settlement between LFSL and persons who might have civil claims against it arising out of the suspension of the Fund (including, but not limited to, those creditors who have brought Litigation Claims).

11. The Scheme is, accordingly, a compromise or arrangement between LFSL and its creditors for the purposes of s895 of the Companies Act 2006. It is a complicated arrangement that is set out in some 51 pages of legal drafting. At a very high level, the Scheme can be summarised as set out in paragraphs 12 to 16 below.

12. Central to the Scheme is the concept of a "Scheme Creditor". That is any person who on 12 December 2023 (the record date for the Scheme) had a "Scheme Claim". A "Scheme

Claim" is a right, or potential right, to claim for losses suffered by Suspension Date Investors in connection with the Fund as a result of LFSL's actions. Thus, in most cases (putting to one side situations where a Suspension Date Investor has assigned the right to make a claim), to be a Scheme Creditor, a person must be a Suspension Date Investor. That, in turn, required the person to be the beneficial owner of shares in the Fund on the Suspension Date.

13. The Scheme operates as a general release of all claims, other than claims based on fraud or dishonesty, that a Scheme Creditor might have against LFSL, whether or not relating to the Fund ("General Release").

14. The Scheme also provides for each Scheme Creditor to release LAHL and its subsidiaries from any claims (other than claims based on fraud or dishonesty) that Scheme Creditors may have against them in respect of the Fund ("Affiliate Release"). In addition, the Scheme provides for Scheme Creditors to release officers and advisers of LFSL and the wider LAHL group from any claims that they might otherwise have had against them (other than claims based on fraud or dishonesty) in connection with Scheme Claims and the formulation and promotion of the Scheme ("Adviser Release"). LFSL's position is that, if there were no Adviser Release or Affiliate Release, any claim by a Scheme Creditor against an affiliate or adviser could result in a "ricochet" claim for a contribution from LFSL, thereby defeating the purpose of the Scheme.

15. If Scheme Creditors made claims against third parties other than LFSL, the LAHL group and their respective advisers ("Third Party Claims"), the "ricochet" risk identified above would also arise. A third party might, if found liable, make a claim for contribution from LFSL. However, the Scheme does not include a provision to release liabilities that third parties generally owe to Scheme Creditors. Instead, the Scheme provides that, if a Scheme Creditor makes a successful Third Party Claim, and the third party either has, or might have, a contribution claim against LFSL, the proceeds of the Scheme Creditor's claim are placed into an escrow account. That account is impressed with a trust, the effect of which is that (after costs and expenses are paid), LFSL is the beneficial owner of that part of the escrow account that equals the amount of any contribution claim that is finally determined against it with the Scheme Creditor beneficially entitled to the balance. The economic effect of this arrangement is that LFSL is assured that it will always have the funds necessary to meet any contribution claim brought by a third party who is sued by a Scheme Creditor. That seeks to ensure that Scheme Creditors can still make Third Party Claims while also ensuring that such claims do not result in a ricochet risk.

16. In consideration for the various releases described above, Scheme Creditors will be entitled to receive a return from the Settlement Fund in proportion to their investment in the Fund. As noted above, the maximum payment to Scheme Creditors (if none of the Reserve Amount is called on) is £230 million, which represents 77% of the FCA Total Amount.

17. LFSL prepared an "Explanatory Statement" for Scheme Creditors that is intended to explain the Scheme and provide Scheme Creditors with the information necessary to decide whether to approve it. A number of criticisms have been made of the Explanatory Statement which I address later.

18. 93.72% by number and around 96% by value of the Scheme Creditors present in person or by proxy at the Court Meeting voted in favour of the Scheme. Objecting creditors do

not dispute that arithmetic, but argue that despite the sizeable majority at the Court Meeting, the court should not sanction the Scheme. Against that, LFSL's application to sanction the Scheme is supported by the FCA.

THE COURT'S DISCRETION TO SANCTION THE SCHEME

19. As long ago as 1892, Bowen LJ recognised in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 that schemes of arrangement such as this can give rise to "a most formidable compulsion upon dissentient, or would be dissentient, creditors". That follows from the very nature of a scheme of arrangement which operates to bind a dissenting minority into a scheme supported by requisite majorities which can interfere significantly with rights previously held.

20. To safeguard against the oppression of a dissenting minority of investors, the court's power to sanction a scheme is extensive and far from simply being a "rubber-stamp" that approves the wishes of the majority as expressed at the court meeting. The presence of the requisite statutory majority represents a threshold that must be surmounted before court sanction can be sought, but it does not guarantee that the court will sanction it.

21. While I have emphasised the breadth of the court's discretion, some principles have emerged from the authorities as to areas that should be examined when exercising that discretion. A classic statement of the approach that a court should follow when exercising its discretion is set out in the judgment of David Richards J in *Re Telewest Communications Plc (No. 2)* [2005] 1 BCLC 772 at [20] to [22] as follows:

> *The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Ltd [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:*
>
> *'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.*
>
> *The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.'*
>
> *This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court*

> *must be satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.*
>
> *The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'.'*

22. In *Re KCA Deutag UK Finance* Plc [2020] EWHC 2977 (Ch), Snowden J provided the following summary of the applicable principles:

> *The relevant questions for the court at the sanction hearing can therefore be summarised as follows:*
>
> *i) Has there been compliance with the statutory requirements?*
>
> *ii) Was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the class meeting?*
>
> *iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?*
>
> *iv) Is there some other 'blot' or defect in the scheme?*

23. I will order my analysis by reference to these four issues. However, recognising that they provide a guide towards the exercise of a wide-ranging discretion, I will not allow my consideration to become compartmentalised.

OBJECTIONS

24. By paragraph 21(b) of Bacon J's order convening the Court Meeting (the "Convening Order"), any person seeking to oppose the application for court sanction of the Scheme was required to file Grounds of Opposition and evidence in support by 4 pm on 21 December 2023.

25. Objections have come from the following main sources:

    i) Harcus Parker, who say that they represent some 7,000 Scheme Creditors, have lodged Grounds of Opposition in accordance with the Convening Order and have appeared at the hearing by Mr Crossley of counsel. I quite accept that Harcus Parker have engagement letters with 7,000 Scheme Creditors relating to Litigation Claims. However, only 3,394 Scheme Creditors in total voted against the Scheme. It follows that some of Harcus Parker's 7,000 clients must either have declined to vote on the Scheme, or voted in favour of it.

    ii) Transparency Task Force Limited ("TTF"), a social enterprise which seeks ongoing reform of the financial sector so that it serves society better. It says, and I accept, that it speaks for a number of Scheme Creditors. TTF has prepared Grounds of

Opposition in accordance with the Convening Order and appeared at the hearing by Mr Falkowski of counsel.

iii) Some individual Scheme Creditors submitted Grounds of Opposition. I have read all Grounds of Opposition, including those submitted after 4pm on 21 December 2023.

iv) Some Scheme Creditors sent through copies of correspondence that they had had with the Financial Ombudsman Service about complaints that they had made in relation to LFSL. I have read that correspondence although in most cases it shed relatively little light on whether I should exercise discretion to sanction the Scheme.

v) I received what was described as an "open letter" (the "Open Letter") written by five academics warning of what they saw as a "dangerous precedent" being set if the Scheme were sanctioned. I saw little harm in reading the Open Letter and did so after forwarding it to LFSL's solicitors. One of the authors of the letter, Dr Schmulow, asked for permission to address the court hearing orally. I gave a short ruling during the hearing explaining that I would not exercise discretion to hear oral submissions from him. He did not appear to be a Scheme Creditor and did not claim to be affected by the Scheme. He was not an independent expert providing an expert report that complied with CPR 35. Rather, his interest was in sharing his point of view on whether the Scheme should be sanctioned. People frequently have views on how a court should decide a particular case, but the court does not routinely ask them to share those views if they are not parties, witnesses or otherwise affected by it.

vi) Some Scheme Creditors sent my clerk in the few days leading up to the hearing a variety of unsolicited material including copies of newspaper articles and similar. In most cases this material shed almost no light on whether the Scheme should be sanctioned.

vii) One creditor of LFSL (Mr Alan Pyatt) had not met the deadline in paragraph 21(b) of the Convening Order but requested permission to make oral submissions nonetheless. I granted him that permission, there being no objection from LFSL.

viii) Mr Barry Stevens made contact with the court to say that he had been unaware of the deadline for making written objections. My clerk forwarded him a link to the hybrid hearing so that he could apply to make oral submissions if he wished, but he chose not to attend.

26. Two central themes among the objections concerned: (i) averred defects in the Explanatory Statement and (ii) the loss of access to the Financial Services Compensation Scheme ("FSCS") and the Financial Ombudsman Service ("FOS") that will result if the Scheme is sanctioned. Understanding these objections will set the scene for much of my analysis that follows and, I will start with them. I consider other objections as part of my analysis of the four issues summarised in paragraph 22 above.

The FSCS and the FOS

27. The FSCS is a compensation scheme that would be available to Scheme Creditors, who I will describe at a very high level as "retail investors", if LFSL defaults on an obligation

to pay a "protected claim" made against it. Where requisite conditions are satisfied, the FSCS will pay the protected claim (up to £85,000) and will acquire a right to seek recovery of the amount paid from LFSL. If the Scheme is not sanctioned, Scheme Creditors would retain the right to make claims against LFSL. If those claims are successful, or result in a negotiated settlement, and LFSL defaulted in payment, there would be a "protected claim" in respect of which a claim could be made under the FSCS. Therefore, at a high level of generality, it can be seen that the Scheme, if sanctioned, would involve Scheme Creditors losing a right of access to the FSCS.

28. The FOS is a service, established under the provisions of s225 of the Financial Services and Markets Act 2000 ("FSMA") to enable disputes between financial services firms such as LFSL and "retail investors" (again using a deliberately broad term) relating to the conduct of regulated activities to be resolved quickly and with minimum formality by an independent person. An investor is not entitled to make a complaint to FOS directly: rather the "Dispute Resolution: Complaints" ("DISP") section of the FCA's Handbook requires complaints to be notified to the regulated firm in the first instance with the FOS's jurisdiction typically being engaged only following the provision of a final response by the regulated firm, or where the firm has failed to provide a response within eight weeks. FOS has the power to make a "money award" which it considers to be fair compensation for loss and damage suffered by a complainant. The regulated firm, rather than FOS, is responsible for paying any money award that FOS makes, but if a money award in relation to a protected claim is not paid, the retail investor may, if applicable conditions are satisfied, seek payment from the FSCS.

29. A number of objections to the Scheme were based on the proposition that the Scheme either impermissibly, or inappropriately, deprived Scheme Creditors of rights in connection with the FSCS or the FOS.

Objections based on jurisdiction

30. In his submissions on behalf of the TTF, Mr Falkowski submitted that the court lacks power to sanction the Scheme because it results in Scheme Creditors being "stripped of their statutory protections under FOS and FSCS". He argues that since those statutory protections arise under FSMA, which sets out expressions of public policy, those statutory protections "have the nature of inviolability".

31. I am quite unable to accept that submission. Its premise as applicable to the FSCS is incorrect. The Scheme permissibly seeks to release LFSL from claims and potential claims against it. It is as a consequence of the release of those claims that Scheme Creditors cease to have rights under the FSCS (since the FSCS could only ever be asked to pay claims that have been established against LFSL but which LFSL has not paid). That is brought out expressly by Rule 8.2.3 of the FCA's Compensation Rules which requires the FSCS to reject an application for compensation where the underlying claim has been compromised.

32. The same is true of claims notified to FOS. Scheme Creditors have no free-standing right to complain to FOS and seek an adjudication. Any adjudication by FOS is in respect of a complaint that must first be made to LFSL. By Clause 6.1.1 of the Scheme, LFSL is released from, among other matters, "Proceedings… in respect of Scheme Claims". By Clause 6.2, Scheme Creditors covenant not to continue with "Proceedings" that relate to a claim that has been released. The definition of "Proceedings" includes a "referral to

FOS". However, that does not mean that there is some free-standing "stripping" of statutory protections under FOS. The effect of Clause 6.1.1 and Clause 6.2 is that LFSL is released from liability in respect of Scheme Claims and, as a result, Scheme Creditors covenant not to refer the subject matter of those Scheme Claims to FOS.

33. That covenant is an aspect of the "compromise or arrangement" that the court is requested to sanction under s899 of the Companies Act that falls within the following summary of the kind of provision that can be made, set out by Patten LJ *in Re Lehman Brothers International Europe* [2010] BCC 272 at [65]:

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

34. In its submissions, the TTF argued that Scheme Creditors' statutory rights to claim under the FSCS, and to make complaints to FOS, were simply incapable of being removed under the Scheme. In its written skeleton argument, TTF relied on *Payward, Inc and others v Chechetkin* [2023] EWHC 1780 (Comm). However, in his oral submissions on behalf of TTF, Mr Falkowski accepted that this authority says nothing about the court's power to sanction the Scheme, although he did submit, as discussed below, that it provided a guide as to how the court should exercise its discretion.

35. Even if, contrary to my conclusions above, the Scheme could be seen as "releasing" rights against the FSCS or FOS, statutory claims whether arising under FSMA or otherwise do not benefit from any special protection which precludes them from being so released. By s895 of the Companies Act, LFSL is permitted to propose a scheme or arrangement with its "creditors". In *Re T&N Limited* [2006] 1 WLR 1728, David Richards J explained in relation to predecessor legislation set out in s425 of the Companies Act 1985 that the term "creditor" is not limited to those persons who would have a provable claim in the winding up of a company. Moreover, the purpose of the relevant statutory provisions is to encourage arrangements that avoid liquidation and facilitate the financial rehabilitation of a company. It follows from this that persons such as Scheme Creditors who have, or may have, claims against LFSL for payment of a sum of money fall within the definition of "creditors" both within the ordinary meaning of that term and once the term is considered together with the statutory purpose. Since persons who are creditors under a statute would be just as capable of placing a company into liquidation as persons who are creditors under a contract formed under common law, there is no rational basis for excluding them from the term "creditor".

36. After I had sent the parties an embargoed judgment, Mr Falkowski wrote asking that I consider points made in TTF's Grounds of Opposition to the Scheme that referred to *Re Pan Atlantic Insurance Company* [2003] EWHC 1969 (Ch) and *Re NFU Development Trust Ltd* [1973] 1 All ER 135. Mr Falkowski's skeleton argument did not refer to these cases, although it did state that the skeleton argument "will not repeat the points made in

the Grounds of Opposition" and requested the court read those Grounds of Opposition. I do not wish to be unduly critical as Mr Falkowski was instructed at short notice and may well be acting on a pro bono or reduced fee basis for the TTF. However, this is not a satisfactory way for argument to be advanced. The statement that Mr Falkowski "will not repeat" points made in the Grounds of Opposition does not explain whether those points are being pursued or why the court should accept them. If TTF thought that the *Re Pan Atlantic* or *NFU* points were good ones, they should have been mentioned in Mr Falkowski's skeleton argument and developed as necessary in oral submissions. Noting the large quantity of material that the court was asked to read in advance, it should not be invited, after the embargoed judgment is issued, to reverse engineer the TTF's submissions.

37. I will, nevertheless, address the points as I understand them from the Grounds of Opposition.

38. The issue in *Re Pan Atlantic* and other similar authorities considered at [72] to [76] of Snowden J's judgment in *Re Noble Group Ltd* [2019] BCC 349 was whether a scheme under Part 26 could provide for an independent adjudicator, rather than the court, to determine disputes after the scheme becomes effective as to whether a person is a scheme creditor and, if so, the amount of the person's claim. In *Re Pan Atlantic* itself, the independent adjudication was expressed to be "final and binding insofar as the law allows", raising the question whether it was at odds with Article 6(1) of the European Convention on Human Rights by denying a right of access to the court. Lloyd J held that there was no infringement of Article 6(1) since, properly construed, anyone dissatisfied with the determination of an independent adjudicator would retain a right of access to the court in cases of fraud or the adjudicator exceeding terms of reference.

39. As far as I can ascertain, the TTF seeks to reason by analogy that (i) the Scheme excludes any right to seek judicial review of a determination by FOS that could be made absent the Scheme and therefore (ii) the Scheme impermissibly restricts access to the courts in breach of Article 6(1). I reject that argument. The Scheme does not oust the jurisdiction of the courts to perform a judicial review of a FOS determination. Rather, as I have explained above, following the Scheme, Scheme Creditors no longer have claims against LFSL in relation to the Fund that can be notified to FOS. That is a consequence of the entirely permissible effect of the Scheme in releasing Scheme Claims.

40. The point based on *Re NFU* seems to be that the Scheme involves expropriation of rights for no consideration. I do not accept that. The Scheme provides for Scheme Claims to be released for consideration. That has consequences for, among other matters, claims against the FSCS or notifications to FOS, but the Scheme involves no "expropriation".

Objections based on rationality

41. Next, the TTF and other objecting creditors argued that no intelligent and honest person, appropriately informed, could rationally vote in favour of the Scheme given that it involved Scheme Creditors losing rights to bring a claim to FOS or to claim against the FSCS. Particular emphasis was placed on the loss of access to FOS since it was said that FOS offered retail investors a low-cost route to achieving substantial money awards that would then be met by the FSCS if LFSL failed to pay. It was argued that no retail investor, acting rationally, would give up these rights.

42. The obvious difficulty with that argument is that the Scheme Creditors present or represented at the Court Meeting did vote in favour of the Scheme by an overwhelming majority. They did so aware that the Scheme would result in them having no further rights to bring complaints to the FOS, or to have recourse to the FSCS. The voter analysis prepared by PwC shows that individual investors represented at the Court Meeting, who were most likely to be giving up rights in relation to FOS and FSCS, voted overwhelmingly in favour of the Scheme (a majority of 91% by number, representing 85.51% by value)

43. In addition, the argument ignores the fact that LFSL does not accept that it has any liability to Suspension Date Investors. Nor does LFSL accept that the FCA's findings of regulatory breach are correct. There is nothing obviously irrational in compromising a disputed claim. Indeed, as David Richards J noted in *Re T&N Limited*, a purpose of Part 26 of the Companies Act is to facilitate such compromises.

44. In his submissions on behalf of the TTF, Mr Falkowski took me to the outcome of three complaints referred to FOS in connection with the Fund on which FOS had adjudicated. He submitted that those adjudicated complaints showed that FOS would make money awards calculated so as to compensate investors for lost investment return on a basis much more favourable than was implicit in the Scheme. He argued that these examples suggested that the amount that would be paid to complainants under the Scheme was somewhere between 4.7% and 7.7% of the money award that FOS could be expected to make.

45. There was no force in that submission. The complaints notified to FOS to which Mr Falkowski referred were not made against LFSL. Rather, they were complaints about investment advisers who were said to have failed to give appropriate investment advice that had resulted in the complainants remaining invested in the Fund, thereby suffering a loss of investment return. When FOS upheld complaints of that nature it is scarcely surprising that the money award made reflected a loss of investment return. However, those very different complaints, which make allegations about the conduct of investment advisers rather than LFSL, say nothing at all about whether FOS would uphold complaints against LFSL or the amount of money award that FOS would make if it did. Nor does the comparison recognise that the complaints against the investments advisers had been shown to be justified, whereas LFSL has not yet been shown to be liable at all to Scheme Creditors.

46. The TTF sought to argue that FOS can make money awards on a different basis from that applicable under the general law. Therefore, it submitted, the fact that Scheme Claims are disputed serves as no guide to the kind of award that FOS might make following consideration of complaints made against LFSL. That submission overstates matters. By s229(2) and s229(3) of FSMA, FOS may make a money award to compensate for financial loss in such amount as it considers to be fair compensation for that loss. DISP 3.7.2 states that a money award may be such amount as FOS considers to be fair compensation for financial loss (and other matters) "whether or not a court would award compensation". However, by DISP 3.6.4R, when deciding what is fair and reasonable in all the circumstances, FOS is obliged to take into account relevant law and relevant regulatory rules and standards. Therefore, while FOS enjoys some latitude that may not be available to a court determining Scheme Claims, it overstates matters to say that it enjoys freedom to make a money award on a basis that does not correspond to established legal principles.

47. There was, in my judgment, a degree of unreality about the TTF's submissions based on FOS. Those submissions sought to portray the rights of retail investors to notify a complaint to FOS as some kind of voucher that would result in a money award compensating them for all losses sustained from investment in the Fund together with an investment return calculated by reference to the FTSE UK Private Investors' Income Total Return Index. It appeared to be suggested that a Scheme Creditor could then take that voucher to the FSCS and exchange it for cash up to £85,000. However, the reality is different. If the Scheme did not go ahead, the very matters that cause Scheme Claims to be uncertain would make the outcome of complaints against LFSL notified to FOS similarly uncertain. Still further uncertainty comes from the fact that, as Mr Walsh of the FCA explained in his evidence, FOS might decline to consider such complaints in circumstances where Litigation Claims were ongoing.

48. I quite accept that a number of Scheme Creditors who attended the court hearing before me or who had their views relayed by others speaking on their behalf, viewed the loss of rights under the FSCS and FOS as an excessive price to pay for the settlement offered under the Scheme. However, Ms Toube was quite right to emphasise in her oral submissions that care should be taken not to give undue weight to those dissenting views simply because they happened to be expressed at the court hearing. There is clearly a contrary view, taken by a significant majority at the Court Meeting, that the amount on offer under the Scheme strikes an appropriate compromise even having regard to the loss of rights under the FSCS and FOS. I am not satisfied that this view is irrational.

49. I do not consider that the *Payward* authority on which TTF relies has anything significant to say about how the court should exercise discretion to sanction a scheme such as this.

50. The signatories to the Open Letter suggest that, if the Scheme is sanctioned, there could be a "systemic risk to the UK economy, and possibly beyond". It is said that the Scheme is a "contrived mechanism" that results in the clear and unambiguous guarantee of consumer protection which the FSCS offers being lost. The signatories assert that this would result in a complete loss of confidence in the UK's financial services industry leading to possible "panic amongst investors and increased systemic contagion risk in any future financial crisis".

51. I regard these opinions as significantly overstated. They stem from a failure to appreciate that the Scheme is not a "loophole" and nor does it involve the court imposing on Scheme Creditors a loss of statutory protection. Rather, as I have explained, Scheme Creditors have voted by the requisite majority to compromise claims that they might otherwise have had against LFSL. Once those claims are compromised, there is no longer anything that could be referred to FOS, or made the subject of a claim against the FSCS. That is a consequence of the compromise that Scheme Creditors have, by the requisite majority, chosen to approve rather than any unprincipled removal of statutory protection.

The fairness or otherwise of the Explanatory Statement

52. Objecting creditors' criticisms on the Explanatory Statement raise important issues. Section 897 of the Companies Act imposes a statutory requirement for an explanatory statement to be circulated that, as well as providing certain prescribed information, "explains the effect of the compromise or arrangement". This is not simply a formal requirement. As Miles J explained in *Re Ophir Energy plc* [2019] EWHC 1278 (Ch) at [22], the process under Part 26 depends on full and accurate information being provided

to those who are to vote upon the scheme. If Scheme Creditors have been provided with materially inaccurate, incomplete or otherwise inadequate information, the court will most likely not be able to place any reliance upon an affirmative vote at the Court Meeting.

"77% of the FCA Total Amount"

53. Paragraph 15 of Part 1 of the Explanatory Statement reads as follows:

> *The maximum possible amount of the Settlement Fund is £230 million, which is approximately 77% of the amount which the FCA claims was the loss incurred by investors who continued to hold shares in [the Fund] on and after the Suspension Time (being £298,403,919)(the FCA Total Amount).*

54. Statements that the maximum possible amount of the Settlement Fund is "77% of the FCA Total Amount" then appear in various places throughout the Explanatory Statement. Harcus Parker argues that this formulation is misleading and suggests to Scheme Creditors that the Scheme will provide them with 77% of the loss that they realised from their investment in the Fund. That point is of potential significance since it is clear that a number of Scheme Creditors consider that their true loss is much higher than the FCA have calculated.

55. I do not consider that Harcus Parker's approach represents a fair reading of the Explanatory Statement. The "FCA Total Amount" is, in the language of lawyers, a "defined term". It means £298,403,919. The statement that the maximum amount of the Settlement Fund (£230m) is 77% of £298,403,919 is a statement of arithmetic that is correct, or at least sufficiently correct since the actual percentage is 77.08% (to two decimal places).

56. I can certainly accept that few of those reading the Scheme Document would be lawyers familiar with the concept of a "defined term". However, any doubt on the issue is dispelled by the fact that the Explanatory Statement includes a table (the "Table") that sets out in terms of pence per share, the actual amounts that investors who held various classes of share in the Fund could expect to receive under the Scheme. Column D of the Table performed the calculations on the assumption that only the absolute minimum of the Settlement Fund (namely £183.5m) is distributed. Column E of the Table performed the calculation on the assumption that the maximum amount of the Settlement Fund (£230 million) is distributed. Column F of the Table shows the amount per share that investors would receive if the FCA Total Amount (specified by reference to the figure of £298 million) were distributed instead. Throughout the Explanatory Statement, readers were urged, often in a bold typeface, to read the Table. By doing so, Scheme Creditors would understand, within a range, the actual amount they could expect to receive under the Scheme. They could then compare that figure with their own perceptions as to the loss that they had suffered in order to decide whether the Scheme was beneficial to them.

57. I accept that some Scheme Creditors will have misunderstood what was said in the Explanatory Statement. One of the objecting investors, Ms Baldwin, did think that the Scheme would give her 77% of her loss. That said, another objecting investor, Mr Dickenson, had a clear understanding of what he would receive under the Scheme and, concluding that it was too little, had voted against it. However, the question is not how a

narrow subset of Scheme Creditors who happened to address the court understood the Explanatory Statement. Rather, the question is how it would have been read by Scheme Creditors as a whole. I do not consider that this aspect of the Explanatory Statement was misleading.

58. Various objecting investors and their representatives argued against the conclusion that I have set out above pointing out what they submitted was inaccurate commentary both in the Press and by the FCA to the effect that the Scheme would give investors "77p in the pound". I do not doubt that there was some inaccurate press comment. However, in my judgment, what matters is the Explanatory Statement as that was the document by reference to which Scheme Creditors had to make their decision. The Explanatory Statement did not use the loose terminology of "77p in the pound".

59. A related objection is that the Explanatory Statement did not set out in detail how the FCA calculated the FCA Total Amount. I do not accept that criticism. A detailed understanding of the FCA's methodology was not necessary to enable Scheme Creditors to decide if they were content to accept the amount on offer as set out in the Table or if they preferred to risk the uncertainty that would come with seeking more. In any event, while the Explanatory Statement itself does not contain this detail, both a summary of the principles that the FCA had applied and the FCA's actual calculation were posted on the website that LFSL maintained in relation to the Scheme to which all Scheme Creditors, and indeed the public at large, had access. (Later in this judgment, I address the logically related question of whether the FCA Total Amount was "too low").

Alleged undue emphasis on the maximum Settlement Fund of £230m

60. Harcus Parker argues that the Explanatory Statement repeatedly stresses the maximum figure that can be distributed under the Scheme (£230m) without giving appropriate prominence to the possibility that the amount returned could be as low as £183.5m. I do not accept that. Throughout the Explanatory Statement, there is a reference to the amount payable as being "up to" £230 million. The Table sets out an express calculation on the basis that only the minimum amount is returned.

61. A specific criticism was made of paragraph 20 of Part 1 of the Explanatory Statement which, after mentioning that the Settlement Fund will be "up to" £230 million, and that an initial distribution is to be made of £183.5 million, states that "Additional payments will also be made to ensure that the Settlement Fund is distributed in full". Harcus Parker argues that the use of the word "will" is misleading as it indicates that payments will definitely be made in excess of £183.5 million. I do not accept that. The point made is clear namely that, whatever the amount of the Settlement Fund is (i.e. somewhere between £183.5 million and £230 million), it will ultimately be distributed in full.

Alleged exaggeration of the adverse consequences of the alternative to the Scheme

62. Paragraphs 23 to 24 of the Explanatory Statement explain what will happen if the Scheme does not go ahead. These paragraphs emphasise that LFSL does not accept that it has any liability to Scheme Creditors. Accordingly, if the Scheme does not go ahead, creditors (i) will have to pursue claims (which LFSL will defend) that may not succeed and which, even if successful, may produce a worse outcome for creditors than the Scheme, (ii) may face costs consequences if they pursue claims in the courts that fail, (iii) will have to wait

until the claims are resolved until they receive payment and (iv) will have a smaller pool of assets against which to enforce successful claims.

63. These points are expanded upon in Part 6 of the Explanatory Statement, to which a specific cross reference is made in paragraph 27 of Part 1. In particular, Part 6 explains point (iv) in paragraph 62: if the Scheme does not go ahead, LFSL will not have the benefit of LAHL's voluntary contribution of £60 million to the Settlement Fund or its contribution of £2.5 million to the costs of the Scheme. Moreover, the FCA might continue to seek to impose a penalty of up to £50 million on LFSL which would deplete funds available to meet liabilities owed to Scheme Creditors. In addition, successful claims might force LFSL into a liquidation process which would add to costs. The significance of these points is tempered by paragraph 26 of Part 1 which refers to retail investors' rights, if they make successful claims, to look to the FSCS to pay up to £85,000 of those claims if LFSL does not.

64. I conclude that, provided the relevant alternative is as stated in the Explanatory Statement, Scheme Creditors were given sufficient information to consider the benefits of the Scheme as against that alternative. The express references to the FSCS in paragraph 26 of Part 1 and in the explanation of the disadvantages of the Scheme in paragraph 22 are important. The Explanatory Statement makes it appropriately clear that, when assessing how adverse they consider the relevant alternative to be, Scheme Creditors should note that under that alternative, retail investors would have potential access to the FSCS which would not be available if the Scheme is approved.

65. Harcus Parker challenges the premise of my conclusion in paragraph 64, arguing that the relevant alternative would be much less adverse to Scheme Creditors. They argue that, if the Scheme were not approved, LFSL would not in practice "dig in" by pursuing, right up to judgment or final regulatory determination, either the Litigation Claims or the conclusions of the FCA's investigation. Instead, Harcus Parker argues that LFSL would propose a more appropriate scheme that properly recognises the position of Harcus Parker's clients who have a stronger negotiating position as a result of bringing legal proceedings. At the very least, they argue that the absence of any reference to the possibility of a "better" scheme makes the Explanatory Statement misleading.

66. The difficulty with that assertion is that it is largely un-evidenced and indeed is contrary to the evidence that has been filed. The evidence shows that the Scheme would involve LFSL contributing all of its assets (other than those needed to cover liabilities not released under the Scheme) to the Settlement Fund. LFSL, therefore, has no more to contribute to a "better" scheme than it is contributing to the Scheme itself. It follows that any further funds necessary to fund a "better" scheme would have to come from LAHL. Mr Reid, the chairman of LFSL's board of directors, has said in a witness statement verified by a statement of truth that LAHL will not make any contribution to the settlement of Scheme Liabilities in excess of that proposed under the Scheme itself.

67. Mr Reid's witness statement, and public statements of LAHL and of LFSL to similar effect carry weight. However, they are not conclusive. In saying that, I am not of course suggesting that Mr Reid would give an untrue witness statement. However, the statement that he makes is akin to the articulation of a negotiating position which LAHL has an obvious self-interest in supporting. If it were thought that LAHL might be prepared to contribute more to a "better" scheme, Scheme Creditors would have an obvious disincentive to vote for the Scheme that is proposed. Accordingly, I consider that I am

entitled to look behind the confirmation given in Mr Reid's witness statement just as Miles J looked behind similar assurances given by directors in *Re All Scheme Ltd* [2021] EWHC 1401 (Ch).

68. However, Mr Reid's confirmation is not obviously open to question. There must be some limit on the amount of voluntary contribution LAHL will make. Given that LFSL does not accept the FCA's allegation of regulatory breach, it is not surprising that LAHL's voluntary contribution results in the Settlement Fund being somewhat less than the FCA Total Amount.

69. In addition, the FCA is well-used to looking behind assertions that regulated entities make to seek to reduce their liability to consumers. If the FCA thought that Mr Reid's position was mere posturing they would scarcely have supported LFSL's application for sanction of the Scheme.

70. Harcus Parker correctly notes that there have been cases in which the court has concluded that a relevant alternative to a scheme proposed was something other than that put forward by the company concerned. The judgment of Miles J in *Re All Scheme* is an example. I do not need to match the facts of the present case with those of *Re All Scheme*. However, it is in my judgment significant that, in *Re All Scheme*, the FCA positively opposed the scheme under consideration. Here, they positively support it.

71. In the circumstances of this case, the evidence does not support the conclusion that the Explanatory Statement misdescribes the appropriate alternative.

Alleged misdescription of the independence of the Chair of the Investors' Committee and/or the fact that the Investors' Committee was providing an independent means for Scheme Creditors to be consulted.

72. The Investors' Committee was established before the Scheme was formally proposed. It consisted of nine members, all of whom had been investors in the Fund on the Suspension Date. Members of the Investors' Committee were selected so as to be representative of the interests of Scheme Creditors generally. Mr Drummond-Smith was provided with legal advice, from Freshfields Bruckhaus Deringer LLP which he could share with the Investors' Committee. The Investors' Committee also had access to senior management of LAHL, including its CEO, Mr Bhatia, and to senior personnel at the FCA. The Investors' Committee used the access that it was given to ask questions both of LAHL and LFSL and also of the FCA. Ultimately it delivered a report confirming that eight of its nine members supported the Scheme with one member being undecided. The Explanatory Statement summarised the Investors' Committee's conclusions in Part 7, albeit making it clear in paragraph 10 of that Part that Scheme Creditors were entitled to form their own view on the Scheme and were not bound by the conclusions of the Investors' Committee.

73. Various objecting creditors, and Harcus Parker, argue that the Explanatory Statement fails to mention matters going to the independence of the Chair of the Investors' Committee (Mr Drummond-Smith). They also argue that the Investors' Committee was relatively inactive failing, for example, to look into the merits of the Litigation Claims. Accordingly, they submit, Scheme Creditors were presented with a misleading picture of the significance of the Investors' Committee's support for the Scheme.

74. I reject the arguments that the Explanatory Statement glosses over matters going to Mr Drummond-Smith's independence. The first focus of those arguments was on his engagement letter which was entered into before the Scheme had been proposed, and so before the Investors' Committee had delivered its conclusions on it. Clause 7.4(l) of that engagement letter required Mr Drummond-Smith to present at a webinar on the final Scheme explaining why the Committee believes that the Scheme being proposed is fair. It was said that this represented a contractual obligation, entered into in advance, that obliged Mr Drummond-Smith to support the Scheme.

75. That argument is mistaken. Clause 4 of Mr Drummond-Smith's engagement required him to act independently of LFSL and to have regard only to the Investors' Committee and the investors in the Fund in performing his role. That overarching obligation would have prevented Mr Drummond-Smith from speaking at a webinar to confirm that the Scheme was fair unless that was his genuine independent view and the view of the Investors' Committee as a whole. The objection based on Clause 7.4(l) fails to read the engagement letter as a whole. It also is at odds with reality. If the Investors' Committee did not support the Scheme there would have been real practical difficulties even in proposing it to Scheme Creditors for approval and clearly no webinar would be necessary if the Scheme were withdrawn in the face of hostility from the Investors' Committee. Moreover, Mr Drummond-Smith could only attend a webinar if LFSL asked him and the Investors' Committee to do so. It is difficult to see how LFSL could realistically ask Mr Drummond-Smith to attend a webinar to say that the Scheme was fair if the Investors' Committee (consisting of nine members in addition to him) had delivered a report saying that it was not.

76. The assertion made by certain objecting creditors that the Investors' Committee failed to take legal advice was simply wrong. The suggestion that the Investors' Committee should have looked into the merits of the Litigation Claims was unrealistic. Even if the Investors' Committee spent the considerable time and effort that would be needed to express any kind of informed view on that question, the fact remains that LFSL was disputing liability and it was that dispute as to liability (rather than to any assertions as to the merits of the Litigation Claims) that was at the heart of the stark choice that the Scheme offered to Scheme Creditors.

77. I see no support for some of the wider allegations that the Investors' Committee was acting in an undue hurry. Nor do I see any support for the allegation made by some objecting creditors that they were positively seeking to deceive Scheme Creditors. The fact that LFSL paid Mr Drummond-Smith £450 per hour for his work attracted criticism, but no evidence has been put forward to suggest that this is excess of market rates.

78. Overall, I see no problem arising out of the way that the conclusion of the Investors' Committee was described in the Explanatory Statement.

Alleged failure of the Explanatory Statement to explain that there would be practical difficulties for Scheme Creditors in making Third Party Claims

79. Some objecting creditors argue that in practice it will be difficult for Scheme Creditors to make Third Party Claims if the Scheme is sanctioned since the Contribution Reduction Mechanism will make it unattractive for litigation funders to provide funding. Accordingly, it is argued that the Explanatory Statement was in substance misleading

when it stated that the Scheme does not prevent Scheme Creditors from making Third Party Claims.

80. There was, however, no evidence before the court as to the attitude of litigation funders to Third Party Claims in the light of the Contribution Reduction Mechanism. I considered unconvincing the reason given for that absence, namely that since the Scheme is not yet final, the precise form of the Contribution Reduction Mechanism is not yet known. A litigation funder could have been asked to comment on how Third Party Claims would be perceived in light of the Scheme as proposed, even though it is not currently in effect.

81. In any event, the conclusion that objecting investors advance can be tested against what is known about the progress of those Third Party Claims that are currently in existence. Wallace LLP has issued such claims, on behalf of some 3,000 former investors in the Fund against Hargreaves Lansdown. Wallace LLP state on their website devoted to claims in respect of the Fund that, whether or not the Scheme goes ahead, Third Party Claims will continue to proceed "on a fully funded and insured basis". It is also known that some complaints against third parties have been made to the FOS. Such claims would not need litigation funding in order to proceed.

82. I am, therefore, not satisfied that the practical impediment to Third Party Claims for which objecting creditors argue is present. It follows that I am not satisfied that the Explanatory Statement was misleading in stating that such claims could continue following the Scheme.

Alleged lack of clarity that the Scheme resulted in Scheme Creditors giving up rights

83. Some objecting creditors made the surprising point that the Explanatory Statement did not clearly explain that the Scheme would result in them losing the right to make claims against LFSL. There is no force at all in that point. That was a central aspect of the Scheme which is made abundantly clear in, for example, paragraph 14 of Part 1.

84. I have already noted, in paragraph 64, that the Explanatory Statement expressly mentions that approval of the Scheme will result in the loss of access to the FSCS. The Explanatory Statement deals in a more roundabout manner with the fact that Scheme Creditors would lose an ability to notify to FOS complaints against LFSL in relation to the Fund. In paragraphs 20 to 22 of Part 4, the Explanatory Statement addresses those complaints against LFSL that have already been made and referred to FOS (described in the Explanatory Statement as "FOS Complaints"). It is noted that FOS decided on 9 August 2023 to defer consideration of the 85 open complaints before it until details of the present Scheme were available. Paragraph 7 of Part 5 of the Explanatory Statement headed "How does the Scheme work?" states that FOS Claims are Scheme Claims with the result that they will be released if the Scheme goes ahead. However, given the meaning of the defined term "FOS Complaints", this statement simply confirms that existing complaints notified to FOS will not be able to proceed. The Explanatory Statement does not say in terms that Scheme Creditors will be precluded from pursuing new complaints to FOS.

85. With the benefit of hindsight, the Explanatory Statement could perhaps have spelt out more clearly that both existing and new complaints to FOS would cease to be considered if the Scheme is approved. However, I do not consider that this absence renders the Explanatory Statement misleading or insufficient. When the document is read as a whole, it is clear that the Scheme will result in all claims or potential claims against LFSL

relating to the suspension of the Fund being released. Against that background, a reasonable reader of the Explanatory Statement could scarcely conclude that even though existing "FOS Complaints" would be precluded from continuing following the Scheme, new complaints would somehow still be permitted. I am reassured in that conclusion by the fact that of the many objections raised by creditors to the Scheme, few if any suggest that investors were unaware that all future access to FOS would be restricted. Rather, the predominant argument is that restricting access to FOS is either impossible or would be inappropriate.

The allegations considered cumulatively and overall conclusion

86. Since the fairness and accuracy of the Explanatory Statement is of considerable significance, I have spent some time in considering the individual criticisms of that document. Having done so, it is right to consider those criticisms cumulatively and also to consider the Explanatory Statement as a whole given that some objecting creditors said that the documentation they were sent was complex and difficult to understand.

87. When considering the adequacy of the Explanatory Statement, I view the document from the perspective of an intelligent Scheme Creditor who reads that document as a whole albeit without reading the small print of the Scheme itself (see the judgment of Lewison J in *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch)). I am myself satisfied that, when read by such a Scheme Creditor, the Explanatory Statement sets out sufficient information to enable the creditor to exercise a reasonable judgment on whether the Scheme is in his or her interest or not.

88. I am only reinforced in that conclusion by the fact that the FCA, who have much greater experience than I do on how communications to investors should be phrased in the interests of clarity, have reached the same conclusion.

COMPLIANCE WITH STATUTORY AND OTHER REQUIREMENTS

89. The Scheme is a compromise or arrangement of the kind that falls within s895 of the Companies Act. I have already, in paragraph 35, addressed an objection raised by some Scheme Creditors to the effect that, since Scheme Creditors have not been shown conclusively to have good claims against LFSL, they are not "creditors" for the purposes of s895. It follows that the court's jurisdiction to sanction the Scheme is engaged.

90. Section 896 provides for creditors attending the Court Meeting "to be summoned in such manner as the court directs". In the Convening Order, Bacon J gave detailed directions and I must consider whether the process of convening the Court Meeting complied with those directions.

91. By paragraph 7 of the Convening Order, Bacon J directed that LFSL send out specified documents in advance of the Scheme. Often, compliance with such a direction will simply require a company to identify the address held for shareholders on a share register and make sure that documentation is sent to the correct addresses. However, in this case there was an anterior question that involved establishing the identity of Scheme Creditors.

92. That issue arises because, as noted in paragraph 12 above, ignoring the possibility of rights to claim against LFSL being assigned, a Scheme Creditor must have had a

beneficial interest in shares in the Fund on the Suspension Date. The Fund's share register is a record of legal ownership only. Some persons holding shares in the Fund whose names appear in that share register will be holding the shares for other persons or, perhaps, partly for other persons and partly for themselves. LFSL has indicated that some 250,000 persons who had a beneficial interest in shares on the Suspension Date held that interest through a third party intermediary (an "Intermediary").

93. Therefore, it would not have been straightforward for LFSL to comply with an order simply requiring it to send documentation to "Scheme Creditors". LFSL would be reliant on Intermediaries to provide contact details for the underlying beneficial owners of shares in the Fund. No doubt with an eye on that difficulty, the Convening Order did not require simply that documentation be sent to "Scheme Creditors". Rather, paragraph 5 of the Convening Order required specified documentation to be made available on the "Scheme Website" to which the public at large have access. Paragraph 7 of the Convening Order required LFSL to send documentation to:

> *all persons registered on the [Fund's] register of members as being a holder of one or more shares in the [Fund], including to financial intermediaries such as brokers and online investment platforms, for onward distribution to their underlying client (my emphasis)*

94. The second witness statement of Mr Reid has satisfied me that LFSL has complied with the provisions of the Convening Order that relate to both the convening of the Court Meeting and proceedings at that meeting.

95. In fact, in my judgment, LFSL has gone beyond the requirements of the Convening Order. It has, through its professional advisers PwC, liaised with Intermediaries to seek confirmation that documents relating to the Scheme were indeed transmitted to the underlying beneficial owners. The FCA has helped with this effort as well, contacting Intermediaries to emphasise the importance of information being given to underlying Suspension Date Investors and issuing an instruction requiring Intermediaries to take all reasonable steps to achieve this.

96. These steps have brought results. By 23 November 2023, 80 Intermediaries who collectively represent 73% of the NAV of the Fund had confirmed to PwC that they had sent documentation to their underlying clients.

97. In addition to the efforts of LFSL and the FCA to ensure that documentation comes directly to the attention of Scheme Creditors, LFSL has also taken steps to make documentation easily accessible electronically so that it can be made available to Scheme Creditors who, for whatever reason, have not received it directly. As well as placing the advertisements in national newspapers that were required by paragraph 8 of the Convening Order, LFSL has conducted a campaign over social media by placing four separate advertisements about the Scheme on Facebook and Instagram, has placed adverts in online newspapers and has run a television advertising campaign.

98. Some objecting creditors expressed disquiet that some of the votes cast at the Court Meeting were cast by what might be thought of as "institutional" investors, rather than by individuals. However, that concern was advanced generally and anecdotally. I was not satisfied that it indicated non-compliance with the provisions of the Convening Order. It is conceptually quite possible for an "institution" to be the beneficial owner of shares in

the Fund. Moreover, even though the evidence indicates that some 16,333 Scheme Creditors cast votes through an investment manager acting on their behalf, I am not satisfied that there was any pattern of institutions impermissibly treating themselves as beneficial owners for voting purposes of shares that were beneficially owned by others.

99. Section 897 of the Companies Act sets out some of the statutory requirements applicable to the Explanatory Statement. In the light of the detailed discussion above, as to whether the Explanatory Statement was fair and not misleading, I am satisfied that the Explanatory Statement does "explain the effect of the compromise or arrangement" as required by s897 of the Companies Act.

100. I also consider that the wider requirements imposed by Paragraph 14 of the Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) dated 26 June 2020 (the "Practice Statement") are satisfied. The Explanatory Statement had to tread a difficult course between including lots of detail, which would run the risk of obscuring the key issues on which Scheme Creditors had to decide, and undue brevity which might not provide Scheme Creditors with the information reasonably necessary to enable them to make an informed decision. In my judgment, the Explanatory Statement has balanced those competing constraints appropriately. I consider that it is "concise" (having due regard to the complexity of the matters under consideration) and is also in a "form and style appropriate to the nature of the [creditor] constituency".

101. Section 897(2)(b) of the Companies Act requires the Explanatory Statement to state material interests of the directors of LFSL and the effect on those interests of the Scheme insofar as different from the effect on the like interests of other persons. Paragraphs 32 to 35 of Part 1, which are repeated in Part 11 of the Explanatory Statement, address this requirement by considering the extent to which directors had an "interest" in LFSL, such as a holding of shares or debt in LFSL. Applying that approach, it is said in paragraph 35 of Part 1:

> *none of the directors are owed money by LFSL nor have a direct interest in LFSL or the Scheme*

102. Some objecting creditors characterise this statement as either misleading or involving a failure to comply with s897(2)(b) on the basis that directors did have some wider "interest" in the Scheme being approved since that would result in a release of claims that Scheme Creditors might have against directors personally. I see no force in that argument. That "interest" of directors (if indeed it falls within the scope of s897(2)(b) on which I make no determination) is clearly and fairly disclosed in, for example, paragraph 45 of Part 5 of the Explanatory Statement. Perhaps, with hindsight, the quotation set out in paragraph 101 could have cross-referred to the fact that claims against directors would be released pursuant to the Scheme. However, since that information is contained in the Explanatory Statement, I do not regard the failure to mention the point in paragraph 35 specifically as involving any breach of s897(2)(b).

103. Some creditors commented on difficulties that they and others have experienced in seeking to register their vote at the Court Meeting. I can quite believe that the process of voting was not straightforward. Given the points about the definition of "Scheme Creditor" that I have mentioned in paragraph 12 above, it was necessary for persons seeking to vote at the Court Meeting to give evidence of their entitlement to do so. That

may well, as a few objecting creditors noted, have involved something of a paperchase. However, by no means did all of the objecting investors say that they had difficulty. Moreover, LFSL ensured that they had access to a telephone helpline and Mr Bannister (the "Investor Advocate") was able to identify at the time that some queries were being raised on the voting forms and, in response to those queries, the voting form was adapted to make it easier for Scheme Creditors to complete.

104. Paragraph 17a of the Convening Order required votes to be counted in the manner set out in Part 8 of the Explanatory Statement. That stated that, for the purposes of the "by number" calculation, each Scheme Creditor would have one vote. For the purposes of the "by value" calculation, each Scheme Creditor's vote would be valued at their proportionate share of the FCA Total Amount. I am satisfied that this methodology has been followed in the determination of the majority at the Court Meeting recorded in paragraph 18 above.

WHETHER THE CLASS WAS FAIRLY REPRESENTED; WHETHER THE MAJORITY ACTED IN A BONA FIDE MANNER

105. As will be seen from the section below, Harcus Parker argue that the Scheme was "unfair" to their clients. This is an allegation of defects in the Scheme itself and not the way in which the Scheme was approved. I have seen no evidence to suggest that the majority who voted in favour of the Scheme were doing anything other than seeking the best outcome for themselves in their capacities as members of the single class of Scheme Creditors voting on the Scheme. The majority voting in favour of the Scheme did not have any "special interest", different from their rights as Scheme Creditors, for doing so.

106. In the section above, I have concluded that the Explanatory Statement provided the Scheme Creditors with sufficient information on which to make their decision. It follows that I reject any suggestion that defects in the Explanatory Statement caused the single class of Scheme Creditors not to be "fairly represented" at the Court Meeting.

107. Some objecting Scheme Creditors argued that turnout at the Court Meeting was "low" with the result that they should not be bound by the conclusion of that meeting. I do not consider that this objection can be answered by considering, at an impressionistic level, whether turnout is "low". There is no objective benchmark against which to assess whether turnout in this case was "low" or "high". In any event, I do not consider that the turnout can, even at an impressionistic level, be described as "low". 21.6% by number of Scheme Creditors, representing 47% by value, voted at the Court Meeting. The court has sanctioned schemes with a much lower turnout (see the 4% turnout in *Re Instant Cash Loans Limited* [2019] EWHC 2795 (Ch)).

108. I respectfully agree with the observations of Zacaroli J at [30] of *Re Instant Cash Loans*. Rather than conducting an impressionistic analysis of whether turnout can be described as "low", it is more instructive to consider what factors caused Scheme Creditors not to vote at the Court Meeting. Without providing any exhaustive list of factors, I would have been concerned if there were suggestions that Scheme Creditors had been prevented from attending the Court Meeting, had not been notified about it, did not understand what was to be decided or felt that they had not been provided with sufficient information to make a decision. Similarly, I would have been concerned if processes failed that resulted in votes not being recorded, or if the format of the meeting, which was held virtually over an online platform, presented an obstacle to Scheme Creditors coming together for

consultation (see the judgment of Trower J in *Re All Scheme Ltd* [2022] BCC 10668 at [34] to [36]).

109. In the light of my conclusions above, I have no concerns about these or similar issues. I am satisfied that the single class was fairly represented at the Court Meeting and that the majority voted bona fide in their own interests as members of the single class.

WHETHER THE SCHEME IS ONE THAT AN INTELLIGENT SCHEME CREDITOR COULD APPROVE

110. Harcus Parker argue that the Scheme is not "fair" because its clients, who are said to have a stronger negotiating position having issued proceedings, and who have incurred costs in connection with those proceedings, are treated in the same way as Scheme Creditors who have done nothing to advance their claims. However, as Snowden J pointed out at [28] to [29] of *Re KCA Deutag Finance plc*, the court is not required to form a view on whether the Scheme is in some general sense, or in the court's opinion, the "fairest" or "best" scheme. Rather, the question is whether an intelligent and honest person, acting in respect of their interests, might reasonably approve it.

111. Harcus Parker's argument summarised in paragraph 110 does not cause me to doubt that. Ultimately, Scheme Creditors, including those represented by Harcus Parker were being offered a straightforward choice between an immediate receipt of cash on the one hand and the prospect, albeit uncertain, of obtaining more by rejecting the Scheme and continuing to pursue claims against LFSL. There is nothing obviously irrational with any Scheme Creditor voting to receive the immediate cash.

112. Insofar as Harcus Parker's complaint is that their clients were required to vote as a single class together with Scheme Creditors who are perceived to have a "weaker" negotiating position, I reject it. I respectfully agree with Bacon J's conclusion in the Convening Judgment that Scheme Creditors should vote as a single class and no real attempt was made to persuade me that I should depart from her view.

113. It was argued that the amount on offer pursuant to the Scheme was simply too low for any intelligent Scheme Creditor to accept that sum in return for a release of claims. One aspect of that argument, which came to be referred to as the "subset argument", was advanced by Mr Falkowski in his oral submissions on behalf of the TTF. The "subset argument" proceeded by reference to the following propositions:

    i) The FCA calculated the FCA Total Amount as redress for what it concluded were LFSL's regulatory failings in respect of the liquidity position of the Fund.

    ii) However, the Litigation Claims alleged failings by LFSL that go beyond liquidity issues. For example, it is said that the Fund made bad investments, or overvalued assets, and that LFSL should compensate investors in the Fund for losses they incurred as a result.

    iii) Since the FCA Total Amount does not include any element of compensation for these other failings, it necessarily follows that it is inadequate. Relatedly, the FCA's statement that the Scheme represents a fair outcome for investors is of little weight in circumstances where the FCA has not considered all breaches for which LFSL is liable.

114. The "subset argument" was not put in that way in Mr Falkowski's skeleton argument served in advance of the hearing, although some objecting creditors had referred in general terms to the FCA Total Amount being "too low". On instructions, Mr Smith said that the FCA's investigation had considered a wide range of possible regulatory breaches. I asked that the FCA provide a witness statement confirming that and Mr Walsh duly filed a second witness statement. I do not accept the TTF's submission that this witness statement fell short of confirming what Mr Smith had said in submissions. I am satisfied from Mr Walsh's second witness statement that the FCA has considered all of the allegations of breach that Scheme Creditors have raised, both in objecting to the Scheme and in bringing Litigation Claims. Having considered all possible breaches, the FCA concluded that LFSL's failings were of liquidity management and that the FCA Total Amount was fair compensation for those failings. The "subset argument" is, accordingly, mistaken.

115. I acknowledge Harcus Parker's point that the Scheme is not the product of extensive negotiations between LFSL and Scheme Creditors. The Investors' Committee succeeded in discussions with LFSL in reducing the Reserve Amount from £50 million to £46.5 million. Therefore, there has been some negotiation. However, broadly the presentation in the Explanatory Statement is of a "take it or leave it" offer. I accept that, in principle, the absence of negotiation might have some bearing on the weight that a court gives to an affirmative vote at a court meeting (see [107] of the judgment of Miles J in *Re All Scheme Ltd*). However, since my analysis thus far has not revealed any concerns with the substantial affirmative vote at the Court Meeting, I consider the absence of negotiation to be of little significance in this case.

116. My conclusion is that an intelligent and honest investor, acting in respect of their interests, might reasonably approve the Scheme.

"BLOTS" ON THE SCHEME

117. I have already considered and rejected the proposition that the removal of access to the FSCS and the FOS is a "blot" on the Scheme which precludes me from sanctioning it.

118. Some individual objecting creditors suggested that the General Release went "too far". That was not a point picked up in the submissions of Harcus Parker or of the TTF. I do not regard this as a "blot" on the Scheme. The Scheme does not seek to release claims based on fraud. More generally, the law recognises the ability of parties to compromise all claims that may lie between them including future and unknown claims (see for example [27] of the speech of Lord Nicholls in *BCCI v Ali* [2002] 1 AC 251).

119. As I have noted, in paragraph 14 above, the Adviser Release and Affiliate Release provisions are justified, at least in part, by LFSL's assertion that absent these provisions it would be at risk of "ricochet" claims. I agree that there is a ricochet risk. However, that is partly self-generated since it is only by a Group Contribution Deed dated 5 October 2023, made in contemplation of the Scheme, that LFSL became liable to indemnify advisers and affiliates. Recital (E) to that deed notes that the purpose of LFSL giving those indemnities was to enable the underlying liabilities, or contingent liabilities owed by advisers and affiliates to be released pursuant to the Scheme.

120. No objecting creditor has suggested that it is objectionable for LFSL deliberately to subject itself to the risk of "ricochet" claims and then positively rely on that risk as a

justification for the Adviser Release and Affiliate Release. I queried the point with Ms Toube during her submissions and she said that it was a standard device that the court does not typically disregard on "artificiality" grounds, citing the judgment of Zacaroli J in *Gategroup Guarantee Limited* [2021] EWHC 775 (Ch) in support.

121. At [34] of Snowden LJ's very recent judgment in *Strategic Value Capital Solutions Master Fund LP and others v AGPS Bondco plc* [2024] EWCA Civ 24, I detect some caution as regards the use of arguably "artificial" devices as a means of benefiting from the Part 26A procedure. However, I do not regard the Adviser Release or Affiliate Releases as a "blot" on the Scheme. Even if it were said to be "artificial" for LFSL to assume an express obligation to indemnify advisers and affiliates, the risk of ricochet claims would exist even without that express indemnity. Moreover, the claims of Scheme Creditors against advisers and affiliates that are released pursuant to the Scheme are closely related to the main subject matter of the Scheme, namely the compromise of claims against LFSL arising in connection with the Fund. I regard the Affiliate Release and Adviser Release provisions as an appropriate aspect of the overall compromise between Scheme Creditors and LFSL, applying the principles that Zacaroli J distilled from the authorities in this area at [163] of his judgment in *Gategroup*.

122. Finally, I have considered in detail the Contribution Reduction Mechanism. It is a novel feature of the Scheme. However, it effects no "release" of Third Party Claims. Rather, it sets out certain provisions that are to apply if such Third Party Claims are made. It therefore represents nothing more than a set of covenants and promises made by both sides as part of the overall terms of the compromises effected by the Scheme. I do not consider this to be a "blot".

CONCLUSION

123. Having considered the matter in detail, I see no reason to gainsay the conclusion of the overwhelming majority of Scheme Creditors at the Court Meeting. I will sanction the Scheme.

124. Some objecting creditors argued that I should make any sanction of the Scheme conditional on the FCA being required to make an order requiring others involved in the Fund (such as its investment manager) to "top up" the amount that investors received. I doubt my power to make such an order, but even if I had that power, I would not exercise it. As I have explained, the vote at the Court Meeting should be respected.

125. So that all interested parties have a chance to digest this judgment, I will not seal the order sanctioning the Scheme until 29 February 2024. Any application to the High Court for permission to appeal against my order to sanction the Scheme must be made in writing no later than 4pm on 23 February 2024.