IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO: WA-24NCC-467-10/2020

In the matter of AirAsia X Berhad (Company No. 200601014410 (734161-K))

And

In the matter of a Proposed Scheme of Compromise or Arrangement of AirAsia X Berhad (Company No. 200601014410 (734161-K))

And

In the matter of Section 366 of the Companies Act 2016

And

In the matter of Order 7 rule 2, Order 28 and Order 88 of the Rules of Court 2012

BETWEEN

AIRASIA X BERHAD

(COMPANY NO.: 200601014410 (734161-K)) … APPLICANT

AND

1. BOC AVIATION LIMITED
(COMPANY NO.: 199307789K)

2. MALAYSIA AIRPORTS (SEPANG) SDN BHD
(COMPANY NO.: 320480-D)

3. **MACQUARIE AIRCRAFT LEASING SERVICES (IRELAND) LIMITED (COMPANY NO.: 429566)**

4. **SKY HIGH LEASING COMPANY LIMITED**

5. **INTERNATIONAL LEASE FINANCE CORPORATION (COMPANY NO.: C1666861)**

6. **KDAC AIRCRAFT HOLDING 4 LIMITED (IRISH COMPANY REGISTRATION NO.: 614327)**

7. **JERDONS BAZA LEASING 1048 DESIGNATED ACTIVITY COMPANY (IRISH COMPANY REGISTRATION NO.: 641024)**

8. **JERDONS BAZA LEASING 1066 DESIGNATED ACTIVITY COMPANY (IRISH COMPANY REGISTRATION NO.: 640977)**

9. **JERDONS BAZA LEASING 1075 DESIGNATED ACTIVITY COMPANY (IRISH COMPANY REGISTRATION NO.: 640978)**

10. **LAVENDER LEASING ONE LIMITED (COMPANY NO.: LL 12932)**

11. **LAVENDER LEASING TWO LIMITED (COMPANY NO.: LL 12992)**

12. **BNP PARIBAS, SINGAPORE BRANCH**

13. **AWAS 1533 LIMITED**

14. AWAS 1549 LIMITED

15. AIRBUS S.A.S … INTERVENERS

GROUNDS OF JUDGMENT

Introduction

[1] This judgment deals with an application made under s. 366(1) of the Companies Act 2016 ('**the Act**') for an order to hold meetings of the company's creditors to approve a scheme of arrangement proposed and to be presented by the company in order to avoid the prospect of a liquidation.

[2] Numerous written submissions were filed by the parties. These were further supplemented by long oral submissions by learned counsel which were conducted through remote platform spanning over 5 sessions. Many legal issues were raised for the Court's consideration and the Court wishes to record its appreciation to all learned counsel for their submissions and extensive research. Each of them has truly assisted me to better understand the issues and to be able to reach my judgment quicker.

Background Facts

[3] Airasia X Berhad ('**AAX**') is a prominent regional provider of long-haul air transportation services with 31 routes connecting Malaysia with various destinations and having, as of 31.12.2019, 2,364 employees. It is the main operating entity of the AAX Group, which

comprises AAX and its 14 subsidiaries (11 of which are companies who have leased aircrafts ('**Leasing Subsidiaries**')).

[4] As with all other airlines, AAX's business has significantly deteriorated with the outbreak of COVID-19 and the consequent closing of national borders in March 2020. On 30.7.2020, AAX triggered the prescribed criteria under Practice Note 17 ('**PN17**') of the Main Market Listing Requirements of Bursa and AAX's external auditors had issued an unmodified audit opinion which emphasized the material uncertainty relating to AAX's ability to continue as a going concern. As a consequence of these developments, it was anticipated that AAX would be unlikely to meet its obligations as they fall due and face liquidation.

[5] In consultation with its financial advisers, BDO Malaysia, AAX formed the view that it is necessary, in order to secure the survival of AAX, to restructure its obligations with its creditors. It was determined that AAX could become viable if it could right-size its financial position and obtain a fresh injection of cash, whether via equity or debt.

[6] Consequently, AAX filed the present Originating Summons ('**the OS**') pursuant to s. 366(1) of the Act, for the purposes of considering and, if thought fit, approving a scheme of arrangement ('**the Scheme**') between AAX and its creditors ('**Scheme Creditors**') as at 30.6.2020 ('**Cut-Off Date**').

[7] The Scheme, being part of a wider Proposed Debt Restructuring exercise, is the first part of the intended rehabilitation of AAX's

financial position. If sanctioned but prior to the Scheme coming into effect:

a. a capital reduction and share consolidation exercise will be implemented;

b. AAX will seek to raise capital via a fresh subscription of shares, by way of a rights issue and new investor subscriptions.

This will be in place before the Scheme takes effect on the lodgement of the Court Order sanctioning the Scheme with the Registrar of Companies Malaysia under s. 366(5) of the Act.

[8] The overarching objective is to avoid liquidation and to salvage the business of AAX. If successful, the intended rehabilitation will return AAX to a solvent going concern.

The Proposed Debt Restructuring

[9] Briefly, under the Scheme, the Scheme Creditors will share *pari passu* in a general pool of RM 200 million ('**the General Pool**'):

a. the Unsecured Scheme Creditors with unsecured debt will participate in the General Pool;

b. Scheme Creditors holding securities will realise such securities or after deducting the value of such securities, participate in the General Pool for their shortfall.

[10] According to AAX, the Scheme Creditors will stand to receive returns under the Scheme as opposed to an uncertain, lengthy and drawn-out liquidation.

[11] The proposed capital reduction will entail a 99.9% reduction of the issued share capital of AAX, and the proposed share consolidation will consolidate every 10 ordinary shares into 1 ordinary share. Once fresh cash is injected into AAX, the existing shareholders' shareholdings will be diluted or reduced.

[12] It is intended that new capital, in the form of cash, will be injected into AAX by way of a rights issue of up to RM 300 million and new investor subscriptions of up to RM 200 million, with an option to be granted to potential investors.

[13] This, says AAX, will ensure that AAX and its subsidiaries will have the working capital necessary to restart operations and implement its revised business plan. Under the revised business plan, AAX will shift its focus to routes that have proven load and yield performance, with projected lease rates being lower. In other words, the new business model will have a reduced and sustainable cost structure.

[14] The full particulars of the Scheme, the intended rehabilitation of AAX and the revised business plan will be set out in the Explanatory Statement, which will only be issued together with the notices summoning the court-convened meetings.

[15] At this stage, what has been disclosed to this Court regarding the Scheme can be stated as follows.

[16] As at the Cut-Off Date, the total estimated debts and liabilities of AAX owed to the Scheme Creditors is approximately RM 64.15 billion ('**Scheme Debts**'). The Scheme Debts include all estimated:

a. liabilities that AAX has incurred or will incur under guarantees issued in favour of lessors of 27 aircraft leased to the Leasing Subsidiaries; and

b. debts, compensation and/or penalties arising from breaches and defaults on the part of AAX and the early termination of contracts, agreements and/or arrangements as at the Cut-Off Date, including lease rentals and aircraft purchase commitments.

[17] The Scheme Creditors have been provisionally ascertained and set out in a provisional list ('**Provisional List II**'). This Provisional List II also sets out the estimated debts and liabilities of AAX (including contingent liabilities) as at the Cut-Off Date. AAX intends to undertake a proof of debt exercise prior to the court-convened meetings to verify the Scheme Creditors and the value of their Scheme Debts.

Classification of Scheme Creditors

[18] The classification of Scheme Creditors has changed 3 times since the filing of the OS. More will be said of this below.

[19] The latest classes of Scheme Creditors (which AAX says may be subject to further modifications) are broadly set out as:

a. **Secured Class A** creditors who are creditors of AAX having security over the assets of AAX; and

b. **Unsecured Class B** creditors who are creditors who have unsecured claims against AAX.

The Scheme

[20] The broad terms of the Scheme, which AAX says again may be subject to modifications, are as follows:

a. AAX shall acknowledge and settle up to RM 200 million of the Scheme Debts owing to the Scheme Creditors on the following salient terms:

i. the General Pool is to be used to pay all Scheme Creditors *pari passu* comprising Secured Class A creditors for the Shortfall (as defined below) and Unsecured Class B creditors;

ii. the repayment from the General Pool shall begin no earlier than the 3rd year from the date of the lodgement of the Court Order approving or sanctioning the Scheme with the Registrar of Companies Malaysia ('**Effective Date**'). The Scheme shall be completed no later than the 5th year from the Effective Date. The principal shall be payable annually in arrears from the 3rd to the 5th years of the Effective Date;

iii. there shall be interest at 2% per annum on a non-compounded basis;

b. The Scheme Creditors shall be settled in the following way:

i. **Secured Class A** creditors shall realize their securities (if such securities are so exercisable and in respect of which AAX has reserved all rights) within 2 years from the Effective Date. The difference between the value of a Secured Class A creditor's Scheme Debts and the proceeds of the disposal of its security or the valuation of such security as at the Cut-Off Date, as the case may be, shall be known as the '**Shortfall**'. The relevant Secured Class A creditors shall be entitled to participate *pari passu* with the other Scheme Creditors in the General Pool for its Shortfall, if any;

ii. **Unsecured Class B** creditors shall be entitled to participate *pari passu* with the other Scheme Creditors in the General Pool.

c. By way of disclosure, if AAX is rehabilitated, travel credits or promotional air travel privileges, which have been customarily offered by AAX to its passengers from time to time *may* be extended to passengers who are Scheme Creditors in Class B as AAX deems fit to foster goodwill for future business efficacy. Such travel credits do not come from the General Pool nor are part of the Scheme and will not affect the sums payable to the Scheme Creditors under the Scheme.

d. On the Effective Date, all existing contracts entered into by AAX and the Leasing Subsidiaries with the Scheme Creditors, if not already terminated on or prior to the Cut-Off Date, shall terminate and be deemed terminated with effect on the Cut-Off Date, and all the debts of the Scheme Creditors against AAX and its Leasing Subsidiaries as at the Cut-Off Date (after taking into consideration the proceeds of the disposal and/or valuation of the securities) shall be deemed compromised and settled on the terms of the Scheme. All amounts which may be owed to Scheme Creditors between the Cut-Off Date and the Effective Date shall be waived.

The Interveners

[21] After AAX filed the OS, the following 15 parties had filed and obtained leave of this Court to intervene:

a. Malaysia Airports (Sepang) Sdn Bhd ('**MASSB**') who is the operator of the KL International Airport;

b. BOC Aviation Limited ('**BOCA**'), Macquarie Aircraft Leasing Services (Ireland) Limited ('**Macquarie**'), Sky High Leasing Company Limited ('**Sky High**'), International Lease Finance Corporation ('**ILFC**'), KDAC Aircraft Holding 4 Limited ('**KDAC**'), Jerdons Baza Leasing 1048 Designated Activity Company ('**JBL 1048**'), Jerdons Baza Leasing 1066 Designated Activity Company ('**JBL 1066**'), Jerdons Baza Leasing 1075 Designated Activity Company ('**JBL 1075**'), Lavender Leasing One Limited ('**Lavender One**'), Lavender

Leasing Two Limited ('**Lavender Two**'), BNP Paribas, Singapore Branch ('**BNP**'), AWAS 1533 Limited ('**AWAS 1533**') and AWAS 1549 Limited ('**AWAS 1549**'). These intervenors are all aircraft operating leasing company and shall be collectively referred to where convenient as '**the Lessors**'.

c. Airbus S.A.S ('**Airbus**') who is a leading company in the business of designing, manufacturing and delivering of *inter alia*, commercial aircrafts.

Objections by the Interveners

[22] The Lessors were represented by different sets of solicitors and common objections were raised by the Lessors against the Scheme and the OS. These are:

i. the Scheme does not constitute a 'compromise' or an 'arrangement' under s. 366 (1) of the Act;

ii. the classification of the Scheme Creditors is wrong. In particular, the Lessors are wrongly classed as 'secured creditors' when in fact and in law they are 'unsecured creditors';

iii. the debts owed by AAX to the Lessors cannot be restructured without their consent pursuant to the Convention on the International Interests in Mobile Equipment ('**the Convention**') and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ('**the Protocol**') (both the

Convention and the Protocol shall be referred as '**the Cape Town Convention'**). Connected to this argument is that the Scheme contravenes the debt restructuring principle advocated by the Aviation Working Group ('**AWG**');

iv. the debts owed by AAX to the Lessors are governed by English laws and can only be discharged under English laws and not by the Scheme. This is based on a common law principle known as the 'Gibbs Rule';

v. the Scheme is unreasonable and unfair to the Scheme Creditors;

vi. the Scheme has no realistic prospect of success;

vii. there is insufficient disclosure by AAX as to how the Scheme Debts are computed, citing particularly, Airbus' debts of RM 48.71 billion constituting about 77% of the total Scheme Debts.

[23] MASSB, who is a secured creditor raised the following objections to the OS:

i. AAX has failed to make unreserved and full disclosure of material facts in its application;

ii. MASSB ought to be placed in a separate class from the Lessors and Airbus as its rights are dissimilar from them;

iii. AAX is a hopelessly insolvent company and has no viable business;

iv. AAX has not acted *bona fide* and the OS is an abuse of court process.

[24] Airbus, who is the largest creditor in terms of value, was initially ambivalent of its position to the Scheme but subsequently when asked to make a clear stand, informed the Court that it is objecting to the Scheme. It did not make any submission on its status as 'secured creditor' and learned counsel for Airbus had in fact turned to learned counsel for AAX when the Court asked if Airbus in fact considered itself as 'secured creditor'. All said, Airbus's position regarding the Scheme and the OS was rather strange.

AAX's response to Interveners' objections

[25] AAX's response to the Interveners' objections to the Scheme and the OS are as follows:

i. the Scheme qualifies as a 'compromise' and or an 'arrangement' under s. 366(1) of the Act.

ii. it is not for the Court to interfere in matters that require a commercial judgment on the Scheme. This includes commercial fairness which is for the creditors to decide;

iii. the determination at the hearing to convene the meetings is only procedural and substantive contests are really only with respect to jurisdictional issue such as classification of creditors. Matters as to the merits, such as whether a Scheme is fair and reasonable or has been proposed in good

faith, is to be determined at the sanction stage and not the convening stage;

iv. on the issue of classification of creditors, the law is that classification is based on the similarity of *rights* of the creditors against the company and not *interest*. On this basis, the latest classification of creditors is correct;

v. the classification of creditors need not be definitively determined at this stage and can still be constituted at the subsequent stages where negotiations would continue with the Scheme Creditors and objections, if any, can be taken at the sanction stage;

vi. the composition of the classes of creditors (as opposed to the formulation of the classes) is not to be determined at the convening stage;

vii. at the convening stage, the standard of disclosure is limited and ought not to be oppressive or onerous so as to fetter genuine attempts at restructuring. Disclosure is merely to ensure fairness of the creditors' meetings and not the merits of the Scheme. Generally, the threshold is low and AAX has made sufficient disclosure;

viii. the Scheme envisages the company emerging as a solvent company and not one that is trading but burdened with liabilities. AAX post the Scheme will not be a hopelessly insolvent company;

ix. The Cape Town Convention is intended to apply to rights *in rem* and not rights *in personam* and its provisions should be interpreted purposively. To adopt the interpretation canvassed by the Lessors will mean that a lessor with a small debt can effectively block any scheme of arrangement worldwide by withholding consent. Also, AAX is not bound by the principles advocated by AWG;

x. the Gibbs Rule has been severely criticised and in fact not followed in some jurisdictions and this Court should also reject the same.

The Law on Scheme of Arrangement – an overview

[26] Before I proceed to deal with the legal issues raised, it is helpful to first set out an overview of the law on the scheme of arrangement.

a. Purpose of a Scheme of Arrangement and its stages

[27] The primary object of s. 366 of the Act is to allow a struggling company or its creditors or members to propose a restructuring plan in order for the company to continue as a going concern and for the creditors to secure payments of their debts or to secure a better repayment than the alternative of the company being wound up leading to the associated value destruction for all creditors.

[28] Upon approvals of the creditors and sanction of the Court, the scheme will bind all classes of creditors, including the minority

creditors who may have opposed the scheme. More specifically, s. 266(3) states:

> '(3) The compromise or arrangement shall be binding on –
> (a) all the creditors or class of creditors;
> (b) the members or class of members;
> (c) the company; or
> (d) the liquidator and contributories, if the company is being wound up,
> if the compromise or arrangement is agreed by a majority of seventy-five per centum of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting and has been approved by order of the Court.'

[29] The section, thus, has the ability to prevent, in suitable cases, a minority in a class frustrating a beneficial scheme. This is commonly known as the 'cram down' procedure. However, care must be taken to not allow the section to 'make a jest of the interest of the minority'. This is explained by Bowen LJ in **Sovereign Life Assurance Co** v. **Dodd** [1892] 2 QB 573 ('**Sovereign Life**') at 582-583. [1891-4] All ER Rep 246 at 251:

> 'What is the proper construction of that statute? It makes the majority of the creditors or of a class of creditors bind the minority; it exercises a most formidable compulsion upon dissentient, or would be dissentient, creditors, and it therefore requires to be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interest of the minority.'

[30] There are 3 stages to a scheme:

i. an application under s. 366(1) of the Act for an order that a meeting of the relevant classes of creditors to be convened ('**Convening Stage**');

ii. the actual convening and holding of the meetings of the relevant classes of creditors ('**Meeting Stage**'); and

iii. if the scheme is approved by the requisite majority at the relevant meeting(s), an application is made to the Court for its sanction of the scheme under s. 366(4) of the Act ('**Sanction Stage**').

[31] Typically, after leave is obtained for the convening of the meetings, the scheme company will proceed, *inter alia*, with the proof of debts exercise to identify the creditors and to determine the quantum of the debts owed. After the Convening Stage when leave is obtained from the Court, the scheme company and the creditors would continue their engagement to negotiate on the terms of the scheme as proposed with each party hoping to achieve the best terms for themselves and for the scheme company to secure approvals from the requisite number of creditors to meet the threshold for the sanction of the scheme from the Court. This intermediate stage between the Convening Stage and the Meeting Stage can be conveniently referred to as the '**Negotiating Phase**'. Indeed, as astute debtor would commence negotiating with its creditors even prior to the application to Court under s. 366(1) of the Act, at times, even securing written approvals of the proposed scheme to be filed.

[32] Commercial exigencies and expectations necessitate that the hearing of an application made under s. 366 of the Act to the Court is to be expedited as the viability of the scheme is usually time-sensitive.

b. The Convening Stage

[33] The Federal Court in **Mansion Properties Sdn Bhd** v. **Sham Chin Yuen and other** [Rayuan Sivil No. 02(i)-91-11/2019(P) has definitively held that an application at Convening Stage is to be made *ex parte*. At para [47] of the judgment, the reason is stated thus:

> '[47] We can confidently say that the legislature purpose of section 368(1) of the CA is to preserve status quo and to prevent efforts to develop and approve a scheme of arrangement from being thwarted by the dissipation of the company's assets. In light of the potential necessity for immediate action and speedy procedures, an ex parte application would be suitable and appropriate to achieve the legislative purpose.'

[34] However, this does not preclude creditors from applying to intervene in the proceedings and to be heard on their objections even at the *ex parte* hearing.

[35] Prior to 2001, the practice of the courts in England was simply concerned to approve the logistics and procedures for the class meetings selected by the applicant of the scheme. The court was not concerned to consider the appropriateness of the classes and

the class meetings proposed or any questions as to its jurisdiction. The court would simply note the class composition proposed and give directions as to the conduct of the class meeting(s).

[36] However, the English Court of Appeal in **Re Hawk Insurance Co Ltd** [2001] EWCA Civ 241, [2001] 2 BCLC 480 ('**Re Hawk**') called for a change in the practice, requiring creditors to be warned that any objections on grounds of class composition should be advanced at the first stage and for the court to consider and if thought fit approve the class meetings as proposed.

[37] This led to a new **Practice Statement (companies: schemes of arrangement)** [2002] 3 All ER 96, [2002] 1 WLR 1345 ('**PS 2002**') which makes it clear that the court's function at the Convening Stage is to deal with any questions of jurisdiction by then identified and to give appropriate directions for the convening of meetings. Although we are not bound to adopt the PS 2002, it a useful direction and the same has been referred to and followed by courts of other jurisdictions. Given that provisions for schemes of arrangement are substantially common in many countries, to adopt a uniform approach and considerations when determining application under our s. 366(1) of the Act will lend certainty and confidence to the process.

[38] A good explanation of the roles of the courts at the Convening Stage based on the PS 2002 is given by Hildyard J in **Re Stronghold Insurance Co Ltd** [2019] 2 BCLC 11 ('**Re Stronghold**') at 18-19, paras [31] to [32] which are set out below:

[31] This has proved a popular change from previous practice, and I return to it later in this judgment to make some general points as to its consequences. I would note one in the meantime, since it does appear to me to have caused some confusion: this is that the focus on the jurisdictional issue of class composition which the present practice brings at the first stage has gradually encouraged a perception that the court at this stage will also address other matters going to its jurisdiction, following the same rationale. That is not quite accurate; nor is the related and (in my experience) increasing tendency to suggest to a judge at the sanction stage that the fact that class meetings have been directed carries with it the implication that the judge at the first stage was satisfied as to other matters hearing on the jurisdiction of the court.

[32] It is right that the court may indeed also consider other jurisdictional issues at the convening hearing, provided interested parties are given proper notice of the points to be raised at the hearing: see, for example, Re Van Gansewinkel Group BV [2015] EWHC 2151 (Ch), [2016] 2 BCLC 138 at [55] and [56]. However, the court is likely to be cautious in this context. First, and as Snowden J explained in the same case, if the court is to be invited to determine a jurisdictional issue in a way which can be relied on (in Snowden J's words) 'as a basis for persuading the judge at the sanction hearing not to revisit the question' there must be very clearly brought to the attention of the judge at the convening hearing, and the judge should be invited to provide a judgment in that regard so that there can be no doubt as to the basis on which the issue was addressed. Secondly, it must be appreciated that even then since it goes to jurisdiction, a decision at the first stage does not bind the court at the third stage, though of course the court is unlikely to depart from a reasoned conclusion at an earlier stage without change of circumstance or very good reason. Thirdly, the court

> is unlikely to wish to deal with issues involving a discretionary element or value judgment: only with clear and obvious jurisdictional impediments such as can be seen without factual exegesis, to render the process unavailable or at least of no substantive avail, in the case of the scheme in question.'

[39] So, at the Convening Stage, the Court is to deal only with the jurisdictional issues and should leave the issues with discretionary or value judgment at the Sanction Stage. Also, the decisions made at this stage do not bind the Court at the Sanction Stage.

[40] Although not directly relevant for the present application before this Court, it aids to understanding and appreciation of the process of a scheme of arrangement to also briefly deal with the issues that are to be determined at the Sanction Stage.

[41] The principles which the court regularly applies to the exercise of its discretion to sanction a scheme of arrangement at the Sanction Stage were summarised by David Richards J in **Re Telewest Communications plc (No. 2)** [2005] BCC 36 at [20]-[22] ('**Re Telewest**'):

> "20. 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.'

21. 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.

22. 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'."

[42] In **Re Noble Group Limited** [2018] EWHC 3092 (Ch) ('**Re Noble Group**') at [17] Justice Snowden paraphrased those requirements as a four-stage test as follows:

(i) the court must consider whether the provisions of the statute have been complied with;

(ii) the court must consider whether the class was fairly represented by the meeting, and whether the majority was coercing the minority in order to promote interests which are adverse to the class that they purported to represent;

(iii) the court must consider whether the scheme was a fair scheme which a creditor could reasonably approve; and

(iv) the court must consider whether there is any "blot" or defect in the scheme.

c. Jurisdictional issues at Convening Stage

[43] What then are the jurisdictional questions that are to be determined at the Convening Stage? The authorities suggest that apart from the principal issue of classification of creditors, the Court can deal with issues which affect directly its jurisdiction rendering the process unavailable or at least of no substantive avail. This is only where it is clear and obvious and without factual exegesis.

[44] **In Re Noble Group** at 526, Snowden J held at [76]:

> '[76] What I do think that a scheme company can legitimately ask at the convening stage is for the Court to indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are other factors which would unquestionably lead the Court to refuse to exercise its discretion to sanction the scheme. This is often described as the question of whether there is a 'roadblock' in the way of the Company…'

[45] Thus, where the proposed scheme does not even meet the definition of a 'compromise or arrangement' or where the company is so hopelessly insolvent that even the 'post-scheme' company is unable to survive as a going concern, the Court will refuse to permit the proposed scheme to proceed even at the Convening Stage. In **Sri Hartamas Development Sdn Bhd** v. **MBf Finance Bhd** [1990] 2 MLJ 31 ('**Sri Hartamas Development'**), Siti Norma Yaakob J (as she then was) dismissed the contention that the court should not entertain objections to the scheme at the Convening Stage. The following passages of her judgment are often quoted:

> 'Lastly, I come to the appellant's contentions that under the circumstances of this case, it is premature for the respondent to voice its objections at his stage of the proceedings as first, all the applicant needs to establish is 'a scheme, the general principles of which have been defined and matters must be at a stage where the court would be justified in ordering a meeting of creditors', See the case of Re GAE Pty Ltd. Secondly, the respondent has two other *fori* where it can voice the same objections, i.e to attend the unsecured creditors' meeting, voice its objections and vote against the proposal, it is still at liberty to

raise the same objections where the applicant applies to court under s 176(4) to sanction the scheme.

To answer the first of the applicant's submissions, I have already singled out that the respondent's interest have not been securely safeguarded in that there is no provision in the scheme entitling the respondent to enforce the terms of the scheme against those who are to implement them. In addition, it is not disputed that being hopelessly insolvent, it is against public policy to approve a scheme to be undertaken by an insolvent company even though the creditors may come to approve the scheme if it is presented to them….

As for the applicant's second submission that it is premature to raise any objections to the scheme at this stage of the proceedings, I consider that by virtue of the discretion given to me under s. 176(4), to either order or refuse a creditor's meeting, objections can and may be made at the summary stage. That being so, I see nothing objectionable to the respondent raising objections to the scheme at the summary stage rather than allow matters to proceed. Moreover different considerations apply at every stage of the proceedings …'

d. Classification of creditors

[46] Where the scheme is proposed by the company, it is the company that is responsible to propose the scheme and classified the creditors. **Woon's Corporations Law** (LexisNexis, Looseleaf Ed, 1994, Issue 37 (July 2011 release) at p. 16 describes the responsibility in this manner:

'[o]ne of the key tasks and responsibilities of the promoter of a scheme of arrangement is to classify its creditors according to their separate interests.'

[47] The task of classifying the creditors must be taken seriously and the applicant assumes the risks of the application being dismissed at the Convening Stage if the classification is found wanting as the Court has no jurisdiction to sanction the proposed scheme if the creditors' meeting(s) are not properly constituted. The jurisdiction of the Court is conditional upon the correct identification and composition of classes, for it is only when approved by the appropriate classes, properly identified, selected and convened that the majority could bind the company (See: **UDL Argos Engineering & Henry Industries Co Ltd** v. **Li Oi Lin** [2001] 3 HKLRD 634 at [27(5)] ('**UDL Argos'**), **The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and other** v. **TT International Ltd and another appeal** [2012] SGCA 9 ('**Royal Bank of Scotland'**); **Re Apcoa Parking Holdings GmbH** [2015] 2 BCLC 659 at 674, para [45] ('**Re Apcoa**)']

[48] Although the issue of creditors' classification was once thought better left to be determined at the Sanction Stage [See: Lord Millet's view in the Hong Kong Court of Final Appeal case of **UDL Argos**], the more recent and prevailing views are that this should now be taken at the Convening Stage. More specifically, in **Royal Bank of Scotland**, V K Rajah JA at para [60] to [62] said:

> '60. Lord Millet NPJ's view in the Hong Kong Court of Final Appeal case of UDL Argos, which suggests that issues of creditors' classification should rather be left to the sanction hearing (see below at [70]) should also be noted. This particular view was grounded on the belief that processes seeking to address those issues earlier could prematurely attract

contentious legal proceedings which might otherwise have been avoidable (see UDL Argos at [14]):

> It might be thought singularly unhelpful to leave the question whether the meetings were correctly convened to the third stage, by which time a wrong decision by the company at the outset will have led to a considerable waste of time and money. But in my opinion the practice is a sound one. The only alternative would be to require notice of the initial application to be made inter partes and for notice of the application together with a copy of the Scheme to be given to everyone potentially affected by it, with the risk of incurring the costs of a contested hearing and possible appeals before it could be known whether the Scheme was likely to attract sufficient support in any event. The present practice ensures that those advising the company take their responsibility seriously, since an error on their part will be fatal to the Scheme. At the same time it leaves the question, which goes to the jurisdiction of the Court to sanction the Scheme, to be decided at the appropriate time, that is to say when the Court is asked to sanction it. By then the outcome of the meeting or meetings will be known and the question, which will no longer be hypothetical, can be argued between the appropriate parties, that is to say the company on the one hand and those who object to the Scheme on the other.

61. While Lord Millet NPJ's view certainly has some force, it seems to us that it avoids the classic chicken and egg conundrum facing every applicant. Indeed, without a preliminary determination of the correct classification of creditors, how can

it be known whether a scheme is likely to attract sufficient support and subsequently pass muster? Further, if it were certain from the outset that certain opposing creditors would be classified separately so that the scheme would never pass, then it would be a futile exercise to even conduct scheme creditors' meetings. The reality of what happens in practice has also to be factored into this dynamic process. Almost invariably, the applicant would have made the effort to ascertain, as best as it could at an early stage, prior to any court application, how particular creditors might be inclined to vote.

62. Concerns about delays and contentious proceedings at an early stage may be somewhat overstated as the court has complete carriage over timelines and the conduct of the proceedings. In our view, even if there is a need at this stage to hear potentially dissenting creditors, such a hearing could usually be conducted expeditiously and summarily. Having considered the relative advantages of both approached, we are inclined to prefer the approach in the Practice Statement which commends itself for the greater degree of certainty it injects into the process of passing a scheme. The adoption of this procedure in Singapore requires the company's solicitors, when applying for an order to summon the scheme creditors' meeting, to unreservedly disclose all material information to the court to assist it in arriving at a properly considered determination on how possible need for separate meeting for different classes of creditors ought to be unambiguously brought to the attention of the court hearing the application. As time is ordinarily if the essence in such applications, all scheme related matters (including appeals therefrom) should be heard on an expedited basis.'

[49] I would emphasise again that the decisions that are taken by the Court as to the composition of classes at the Convening Stage is

not to be treated as final and the Court is not bound by its decision made at the Convening Stage [See: **Re Apcoa** at p.673, para [42] to [43] where Hildyard J said:

> '[42] The principal jurisdiction question at the Convening Hearing is normally the identification of the appropriate classes for the purpose of convening meetings to vote upon the scheme proposals; but other matters going to jurisdiction of the court may also be raised, and it is obviously optimal that any such matters be adjudicated, if possible, since if the court lacks jurisdiction there is no point in any class meetings at all.
>
> [43] It is, however, important to emphasise that the function of the court at the Convening Hearing is a limited one; and its decision, even on the question as to the composition of classes, is not final, even though the court can be expected not to change its mind of its own, at the third stage on matters it decided at the first stage (since to do so would tend to subvert the purpose of the revised practice).'

e. Test of Classification of Creditors

[50] The classic test for identifying classes is formulated by Bowen LJ in **Sovereign Life Assurance Co** v. **Dodd** [1892] 2 QB 573 ('**Sovereign Life'**) that a class '*must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'*.

[51] This formulation has been subject to further refinements and clarifications in subsequent cases.

[52] In **Re Hawk**, Chadwick LJ at para [33] stated:

> 'When applying Bowen LJ's test to the question "are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?" it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements – so that they should have their own separate meetings – but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression … is that the court is not bound by the decision of the meeting. It is important Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority'.

[53] In **Re Telewest** and **Argos UDL**, the courts held that the test is based on similarity or dissimilarity of *legal rights* against the company and not on similarity or dissimilarity of *interest* not derived from such legal rights.

[54] Thus, the fact that individuals may hold divergent views based on their private interest not derived from their legal rights against the company is not a ground for calling a separate meetings.

[55] The strict distinction between 'legal rights' and 'interest' can sometime be challenging, leading Hildyard J in **Re Apcoa** to make the following comment:

> '[51] My own sense is that, although the difference (which is plain) between legal rights against the company and personal interests or objectives in the case of particular creditors has always been recognised and emphasised, the importance attached to the difference has somewhat varied over the years. A tendency that developed was to regard Bowen LJ's classis test as to the meaning of the term 'class' as connoting a single ultimate question, that is, whether the class constitution was such that any differences in the rights and the interests of the members of the proposed class were not such as tom prevent them consulting together with a view to their common interests. Post as a single question in that form, the test invites, indeed requires, consideration of interest'.

[56] The established and prevailing approach is to break the question into a 2 stage test:

i. Whether there is any difference between the creditors *inter se* in their strict legal rights ;

ii. If there is, to postulate by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interests or subjective motivations operating in the case of any particular creditors.
[See: **Re Apcoa** at para [52]].

[57] The 2 stage test was helpfully elaborated and clarified by Lady Wolffe in **Premier Oil Plc and Premier Oil UK Limited** [2020] CSOH 39 ('**Premier Oil Plc'**) at [64] as follows:

"(1) At the first stage, the court considers the legal rights of the relevant creditors. There are two sets of rights that are relevant in this context (Re Hawk Insurance Co Ltd [2001] BCLC 480, at para 30; Re UDL Holdings Ltd [2002] 1 HKC 172 at para 17):

(i) The existing rights against the company, which are to be released or waived under the scheme; and

(ii) The new rights (if any) which the scheme gives to those whose rights are to be released or waived.

(2) If there is no material difference between the legal rights of the relevant creditors, they will form a single class. And there is no need to proceed to the second stage of the test.

(3) If there are material difference between the legal rights of the relevant creditors, at the second stage the court needs to assess the relevance of those differences.

(4) A class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest in order to avoid the unnecessary proliferation of classes.

:

[68] It is important to note that at both stages of the test, the Court is concerned purely with the legal rights of the relevant creditors as against the scheme company, not their economic interest (UDL, at para 27, Re Primacom Holding GmbH [2013] BCC 201, paras 44-45'

[58] To determine the existing rights of the creditors which are to be released or waived under the scheme, it is necessary to identify what is the appropriate comparator: this is what would be the alternative if the scheme does not proceed. By identifying the right comparator, the likely practical effect of what is proposed can then be assessed and the likelihood of sensible discussion between the

holders of rights so affected and between them and other with different rights can be weighed fairly [See: **Re Stronghold** at 23].

[59] Thus, in the case where the appropriate comparator is the insolvent liquidation of the company, the Court will look at what the creditors' legal rights *inter se* in the case the company is in liquidation and compare that with the relative rights of the creditors *inter se* under the scheme. If there is a difference between the creditors' relative positions, the Court is to assess whether the difference is such as to render the creditors' rights 'so dissimilar that they cannot sensible consult together with a view to their common interest'.

[60] V K Rajah JA in **Royal Bank of Scotland** explained the approach in this manner at [140] which I find most instructive:

> '140. Therefore, the dissimilarity principle means that if a creditor's (or a group of creditors') position will improve or decline to such a different extent vis-à-vis other creditors simply because of the terms of the scheme (and not because of its own unique circumstances, i.e. its "private interests") assessed against the most likely scenario in the absence of scheme approval ("the appropriate comparator"), then it should be placed in a different voting class from the other creditors. We should highlight here that the appropriate comparator depends on the facts of each case and is not necessarily an insolvent liquidation…'

[61] In the Singapore Court of Appeal case of **Pathfinder Strategic Credit LP and another** v. **Empire Capital Resource Pte Ltd and another appeal** [2019] 2 SLR 77 ('**Pathfinder**'), Sundaresh

Menon CJ at [88] adopted the approach by V K Rajah JCA in **Royal Bank of Scotland** (which was referred to as 'TT1' in the judgment) and outlined the application of the approach as follows:

> '88. In practical terms, under the approach laid down in TT 1, there are three broad steps to creditor classification:
>
> (a) First, identify the comparator. For instance, in TT 1, the court considered the expert evidence and stated at [142]: "In the present case, the appropriate comparator was an insolvent liquidation. Without the [proposed scheme], the liquidator would distribute the contingent claimants a portion of the [company's] assets (on a *pari passu* basis) based on the 'just estimate' … of their contingent claims…"
>
> (b) Second, assess whether the relative positions of the creditors under the proposed scheme mirror their relative positions in the comparator. This implies that at least four positions must be identified and compared: the positions of the two groups of creditors under the proposed scheme, and the positions in the comparator.
>
> (c) Third, if there is a difference between the creditors' relative positions identified in the second step, assess whether the extent of the difference is such as to render the creditors' rights "so dissimilar that they cannot sensible consult together with a view to their common interest" (Wah Yuen ([47] supra) at [11]; TT 1 at [131]). This raises a question of judgment and degree. In TT1 at [140], we explained the approach in these terms: "if a creditor's (or a group of creditors') position will improve or decline to such a different extent vis-à-vis other creditors simple because of the terms of the scheme …assessed against [the comparator], then it should be placed in a different voting class" (see also TT1 at [133], [143], and [147]. There is sense in this approach, since if the creditors are in the same position under the proposed scheme as in the

> comparator, then there is no issue of the proposed scheme preferring one creditor over the other, and the creditors' interests (in a loose sense of the term) in relation to the question of whether to vote for the proposed scheme may reasonably be expected to be aligned. To this end, the court generally takes a "broad, practical and objective approach" and seeks to avoid "an impractical mushrooming of classes that could potentially result in the creation of unjustified minority vetoes" (TT1 at [141]).

[62] Learned counsel for AAX had submitted that for the purpose of the 2 stage test, the comparator is only featured at the 2nd stage and not the 1st stage. According to learned counsel, at the 1st stage of the test, the court is to compare the existing rights of the creditors prior to the scheme with the rights proposed under the scheme. Only when there is some differences between the two rights will the court look at the rights of the creditors under the appropriate comparator as the alternative to the scheme.

[63] With respect, I am unable to agree with the interpretation of learned counsel for AAX on the 2 stage test in the light of the clear passages in **Pathfinder** and **Royal Bank of Scotland**. In **Re Stronghold**, Hildyard J explained the relevance of the comparator in this manner:

> '[48] What is now ordinarily adopted as *the starting point* is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed. …
>
> [49] The reason is two-fold. First, a fair comparison between a policyholder's rights if there is no scheme and its rights under the proposed scheme depends on ascertaining the nature and

quality of the right in the 'non-scheme world', and the latter depends on the appropriate comparator. Secondly, only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights be weighed fairly.'

[64] Justice Trower in the recent case of **Virgin Atlantic Airways Limited** [2020] EWHC 2191 ('**Virgin Atlantic'**) at para [43] of his judgment also confirmed that the comparator is applied at the 1st stage when he said as follows:

'43. In analysing whether scheme creditors should or can be required to consult together as a single class, the court must identify the substance of the scheme creditor's existing rights and then compare them to the rights which they will have in consequence of the scheme. Where a scheme is proposed as an alternative to a formal insolvency procedure, it is necessary to identify the rights that the creditors would have in a formal insolvency proceeding. As a matter of principle, these are the rights which are to be compromised under the scheme (see, in particular, the way the point is described by Chadwick LJ in Re Hawk at para 42 and David Richards J in Re T&N Ltd (No 4) [2007] Bus LR 1411 at [87]).'

[65] In fact, Snowden J in **Re ColourOz Investment 2 LLC** [2020] EWHC 1864 ('**Re ColourOz'**) makes this plain in para [79] of his judgment:

'In order to carry out this analysis of the extent and importance (or otherwise) of differences between creditors of their current rights which are to be released or varied, and the rights which are to be given in their place under the scheme, it is generally

necessary to identify a comparator in the scheme – i.e the position that would apply if the scheme were not to proceed. In many creditors' schemes, as was the case in Hawk, that comparator is a relatively immediate commencement of insolvency proceedings (an administration or liquidation). But there are other cases where that is not so'.

f. Duty of Disclosure

[66] In connection with the Court's role in determining the jurisdictional issues at the Convening Stage, it is incumbent upon the scheme company to adduce evidence of sufficient quality to persuade the Court to act on the scheme and it has a duty to make full and frank disclosure of all relevant facts and matters to the Court relevant to such jurisdictional issues including the classification of creditors.

[67] In **Indah Kiat International Finance Company BV** [2016] BCC 418 ('**Indah Kiat'**), Snowden J explained the duty of disclosure in this manner:

'39. ,,, As I have indicated above, the only issues that are generally appropriate to be considered at the convening hearing are the proper class composition of the scheme meetings, together with any other essential issue which, if decided against the scheme company, would mean that the court simply had no jurisdiction or would unquestionably refuse to sanction the scheme.

40. But the court is not bound to accept at face value bare assertions in the evidence in relation to class composition or any other matter. At the convening hearing, the applicant company has the burden of adducing evidence of sufficient quality and credibility to persuade the court to act. Further, and

importantly, whether or not there is any opposition, the company proposing a scheme of arrangement has a duty to make full and frank disclosure to the court of all material facts and matters which may be relevant to any decision that the court is asked to make. The scheme jurisdiction can only work properly and command respect internationally if parties invoking the jurisdiction exhibit the utmost candour with the court.'

[68] Sundaresh Menon CJ in **Pathfinder** described the duty of disclosure at the Convening Stage thus:

'50. However, we must emphasise that even this less onerous standard of disclosure at the leave stage is not wholly without bite, and there remains a minimal standard of disclosure that a company must satisfy before leave will be granted under s 210(1) of the CA. … existing jurisprudence makes clear that at the leave stage, the company bears a duty of unreserved disclosure to assist the court in determining whether and how the creditors' meeting is to be conducted. This must be taken to require at least such disclosure as would enable the court to determine the issues that it must properly consider at this stage, such as the classification of creditors, the proposal's realistic prospects of success, and any allegation of abuse of process.

51. In our judgment, the balance between the company's desire to table a proposal, the creditors' right to consider such a proposal, and the court's overriding duty to ensure the proper exercise of its statutory powers, is correctly struck by requiring, in addition, that the company provide such financial disclosure by the leave stage in such manner and to such extent as is reasonably necessary for the court to be satisfied that fair conduct of the creditors' meeting is possible.

> 52. We consider this formulation to be justified in principle. As an aspect of the company's duty of disclosure at the leave stage, it should not be applied in a manner that is particularly onerous or exacting. The leave application is, after all, usually heard in an expedited basis… But this does not mean that the duty is a hollow one, and the court should not be taken as a rubber stamp just because the proposed scheme would likely return to the court at the sanction stage. By that stage, if an unsuitable creditors' meeting had been convened in the interim, it is likely that valuable time and resources would have been spent, positions crystalised, the financial situation deteriorated and serious distrust engendered, all of which may be fatal to any prospective rehabilitation of the company while also being unfairly prejudicial to the creditors…'

[69] Notwithstanding the aforesaid, learned counsel for AAX contended that the standard of disclosure in Malaysia is lower. In Malaysia, unlike in the UK and in Singapore, it seems that it is not a practice for the scheme company to present together with the application at the Convening Stage a draft Explanatory Statement containing detailed terms of the proposed scheme. On this basis, learned counsel for AAX contended that standard of disclosure cannot be such as to permit the creditors to deal with the merits of the scheme or to be able to decide whether to vote for the scheme.

[70] To my mind, whilst the Court should not generally be considering the merits or fairness of the proposed scheme at the Convening Stage as these are issues that should be left for the creditors to decide, nevertheless, there must be sufficient particulars to enable the Court to determine the jurisdictional related issues.

[71] I agree with learned counsel for MASSB that the duty of disclosure as stated in **Indah Kiat** and **Pathfinder** in fact is not at all link to the existence of the Explanatory Statement. Just because it may not be the practice in Malaysia for the scheme company to annex an Explanatory Statement does not at all mean that the threshold for disclosure is and or ought to be lower. The scheme company still bears the duty of absolute transparency and to unreservedly disclose all material information to assist the Court in determining the classification and the composition of the creditors, how the creditors' meeting(s) are to be conducted and to address any allegation of an abuse of process and or if the application is not made *bona fide* [See: **Indah Kiat**, **Pathfinder** at [29]].

[72] If there are private commercial arrangements between the scheme company with any of the creditors after the restructuring takes effect or any sort of payment arrangement made to any creditors in connection with the restructuring plan or after the restructuring which can have a potential impact both upon the class question and upon the question at the sanction hearing, this must be disclosed to the Court at the Convening Stage [See: **Noble Group Ltd** at [111]]. Also, if there is a voting agreement with any class of creditors for the proposed scheme, this ought to be disclosed [See: **Re Telewest** at [54]].

[73] Having dealt with an overview of the law relating to the scheme of arrangement, I will now address the issues raised in this OS by the various interveners.

Whether the Scheme is a 'compromise or arrangement' under s. 366(1) of the Act

[74] Learned counsel for Sky High in her written submission had contended that the Scheme cannot be considered a 'compromise or arrangement' within the meaning of s. 366(1) of the Act as the Scheme only confers benefits to AAX with the creditors being expected to abandon their claims and to accept an absurd rate of 0.3% of their claims.

[75] Citing Siti Norma Yaakob J (as she then was) in **Sri Hartamas Development**, learned counsel for Sky High submitted that the concept of 'compromise or arrangement' must have an element of 'give and take' referring to the following passage in the judgment:

> 'The word 'compromise or arrangement' have been defined in the case of Re NFU Development Trust Ltd [1973] 1 All ER 135 in the following manner. 'Compromise' implies some element of accommodation on each side. It is not apt to describe it as total surrender. A claimant who abandons his claim is not compromising it. Similarly, the word 'arrangement' implies some element of give and take. Confiscation is not an arrangement. A member whose rights are expropriated without any compensating advantage has also been held by the same case as 'not having his rights rearranged in any legitimate sense of that expression'.

[76] In the English High Court case of **Re NFU Development Trust Ltd** [1973] 1 All ER 135 (HC), Brightman J refused to sanction a scheme between the company and its members as the scheme although supported by a majority of three-fourths in value of the

members as required under s. 206(2) of the Companies Act 1948 (*in pari materia* with our s. 366(2) of the Act), required its members to totally surrender their rights without compensation and therefore cannot be said to involve any 'accommodation on each side'.

[77] In the present case, learned counsel for Sky High contended that the Scheme Creditors will have nothing to gain from the Scheme as they are asked to accept:

(i) a disproportionate debt restructuring debt reduction of 99.7%;

(ii) an interest rate that is substantially below the market rate and is disproportionate to the creditors' funding costs;

(iii) waive all interest and penalty interest on the existing debt after the cut-off date of 30.6.2020.

[78] On the contrary, AAX will come out of the Scheme a debt-free company and the shareholders of AAX will reap a potential upside with the company being poised to continue with its business afresh when the Covid-19 pandemic is over.

[79] In response, learned counsel for AAX contended that the shareholders are taking a 99.9% hit arising from the proposed capital reduction and proposed share consolidation of every 10 ordinary shares into 1 ordinary share. However, to my mind, this is more of a 'paper loss' since the shares have no real value given the insolvency status of the company.

[80] Next, learned counsel for AAX submitted that there is 'give and take' under the Scheme because the Scheme Creditors will in fact be receiving more under the Scheme than they otherwise would have under the liquidation alternative. This is notwithstanding the 99.7% hair-cut. Also, with the approval and sanction of the Scheme, the Scheme Creditors stand to gain the opportunity to engage with AAX to negotiate fresh contracts and continue their business relation with AAX as their businesses and services are essential to AAX's continue operation. This will help mitigate the Scheme Creditors' losses incurred prior to the Scheme.

Court Analysis

[81] The Act does not provide a definition for the word 'compromise' or 'arrangement'. The cases however established that a broad and expansive interpretation should be given to these words.

[82] In **Re T & N Ltd (No 3)** [2007] 1 BCLC 563 ('**Re T & N**'), David Richard J held:

> 'In my judgment it is not a necessary element of an arrangement for the purpose of s 425 [of the Companies Act 1985, the then applicable section] that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases, it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s.425. It is, as Nourse J observed, neither necessary nor desirable to attempt to a definition of arrangement. The legislature has not done so. To insist on an alteration of rights,

> or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the court's approach over many years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because it effect is to alter the rights of creditors against other party or because such alteration could be achieved by a scheme of arrangement with that other party.'

[83] In the aforesaid case, the English court was of the view that an arrangement could cover an alteration between the rights of the creditors and their insurers (a third party). It need not be limited to a compromise or arrangement between T & N and its creditors.

[84] In **Lehman Brothers International (Europe)** [2009] EWCA Civ 1161 ('**Lehman Brothers'**), the scheme was intended to achieve a resolution of certain trust claims in the administration of Lehman Brothers International (Europe) Ltd after its sudden collapse and entry into administration in September 2008. The scheme provided, in outline, for any client who had both a pecuniary claim against Lehman and a proprietary or beneficial interest in assets held or controlled by Lehman to be treated as a scheme creditor and have both its pecuniary and its property interest dealt with by an 'arrangement' under the scheme. The question was whether the property rights could be dealt with in such a way under a scheme. The answer given was that they could not. Pattern LJ's analysis at para [65] to [67] of his judgments is as follows:

> 'It seems to me that an arrangement between a company and its creditors must mean an arrangement which deals with their rights inter se 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 as security.
>
> :
>
> [67] A proprietary claim to trust property is not a claim in respect of a debt or liability of the company. The beneficiary is entitled in equity to the property in the company's hands and is asserting his own proprietary rights over it against the trustee. The failure by a trustee to preserve that property in accordance with the terms if the trust may give rise to a secondary liability to make financial restitution for the loss which results, but that is a consequence of the trust relationship and not a definition of it.'

[85] The present case before this Court does not involve 'proprietary claims' of the creditors and nor does it involve alteration of the creditors' rights with third parties. But the principles derived from the 2 said cases are that the 'arrangement' ought to be given its widest possible meaning and must deal with an arrangement between the company and its creditors *inter se* as debtor and creditor.

[86] In **Fowler** v. **Lindholm** (2009) 178 FCR 563 at 578, the Federal Court of Australia held that:

> 'No narrow interpretation should be given to the expressions 'compromise' or 'arrangement' … there is no reason to construe the term in s 411 as restricting in any way the nature of the

bargain that might be made between the company and creditors (Re Sonodyne International Ltd (1994) 15 ACSR 494 at 497-498), subject only to the additional requirement that the arrangement must be within the power of the company and not in contravention of the Corporation Act. …

A scheme of arrangement between a company and its creditors or a class of creditors is no more than a proposal to vary or modify the company's obligations in relation to its debts and liabilities owed to the creditors or class of creditors.'

[87] Most recently in **Re ColourOz**, Snowden J reiterated the need for a broad concept of an arrangement, stating thus:

'67. The concept of an arrangement is extremely broad. In Re Savoy Hotel Ltd [1981] Cg 351, Nourse J summarised the position as follows (at 359E-F):

> "… there can be no doubt that the word 'arrangement' in section 206 has for many years been treated as being one of very wide import. Statements to that effect can be found in the judgments of Plowman J in Re National Bank Ltd [1966] 1 W.L.R 819. 829 and of Megarry J in re Calgary and Edmonton Land Co Ltd (In liq) [1975] 1 W.L.R 355, 363. That is indeed a proposition for which any judge who has sat in this court in recent years would not require authority and its validity is by no means diminished by what was said by Brightman J in Re NFU Development Trust [1972] 1 W.L.R 1548. All that that case shows is that there must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition of 'arrangement'.

[88] Mindful of the aforesaid, can it still be said that the Scheme as proposed by AAX in this case cannot be said to be a 'compromise or arrangement'?

[89] A scheme that proposes to pay its scheme creditors only 0.3% of their claims does come across as audacious initially. There is a natural tendency to immediately write it off as a non-bona fide scheme and or that such a scheme cannot be deemed as a 'compromise*'* or an 'arrangement' under the Act as there is no 'give and take' in the scheme.

[90] However, as counsel for AAX had taken great pain to caution the Court, the merit or fairness of the Scheme is really not a matter for this Court to consider at the Convening Stage. The fact that the Scheme provides only a marginally better position to the Scheme Creditors than the alternative of liquidation still constitutes a variation or modifications of the company's obligations to the creditors and it is for the Scheme Creditors to decide whether to accept and approve the Scheme. It does not amount to a surrender or confiscation of the Scheme Creditors' rights. The position may well be different if the Scheme confers no benefit at all to the Scheme Creditors compare to the rights that they may have if AAX goes into liquidation.

[91] Learned counsel for AAX also contended that the Court may look at the 'wider arrangement' outside the Scheme when considering the question if the Scheme is a 'compromise' or an 'arrangement' under the Act. In this case, it is said that this Court should consider

the opportunities of future businesses presenting themselves to the Scheme Creditors with AAX post-scheme as benefits to the Scheme Creditors under the Scheme. Reliance is placed on the following passage by Mann J in **Re Bluebrook Ltd** [2010] 1 BCLC 338 ('**Re Bluebrook'**) at 363, para [74]:

> '[74] … The schemes release the scheme claims but it is part of an arrangement under which those claims are substituted by new claims against the new group, and the assets of the existing group are to be transferred. True it is that the scheme companies do not themselves promise to do much under the scheme, but the schemes are part of a wider arrangement. The situation is really nothing like that in the NFU case, where there was absolutely nothing passing back to the members. It is right to describe the present schemes as being certainly arrangements, and probably compromises as well. The present case is not a complete surrender.

[92] With respect, the facts in **Re Bluebrook** are very different. In that case, the objection was that the scheme company under the scheme practically did not have to do anything since the claims by the scheme creditors were transferred to claims made against a new company. The court held that the fact that the claims against the scheme company were released and that the scheme company did not have to make any payment cannot be view in isolation but must take into account the wider arrangement where the scheme creditors' claims would be made against a new company where assets of the scheme company had been transferred.

[93] In our instant case, the Scheme does not provide that AAX post-scheme *will* enter into fresh contracts with any of the Scheme Creditors, let alone commits AAX to certain terms and conditions in respect of such contracts. Conceivably AAX may not even deal with any of the Scheme Creditors at all post-scheme. Thus, I am not inclined to take these 'business opportunities' (which are strictly speaking not part of the Scheme) into consideration as 'benefits' conferred by AAX to the Scheme Creditors under the Scheme. However, given my views that the marginally better position provided for under the Scheme to the Scheme Creditors compare to the liquidation of AAX is sufficient for the Scheme to constitute a 'compromise' or an 'arrangement', my rejection of the 'business opportunities' argument is of no consequence.

[94] Accordingly, I hold that the Scheme by AAX is a 'compromise or arrangement' under s. 366(1) of the Act.

AAX is hopelessly insolvent

[95] MASSB and a few of the Lessors have raised objection to the Scheme that AAX is so hopelessly insolvent that it would be against public policy to permit sanction to the same. It is contended that AAX is saddled with astronomical debts and that even with the proposed Scheme, AAX would not be able to survive as a going concern. This is tied to the other objection by some of the Lessors that the Scheme has no chance of success.

[96] In support of the 'hopelessly insolvent' argument, reliance was placed on the following available evidence in these proceedings:

(a) AAX's estimated debts and liabilities owed to creditors amounted to RM 64.15 billion as at financial quarter ended ('**FQE**') 30.6.2020.

(b) For financial year ended ('**FYE**') 31.12.2018, AAX group recorded a loss after taxation of RM 301.48 million. AAX group's current liabilities exceeded their current assets by RM 623.68 million with its net assets decreasing by 41.97% from RM 988.61 million to RM 573.66 million.

(c) For FYE 31.12.2019, AAX group recorded a loss after taxation of RM 650.32 million. AAX group's current liabilities exceeded their current assets by RM 1,080.3 million with its net assets decreasing by 75.96% from 573.66 million to RM 137.93 million.

(d) AAX's external auditors, Messrs Ernst & Young PLT, have issued an unmodified audit opinion on AAX's financial statements of its financial position as at FYE 31.12.2019 where it emphasised that there was in existence material uncertainty that may cast significant doubt on AAX's ability to continue as a going concern:-

> "Material uncertainty related to going concern
>
> We draw attention to Note 2.1 to the financial statements, which indicates that the Group and Company have reported a net loss of RM 650.3 million and RM 682.5 million respectively for the year ended 31 December 2019. In addition, the Group's and

Company's current liabilities exceeded its current assets by RM 1,080.3 million and RM 1,103.5 million respectively. Further, in 2020, the global economy, in particular the commercial airlines industry, faces an uncertainty as a result of the unprecedented COVID-19 pandemic. The travel and border restrictions implemented by countries around the world has led to a significant fall in demand for international air travel which impacted the Group's and the Company's financial performance and cash flow. These events or conditions, along with other matters as set forth in Note 2.1 and Note 41 to the financial statements, indicate the existence of material uncertainties that may cast significant doubt on the Group's and the Company's ability to continue as a going concern." (Emphasis added)

(e) For financial period ended ('**FPE**') 30.6.2020 (Cut-Off Date), AAX's unaudited loss after taxation increased by 422.01% from RM 163.78 million to RM 854.94 million. AAX's shareholders' equity decreasing by 796.48% from RM 137.93 million as at FYE 31.12.2019 to net liabilities position of RM 960.66 million.

(f) For FPE 30.9.2020, AAX's unaudited loss after taxation increased further to RM 1.163 billion.

(g) AAX had triggered the prescribed criteria set out in paragraph 8.04 and paragraph 2.1(a) and 2.1(e) of Practice Note 17 ('**PN17**') of the Main Listing Requirements of Bursa Malaysia Securities Berhad ('**Main LR**'): -

(i) AAX's shareholders equity on a consolidated basis is 25% or less of its share capital (excluding treasury shares) and such shareholders' equity is less than RM 40 million in respect of FPE 31.3.2020; and

(ii) AAX's external auditors have issued an unmodified audit opinion with an emphasis of matter on material uncertainty relating to going concern in respect of AAX's audited financial statement for FYE 31.12.2019 and AAX's shareholders' equity on a consolidated basis is 50% or less of its share capital (excluding treasury shares).

The only reason AAX has not been classified as a PN17 company is because Bursa Malaysia had granted AAX temporary relief from complying with the obligations under Paragraph 8.04 of the Main LR until June 2021.

(h) AAX had raised RM 395 million of capital funding in May 2015 through rights issue (an abridged prospectus was issued) to purportedly raise funds for working capital requirements and reduce its short-term borrowing. Notwithstanding this, there is still no sign of AAX turning around its business until to-date and it consistently and continuously operates at a significant loss.

(i) Since AAX was listed in the Kuala Lumpur Stock Exchange ('**KLSE**') in 2013, its share price had reduced significantly. From its initial public offering price of RM 1.25, it now trades at around RM 0.10.

(j) Since AAX was listed in KLSE in 2013, it has never been solvent enough to declare or distribute dividends to its shareholders/investors even during the one solitary year it made a profit.

[97] With the dire financial position outline above, it is contended that AAX has failed to demonstrate that it is viable, feasible or workable to turn the financial predicaments of the company around. This is because there is no certainty of fresh injection of capital or entry of a white knight to facilitate the survival of AAX.

[98] At the outset, AAX proposed that it shall acknowledge and settle only up to RM 200 million of debt due and owing to Scheme Creditors, which is valued at approximately RM 63.5 billion.

[99] There is absolutely no certainty that the proposed settlement sum of RM 200 million will be available and secured for the purposes of this Proposed Debt Restructuring. Under the proposed Scheme, AAX merely acknowledged an indebtedness for "a principal amount of up to RM 200 million … an amount which the Group's future operational cash flow may accommodate and payable annually over a period of 5 years …*".*

[100] From the history of AAX's operational performance, it clearly shows that AAX will not be profitable or have sufficient cash flow to pay back the Scheme Creditors annually or at all. AAX suffered consistently and continuously a net operating loss of RM 218.72 million in 2018, RM 347.82 million in 2019 and RM 377.05 million

on FPE 30.6.2020. The proposed RM 200 million is therefore illusionary and speculative, and it depends on a variety of circumstances, all of which are not in AAX's direct control. This is confirmed by AAX when it stated that *"*the actual amount which may be needed by AAX is dependent on, amongst others, finalised business model and the market conditions*"*. This clearly proves that the figure proposed at RM 200 million is merely a bare estimate without any basis on the facts.

[101] AAX has not provided any profit and loss projection under the proposed Scheme to show that it is capable of operating as a going concern post Scheme. AAX did not provide a forecasted profit of the group probably because it is too speculative and cannot be substantiated by any credible or empirical evidence. The information contained in the Business Restructuring Updates dated 9.10.2020 was not exhibited by AAX. Such or related information is crucial for this Court to determine whether the Scheme is feasible and merits due consideration by the Scheme Creditors when it is eventually placed before them in detailed form. Learned counsel for MASSB submitted that the only plausible reason for not exhibiting these and other relevant particulars is that it will be extremely difficult to forecast any profits in the coming years because of AAX's business model and the volatility of the aviation industry post COVID-19 pandemic.

[102] AAX admits that all the other major airlines, even the largest airlines, were provided with substantial government support, funding and/or bailout to continue as a going concern.

	Airline	Bailout amount	Region
1	Singapore Airlines	USD13 billion	Asia
2	Garuda Airlines	USD1 billion	Asia
3	Lufthansa	USD10 billion + €5.7 billion	Europe
4	Airfrance-KLM	€10.4 billion	Europe
5	Cathay Pacific	USD6 billion	Asia
6	Brussels Air	€290 million	Europe
7	South African Airline	USD685 million	Africa
8	Norwegian	NOK3 billion	Europe
9	Multiple Airlines in the United States of America ("**USA**")	USD25 billion	USA

There is no such confirmed support from the Malaysian government or for that matter from any party which further casts serious doubts to the ability of AAX to operate as a going concern post Scheme.

[103] AAX averred that it intends to apply for an "application for a government guaranteed loan under Danajamin PRIHATIN Guarantee Scheme and/or raising funds from equity providers." Apart from this self-serving bare averment, there is no evidence whatsoever such as a letter of comfort or intent from the Malaysian government or any formal communication between the parties exhibited in these proceedings to show to the Scheme Creditors that this may be a possibility.

[104] Further, only after the interveners had contended that AAX is hopelessly insolvent and that it does not have any means to obtain fresh injection of capital or an entry of a white knight to ensure the survival of AAX, it tries to counter these contentions by making a desperate last ditch attempt to raise additional capital into AAX.

[105] AAX proposed the issuance and allotment of new AAX shares by way of subscription by a special purpose vehicle ('**SPV**') incorporated by Dato' Lim Kian Onn (director and deputy chairman of AAX) directly and/or its associates of up to 200 million shares to raise gross proceeds of up to RM 300 million. The SPV will commit a minimum subscription of RM 50 million subject to the terms of the share subscription agreement. However:

(a) The information provided is bare bones and very sketchy particularly the plans on how this SPV intends to obtain the funds to commit to purchase any or even the minimum subscription of RM 50 million. AAX alleged that it intends to raise a minimum of RM 100 million by underwriting arrangements, which will be arranged at a later date, which is after the extraordinary general meeting ('EGM') to be convened to approve the Proposed Rights Issue. The underwriting is therefore *subject to* the approval of the Proposed Right Issue. Further, there is little or no credible information of this underwriting arrangement and what it consists of. The distinct lack of information provides no comfort or confidence to the Scheme Creditors at all that AAX can secure sufficient capital to operate in future.

(b) Pursuant to Paragraph 6.06 of the Main LR, a listed issuer must not issue shares or other convertible securities *unless* the shareholders in general meeting have approved the specific allotment. Therefore, the Proposed Rights Issue is still subject to the approval of the shareholders. At this stage, it is too premature to discuss these issues as it is very

speculative and there is no indication whatsoever that the Proposed Right Issue will be approved by the shareholders of AAX at the EGM.

(c) There are no particulars on the material terms of the share subscription agreement and how these conditions will affect AAX's financial standing in the long run. It must be noted that the share subscription agreement contained undisclosed preconditions. Particularly, SPV's ability to subscribe an additional 15% of the enlarged total number of AAX Shares *only crystallises after* the share subscription agreement becomes *unconditional*. There is no information provided by AAX and the level of disclosure is simply insufficient.

(d) There is no guarantee whatsoever that anyone else would want to purchase the remainder shares of an insolvent company at the Rights Issue Price, and it may be the case, that AAX may have to issue more shares to achieve its intended goal. This will require AAX to potentially call for another general meeting to issue further shares to raise more capital to sustain its future operations none of which are straightforward or certain.

(e) There is a significant lack of material information surrounding the Proposed Rights Issue and what is clear now is that nothing is certain, and everything is fraught with preconditions and qualifications

Court Analysis

[106] The rule involving 'hopelessly insolvent' companies is this. A company will not (after a s.366 restructuring) be allowed to enter into the commercial world when it is hopelessly insolvent. This is because the company should not be allowed to incur credit with new creditors that it will not be able to repay,

[107] In **Re Egnia Pty Ltd (in liq)** (1991) 5 ACSR 781 at 784, the Court held:

> 'For long it has been regarded as in the public interest that companies that have become hopelessly insolvent should be wound up. In the main this is because allowing companies in such a condition to continue, places future creditors in jeopardy and also may have the effect of protecting from investigation and accountability those who have mismanaged the companies' affairs. However, while acknowledging the force of Mr O'Connor's submissions and the correctness of the notions underlying them, the considerations to which he refers do not seem to me to loom very large in this case. *If the scheme is implemented, the company will be freed of all its debts. That is an integral part of the scheme. The court will not be asked to approve a scheme which will enable the company to go forth still heavily burdened with debt:* cf Re Mascot Home Furnishers Pty Ltd (in liq) [1970] VR 593'.

[108] Thus, in **Re Cascade Pools Australia Pty Ltd** (1985) 9 ACLR 995, McLelland J refused to order a meeting of creditors where the proposed scheme would result in the scheme company continuing to carry on business but with no assets and with liabilities exceeding $160,000.00. The relevant passage states:

> 'The problem raised by the proposal in the present form is that if implemented, Cascade would be left with the capacity to carry on business with liabilities exceeding $160,000 and no assets. It has frequently been said that as a matter of public policy the court should not facilitate such a state of affairs …'

[109] There is no doubt that under the Scheme, the entity, AAX post-scheme will be completely debt free with no liabilities and with fresh capital to meet its operation. In fact, in this application, AAX has referred to a proforma balance sheet showing that AAX is a solvent company post-scheme and anticipates to derive profits once the pandemic is over. Thus, it cannot be said that such a company is 'hopelessly insolvent' by whatever definition of 'insolvency'.

[110] It is true that AAX's past performance records and its financial positions up to the filing of this OS show that AAX is indeed hopelessly insolvent. This was the thrust of the submissions by learned counsel for MASSB relying on AAX's dire financial status as outlined above. But this is precisely the reason compelling AAX to make the application for the approval of the Scheme. To echo V C George J (as he then was) in **Re Kuala Lumpur Industries Berhad** [1990] 2 MLJ 180 at 183:

> 'The complaint that the intention of the applicant in taking out the application was to forestall the winding up of a hopelessly insolvent company does not take the matter anywhere since the whole point of s 176 is to provide a statutory remedy to sort out the problems of ailing companies without letting them go under.'

[111] As regard the contention that the business of AAX post-scheme is not viable or feasible given the past performance and the figures forecasted, I agree with learned counsel for AAX that MASSB is really asking this Court to assess AAX's financials to determine that the business model is flawed and cannot be salvaged. This Court simply has no role nor the expertise to make such a commercial assessment. The viability or otherwise of AAX post scheme is best left for the Scheme Creditors who are in the airline industries to decide.

[112] Learned counsel for MASSB contended that the profit projections are speculative and unsupported by any cogent evidence and that it is not supported by any financial experts, citing the case of **High-5 Congolomerate Berhad & Anor and another case** [2015] 1 LNS 507:

> '[58] The proposed scheme must be one that is viable and supported by views of financial experts such as auditors. The profit forecast as set out in Appendix V of the Proposed Scheme is speculative and unsupported by any cogent evidence. This Court would have to agree with the submission of the Learned Counsel for CIMB that the said profit forecast has not been independently verified and is entirely based on the Applicants' assumptions …
>
> [60] The forecasted profit of the Group as envisaged by the Applicants are entirely speculative and unsubstantiated with any documents in support. It is or would not be in the interest of the creditors to rely on such information and/or statements which are entirely speculative and unsubstantiated with documents.'

[113] Whilst it is true that AAX has not placed before this Court any expert evidence on the profit forecast, neither have the Interveners provided any independent report to state that AAX post the Scheme is not viable. This Court ought not to make any commercial judgment on the viability or otherwise of the company post the Scheme at this stage without the benefits of any independent or expert report.

[114] Similarly, it is not for this Court at this juncture to speculate as to whether AAX will or will not be able to raise the necessary funding. There are expressions of interest shown at this stage to subscribe for the shares. Whether RM 300 million is sufficient is a commercial decision for the creditors and is not a function of this Court.

[115] Based on the aforesaid, I disagree that this OS ought to be dismissed on the ground that AAX is a hopelessly insolvent company.

Whether the Proposed Debt Restructuring is *bona fide* or an abuse of process

[116] Learned counsel for MASSB submitted that the Scheme filed by AAX lacks *bona fide* and is an abuse of the court process.

[117] This contention is linked to the point that AAX has failed to make unreserved full and frank disclosure of all material information to the Court. As such these 2 objections will be taken together.

[118] Learned counsel for MASSB referred to the passages in **Pathfinder** delivered by Sundaresh Menon CJ and the passages in **Re Indah Kiat** delivered by Snowden J setting out the legal principles concerning disclosure obligations at the Convening Stage which I have quoted above.

[119] More specifically, learned counsel for MASSB contended that AAX has failed to discharge its duty of utmost candour to this Court as can be seen from the manner in which AAX constantly made piecemeal changes to its classification of the creditors as and when objections are raised by the intervening creditors.

[120] MASSB also questioned the constant change in the classification of creditors by AAX in the Scheme.

[121] When AAX first filed its application, the Scheme that was proposed was only for the unsecured creditors to restructure approximately RM 63.50 billion of debt ('**the Original Scheme**'). At this stage, MASSB was included as an unsecured creditor.

[122] After MASSB had objected to AAX's classifying it as an 'unsecured' creditor, AAX filed an application to amend its classification to change it to 2 classes, namely, (1) Class A creditors comprising 'creditors who are considered critical or essential and who may have secured and or other rights' and (2) Class B creditors who are 'creditors who do not fall within Class A' ('**the First Revised Scheme**').

[123] In the application to amend, a 'provisional list' of these creditors were provided. Also, the total debts is stated to be RM 64.15 billion which curiously is not significantly different from the amount of RM 63.5 billion when the scheme was only for unsecured creditors.

[124] In appendix 'A-2' to the application to amend, MASSB was included in Class A but it was not clear if AAX still treated MASSB as an unsecured creditor as that class was described as creditors who '*may* have secured and or other rights'.

[125] The reason given by AAX for the change was that under the Original Scheme, AAX had treated only those debts owing to creditors whose financing arrangements included a security trustee and charges over 2 specific aircraft as being secured debts and were to be excluded from the Original Scheme. However, the re-classification was prepared on the basis, *inter alia*, that those creditors who do not have the debts as described but could assert some other secured right were also secured debts for the purposes of the First Revised Scheme. The creditors with debts as described and excluded in the Original Scheme are now also included in the First Revised Scheme.

[126] However, in the affidavit affirmed on 24.11.2020, AAX made further changes to its formulation of the classification of creditors. This time Class A was described as 'creditors who are critical or essential to the business of AAX and are considered to have a common or unified interest in the continuation of AAX as a going concern, some of whom may be able to assert secured rights' ('**the Second Revised Scheme**').

[127] AAX averred that the debts of creditors who are able to assert secured rights under Class A amount to 62.83 billion while the creditors who are not able to assert secured rights only amount to approximately RM 0.70 million. The latter category includes passengers, travel agents and some airport authorities. Class B creditors are defined as those who do not fall under Class A.

[128] The total number of creditors had also increased from 1,200 in Appendix A to 1,298 in Appendix A-2. The change was stated to be due to 'certain inadvertent duplication and omission in or change of circumstances to the original creditors in Appendix A'.

[129] After leave to amend was granted, AAX filed a further affidavit affirmed on 17.12.2020 where it proposed again to change the classification of the Schemed Creditors ('**the Third Revised Scheme'**). The reasons for the change to the new classification was stated in paragraphs 23 and 24 of the aforesaid affidavit:

> '23. As indicated by counsel for AAX as the hearing of Encl. 45 on 1.12.2020, AAX has now considered the arguments of some of the interveners and the observations of this Honourable Court. On advice of Counsel, AAX proposes classifying its Schemed Creditors into 2 classes, comprising Secured Class A and Unsecured Class B. Such classification is based on the rights of the Scheme Creditors against AAX and their treatment under the Proposed Scheme.
>
> 24. The classes of Scheme Creditors (which may be subject to further modification) are broadly set out below:-

24.1 Secured Class A creditors are creditors of AAX having security over the assets of AAX; and

24.2 Unsecured Class B creditors who have unsecured claims against AAX.'

[130] There are few things to note with regards to the current classifications:

i. the classification is stated as 'may be subject to further modifications';

ii. the list of secured creditors and unsecured creditors for Class A and Class B are stated to be 'provisional';

iii. apart from setting out 7 categories of creditors under the Secured Class A and 8 categories of creditors under the Unsecured Class B, AAX has failed to particularise the names of these creditors until after objections were raised by the interveners;

iv. Class A includes creditors who are disputing that they are 'secured' creditors;

v. AAX has not exhibited any of the security documents for those creditors who are included as 'secured creditors' in Class A and only disclosed the same after objections were raised by the interveners. Even then, only security documents related to the interveners were disclosed but not those 'secured creditors' who have not intervened, which means the Interveners are not able to verify their status.

[131] From the aforesaid, MASSB contended that AAX is deliberately withholding full disclosure to the Scheme Creditors and the Court and although learned counsel for MASSB did not say so explicitly, there is an inference from the submission that this is so to enable AAX to have the flexibility of 'moulding' and 'remoulding' the classifications of creditors and the constitution of the classes in order to achieve the requisite approvals for its proposed Scheme. Information was provided on a piecemeal basis only to meet the objections of the Interveners.

[132] In the Original Scheme, AAX had only a single class of unsecured creditors with a total debt of RM 63.5 billion. As the result of MASSB's objection, AAX by way of the First Revised Scheme amended its class of creditors by splitting them into Class A and Class B with Class A consisting both secured and unsecured creditors with a total debt of RM 64.15 billion. In the latest classification via the Third Revised Scheme, AAX is stating that all the creditors in Class A with a total debt of RM 62.83 billion are all secured creditors.

[133] More specifically, Airbus, the Lessors and MASSB were originally classified by AAX as 'unsecured creditors'. In the First Revised Scheme they were re-classified as 'secured creditors'.

[134] It is difficult to understand the reasons proffered by AAX for the changes made. As alluded to earlier, AAX had explained that in the Original Scheme, AAX had treated only those debts owing to creditors whose financing arrangements included a security trustee and charges over 2 specific aircraft as being secured debts. This

unusual and narrow definition of ‘secured creditors’ opted by AAX may be motivated with the view to include some genuine secured creditors into the class of unsecured creditors. One case in point is the position of MASSB.

[135] Then in the new classifications, AAX had deliberately included in the class of secured creditors some creditors whom they had previously treated as ‘unsecured creditors’. AAX had sought to justify this by defining the Class A to include those who ‘may be able to assert a secured rights’. This was subsequently changed again when objections were raised to just creditors ‘having security over AAX’s assets’.

[136] In the circumstances, it is not unexpected that some of these creditors who were originally classified as ‘unsecured’ have raised objection at this stage to their classification as ‘secured creditors’.

[137] As a result, AAX is compelled to justify their treatment of these objectors, i.e the Lessors of the aircrafts as secured creditors. As will be seen below, AAX has really no legal basis to treat them as secured creditors. In fact, AAX’s main response to this challenge was to argue before this Court that the issue of the proper constitution (as opposed to the formulation of the classes) is to be determined at a later stage, after the proof of debts exercise.

[138] AAX’s conduct thus far suggests a determined effort to place certain creditors together into a single group regardless of the true legal position of the creditors as secured creditors or otherwise. The formulation of the classes appears to be no more than a

matter of form than substance. This is why despite the changes to the formulation of the classes, one class remains substantially the same in terms of value.

[139] The Court must always be mindful of the possibility of class manipulation in a proposed scheme of arrangement. It is incumbent on a company to propose a scheme fairly and not to manipulate the constitution of classes to ensure the apparent satisfaction of the statutory requirements. If it does not do so, injustice will or might follow. Indeed, in **Re PCCW Ltd** [2009] 3 HKC 292, the Hong Kong Court of Appeal made it clear that share splitting for the purpose of manipulating the outcome in a shareholders' scheme of arrangement is a form of abuse. Similarly, in **SK Engineering & Construction Co Ltd** v. **Conchubar Aromatics Ltd and another appeal** [2017] SGCA 51, the Singapore Court of Appeal ruled that the assignments of some of the debts by existing creditors were made to circumvent the statutory hurdle in passing the scheme at the creditors' meeting.

[140] What is clear is that the selection of creditors for the class composition cannot be arbitrary or capricious. If there is evidence of a calculated and dishonest move to remove or to place certain creditors in certain class with the purpose of ensuring that the class is constituted in such a way that certain creditors would not be able to vote or that their votes would be rendered ineffective, this will be considered as class manipulation or gerrymandering. Is the present case such an instant?

[141] Learned counsel for AAX contended that the changes to the classification were merely in response to meet the objection of MSSB and that subsequent changes were prompted by other objections from the Lessors and observation made by this Court during the hearing of AAX's application to amend the OS. There is no evidence of dishonesty or a calculated act to classify the creditors in any manner to achieve a desire result. In fact, according to learned counsel for AAX, it is not abnormal for changes to be made to the classes citing **Re Virgin Atlantic Airways Ltd** [2020] EWHC 2376 ('**Re Virgin Atlantic**') at [21], **Royal Bank of Scotland** and **Re Apcoa** as examples where classes were changed.

[142] On the piece meal disclosure of material information, learned counsel for AAX maintained that it had fulfilled its duty of full and frank disclosure when the OS was first filed. The fact that further disclosure was made to meet the 'objections' by the Interveners ought not to be taken against AAX as such information was not strictly necessary to be disclosed. There is no *mala fide* in the conduct of AAX and the OS is not an abuse of the court process.

[143] More importantly, learned counsel for AAX urged this Court to consider the classification issue based on the latest classification under the Third Revised Scheme. This classification, which places the secured creditors and the unsecured creditors into different classes is a classic formulation based on distinct legal rights and cannot be said to be a manipulation of the classes. Any misgivings that this Court may have regarding the prior classifications should be forgiven and no longer to be taken against AAX.

Court Analysis

[144] It must be said that the manner in which AAX had proceeded with the OS thus far as alluded above has been less than satisfactory. With respect to learned counsel for AAX, the facts in the cases cited in support of his submission (that changes to classification of creditors are permitted in an application under s. 366(1) of the Act) are vastly different from the present case. In **Re Virgin Atlantic**, the Finance Lease Creditors were already excluded from the Restructuring Plan when the same was filed at the convening hearing. As regards **Royal Bank of Scotland** and **Re Apcoa**, in both these cases, some alterations were made to the scheme by the Court arising from the objections taken by the creditors. The changes made to the classification in the present case are clearly more drastic.

[145] There is much force in learned counsel for MASSB's contention on the *bona fide* of the application. However, whilst AAX has not been able to satisfactorily explain its earlier questionable classifications, there is no evidence of *actual dishonesty* shown. Also, the latest classification of creditors by AAX via the Third Revised Scheme cannot be said to be either arbitrary or capricious.

[146] More significantly, in considering the question of *bona fide* and abuse of court process, I have taken into account certain developments that have arisen since 9.12.2020 i.e after the Third Revised Scheme. It was brought to the attention of this Court that AAX has received favourable responses from various creditors totalling approximately 94.5% of Secured Class A creditors who

are not insisting on the liquidation of AAX. A total of 89.03% support the convening of the Scheme meetings or take no position and 86.41% support AAX's application for a restraining order.

[147] Implicit in the aforesaid is that a large majority of Secured Class A creditors of AAX wish to negotiate and reach a consensus on a restructuring plan for AAX rather than see it under liquidation. This is quite understandable given that the airline operating business is a niche market and the survival of any company with an airline operating licence can only benefit the creditors who are in the airline industry.

[148] Thus, although the Interveners are obviously less than enthusiastic with a scheme where 99.7% of their claims will be discharged, nevertheless, the process itself does allow for a Negotiation Phase which may lead to the proposed Scheme being sufficiently revised to meet the legitimate expectations of the Scheme Creditors. This, to my mind, is the significance of the expressions by the Secured Creditors not desiring to see AAX being liquidated although I agree that they are certainly not expression of support for the existing Scheme.

[149] Learned counsel for MASSB contended that AAX had still not discharged its duty of unreserved full and frank disclosure as AAX has not disclosed *all* the security documents to support its selection of all the 67 creditors as 'Secured Creditors' in Class A. Of the 67 secured creditors, only 15 have intervened. The security documents in respect of the remaining 53 secured creditors have not been disclosed before this Court. This omission means that

MASSB or any other Scheme Creditors will not be in a position to challenge the correctness or otherwise of the composition of the class.

[150] With respect to learned counsel for MASSB, I do not think that it is necessary for AAX to exhibit *all* the documents to support their selection of the creditors in each class of creditors at the Convening Stage. It would suffice if AAX produces the relevant documents when a challenge is raised by any creditor at the Convening Stage regarding the constitution of any of the members of a particular class. It will be placing too onerous a duty on the scheme company if a requirement is imposed on the scheme company to substantiate the selection of each of the creditors in a particular class at the Convening Stage.

[151] The aforesaid is all the more so given that a scheme creditor is entitled to examine the proofs of debt submitted by other scheme creditors as long as the information sought was relevant to his voting rights. This is clear from the decision by V K Rajah JA in **Royal Bank of Scotland**.

[152] The aforesaid also address the objection by AWAS 1533 and AWAS 1549 that there is a lack of meaningful information as to how the various sums allegedly due to the different Scheme Creditors are computed, including the claim of RM 48.71 billion by Airbus.

[153] Accordingly, I am not prepared to hold that the OS filed by AAX is an abuse of process or not *bona fide*. Neither do I find that there is

material non-disclosure in the application. Rather than dismissing the OS and having AAX refiling again, it seems to me much more beneficial to all the Scheme Creditors and AAX that the Scheme be permitted to be presented for further discussions and negotiations among the parties. More so in this case as much time has been spent on the legal issues raised in connection to the Scheme.

Classification of creditors

[154] It is common ground that the onus is on the party making the application under s. 366(1) of the Act to formulate the classes of meetings based on the test that persons with not dissimilar rights such that they are able to consult together with the view to their common interests are to be constituted together in the same class. This also means that it is within the scheme company's discretion to exclude certain creditors from the scheme.

[155] It is also common ground that AAX is for all intent and purposes an insolvent company. However, the fact that AAX is insolvent does not mean that all creditors should be placed in a single class. The following passage by Snowden J in **Re Sunrise Business Services Ltd** [2020] EWHC 2860 is instructive:

> '21. It does not follow, however, that simply because a scheme company is insolvent and seeking to restructure to avoid liquidation, that all creditors should simply be placed into a single class on the basis of an agreement that the scheme will provide a better economic outcome for everyone than the financial Armageddon of a liquidation. As Hildyard J pithily

remarked in the second APCOA case, Re APCOA Parking Holdings GmbH (No 2) [2015] Bus LR 374 at [117].

> "the risk of imminent insolvency is not to be sued as a solvent for all class differences"

22. By the same token, many judges have sounded warnings that the court should not be overzealous in identifying differences for fear of creating too many small classes carrying an inappropriate right of veto, and have reiterated that an important safeguard against minority oppression is that the court is not bound by the decision of the class meeting, but retains a discretion to refuse to sanction the scheme: see e.g. Hawk at [22], Re BTR plc [2000] 1 BCLC 740 at 747 and Re Telewest Communications plc [2005] 1 BCLC 752 at [37].'

[156] The parties are however divergent in respect of 3 matters on the issue of classification, namely (i) whether the constituent of the class is a matter that ought to be determined by the Court at the Convening Stage or better left to after the proof of debts exercise or even the Sanction Stage, (ii) even if the Court were to determine the constituent of the class at the Convening Stage, whether AAX was wrong in classifying the Lessors and Airbus as 'secured creditors' and (iii) whether the Lessors ought to be placed in a separate class altogether from Airbus by reason of their dissimilar rights.

Court Analysis

a. Should the Court determine the composition issue at Convening Stage

[157] With respect to learned counsel for AAX, I am unable to agree with his submission that the Court should only determine the *formulation* of the classes at the Convening Stage and should leave the *constituent* or *composition* of its members to be determined only after the Convening Stage.

[158] At the Convening Stage, the principal jurisdiction question for the Court is the identification of the classes and to ensure that each class is properly constituted so that the meetings for each of the classes can be properly convened. To me, this can only be achieved if the issue pertaining to the *constituent* or *composition* of the classes is taken at the Convening Stage. This is all the more so when this issue is raised before the Court at the Convening Stage for its determination and the Court does not find any difficulties to decide on the matter without unnecessarily protracting the application.

[159] Indeed, this is the approach preferred in **Re Apcoa** where at paragraphs 43 to 45 of the judgment, Hildyard J held as follows:

> '[43] It is, however, important to emphasise that the function of the court at the Convening Hearing is a limited one; and its decision, even on the question as to the composition of classes, is not final, even though the court can be expected not to change its mind, of its own, at the third stage on matters it decided at the first stage (since to do so would tend to subvert the purpose of the revised practice).
>
> [44] All this is admirably summarised by David Richards J in Re Telewest Communications Plc; Telewest Finance (Jersey)

Ltd [2004] EWHC 924 (Ch), [2005] 1 BCLC 752 at [14], where he said this:

> '…The matters for consideration at this stage concern the jurisdiction of the court to sanction the scheme if it proceeds. There is no point in the court convening meetings to consider the scheme if it can be seen now that it will lack the jurisdiction to sanction it later. This is principally a matter of the composition of classes. Under s 425 [the predecessor section under the Companies Act 1985], the court will have no jurisdiction to sanction the scheme if the classes have been incorrectly constituted.'

[45] That passage makes clear also that the issue as to the appropriate classes is a fundamental one; the jurisdiction of the court depends and is conditional upon the correct identification and composition of classes, for it is only if approved by the appropriate classes, properly admitted, selected and convened, that the majority should be enabled to bind the minority (which is the purpose and effect if a scheme).'

[160] Hildyard J was in fact merely adopting the new practice statement in the English Court PS 2002 issued by Sir Andrew Morrit VC which states:

> '1. … A change in practice is required to avoid, if possible, the waste of costs and court time illustrated in Re Hawk Insurance Co Ltd [2001] 2 BCLC 480. The purpose is to enable issues concerning the composition of classes of creditors and the summoning of meetings to be identified and if appropriate resolved early in the proceedings. To achieve these objects the following practice should be observed.

> 2. It is the responsibility of the applicant to determine whether more than one meeting of creditors is required by a scheme and if so to ensure that those meetings are properly constituted by class of creditors so that each meeting consists of creditors whose rights against the company are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.
>
> …
>
> 5. In considering whether or not to order meetings of creditors (a meeting order) the court will consider whether more than one meeting of creditors is required and of so what is the appropriate composition of those meetings.'

[161] I find much merits in this approach and readily adopt the same as it not only saves both costs and time but gives greater clarity and certainty to the convening of the meetings.

[162] Thus, this Court should determine the objections raised by the Lessors that they ought to be treated as unsecured creditors under the Scheme at the Convening Stage. BOCA, Macquarie, Lavender Leasing One, Lavender Leasing Two, AWAS 1533, AWAS 1549 and Sky High also took objection to AAX's decision to place them in the same class as Airbus and 'Airports and Authorities'.

b. Are the Lessors 'secured creditors'?

[163] AAX's had originally considered these Lessors as 'unsecured creditors'. The status was subsequently changed to 'secured creditors' and the ground for holding this position was subsequently disclosed to be based on the 'security deposits' and

'maintenance reserves' that are paid over by AAX to the Lessors pursuant to the their respective Lease Agreements.

[164] AAX relied on the Federal Court case of **Asia Commercial Finance (M) Bhd** v. **JB Precision Moulding Industries Sdn Bhd (In Liquidation)** [1996] 2 MLJ 1 to support its position that the security deposits and maintenance reserves paid constitute 'security'. In that case, the Federal Court had to decide if the lessor of an equipment who held a 'memorandum of security deposit' containing a security sum of RM 26,691 comprising the security deposit of RM 25,086 and a sum of RM 1,605 being prepaid rental was a secured creditor within the meaning of the Bankruptcy Act 1967 and the Companies Act 1965.

[165] The decision of the Federal Court is encapsulated in the headnotes as follows:

> 'Held, allowing the appeal with costs:
>
> (1) …
> (2) …
> (3) In this case, pursuant to s. 219(2), the winding up was deemed to have commenced on the date of the presentation of the winding up petition, ie 2 December 1989. From the evidence, it was obvious that the lessee was owing the lessor at least two instalments of rentals on that day. Therefore, there existed a debt owing by the lessee to the lessor on 2 December 1989. It followed that there was a lien within the term of 'secured creditor' under s 2 of the Bankruptcy Act and the lessor was a secured creditor on 2 December 1989 (see p 9C-1).

(4) Independent of the definition of secured creditor contained in s 2 of the Bankruptcy Act, the lessee was nonetheless entitled to hold the memorandum as security for payment of the arrears of instalment rentals owing. The deposit was placed as security for the performance of the terms and conditions of the agreement and was refundable at the expiry of the agreement but only upon full satisfaction of the terms and conditions therein contained…'

[166] The facts are clearly very different as the security in question in **Asia Commercial Finance (M) Bhd** was a memorandum of security deposit which was a charge over a cash deposit placed with a third party, usually a bank. On the other hand, in our present case, there is no question of any charge over the 'security deposits' or the 'maintenance reserves' as these are already paid over to the Lessors.

[167] Another factor which militates against AAX's position that these 'security deposits' and 'maintenance reserves' constitute 'security' is the fact that AAX has no proprietary rights over these 'security deposits' and 'maintenance reserves' once the cash is paid over to the Lessors. In fact, the Lessors had in most cases commingled these cash payments with their own funds. A typical clause relating to the security deposits is set out below:

Clause 6.2

"Subject to the payment, performance and discharge in full of all of Lessee's obligations under this Agreement and the other Operative Documents and no default then existing under any of the Other Agreements, Lessor shall, within thirty (3) Business Days of the Expiry Date, pay to Lessee an amount equal to the

remaining Security Deposit that has not been applied by Lessor in accordance with the terms of this Agreement. Except as expressly specified in this Agreement, *Lessee shall have no entitlement to receive payment of any part of the Security Deposit*."

Clause 6.3

"6.3.1 *Lessee agrees that the Security Deposit shall irrevocably and unconditionally become the property of Lessor, and Lessor shall be entitled to commingle the Security Deposit with Lessor's general or other funds, and Lessor will not hold any such funds as agent or on trust for Lessee or in any similar fiduciary capacity*.

6.3.2 Following the occurrence of the Default which is continuing or if a default (however described) has occurred and is continuing under any of the Other Agreements, in addition to all rights and remedies of Lessor elsewhere in this Agreement or at Law, Lessor may immediately or at any time thereafter, without notice to Lessee, use, apply or retain all or part of the Security Deposit on or towards the payment or discharge of any matured obligation owed by Lessee (or any Affiliate of Lessee) under this Agreement, any other Operative Document or any Other Agreement, in such order as Lessor sees fit, and/or exercise any of the rights of set-off described in Clause 24.4 (Set-off) against all or part of the Security Deposit.

6.3.3 If Lessor exercised any of the rights described in Clause 6.3.2:

(a) Lessee shall, upon a demand in writing from Lessor, within two (2) Business Days restore the Security Deposit to the level at which it stood immediately prior to such exercise; and

(b) Such use application or retention shall not be deemed a cured of any Default or Event of Default unless such use application or retention was sufficient to cure such payment Default or Event of Default and Lessee has restored the Security Deposit to the full amount required pursuant to this Agreement."

Clause 6.4

"*Any interest accrued from time to time on the Security Deposit shall be retained by Lessor and Lessee shall have no right in or to such interest.*"

Clause 6.8

"Provided that no Default has occurred and is continuing and all amounts due and owing to Lessor under this Agreement, any other Operative Document and the Other Agreements have been paid, Lessor shall not later than thirty (3) Business Days following the Expiry Date, return any Security Deposit Letter of Credit to Lessee."

[Emphasis added]

A typical clause on the 'maintenance reserves' is set out below:

Clause 7.3

"All Maintenance Reserves are irrevocably and unconditionally the sole and exclusive property of the Lessor and Lessor shall be entitled to commingle the Maintenance Reserves with its general or other funds. Lessor will not hold any such funds as agent or on trust for Lessee or in any similar capacity. No interest shall accrue on the Maintenance Reserves or be paid at

any time to Lessee. Lessor shall be entitled to retain all Maintenance Reserves remaining on the Expiry Date."

Clause 7.6

"Subject to the provisions of Clauses 7.7.1 and 7.7.2, Lessor shall refund Maintenance Reserves to Lessee following the completion of qualifying scheduled maintenance on the Airframe or Landing Gear (as the case may be)…"

Clause 7.7

"7.7.1 Lessor's obligations to refund any Maintenance Reserves to Lessee shall be subject to satisfaction of the following conditions:

(a) no Default shall have occurred and be continuing;

(b) Receipt by Lessor of the following from Lessee or Sublessee in a form and substance acceptable to Lessor:

(i) Detailed and substantial labour and material invoices for the relevant work;

(ii) Evidence of payment of such invoices; and

(iii) The agreed workscope, maintenance plans, the final report release or return to service documentation and such other supporting documentation as typically provided by the Maintenance Performer evidencing performance of workscope;

(c) The maintenance shall have been completed during the Terms and the invoice and relevant supporting

documentation shall be submitted before the earlier of:

(i) six (6) months after the commencement of such maintenance; and

(ii) the Expiry Date; and

(d) The maintenance shall have been performed by the Maintenance Performer in accordance with the Maintenance Programme.

7.7.2 Lessor's obligation to refund Maintenance Reserves shall be limited as follows:

(a) The maximum amount of Maintenance Reserves available shall not be increased by any Maintenance Reserves paid and held in respect of scheduled maintenance to be performed on other Parts or other maintenance events which are unrelated;

(b) In any case where the Maintenance Reserves paid to Lessee by Lessor is not sufficient to pay the cost of the work that was the subject of the claim for reimbursement, Lessee shall pay such shortfall from its own resources and the shortfall shall not be carried forward or made subject to any further claim for reimbursement;

…"

[168] Learned counsel for AAX boldly submitted that the fact of the property in the 'security deposits' and 'maintenance reserves' being vested with the Lessor is no hindrance to a creation of

security. For this, learned counsel referred to the case of **Nouvau Mont Dor (M) Sdn Bhd** v. **Faber Development Sdn Bhd** [1984] 2 MLJ 268 ('**Nouvau Mont Dor**') where the property in all legal and beneficial rights in a sale and purchase agreement were assigned under a deed of assignment as a security.

[169] With respect to learned counsel for AAX, the **Nouvau Mont Dor**'s case is of no help to AAX as that case was dealing with the effect of a deed of assignment on the right of the assignor to commence an action based on the rights assigned. There is no question of any deed of assignment in this case.

[170] Learned counsel for AAX also contended that the commingling does not extinguish the security. In support, AAX placed reliance on the Singapore case of **Pars Ram Brothers (Pte) Ltd (in creditors' voluntary liquidation)** v. **Australian & New Zealand Banking Group Ltd and others** [2017] 4 SLR 264 at [15] to [17] that a right to commingle does not extinguish the Lessors' security.

[171] In **Pars Ram Brothers**, Steven Chong J (as he then was) was dealing with security interests in the nature of trust receipts where the pledged goods was not segregated in a mixed bulk. The learned judge was dealing with the legal possessory security interest asserted by the lenders in the proceeds of sale. In para [17], this was what the learned judge said:

> '17. Therefore, I find that each Lender's security interest remains intact notwithstanding the mixture with goods in which other Lenders might have security interests. As earlier mentioned, the difficulty posed by the mixture should be treated

> as an evidential one, namely, how to identify whose interest remains in the mixed stocks. Here, since the mixture came about through no fault of the Lenders, there is no reason to prefer the interests of one Lender over another (see Sanderman [9] supra). Thus, the just solution is for the mixed stock to be divisible among the contributing Lenders rateably in proportion to the value of their respective contributions…'

[172] Again, the facts in our present case are entirely different. There is no issue of commingling of any *security interests* as the Lessors never had any security interests in the 'security deposits' and 'maintenance reserves' to begin with.

[173] The 2 features, namely, the fact that the property in the 'security deposits' and the 'maintenance reserves' vests with the Lessors and that the Lessors can commingle the cash with its own funds show that the right of disposal of the 'security deposits' and 'maintenance reserves' is no longer with AAX. Therefore, AAX cannot say that it retains any proprietary interest in the cash paid. All that AAX has is a contractual right upon the termination of the Lease Agreements to be paid an equivalent sums or balance sum in the event that AAX had met all its obligations thereunder. The fact that the Lease Agreements states that the 'security deposits' are 'security for the performance of the agreement' does not assist AAX's position any further.

[174] In fact, in some of the cases, the 'security deposits' have already been applied against the outstanding debts. Thus, even assuming for the moment that they were secured creditors by reason of the

'security deposits', with the set-offs, these Lessors could no longer be secured creditors.

[175] Even this is challenged by AAX who sought to maintain that though the 'security deposits' had been applied, the Lessors have not *surrendered* their security and have in some instances asked AAX to top-up their security. In this regard, AAX referred this Court to **Re Airbus (UK) Ltd** [2008] 1 BCLC 437 ('**Re Airbus (UK) Ltd'**) as support.

[176] **Re Airbus (UK) Ltd** was a case dealing specifically with s. 176A of the UK Insolvency Act 1986 which requires a liquidator to make a 'prescribed part' of the company's net property available for the satisfaction of unsecured debts and s.176A(2)(b) prohibited the liquidator from distributing the 'prescribed part' to a holder of a floating charge except in so far as it exceeded the amount required for the satisfaction of unsecured debts.

[177] The court held that the holder of floating charge whose debt could not be paid in full out of the secured assets when the company giving the charge went into administration was not entitled to participate as an unsecured creditor in respect of the shortfall as the 'prescribed part' was held for the benefit of the unsecured creditors alone and 'unsecured creditors' in s176A(2)(b) did not include the unsecured debts of any type of secured creditors.

[178] Clearly, the case has no application to our present facts as it was dealing with a specific UK legislation.

[179] Reliance was also placed by AAX on the case of **In re Lind, Industrial Finance Syndicate Limited** v. **Lind** [1915] Ch. D 345 ('**Re Lind'**) as support that the top-up provision gives rise to a security in the form of a future charge over cash.

[180] Again, in the case of **Re Lind**, the court was dealing with an agreement to create a charge over property that may be acquired in the future by the chargor. It was an assignment for value of future property which binds the property itself as soon as it is acquired by the chargor without any further act to be done and does not merely rest in or amount only in contract. There is no question of the AAX acquiring any future property that has been charged over to the Lessors under the lease agreements in this case.

[181] Accordingly, in my judgment, AAX cannot treat the Lessors who had paid the 'security deposits' and 'maintenance reserves' as secured creditors and classified them under Class A creditors. They do not come within the definition of 'secured creditors' under s. 2 of the Insolvency Act 1967, Act 360 which provides:

> '"secured creditors" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.'

[182] Related to this issue of the Lessors as 'secured creditors', both ILFC and KDAC 4 had additionally contended that they ought not to be classed as secured creditors because the 'security deposits'

and ‘maintenance reserves’ that were held by them were never provided for by AAX but instead by its Leasing Subsidiaries.

[183] Some details were provided to this Court on the historical arrangement with AAX pertaining to the lease of 2 aircrafts from ILFC and the lease of another 2 aircrafts from KDAC 4. The respective agreements between ILFC and KDAC 4 with AAX for the lease of these aircrafts were subsequently novated by AAX to one of its Leasing Subsidiaries. The legal issue arising therefrom is whether the ‘security deposits’ and ‘maintenance reserves’ that were previously paid by AAX are to be treated as the ‘property’ of AAX notwithstanding that all rights and benefits under the agreements have been novated to the subsidiaries.

[184] Given my decision that the ‘security deposits’ and ‘maintenance reserves’ do not constitute ‘security’, there is no need for me to deal with the question whether these payments notwithstanding the novation agreements are to be treated as payments by AAX.

[185] Separately, learned counsel for MASSB had made extensive submission that MASSB and the Lessors ought to be put in a separate class of their own given the different in the nature of their respective securities.

[186] Given my decision that the Lessors are unsecured creditors, I am also spared from making any determination in respect of the submissions by learned counsel for MASSB as it is not disputed that MASSB is a secured creditor and thus both MASSB and the Lessors will be placed in Class A and Class B respectively.

c. Is Airbus a 'secured creditor'

[187] At this juncture, it is convenient to also deal with the "cash deposits" said to be held by Airbus which it is now common ground consists of "pre-delivery payments". AAX contended that these "pre-delivery payments" is a form of security requiring Airbus to be placed in Class A creditors.

[188] It is common in the sale and purchase of aircrafts that "pre-delivery payments" would be made by the purchaser to the manufacturer. These payments are essentially progress payments made in advance of delivery of the aircraft.

[189] The "pre-delivery payments" made by AAX constituted instalment payments towards the Final Price of the aircraft. The Purchase Agreement dated March 2019 between Airbus and AAX (at Exhibit '**A-2**'**,** Encl. 114, Airbus' Affidavit filed in support of their application to intervene in this proceeding), in particular, the clauses governing "predelivery payments" at pages 45 and 46 of Encl. 114 state:

5.3 **Predelivery Payments**

5.3.1 The Buyer shall pay Predelivery Payments to the Seller calculated on the predelivery payment reference price of each Aircraft. The predelivery payment reference price is determined by the following formula:

A = Pb (1 + [redacted]N)

Where

A : The predelivery payment reference price for Aircraft to be delivered in year T;

T : the year of Delivery of the relevant Aircraft

Pb : the Base Price;

N : (T-[redacted])

5.3.2 Such Predelivery Payments shall be made in accordance with the following schedule:

5.3.3 Any Predelivery Payment received by the Seller shall constitute an instalment in respect of the Final Price of the Aircraft. The Seller shall be entitled to hold and use any Predelivery Payment as absolute owner thereof, subject only to (i) the obligation to deduct any such Predelivery Payment from the Final Price when calculating the Balance of Final Price or (ii) the obligation to pay to the Buyer an amount equal to the Predelivery Payments pursuant to any other provision of this Agreement.

5.3.5 **Specification Change Notice Predelivery Payments**

The Seller shall be entitled to request Predelivery Payments for each SCN or group of SCNs [redacted] executed after signature of this Agreement:

(i) for each SCN or group of SCNs executed prior to the first day [redacted] month prior to the Scheduled Delivery Month, this Predelivery Payment shall correspond to a percentage of the SCN or group of SCNs price equal to the total percentage of Predelivery Payments as defined in Clause 5.3.2 above and shall be paid on the first day [redacted];

(ii) for each SCN or group of SCNs executed between [redacted] prior to the Scheduled Delivery Month, this Predelivery Payment shall amount to [redacted] the SCN or group of SCNs price and for each SCN or group of SCNs executed between [redacted] prior to the Scheduled Delivery Month this payment shall amount to [redacted] of the SCN or group of SCNs price ;

these payments shall be paid on the first day of the sixth (6) month prior to the Scheduled Delivery Month ;

(iii) each of the above Predelivery Payments shall constitute an instalment towards the Final Price of the corresponding Aircraft.

5.4 **Balance of Final Price**

5.4.1 The Balance of Final Price payable by the Buyer to the Seller on the Delivery Date shall be the Final Price less the amount of Predelivery Payments received by the Seller on or before the Delivery Date.

[190] Airbus has affirmed an affidavit maintaining that the "security" held by Airbus in the form of the "pre-delivery payments" are considered as *part payments* of the purchase price of aircrafts. Based on the aforesaid clause 5.3.3, these "pre-delivery payments" are to be held and used by Airbus as absolute owner.

[191] These "pre-delivery payments" which are treated as part payment towards the purchase price clearly do not make Airbus a secured creditor at all.

[192] AAX contended that the "pre-delivery payments" are securities as there is a provision in the 3 purchase agreements between AAX and Airbus to treat the "pre-delivery payments" as "cross-collateral". The clause relied on is Clause 5.11.1 of the 3 purchase agreements which is produced below :-

5.11 Cross-Collateralisation

5.11.1 The Parties acknowledge that pursuant to this Agreement, the Seller shall make available to the Buyer certain funds and credits and that the Seller shall receive and hold Predelivery Payments from the Buyer under the Agreement, the amount of which will vary from time to time as the Aircraft are delivered.

The Buyer hereby agrees that, notwithstanding any provision to the contrary in the Agreement, in the event that the Buyer should fail to make any material payment owing under the Agreement in respect of any of the Aircraft, the Seller may:

(i) withhold payment to the Buyer of any sums that may be due to or claimed by the Buyer or its Affiliates from the Seller or its Affiliates pursuant to this Agreement, unless or until the default under the Agreement is cured or remedied; and

(ii) apply any amount of any Predelivery Payment it then holds under the Agreement in respect of any of the Aircraft in such order as the Seller deems appropriate in satisfaction of any amounts due and unpaid by the Buyer and to compensate for any losses and/or damages the Seller or its Affiliates may suffer as a result of the Buyer's failure to make payments in a timely manner under the Agreement. The Seller and the Buyer acknowledge that the utilisation of any such Predelivery Payment will serve as a cure of a default to make payment in respect of the subject Aircraft. However, the Buyer acknowledges that as a consequence of the application of any of the Predelivery Payments as aforesaid, it may result in the Buyer being in default (unless such default is otherwise cured or remedied and the Buyer shall make immediate steps to rectify such default) in relation to the Aircraft in respect of which such Predelivery Payments were originally granted or required to be paid, as the case may be.

The rights granted to the Seller in the preceding paragraphs (i) and (ii) are without prejudice and are in addition to and shall not be deemed a waiver of any other rights and remedies the Seller or its Affiliates may have at law or under this Agreement, including the right of set-off.

5.11.2 In the event that the Seller applies any amount of any Predelivery Payment it then holds under this Agreement pursuant to Clause 5.11.1 (ii) in respect of any of the Aircraft in satisfaction of the amount due and unpaid by the Buyer or to compensate for losses and/or damages to the Seller or its Affiliates as a result of the Buyer's failure to make payment in a timely manner under the Agreement, then the Seller shall notify the Buyer to that effect. Within seven (7) Business Days of issuance of such notification, the Buyer shall pay by wire transfer of funds immediately available to the Seller the amount of the Predelivery Payment that has been applied by the Seller as set forth above.

Failure of the Buyer to pay such amount in full, shall entitle the Seller to (i) collect interest on such unpaid amount in accordance with Clause 5.7 hereof from the eighth (8th) Business Day following the Seller's written request to the

Buyer for such payment and (ii) treat such failure as termination event for which the Seller shall be entitled to the remedies available under Clause 20.2 of the Agreement.

[193] To my judgment, there is nothing in Clause 5.11.1 that changes the nature of the "predelivery payments" from part payment/instalment of purchase price of aircraft to that of a security over the assets of AAX. All that the said clause provides is that Airbus has a right to apply the "predelivery payments" paid under the purchase agreement concerned "in satisfaction of any amounts due and unpaid by the Buyer or to compensate for losses and/or damages to the Seller in a timely manner under the Agreement". In other words, the cross collateral clause permits Airbus to 'allocate' a payment made under one agreement as part payment of an amount due under another agreement.

[194] Next. Learned counsel for AAX referred to "a clause to refund" at Clause 10.5 of the purchase agreements with Airbus to support its argument that the 'predelivery payments' are securities held by Airbus.

[195] Clause 10.5 essentially provides that if the purchase agreement with Airbus is terminated due to excusable delay by Airbus (Clause 10.3) or total loss, destruction or damage (Clause 10.4), then parties shall have no claim against each other but Airbus will "promptly repay to the Buyer (AAX) all predelivery payments already paid by the Buyer with respect to such affected Aircraft".

[196] With respect, there is nothing in Clause 10.5 to suggest that the 'predelivery payments' are securities held by Airbus. In fact, in the two subsequent purchase agreements signed with Airbus, Clause 10.5 does not use the word "refund". Instead, on the termination of the agreement due to excusable delay by Airbus (Clause 10.3) or total loss, destruction or damage (Clause 10.4), Airbus will:- i) "promptly pay to the Buyer (AAX) an amount equal all Predelivery Payments already paid by the Buyer to the Seller with respect to the affected aircraft"; ii) "promptly pay to the Buyer (AAX) an amount equivalent to the Predelivery Payments received from the Buyer in respect of such affected Aircraft".

[197] The way Clause 10.5 has been worded in the subsequent purchase agreements with Airbus is consistent with the fact that the 'predelivery payments' are not kept separately as securities held by Airbus and that Airbus is the absolute owner of the 'predelivery payments'.

[198] In fact, Airbus is treated as a contingent creditor under the Scheme. This is because there is presently no breach of the purchase agreements. However, upon the approval of the Scheme, these purchase agreements would be terminated as at

the Cut-Off Date which exposes AAX to claims by Airbus for damages arising from the same. Such damages will of course be subject to a duty by Airbus to mitigate its losses.

[199] As such it is my judgment that there is also no basis for AAX is treat Airbus as a secured creditor and be placed in Class A creditors. Airbus should be categorised as an unsecured creditor.

d. Should the Lessors be placed in a separate class?

[200] The next question is whether the Lessors ought to be put in a separate class from Airbus and other creditors.

[201] In this regard, the first contention by the Lessors is that the debt owed by AAX to the Lessors cannot be restructured under the Scheme without their consent pursuant to:

i. the Convention and the Protocol to the Cape Town Convention which was implemented and came into force in Malaysia on 1.3.2006 pursuant to the International Interests in Mobile Equipment (Aircraft) Act 2006 ('**IIME Act**'). Under this legislation, it is specified under Article XI (10) of the Protocol that "no obligation of the debtor under the agreement may be modified without the consent of the creditor". Therefore, as the Scheme is not consensual and permits of "*cram down*" of non-consenting creditors such as the Lessors, it is in contravention of such legislation; and

ii. the common law principle known as "the rule in Gibbs" (‘**Gibbs Rule**’). The Gibbs Rule was formulated in the landmark English Court of Appeal case of **Anthony Gibbs & Sons** v **LA Societe Industrielle Et Commerciale Des Metraux** [1890] 25 QBD 399 (‘**Antony Gibbs**’) and provides that a debt obligation can only be changed or discharged in accordance with the law governing that obligation. The debts owed by AAX to the Lessors are governed by English law and therefore cannot be discharged by the Scheme which is subject to the laws of Malaysia.

I will now turn to these 2 issues.

(i) Alternative A of Article XI of the Protocol under the Cape Town Convention is applicable

[202] The arguments based on the Cape Town Convention are succinctly put by learned counsel for BOCA, MacQuarie, Lavender Leasing One and Lavender Leasing Two in the following manner.

[203] As part of its implementation of the Cape Town Convention, Malaysia had declared that the remedies under Alternative A of Article XI of the Protocol shall apply in its entirety to all types of insolvency related proceedings.

[204] Alternative A, Article XI (10) of the Protocol provides that upon the occurrence of an insolvency-related event, “no obligation of the debtor under the agreement may be modified without the consent of the creditor”.

[205] "Insolvency-related event" is defined in Article I(2)(m) of the Protocol to mean:

> a. the commencement of insolvency proceedings; or
>
> b. the declared intention to suspend, or actual suspension of, payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action.

[206] It is common ground that limb (b) above is not applicable in this case.

[207] Article 1(l) defines 'insolvency proceedings' to mean:

> 'bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation.'

[208] Learned counsel submitted that AAX's scheme of arrangement application is said to fall within the definition of "insolvency proceedings" as provided for in Article 1(l) of the Convention.

[209] Reliance is placed on the Annotation to the Official Commentary on the Cape Town Convention which states that:

(i) a proposed debt restructuring exercise in the form of a scheme of arrangement is a "collective judicial or

administrative proceedings, in which the assets and affairs of [AAX] are subject to control or supervision by a court for the purposes of reorganisation";

(ii) the scheme is an arrangement that is formulated by reason of "actual or anticipated financial difficulties" of AAX;

(iii) the scheme of arrangement is an arrangement that is collective in that it is "concluded on behalf of creditors generally or such classes of creditors as collectively represent a substantial part of the indebtedness"; and

(iv) the scheme of arrangement is an arrangement in which "a Court acts to facilitate a statutory process, and where the court's approval is required for its implementation".

[210] Accordingly, Article XI (10) under Alternative A to the Protocol is applicable. The scheme of arrangement contravenes the said provision of the Protocol that "no obligation of the debtor under the agreement may be modified without the consent of the creditor" at it seeks to 'cram down' the Lessors' claims and this constitutes a modification to the AAX's obligations under the Lease Agreements without the consent of the Lessors.

[211] AAX's response to the argument based on the Cape Town Convention is that the aforesaid conclusions ignore the principal purpose of the Convention and that in any event, this objection should be taken at the Sanction Stage.

[212] According to learned counsel for AAX, the Cape Town Convention provides for the creation of an international registry for certain categories of mobile equipment and associated rights. It was emphasised that by virtue of Article 6(1) of the Convention, the Convention and the Protocol are to be read and interpreted as a single instrument.

[213] Article 5 of the Convention is entitled "Interpretation and applicable law". Article 5(1) provides:

> "In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application."

[214] The preamble to the Convention provides as follows:

> "THE STATES PARTIES TO THIS CONVENTION,
>
> AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,
>
> RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,
>
> MINDFUL of the need to ensure that *interests in such equipment are recognised and protected universally*,
>
> DESIRING to provide broad and mutual economic benefits for all interested parties,

> BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,
> CONSCIOUS of the need to *establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,*
>
> TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,
>
> HAVE AGREED upon the following provisions:"

[215] The preamble makes clear that the Convention is directed towards the protection of assets, being mobile equipment and its associated rights. Learned counsel for AAX submitted that the Convention was never intended to regulate rights *in personam* that a creditor might have against a debtor, for example, lease rentals and termination compensation.

[216] In his article, '**Security Interests in Mobile Equipment: Lawmaking Lessons from the Cape Town Convention**' (2014) 35 Adelaide Law Review 59, Professor Sir Roy Goode (who is one of the architect of the Cape Town Convention) explained that the Convention arose from a need for an international regime governing the creation, perfection and priority of interests in mobile equipment, with an international registry for the registration of such interests and priority rules based on the order of registration.

[217] According to Professor Sir Roy Goode:

> "The most crucial element of the whole package is the establishment of an International Registry for the registration,

assignment, subordination, etc of *international interests in aircraft objects.* In a Contracting State, a registered interest has priority over both a subsequently registered interest and an unregistered interest. This is true even if the latter was not capable of registration because, for example, it did not fall within one of the registrable categories or because the debtor was not situated in a Contracting State at the time of the relevant agreement. So a registered international interest trumps all interests created under national law except non-consensual rights or interests covered by a declaration of a Contracting State under art 39 of the Cape Town Convention or pre-existing rights or interests …"

[218] Learned counsel for AAX drew an analogy to our Torrens system of land registration, which seeks, like the Convention and Protocol, to protect interests in a particular type of property. In short, these systems of registration grant protection *in rem*. In Malaysia, the distinction between proprietary and personal rights has been expressed on numerous occasions, and the Federal Court in **Low Huat Cheng & Anor** v **Rozdenil bin Toni** [2016] 5 MLJ 141 has recently put it thus:

"[49] Legal rights are either in rem or in personam. We should point out that a statutory claim brought to set aside a title or interest upon one or more of the grounds of defeasibility specified under s 340 of the NLC, as in the present case, is an action in rem brought for the assertion of property, which is enforceable against the world at large, as opposed to right in personam for damages which is enforceable against specified person arose about of an obligation whether in contract or in tort (see Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, Low Lee Lian v Ban Hin Lee Bank Bhd

[1997] 1 MLJ 77 and Webb v Webb [1994] QB 696). Some 60 years ago, in the case of Bachan Singh v Mahinder Kaur & Ors [1956] 1 MLJ 97, Thomson J (as His Lordship then was) reminded us that many of the difficulties in cases relating to land, 'would not arise if we were to bear in mind throughout the distinction between rights ad rem or personal rights and rights in rem or real rights'. We will deal with the plaintiff's claim in personam for damages at a later stage of this judgment."

[219] The Convention adopts a threefold classification of what it calls "international interests", namely, (i) security interests in the traditional sense (charges, etc), (ii) title reservation agreements (i.e. conditional sale agreements), and (iii) leases, with or without an option to purchase.

[220] Article 2 of the Convention, entitled "The international interest", again makes clear that the interests covered by the Convention (and therefore, the Protocol) are only those that relate to mobile equipment of the types set out in Article 2(2).

"Article 2 – The international interest

This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

For the purposes of this Convention, *an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3* and designated in the Protocol:

(a) granted by the chargor under a security agreement;

(b) vested in a person who is the conditional seller under a title reservation agreement; or

(c) vested in a person who is the lessor under a leasing agreement

An interest falling within subparagraph (a) does not also fall within subparagraph (b) or (c).

The categories referred to in the preceding paragraphs are:

(a) airframes, aircraft engines and helicopters;

(b) railway rolling stock; and

(c) space assets.

The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph.

An international interest in an object extends to proceeds of that object."

[221] In the present case, the objects of relevance are airframes, aircraft engines and helicopters, which are described as "aircraft objects" in the Protocol.

[222] Learned counsel for AAX contended that the remedies provided under the Convention and the Protocol reflect these parameters. Under the Convention and Protocol, the primary remedy allowed to a creditor, and corresponding obligation on the debtor or the insolvency administrator, as the case may be, is that of possession of the relevant aircraft object.

[223] Chapter III of the Convention is entitled “Default remedies”. Relevantly, in the event of a default under a leasing agreement, Article 10 provides:

> “Article 10 – Remedies of conditional seller or lessor
>
> In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may:
>
> (a) subject to any declaration that may be made by a Contracting State under Article 54, *terminate the agreement and take possession or control of any object to which the agreement relates*; or
>
> (b) apply for a court order authorising or directing either of these acts.”

[224] Article 13 of the Convention provides for relief pending final determination and, again, is specific to the aircraft object.

[225] Likewise under the Protocol, Article IX(1), which falls under Chapter II of the Protocol, “Default remedies, priorities and assignments”, provides as follows:

> “Article IX – Modification of default remedies
>
> In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:
>
> (a) procure the de-registration of the *aircraft*; and
> (b) procure the export and physical transfer of the *aircraft object* from the territory in which it is situated.”

[226] Based on the aforesaid, learned counsel for AAX contended that it is evident, therefore, that the remedies the Convention and Protocol are concerned with are remedies *in rem* as against the aircraft objects. In the event of insolvency of the debtor, a registered international interest will remain effective. In other words, the creditor's interest in the aircraft object will be protected and preserved [See Article 30 of the Convention].

[227] Under the Protocol, upon the occurrence of an "insolvency related event", a creditor with a registered international interest in a particular aircraft object will be entitled to possession of the said object upon the expiry of the relevant period [See Article XI(2), Alternative A of the Protocol].

[228] Thus, learned counsel for AAX submitted that it is against this backdrop that Article XI (10), Alternative A of the Protocol, which the Lessors rely on, must be examined.

[229] Thus, according to learned counsel for AAX, Article XI (10) cannot be read in vacuum in the manner suggested by the Lessors. The Convention and the Protocol have to be read as a single instrument and it must therefore follow that the protection offered by Article XI (10) only extends to the Lessors' interests in so far as they relate to the aircraft objects, and not to any claims *in personam* against AAX.

[230] Learned counsel for AAX contended that the rights *in personam* are not affected by the Convention and stand to be dealt in the

same way as any other such right. Critically, the Scheme does not alter any of the Lessors' rights relating to the aviation objects, namely, the aircraft which are the subject matter of the leases. As such, the Lessors cannot be excluded from the Scheme.

[231] It is further contended that apart from interpreting Article XI (10), Alternative A of the Protocol in the manner provided by Article 5 read with Article 6 of the Convention, the aptness of the proposition advanced by the Lessors can also be tested by examining its consequence. If their proposition is correct, the practical and real effect is that one lessor with a small debt can effectively put a halt to any schemes of arrangement worldwide by withholding consent. It would therefore allow the lessor with even a small debt to put a gun to the head of not just the debtor, but to that of every other creditor. AAX submits that this cannot be the intention of the Convention or Protocol.

[232] Learned counsel for AAX urged this Court to adopt the interpretation by the eminent Professor Jennifer Payne who provided her expert opinion in a form of an Expert Report that was tendered during oral submissions. She had based her opinion on the basis that AAX's scheme of arrangement is governed by Part 26 of the UK Companies Act 2006. The UK has acceded to the Cape Town Convention and has adopted Alternative A in Regulation 37 of the Cape Town Convention Regulations ('**the Regulations**') where the obligations were brought into English law.

[233] The Regulations introduce some changes to the underlying instruments and for our purpose, the definition of 'insolvency

proceedings' in regulation 5 of the Regulations provides that 'insolvency proceedings' :

> 'means liquidation, bankruptcy, sequestration or other collective judicial or administrative insolvency proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control and supervision by a court (or liquidation committee)'.

[234] This definition makes a number of changes, including adding the word 'insolvency' into 'collective judicial or administrative proceedings' and omitting the phrase 'for the purposes of reorganisation or liquidation' from the end of the definition. Notwithstanding these changes, Professor Jennifer Payne had in her opinion proceeded on the basis of the definition in Article 1(l) of the Convention.

[235] According to the learned Professor Jennifer Payne, 3 elements are required in order for a scheme of arrangement to be an 'insolvency proceedings' for the purpose of Article 1(l) of the Convention, namely:

a. the proceeding must be a collective proceeding;

b. the debtor's assets and affairs must be subject to control or supervision by a court; and

c. the purpose must be the reorganisation of the debtor, or immediate liquidation.

[236] For our present purposes, Professor Jennifer Payne accepts that elements (a) and (c) are present in AAX's Scheme but not (b). Her view is that under Part 26 of the UK Companies Act 2006, schemes of arrangement leave the debtor in control of its assets and affairs. The possession and management of the company remain with the management, with no control being passed to the creditors or to a representative of the creditors; no supervisor takes control and neither does the court take control of the company.

[237] On the role of the court, the learned Professor Jennifer Payne referred to **Re Telewest** on the principles guiding the court at the Sanction Stage giving emphasis to the fact that the court has no role in determining the commercial merits of the scheme but merely ensuring that the scheme is such that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve' and that the Scheme is considered fair and equitable.

[238] Based on the aforesaid, the learned Professor Jennifer Payne opined that the requirement that the court have control over the assets and affairs of the debtor is not met in relation to schemes of arrangement. According to her, 'the court in a scheme of arrangement only has control over those issues over which the company chooses to give it control, namely the terms of the scheme, including class composition and overall fairness. At most therefore the court has control and supervision over the scheme of arrangement proceedings and, to the extent discussed above, the fairness of its terms'.

[239] According to the learned Professor Payne:

> 'The definition of 'insolvency proceedings' within Article 1(l) of the Convention and regulation 5 of the Cape Town Convention Regulations requires more than this in my opinion. It requires that the 'assets and affairs' of the debtor are under the control and supervision of the Court. This is not the case in a scheme of arrangement. Outside the terms of the scheme of arrangement, the directors can continue to manage the company without court approval as they see fit. This stands in sharp contrast to bankruptcy and liquidation processes, or insolvency processes such as UK administration where the control of the company's assets passes to an insolvency official, such as a liquidator or administrator, under the supervision if the court. It also stands in sharp contrast to debtor-in-possession insolvency processes such as US Chapter 11.'

Court Analysis

[240] Having considered the submissions of counsel, it seems to me that the issue on the Cape Town Convention centred on 2 particular points, namely, (i) whether a scheme of arrangement is an 'insolvent-related event' under Article XI (10) of the Protocol and (ii) whether Article XI (10) means that the debtor's obligations to make payments under the lease agreement cannot be subject to the 'cram down' provisions under a scheme of arrangement.

[241] One of the most substantive provisions of the Cape Town Convention is Article XI of the Protocol which deals with remedies on insolvency. Article XI provides for a contracting state to make a declaration pursuant to Article 30(3) of the Protocol to opt for one

of two specific insolvency regimes to govern creditors' rights in relation to aircraft objects: Alternative A or Alternative B. Malaysia has opted for Alternative A.

[242] Alternative A regime is based on the protections provided by section 1110 of the US Bankruptcy Code. It provides, *inter alia*, that upon the occurrence of an insolvency-related event (as defined in the Protocol), the insolvency administrator or the debtor either (i) cures all defaults (other than the default constituted by the opening of insolvency proceedings) and agrees to perform all future obligations under the agreement or (ii) gives possession of the aircraft object to the creditor.

[243] The insolvency administrator or the debtor must take the action required by the above cases no later than the earlier of the end of the waiting period or the date on which the creditor would be entitled to possession of the aircraft object if the relevant provision of article XI did not apply. Each contracting state is free to define its own waiting period, and Malaysia has adopted a 40-day waiting period.

[244] This regime provides creditors (be they lessors under lease agreements or finance parties under security agreements) with certainty as to the time when they will either obtain possession of the relevant aircraft object or obtain the curing of all past defaults and an agreement to perform all future obligations, in an insolvency scenario, as opposed to being subject to any judicial stay or moratorium.

[245] Of relevance to our present case is the article XI (10) provides that 'no obligations of the debtor under the agreement may be modified without the consent of the creditor.' As a provision that is to apply only upon the occurrence of an insolvency-related event, this provision must be intended to provide protection for creditors in the event of an insolvency-related event.

[246] The question before this Court is whether the scheme of arrangement that is filed under s. 366(1) of the Act is an 'insolvent-related event' under the Protocol.

[247] An 'insolvency-related event' is defined for the purposes of the Protocol as meaning either:

> (i) the commencement of insolvency proceedings; or
>
> (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or state action.

[248] As alluded above and it bears repeating, 'insolvency proceedings' is in turn defined in Article 1(l) of the Convention to mean:

> 'bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation.

[249] There had been 2 UK cases that had come close to determining the question whether a scheme of arrangement or a restructuring plan is an 'insolvency-related event' for the purposes of the Protocol. However, in the end the question was not necessary for the court's decision as the creditors had approved the scheme of arrangement and the restructuring plan.

[250] In **Re Nordic Aviation** IEHC [2020] 445, the High Court of Ireland sanctioned a scheme of arrangement pursuant to Part 9, Chapter 1 of the Companies Act 2014 for Nordic Aviation Capital DAC (NAC), the world's largest regional aircraft lessor. The NAC scheme provided for a nine-month deferral of principal payments and a 12-month deferral of maturity payments in respect of approximately US$5 billion of NAC's debt. NAC's debt had arisen from the typical security arrangements where under the Cape Town Convention, 'international interests' over various aircraft objects had been created.

[251] Ireland has ratified the Cape Town Convention and has made the relevant declarations to apply the terms of Alternative A. Accordingly, if a dissenting creditor were to successfully argue that the NAC scheme constituted an insolvency-related event for the purposes of the Cape Town Treaty, the court would have to decide if Article XI (10) prevented the NAC scheme from compromising or amending NAC's obligations to that creditor without the creditor's consent.

[252] NAC submitted to the court (both in its written submissions in respect of the convening hearing and the later sanctions hearing)

that the proposed scheme of arrangement did not constitute either insolvency proceedings or an insolvency-related event for the purposes of the Cape Town Convention. Accordingly, it submitted that Article XI (10) did not apply to the proposed scheme of arrangement and that the consent of each creditor with the benefit of an international interest was not required.

[253] Arguments were put forward relying on Professor Jennifer Payne's expert opinion focusing on the requirement that insolvency proceedings are collective proceedings in which the assets and affairs of the debtor are subject to control or supervision by a court. The company contended that a scheme of arrangement comprised a restructuring of only certain of a debtor's affairs (and was, therefore, not entirely akin to collective proceedings) and that the court merely supervises aspects regarding the scheme itself rather than its assets and affairs more generally. The company drew a distinction between other debtor-in-possession processes, such as Chapter 11 where court's involvement is broader, and other English insolvency processes, such as a company voluntary arrangement where a court-appointed supervisor has an oversight role.

[254] As stated, ultimately the NAC scheme was unanimously approved by both classes of creditors (in value, 98 per cent of the unsecured creditors and 91 per cent of the secured creditors attended and voted in favour of the NAC scheme at the respective scheme meetings). The court took the view that it was unnecessary for it to consider or make a ruling on the potential issues arising under the

Cape Town Convention. Justice David Barniville, in his written judgment, noted:

> ‘162. The Scheme Company quite properly drew to my attention the provisions of Cape Town Convention and its accompanying Aircraft Protocol (both of which have force of law in Ireland pursuant to s. 4(1) of the International Interests in Mobile Equipment (Cape Town Convention) Act, 2005). In the event that the Cape Town Convention and the Aircraft Protocol applied to the Amended Scheme, fundamental difficulties might have arisen as regards court sanction for the scheme, having regard to the provisions of those legal instruments. The Scheme Company forcefully argued that the Cape Town Convention and the Aircraft Protocol did not apply and that schemes of arrangement, including the Amended Scheme, fell outside the definition of *“insolvency proceedings”* for the purposes of the Cape Town Convention and the definition of an “*insolvency related event*” under the Aircraft Protocol.
>
> 163. The Scheme Company provided expert evidence in support of its position in the form of an affidavit and expert report by Professor Jennifer Payne, Linklaters Professor of Corporate Finance Law at the University of Oxford. Professor Payne’s conclusion was that the Amended Scheme did not fall within the definition of *“insolvency proceedings”* for the purposes of the Cape Town Convention and did not fall within the definition of an *“insolvency-related event”* for the purpose of the Aircraft Protocol. Detailed written submissions were also provided on behalf of the Scheme Company which argued for that conclusion, in the event that the court found it necessary to deal with this issue. The Scheme Company also provided evidence from Joe Fay, a solicitor in McCann Fitzgerald, as to the status and role of the Aviation Working Group and the Cape Town Convention Academic Project and, in particular, as to the

> status of certain annotations made in June, 2020 to the Official Commentary on the Cape Town Convention.
>
> 164. Ultimately, I took the view that it was unnecessary for the court to embark upon a consideration of the potential issues arising under the Cape Town Convention and the Aircraft Protocol and that, in circumstances where none of the Scheme Creditors and, most importantly, none of the Secured Scheme Creditors, were opposing the Amended Scheme or relying on the Convention or the Protocol, the court should not get into this area. I was satisfied that, while a strong case was made on behalf of the Scheme Company that the Cape Town Convention and the Aircraft Protocol did not apply, it was not necessary for me to decide that issue in this case, having regard to the overwhelming support for the Amended Scheme by the Scheme Creditors and most significantly, for present purposes, by the Secured Scheme Creditors…'.

[255] In the **Virgin Altantic**, the English High Court sanctioned a restructuring plan for Virgin Atlantic Airways Ltd (Virgin) under Part 26A of the Companies Act 2006, the provision incorporated into UK legislation pursuant to the Governance Act 2020. Virgin became the first company to use the new restructuring plan process to pursue a solvent recapitalisation of its business. Similarly to the NAC scheme, if a court were to find that a restructuring plan falls within the definition of insolvency-related event for the purposes of the Cape Town Convention, the cram down provisions may possibly be prevented by the application of article XI (10) of the Protocol.

[256] However, prior to the sanction hearing, Virgin had secured the consent of all Convention creditors, and the scheme did not

threaten to cram down any Convention creditors. Accordingly, the question of whether a cram down of non-consenting creditors pursuant to a restructuring plan would be contrary to the provisions of the Cape Town Convention was not at issue.

[257] Learned counsel for AAX informed the Court that most recently there is another UK case that considered whether a scheme of arrangement is an insolvency proceeding or an insolvency-related event. This is the MAB Leasing Ltd ('**MABL**') case which was a decision in respect of the convening of a creditors' meeting just delivered in the UK on 20.1.2021. The company is incorporated in Malaysia and it leases a total of 86 aircrafts and 10 aircraft engines from both operating and leasing lessors. It sub-leases most of these to Malaysia Airlines Berhad, and two other airlines within the Malaysia Aviation Group. The company is dependent on the income from the sub-leases to airlines to pay the rentals due under the operating and financing leases. The revenue had dropped dramatically flowing the Covid-19 pandemic.

[258] In the scheme filed, it provides creditors with 4 alternatives. 43 of the 44 scheme creditors have signed up locked up agreements with no fees or other benefits being offered as part of the lock-up. A single meeting of all scheme creditors was proposed. The alternative to the scheme would be liquidation where the leases would be terminated and the lessors would be have merely a right to prove in liquidation for damages upon termination. The expected return from liquidation is from 0.9% to 1.4 % of the claims against the company.

[259] The lessors were given the option to terminate the lease, recover the aircrafts and be entitled to receive a one-off termination payment which is marginally better than liquidation. The other option was to continue with the lease but on a reduce rentals which will differ for each aircraft.

[260] Justice Zacaroli did not think that the differences in the rental treatment for each aircraft warrants fracturing the class and held that there is far more that unites the creditors than divides them in that case. On the Cape Town Convention, the learned judge also need not have to decide the dame given that no creditor has raised the objection to the scheme. This is clear from paras [43] and [44] of judgment where Justice Zacaroli stated thus:

> ‘ 43. Mr Smith and Mr Perkins’ skeleton contains a very detailed review of the arguments on the potential applicability of the Regulations, identifying a number of arguments why the Regulations do not apply, but fairly pointing to academic and other writings which argue the opposite effect. The debate turns, in essence, on whether a scheme of arrangement is an insolvency proceeding within the meaning of the Regulations.
>
> 44. This is a point which could only be taken by a creditor who did not consent to restructuring. No such creditor has raised this as an objection or made any representations at this hearing. It remains possible, since forty-three out of forty-four creditors have locked up, that all creditors will, in fact, consent by the time of the scheme meeting. In light of that alone, it is not certain, even if the Regulations were capable of applying to a scheme of arrangement, that they would have any impact in this case. For that reason, I could not conclude that the potential applicability of the Regulations is a showstopper or obvious blot

on the scheme, which would necessitate the court refusing to sanction the scheme at the sanction hearing.'

[261] Now, Article 5(1) and (2) of the Convention provides:

> 'Article 5 – Interpretation and applicable law
>
> 1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.
> 2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

[262] The aforesaid suggests that the question whether the scheme of arrangement in the present case is an insolvency proceedings needs to be settled in accordance with the principles underlying the Convention and not based on national law [See also: **VB Leaseco** *v* **Wells Fargo** 384 ALR 379, FCA at [56] on the principles relating to the interpretation of treaties].

[263] In this regards, Professor Sir Roy Goode's has been the author of the definitive guide to the Cape Town Convention, i.e the Official Commentary to the Cape Town Convention since 2001. The latest edition to the said Official Commentary is the 4th Edition, launched in May 2019. He headed the Drafting Committee of the Official Commentary to the Cape Town Convention since 2001. At the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held under the joint auspices of the

International Institute for the Unification of Private Law and the International Civil Aviation Organisation at Cape Town from 29 October to 16 November 2001, Resolution No. 5 was passed, stating among others:

> *'THE CONFERENCE*
> *HAVING ADOPTED the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment;*
> *CONSCIOUS of the need for an official commentary on these texts as an aid for those called upon to work with these documents;*
> *RECOGNISING the increasing use of commentaries of this type in the context of modern, technical commercial law instruments; and MINDFUL that the Explanatory Report and Commentary (DCME-IP/2) provides a sound starting point for the further development of this commentary;*
> *RESOLVES:*
> *TO REQUEST the preparation of a draft official commentary on these texts by the Chairman [Professor Sir Roy Goode] of the Drafting Committee, in close co-operation with the ICAO and UNIDROIT Secretariats, and in co-ordination with the Chairman of the Commission of the Whole, the Chairman of the Final Clauses Committee and observers that participated in its works;*
> *TO REQUEST that such draft be circulated by the two Secretariats to all negotiating States and participating observers as soon as practicable after the conclusion of the Conference inviting comments thereon; and*
> *TO REQUEST that a revised final version of the official commentary be transmitted by the two Secretariats to all negotiating States and participating observes as soon as practicable after the conclusion of the Conference.*'

[264] Thus the interpretation of the Convention and the Protocol ought to be consistent with the Official Commentary to ensure uniformity and to accord with the purpose of the Cape Town Convention.

[265] However the Official Commentary does not address the issue as to whether a scheme of arrangement is an 'insolvency proceedings'.

[266] In respect of Article XI of the Protocol, by way of the letter dated 12 June 2020, The Cape Town Convention Academic Project wrote to Professor Sir Roy Goode to request for his confirmation, among others, that a scheme of arrangement or restructuring plan fall within the definition of '*insolvency proceedings'* for the purposes of the Cape Town Convention.

[267] On the same day, Professor Sir Roy Goode had responded to confirm that the annotations very much follow the approach he took in discussions relating to the UK Corporate Insolvency and Governance Bill which was then going through the UK Parliament. He had also indicated that he intends to include material along the same lines in the next Official Commentary on the Cape Town Convention.

[268] It was this exchange of correspondence on 12 June 2020 between Professor Sir Roy Goode and the Cape Town Convention Academic Project (sponsored by the Aircraft Working Group (**AWG**)) which led to the preparation and publication of the Annotation to the Official Commentary on the Cape Town Convention on 16 June 2020 ('**the Annotation**'). The Annotation

confirms that schemes of arrangement fall within the definition of 'insolvency proceedings' in the Cape Town Convention where they are:

> (i) formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company; and
>
> (ii) collective in that they are concluded on behalf of creditors generally or of classes of creditor that collectively represent a substantial part of the indebtedness.

[269] The Annotation also confirms that a reorganisation arrangement, in which a court acts to facilitate a statutory process and where the court's approval is required for its implementation, constitutes insolvency proceedings where the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation.

[270] In addressing Article XI(10), the Annotation provides that:

> 'in a reorganisation arrangement which falls within the definition of "insolvency proceedings" as interpreted in the Annotation, any modification of the debtor's obligations under the agreement without the consent of a creditor (so-called "cram down" provisions) is inconsistent with article XI(10) of the Protocol, where declared and implemented'.

[271] I am conscious that the Annotation is endorsed by Professor Goode in his personal but not official capacity and does not represent the Official Commentary to the Cape Town Convention. I am mindful that the Official Commentary is not legally binding on

national courts. Additionally, the Annotation does not have any official standing and does not constitute part of the Official Commentary. However, in the absence of any existing judicial precedents, due consideration to both the Official Commentary and the views of the Cape Town Convention Academic Project must be had when considering the provisions of the Cape Town Convention.

[272] In the present case, there is no doubt that the scheme of arrangement is formulated in the context of an insolvency. That AAX is currently insolvent is not disputed.

[273] The Scheme is also an arrangement that is collective in that it is "concluded on behalf of creditors generally or such classes of creditors as collectively represent a substantial part of the indebtedness".

[274] There can also be no dispute that the Court's approval is required for its implementation.

[275] With regards to Professor Jennifer Payne's opinion, this Court must be mindful of the fact that no opportunity was given to counsel for the Lessors to secure and placed before this Court their Expert Report giving a contrary view to that of Professor Payne, including an opinion from Professor Sir Roy Goode or other eminent jurists responding to the learned Professor Jennifer Payne's opinion. Indeed, learned counsel for AAX has suggested that the Court could hold the determination of the issues relating to

the Cape Town Convention until the Sanction Stage so that a more mature consideration can be given.

[276] While it would certainly relieve this Court of the considerable burden of deciding the issues if this matter is left to a later stage, the Cape Town Convention has been raised before this Court at this stage and I should at least provide a provisional view on the issues raised as they go towards the jurisdiction of the Court.

[277] With respect to the learned Professor Jennifer Payne's expert opinion, I am of the view that her interpretation of Article 1(l) of the Convention puts too restrictive a meaning to the words 'in which the assets and affairs of the debtor are subject to control or supervision by a court'.

[278] Article 1(l) does not state that the *entire* assets and affairs of the debtor must be covered under the scheme. Neither does it matter that outside the scheme, possession and management of the company remain with the management. All that is required is that the *proceedings* being a collective proceedings is such that it involves assets and affairs of the debtor being subject to the control *or* supervision of the court. In the present case, there is no doubt that the Scheme involves 'assets and affairs' of AAX.

[279] Further, whilst the Court may not be concern with the commercial merits of the Scheme and rightly so, nevertheless, the fact that the Scheme must receive the sanction from this Court and AAX and the creditors must also comply with directions from the Court on the implementation of the Scheme, to my mind, meets the

requirement of ‘control or supervision by a court’. The role of the Court is more than merely ‘to facilitate the compromise or arrangement put forward by the parties’ as opined by Professor Jennifer Payne.

[280] Accordingly, I am in agreement with learned counsel for the Lessors that the present Scheme is indeed an ‘insolvency-related event’ under Article XI of the Protocol.

[281] My view is also fortified by the opinion dated 23.11.2020 expressed by Professors Louise Gullifer, the Rouse Ball Professor of English Law at the University of Cambridge, and Professor Riz Mokal who is a barrister practising from South Square, Gray’s Inn, London and an Honorary Professor in Laws at University College London. Their expert opinion was made available to me by learned counsel for BOCA on 13.2.2021.

[282] Specifically, with regard to the element for control or supervision by a court, Professors Louise Gullifer and Riz Mokal opined that:

(i) the control or supervision by the court within relevant proceedings must be for the purposes of those proceedings;

(ii) what matters is the court’s control or supervision of the proceeding and only derivatively and insofar as necessary, of control or supervision of the debtor’s assets or affairs;

(iii) the timing, extent and form of court control or supervision of the debtor’s assets or affairs that must be present is

"whatever is necessary and sufficient to give efficacy to proceedings whose purpose is the debtor's reorganisation (and which are collective and judicial or administrative proceedings)";

(iv) the level of court supervision or control is whatever that is appropriate to the proceedings, so long as the debtor's assets or affairs are not under the control solely of the debtor itself or its creditors;

(v) he Court's control or supervision is exercised through the imposition of duties pursuant to the applicable insolvency law. In the context of the Restructuring Plan under Part 26A of the UK Companies Act 2006, the most important duties are the statutory duty of the debtor and relevant officers to provide relevant claimants with notices and a statutory explanatory statement with information about the proposed plan, with non-compliance constituting statutory offences;

(vi) the Court possess all, but only, the powers to control or supervise the debtor's assets and affairs as are necessary and sufficient to give efficacy to a Restructuring Plan proceeding. In aid of this objective:

(a) the Court would need to understand the relevant alternative if the plan was not sanctioned;

(b) the Court would need to understand the current and proposed rights of members of each of the proposed

claimant classes in order to decide whether to order one or more class of meetings;

(c) the Court must assess the debtor's compliance with its statutory duties in the Restructuring Plan proceedings;

(d) the Court must decide whether to sanction the proposed plan by satisfying itself that it has jurisdiction to do so because all statutory requirements have been met, and by reference to each of the principles for the exercise of its discretion as are relevant to the Restructuring Plan; and

(e) in approving the Restructuring Plan, the Court's order may "cause restructuring of the debtor's shareholding or any part of it, cause disposal or encumberment of any or all of the debtor's assets, discharge or modify any of its liabilities, and permit release of the claims its creditors have against third parties such as guarantor and insurers".

[283] As regard the interpretation of Article XI (10) of the Protocol, the said Article is unambiguous and a literal, ordinary and natural meaning to be given to the words 'obligations under the agreement' does not produce an absurd result. There can be no doubt that the phrase must include the obligation of the debtor to pay the rentals under the agreement. To restrict the meaning of the word '*obligations*' to only obligations relating to *in rem* matters is to read into the Articles words which are simply not there. There

is nothing to suggest that the Cape Town Convention is to be viewed narrowly, in that it is only to cover *in rem* rights as asserted by learned counsel for AAX.

[284] The word 'obligations' is also found in Article XI (7) of the Protocol which provides:

> '7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.'

[285] There is little doubt that the word 'obligations' in this Article XI (7) must include the *in personam* obligation to pay rentals under the agreement. It will be incongruous that the same word in Article XI (10) bears a different and indeed a narrow meaning as suggested by learned counsel for AAX.

[286] I also agree with learned counsel for SkyHigh that the prohibition under Article XI (10) to permit the debtor to modify the obligations under the agreement except with the consent of the creditor is consistent with the purposes of the Cape Town Convention – to promote and reduce the costs of asset-based financing for airline equipment.

[287] This is why para 3.112 of the Official Commentary to the Cape Town Convention provides:

> 'any provisions of domestic law modifying or empowering a court to modify the debtor's obligations must be disapplied where these could conflict with paragraph 10'.

[288] However, the 'obligations' that cannot be modified without the consent of the Lessors in this case are 'obligations under the agreement'. The Official Commentary to the Cape Town Convention makes this clear in para 3.112 where it provides as follows:

> '[3.112 … Though *paragraph 10 only precludes modification of the debtor's obligations under the agreement*, that it, the security agreement, title reservation agreement or leasing agreement relating to the aircraft object, and says nothing about security assignments of debtor's rights, it must be intended to cover these as well, particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditors remedies permitted by the Convention or Protocol, applies to all remedies, not merely relating to the aircraft objects.'
>
> [Emphasis added]

[289] Further, it is not insignificant that Article XI (11) under Alternative A of the Protocol states:

> '(11) Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.'

[290] To my mind, reading Article XI (7), (10) and (11) together, Alternative A of the Protocol provides the following protection to the creditor, namely, in the event the debtor chooses not to terminate the agreement when an insolvency-related event has occurred or the creditor does not exercise its right to repossess the aircraft, the obligations under the agreement including the obligation to pay the rentals cannot be modified by the debtor unless with the consent of the creditor.

[291] For example, if the Scheme seeks to provide for a variation to the obligation to pay the rentals (either a reduced sum or a deferral in payment), this would be in contravention of Article XI (10) as AAX would be seeking to modify its obligations under the Lease Agreements and the consent of the Lessors have not be procured.

[292] But in this case, the Scheme provides for the termination of the Lease Agreements which under Article XI (11), AAX is entitled to do. With the termination, the Lessors would be left with the remedies of repossession under the Convention as provided under Article XI (7). These remedies are not interfered with under the Scheme at all.

[293] With the termination of the Lease Agreements, apart from the right to repossession under the Cape Town Convention, the Lessors also have the right to claim against AAX for damages which comprises both the accrued rentals that were unpaid and the future rentals under the remaining terms of the Lease Agreements subject to the duty to mitigate.

[294] This claim for damages arises from the termination of the Lease Agreements. This is the same claim that the Lessors would make against AAX in the event of liquidation where the Lessors would have to share *pari passu* with other unsecured creditors in the assets of AAX. What the Scheme is seeking to do is to compromise this claim for damages. To my mind, this has nothing to do with Article XI (10) of the Alternative A of the Protocol.

[295] For the reasons above, it is my judgment that AAX does not require the consent of the Lessors in respect of the 'cram-down' provision under the Scheme in the form of a 99.7% hair-cut of their claims.

[296] Learned counsel for AAX had raised the concern that an interpretation of Article XI (10) of Alternative A of the Protocol which provides for the debtor to seek the consent of the creditor in order to modify the obligations under the agreement would result in the creditor being able to veto a scheme of arrangement presented by the debtor.

[297] With respect, the fact that no obligations under the agreement can be modified without the consent of the creditors does not necessarily mean that the creditor will veto a scheme of arrangement presented by the debtor. Firstly, the debtor is entitled to terminate the lease agreement. Secondly, from a commercial standpoint, it may serve the interest of the creditor to engage into negotiation with the debtor on the proposed terms under the scheme of arrangement rather than insisting on the obligations under the agreement as the resulting modification to the

obligations would mean a continuation of the lease agreement. Indeed this was what had happened in both the **Nordic Aviation** and the **Virgin Atlantic** case which had resulted in the court not needing to deal with the issues arising under the Cape Town Convention.

[298] For completeness, learned counsel for AAX had submitted that under our IIME (Aircraft) Act 2006, section 2 (2) stipulates:

> 'Application of the Convention on International Interests in Mobile Equipment and the Protocol to the 'Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment'
>
> 2 (1) …
>
> (2) Notwithstanding Article 2 of the Convention on International Interests in Mobile Equipment, this Act shall apply in respect of *aircraft objects* only.'

[299] Based on the aforesaid, it was contended that the Malaysia legislation enabling the Convention and Protocol makes clear that its effect is only in relation to an international interest in airframes, aircraft engines and helicopters (i.e aircraft objects) and no others, including associated rights.

[300] With respect, all that the said Section 2 (2) of IIME (Aircraft) Act 2006 stipulates is that the legislation only enable the Convention and the Protocol in respect of aircraft objects as opposed to railways and or space assets. The section has no bearing on the

interpretation of the word ‘obligations’ in Article XI (10) of the Alternative A to the Protocol.

ii. The Gibb Rule

Court Analysis

[301] The Gibbs Rule is an English common law principle which provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings (see: **Anthony Gibbs**).

[302] The brief facts of **Anthony Gibbs** are as follows. The defendant in **Anthony Gibbs** was a French trading company. It entered into contracts governed by English law to purchase copper from the plaintiff. The defendant went into liquidation in France. The plaintiff filed a claim in the English courts against the defendant to recover the debt owing. It was argued by the defendant that under French law, the judgment of liquidation operated as a discharge of the debt. This was rejected by the English Court of Appeal. Lord Escher MR, in delivering the judgment, emphasized that the law of the contract was English law and therefore the French liquidation did not discharge the debt owed by the defendant.

[303] Accordingly, the effect of the Gibbs Rule is that a foreign proceeding designed to bring about the cancellation of a debtor's obligations will discharge only those liabilities governed by the law of the country in which that proceeding took place.

[304] The Gibbs Rule remains good law in England and was recently reinforced by the English Court of Appeal decision of **Re OJSC International Bank of Azerbaijan** [2018] EWCA Civ 2802 ('**Re OJSC**'). The Court of Appeal refused to prevent creditors under English law debt arrangements from enforcing their rights against an Azeri bank that had successfully put forward an Azeri restructuring plan discharging its debts, approved by the requisite majority of creditors and sanctioned by the Azeri court. This was because to do so would go against the long-standing Gibbs Rule. The Court of Appeal also referred to a modern statement of the Gibbs Rule (Fletcher, The Law of Insolvency (5th edn, 2017), at para 30–061):

> "According to English law, a foreign liquidation – or other species of insolvency procedure whose purpose is to bring about the extinction or cancellation of a debtor's obligations – is considered to effect the discharge only of such a company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some other foreign law under which the liquidation is accorded the same effect. Consequently, whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that *a debt owed to or by a dissolved company is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question.*"
>
> [Emphasis added]

[305] The Gibbs Rule has been recently referred by our High Court in the decision of **RHB Bank Berhad** v **First Omni Sdn Bhd & Anor** [2020] MLJU 676. The following excerpts are pertinent:

> "[30] The discharge of the 2nd Defendant's debts to all creditors as provided and under the scheme of arrangement takes effect by the operation of the legislation or law applicable in the Republic of Singapore. Can it, a foreign legislation operates to discharge the debts or liability of the Corporate Guarantees given by the 2nd Defendant in Sabah, Malaysia? I do not think so."
>
> [32] The proper law of contract in respect of these Corporate Guarantees given by the 2nd Defendant to the Plaintiff is the law of Malaysia. The liabilities and debts arising thereunder cannot be discharged by a foreign law, in this case the laws of the Republic of Singapore."

[306] However, as rightly pointed out by learned counsel for AAX, **RHB Bank Berhad** was a case involving an application to the Court for certain preliminary issues of law to be determined. The comments that the learned judicial commissioner made regarding the Gibbs Rule were mere *obiter dicta*.

[307] In our case, it is the contention of the Lessors that the debt owing by AAX arising from the Lease Agreements and Guarantees with them are governed by English law. In this regard, applying the Gibbs Rule, these debts could not be discharged or varied by this Court under the Scheme as these debts could only be discharged under English law.

[308] Learned counsel for AAX however argued that the Gibbs Rule has been severely criticised by many academics and commentators, including on the basis that it is 'an outdated relic from an era when international cooperation in insolvency matters was in its infancy, and a parochial outlook tended to prevail; indeed, the rule may be thought increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much cross-border cooperation in insolvency matters' as commented in **Re OJSC** at [29] and [31].

[309] The rule has been rejected in (i) Singapore (See: **Pacific Andes Resources Development Ltd.** [2016] SGHC 210 Kannan RAMESH, the *Gibbs* Principle (2017) 29 SAcLJ 42, (ii) Australia (See: **Re Bulong Nickel Pty Ltd** [2002] WASC 226 and **Re Wollongong Coal Ltd and Jindal Steel & Coal Australia Pty Ltd** [2020] NSWSC 73 and (iii) United States (See: **In re Agrokor,** 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

[310] The basis of the rule in **Anthony Gibbs** is that while the parties had agreed that English law should govern the contracts, they had never agreed to be bound by French insolvency law. The underlying assumption behind this reasoning is that the question of discharge ought to be characterised as a *contractual* issue rather than a *bankruptcy or insolvency issue* attracting the principle of collectivity.

[311] Kannan JC in **Pacific Andes Resources Development Ltd** citing Professor Ian Fletcher opined that once an insolvent restructuring is under way, the basis of the *Gibbs rule* (that being a matter of

contract, the discharge of the debt must be under that law) no longer applies. The law of restructuring or bankruptcy will apply. At para [24] of the judgment, the learned Judicial Commissioner (as he then was) said:

> "24. The point made by Professor Fletcher is a crucial one. The principle of collectivity in insolvency law demands the transformation of contractual entitlements in discrete pre-insolvency contractual relationships into the rights of creditors to participate in the distribution of the debtor's estate under the governing insolvency law. Once insolvency or restructuring is underway, a creditor no longer has any basis to insist on the satisfaction of the full range of his pre-insolvency entitlements. This includes his entitlement to have any contractual debt that is owed to him discharged under **–** and only under – the law of the contract. In other words, party autonomy is subjugated to a broader policy imperative."

[312] Em Heenan J in **Bulong Nickel Pty Ltd** [2002] WASC 226 gave an illuminating legal justification for the court's jurisdiction in relation to a scheme of arrangement to modify the rights of creditors even where the contracts and the rights of the parties are to be determined by a foreign system of law other than the law governing the scheme of arrangement. This was what he said:

> 'The jurisdiction of a court of bankruptcy or insolvency under the legislation arises from the presence of the debtor within the jurisdiction, the trading of the debtor within the jurisdiction, or the existence of property of the debtor within the jurisdiction. Once the jurisdiction is established the consequences of the insolvency, including any orders made by the court exercising in insolvency, will govern the rights, obligations and property of the insolvent debtor wherever situate. The function performed by

the courts under legislation with respect to bankruptcy and insolvency can, therefore, be seen as fulfilling a far wider and greater public interest than simply adjudicating upon the rights and liabilities existing between the debtor and one or more of his privies under a contract imposing mutual obligations between them. Such legislation addresses, as well, the interests of other creditors, including those who may be recognised to have priority of access to some, or all, of the property of the debtor, those of general commercial community within which the debtor has been carrying on business, and the public need for investigation and supervision of the insolvent debtor to ensure that the administration of his affairs is actually undertaken in a manner which ensures equality between creditors according to their degree and priority. Other associated purposes such as investigating the extent of the property of the insolvent, both locally and in foreign places, and investigating, and if warranted setting aside, preferential or fraudulent transactions are associated subsidiary purposes.

There can be no doubt of the jurisdiction of this Court to consider, and if thought appropriate to approve, a compromise or scheme of arrangement in relation to these two Bulong companies. The basis for this jurisdiction was examined in my earlier reasons for decision in par 36. It comes directly from the Corporations Act. I consider that Pt 5.1 of the Act in s 411 should be characterised as a law dealing with corporations in financial difficulty, or on the brink of insolvency, and authorising schemes of arrangement or reconstruction which are designed to modify the obligations of the company, its members or its creditors, so as to encourage economic survival of the corporation as part of a scheme of insolvency which will, as far as possible, secure an acceptable treatment to creditors of comparable degree. The ensuing modification of the obligations of the company and or its creditors is secured, not by a general

status of insolvency and the application of the laws relating to a company in insolvency but, rather, by a means which commends itself to a majority in number and in value of the creditors or members if the company concerned. The premise is that these are, for good reason, presumed to act in their own self-interests when considering whether or not to approve a proposed compromise or scheme. Such a scheme, if approved by the requisite majority of creditors or members, and complying with the other requirements of s 411, will still require the approval of the Court.

I am satisfied that the proper characterisation of Pt 5 and s 411 of the Act is to treat it as a law relating to insolvency of corporations and, as such, to recognise that it accommodates the rights and interests not only of the company concerned, its members and creditors but also the interests of the community in which it has been conducting business and incurring obligations. This characterisation leads to the conclusion that the compulsory variation of the rights between the company and some of its creditors or members, if so approved in accordance with the legislation, is a discharge or variation of those contractual rights in accordance with the law of the forum which, because of its association with the insolvency, will be effective notwithstanding that some, or even all, of the obligations between the company debtor and its creditors are governed by a foreign system of law, In this respect, it is significant to note that Ellis v. M'Henry (supra) was itself a case dealing with a composition with creditors. See also Philip R Wood "Principles of International Insolvency" (1995); Philip St J Smart "Cross Border Insolvency" (1998) 2nd ed at 257 and Sykes & Pryles "Australian Private International Law", 3rd ed at 791. It follows that I am satisfied that s 411 confers in this Court a power to approve a compromise or arrangement even if the effect if the scheme of arrangement will be to modify or discharge

obligations existing between the company concerned and third parties under a contract which stipulates that it is to be governed by a foreign system of law.'

[313] Both the reasoning by Kannan JC and Em Heenan J are most persuasive. I share their views that the Gibbs Rule does not operate to restrict our Court from entertaining and if thought fit, approving a scheme of arrangement which involves the discharge or modification of any contractual rights between the scheme company and its creditors even where the contracts are governed by English laws or other foreign laws.

[314] Of course the question whether the court applying the proper law of the contract will accept the discharge or modification of the debt by the law of the country in which the scheme of arrangement takes place is a separate issue. This, in fact, is the genesis of the Gibbs Rule i.e that the foreign proceeding designed to bring about the discharge or modification of the debtor's obligations under its law will not be recognised and the debt can only be discharged or compromised under its proper law.

[315] This was the *obiter* by our High Court in **RHB Bank Berhad** v. **First Omni Sdn Bhd & Anor** [2020] MLJU 676 where the Corporate Guarantees given by the 2nd Defendant which was discharged by a scheme of arrangement under the law applicable in Singapore was held to be ineffective as the proper law governing the Corporate Guarantees was the law of Malaysia.

[316] It is not necessary in this case for this Court to decide if a creditor who participates in the foreign insolvency or restructuring proceedings should subsequently be estopped from relying on the Gibbs Rules in an action to enforce the debts before the Malaysian Courts. The question of estoppel was considered by Mr Justice Teare in **Global Distressed Alpha Fund 1 Limited Partnership v. P T Bakrie Investindo** [2011] EWHC 256 (Comm) at [14]. It suffices at this juncture to quote a passage by Professor Ian Fletcher in his work **Insolvency in Private International Law**:

> 'Before any creditor can subsequently be permitted to take action in England to enforce an obligation which the defendant claims was comprised within the foreign discharge, but whose applicable law was not that of the country of bankruptcy, the court should have regard to whether the plaintiff had adequate notice of the foreign proceedings and a reasonable opportunity to participate in them in accordance with acceptable standards of fair and equal treatment. If this was the case, the remedies of English process would be withheld on the basis that the plaintiff is estopped from invoking them.'

iii. Separate class between Lessors and Airbus

[317] In the event that they cannot be excluded from the Scheme, the Lessors contended that they ought at least to be placed in a separate class from Airbus since the amount of the debt said to be owed to Airbus (stated in the Provisional List as RM 48.71 billion) in contrast with the collective debt owed to the Lessors (stated in the Provisional List as RM 9.26 billion), will effectively deprive the Lessors of having any meaningful weight in its votes on the Scheme since Airbus's vote alone would carry the resolution as its

debt value would exceed more than 75% of the total Scheme Debts.

[318] Although initially an appealing argument, on further reflection however, the fact that Airbus's claim is stated at RM 48.71 billion and therefore constitutes in excess of 75% of the debt within its class cannot *per se*, without more, be a reason for the Lessors wanting to be placed in a separate class from Airbus.

[319] Each of the creditors in a particular class is entitled to vote at the class meeting. The weight attached to each of the creditors' vote is a function of the quantum or value of the creditor's claims duly approved after the proof of debt exercise. The quantum or value of the creditor's claims should not be a reason to exclude them from the class. Otherwise, it could be argued that creditors A, B and C whose claims cumulatively exceed 75% of the value of the claims in a particular class and who have indicated their support or otherwise for the scheme, ought to be excluded from the class as they would render the votes by the rest of the creditors within the class meaningless.

[320] Accordingly and with respect to learned counsel for MASSB, I do not agree that Airbus should be placed in a separate class just because its claim alone exceeds 75% of the total claims in Class A. In any case, Airbus' claims of RM 48.71 is still subject to proof and may be significantly reduced after the proof of debt exercise.

iv. Dissimilar rights between Airbus and the Lessors

[321] The Lessors further contended that they should also be placed in a different class because their legal rights are entirely different from Airbus. It is contended that the Lessors' business model required a huge upfront capital investment for the Lessors at the inception of the Leasing Agreements. Further, the losses for the Lessors have crystalized. Such losses would not be recoverable from any fresh contracts that the Lessor may enter into with AAX post the Scheme.

[322] On the other hand, there is no evidence that Airbus has sustained any actual loss and damages at this moment. Indeed, the debts that is provisionally stated for Airbus is a contingent debt, i.e it is a debt contingent upon Airbus making a claim for losses arising from the termination of the manufacturing agreements by reason of the Scheme. There is a high likelihood that post the Scheme, AAX will enter into fresh contracts with Airbus on terms which would substantially mitigate Airbus' losses.

Court Analysis

[323] In determining this issue, the Court will apply the 2 stage test as I have stated above. Another exposition of the said 2 stage test is set out with great clarity by Hildyard J in **Re Stronghold Insurance Company Ltd** [2019] 2 BCLC 11 as follows:

> "**[42]** The test is a two-stage one. At the first stage, the focus is on rights: if there is no difference in their respective rights the fact that they may have opposing commercial or other interests

> is not relevant to class constitution (though it may become relevant at a subsequent stage). This requires consideration of (a) the rights of creditors in the absence of the scheme and (b) any new rights to which the creditors become entitled under the scheme.
>
> At the second stage of the test, if there is a difference in such rights, the question is whether, in the court's assessment and looking at the issue from the point of view of the two groups in the round (that is, not having regard to individual and special or separate commercial interests), the differences in their rights and their treatment under the proposed scheme are such as to make it impossible for them to consult together with a view to their common interest."

[324] It is not in dispute that the appropriate comparator for the first stage is the liquidation of AAX given its insolvent status. In such a case, both Airbus and the Lessors would be treated as unsecured creditors and would share *pari passu* in the estate of AAX. In the liquidation scenario, there is hardly any likelihood of any significant and or substantial recovery of their losses.

[325] On the other hand, under the Scheme, Airbus stands in a much better position that the Lessors as there is a good likelihood that their contingent losses can be recouped or substantially met from renegotiated or fresh contracts with the post-Scheme AAX for the purchase of their aircrafts.

[326] Whilst it is true that the Lessors may also similarly recovered their losses arising from the termination of the Lease Agreements under the Scheme, they would not be able to recover their accrued and

crystalized losses in respect of the unpaid rentals prior to the termination.

[327] The aforesaid shows that there is a difference between the rights of Airbus and the Lessors absence the Scheme and their respective new rights under the Scheme. This requires the Court to proceed to the second stage of the test i.e whether in the Court's assessment and looking at the issue from the point of view of the two groups (that is, not having regard to individual and special or separate commercial interests), the differences in their rights and their treatment under the Scheme assessed against the comparator are such as to make it impossible for them to consult together with a view to their common interest.

[328] In **Re Sunbird Business Services Ltd** [2020] EWHC 2860 (‘**Re Sunbird**’) Snowden J explained:

> ’20. Under Part 26 the courts have emphasised that the mere fact that there are differences, or even material differences, between the rights of creditors does not mean that they must be placed in separate classes for the purposes of considering a scheme. Whether any such differences in existing and new rights make it impossible for creditors to consult together with a view to their common interest requires an evaluation by the court of the economic and business impact of the proposals.
>
> 21. It does not follow, however, that simply because a scheme company is insolvent and seeking to restructure to avoid liquidation, that all creditors should simply be placed into a single class on the basis of an argument that the scheme will provide a better economic outcome for everyone than the financial Armageddon of a liquidation. As Hildyard J pithily

remarked in the second APCOA case, Re APCOA Parking Holdings GmbH (No 2) [2015] Bus LR 374 at [117]:

> "the risk of imminent insolvency is not to be used as a solvent for all class differences"

22. By the same token, many judges have sounded warnings that the court should not be overzealous in identifying differences for fear of creating too many small classes carrying an inappropriate right of veto, and have reiterated that an important safeguard against minority oppression is that the court is not bound by the decision of the class meeting but retains a discretion to refuse to sanction the scheme: see Hawk at [33], Re BTR plc [2000] 1 BCLC at 747 and Re Telewest Communications plc [2005] 1 BCLC 752 at [37].

23. Finally, and relevantly for the instant case, modern authorities have emphasised that, in assessing how creditor classes should be constituted for the purposes of a scheme, the Court should not adopt a narrow approach and look at a scheme in isolation. The scheme should be looked at in the context of the restructuring as a whole, including, in particular, any rights conferred in other agreements that are provided for under the terms of the scheme, or which are conditional upon it: see e.g. per David Richards J in Re Telewest Communications plc [2004] BCC 342 at paragraph [54]; my own observations to that effect in Re Baltic Exchange Ltd [2016] EWHC 3391 at [17], citing Re Stemcor Trade Finance Ltd [2016] BCC 194 at [17] – [18]; and the recent discussion of this approach by Falk J in Re Codere Finance 2 (UK) Limited [2020] EWHC 2441 (Ch) at [49] et seq ..

24. Applying these principles to the facts of the instant case, it seems to me self-evident, first, that the New Scheme and Rights Issue, which are legally and commercially inter-

dependent, must be taken together for the purpose of applying the class test. It is also necessary to take into account the existing rights which 21st Century has against SBSAL and the conversion of those rights into shares in the Company which is envisaged by the Deed of Novation. That agreement is plainly part of the overall restructuring and is legally and commercially conditional upon the New Scheme becoming effective.

25. In that regard, I accept the submissions of Mr Phillips that there is a material difference between the treatment of the rights of 21st Century and the treatment of the rights of the other Scheme Creditors. In addition to the conversion of the debt which it is owed by the Company into shares in the Company, 21st Century stands to receive an extra tranche of shares in the Company in exchange for its (different) rights against SBSAL. Although Mr. Thornton QC initially sought to persuade me that there was no real difference between the rights of a creditor in respect of debts owed by the Company and those in respect of the debts owed by SBSAL, the analysis of rights at the first stage of the class test must be carried out in accordance with legal principle and respecting separate corporate personalities.

26. The key issue, however, is whether that difference in rights makes it impossible for 21st Century to consult together with the other Scheme Creditors with a view to their "common interest" in the New Scheme. At this stage of the analysis it is important to have regard to the commercial factors relevant to the decision facing Scheme Creditors and the effect on that commercial evaluation of the additional deal which applies solely to 21st Century.'

[329] In **Re Sunbird**, it was submitted that the Deed of Novation which resulted in the debts of SBSAL due to 21st Century to be assumed by the company and which would entitle 21st Century to further

shares in the company in comparison to other creditors is a sufficient difference in right to place 21st Century in a separate class from the other creditors.

[330] However, on the facts, Snowden J found that the effect of the difference in rights provided to 21st Century was not an additional benefit to 21st Century but rather a giving up of a valuable commercial leverage by them. This led to His Lordship's decision that a separate class was not required. The relevant passages from the judgment are instructive:

> '30. Mr Thornton QC therefore disputed Mr Phillips' contention that the arrangement under the Deed of Novation amounted to 21st Century seeking an additional benefit to the detriment of the other Scheme Creditors. Rather, he submitted, 21st Century was agreeing to assist the restructuring process by giving up valuable commercial leverage resulting from its right to seek full repayment of its debt by SBSAL after the New Scheme and Rights Issue had become effective. Mr. Thornton QC characterised this as 21st Century "seeking to stand closer to the Scheme Creditors rather than further apart from them".
>
> 31. I accept Mr. Thornton QC's submissions. When the effect of the difference in rights provided to 21st Century under the New Scheme. The Rights Issue and the Deed of Novation, and to the other Scheme Creditors under the New Scheme and Rights Issue is analysed in a commercial way, it does seem that 21st Century is willing to forgo a strategic advantage which it has by being owed money by SBSAL, and instead to throw its lots in with the other Scheme Creditors who are only owed money by the Company, in order to give the overall restructuring the chance to succeed.

> 32. On that basis, in my judgment there is no reason why 21st Century cannot consult together with other Scheme Creditors on the commercial merits (or otherwise) of the proposal put forward for the survival of the group. In particular, I see no reason why 21st Century cannot consult together with the other Scheme Creditors on the common interest that they all have of evaluating whether the Company's proposals for the future operations of the group are viable or whether they are in effect being asked to throw good money after bad; together with evaluating whether the relative proportions of the shares in the restructured group which are being offered to the Scheme Creditors and to the existing shareholders provide a suitable division of the ownership of the restructured group.'

[331] However in this case, I am of the opinion that the difference in the rights between Airbus and the Lessors under the Scheme is significant and warrants that the Lessors be placed in a separate class from Airbus. Unlike **Re Sunbird** where the difference in the rights to 21st Century was in fact a 'giving up' of 'valuable commercial leverage' in order that 21st Century could 'throw its lot in with the other Scheme Creditors', in the present case, taking into consideration the effect of the commercial evaluation of the fresh contracts that that Airbus would very likely enter with AAX which would potentially significantly mitigate Airbus' losses arising from the termination of the agreements in comparison with the Lessors' rights under the Scheme where the Lessors would bear a 99.7% loss of their accrued debts even with fresh contracts entered with AAX to mitigate its losses of rentals in respect of the unexpired terms of the Lease Agreements, it is my judgment that Airbus' rights under the Scheme are so dissimilar with the Lessors'

that they cannot sensibly consult together with a view to their common interest.

[332] The amounts of the Lessors' accrued debts are not insignificant. The claims in terms of accrued rentals for a few of the Lessors are set out below to provide an idea of their losses:

a. For ILFC, a sum of USD$ 8,388,236.06 (RM 34,932,809.07) as at 28.10.2020;
b. For KDAC, a sum of USD$ 10,939,364.00 (RM 45,608,543.64) as at 28.10.2020;
c. For JBL 1048, a sum of USD$ 4,922,011.57 (RM 20,497,717.18) as at 28.10.2020;
d. For JBL 1066, a sum of USD$ 4,879,465.78 (RM 20,320,535.84) as at 28.10.2020;
e. For JBL 1075, a sum of USD$ 4,884,784.01 (RM 20,342,683.80) as at 28.10.2020;
f. For AWAS, in respect of MSN 1533, a sum of USD$ 9,673,031.03 (RM 39,799,686.17) as at 16.11.2020;
g. For AWAS, in respect of MSN 1549, a sum of USD $ 10,469,696.42 (RM 43,077,566.74) as at 16.11.2020.

[333] In addition, Airbus' current contingent claim of RM 48.71 billion constituting close to 77.5% of the total debts of AAX means that Airbus will have a stronger bargaining position with AAX in the negotiation of the fresh contracts as compare to the Lessors.

[334] Accordingly, it is my judgment that the Lessors ought to be put in a separate class from Airbus for the purposes of the Scheme.

v. Passengers

[335] Learned counsel for MASSB also contended that the Passengers are to be put into a separate class from other unsecured creditors because their rights under the Scheme are different since they would potentially also be receiving travel credits. With respect, the giving of travel credits to the Passengers are discretionary and are not part of the Scheme. In any case, I am not persuaded that the mere fact that the Passengers may potentially be refunded their travel credits will mean that their rights would be so dissimilar to the rights of the other unsecured creditors that they cannot consult together with the view to their common interest.

vi. Related Party Creditors

[336] There was an objection made that related creditors should not be put in the same class as other creditors. However this was not seriously pursued. In any case, for the present moment, there is nothing to suggest that their rights as unsecured creditors are any different from the other creditors in its class to warrant putting them in a different class. There is precedent for this in **Transmile Group Bhd** v. **Malaysian Trustee Bhd & Ors** [2012] MLJU 130.

Conclusion

[337] Accordingly, this Court grants an order in terms of prayers 1 to 16 of Enclosure 90 subject to the following directions:

a. That the Lessors of lease agreements with AAX be treated as unsecured creditors and be placed in Class B creditors;

b. That Airbus be treated as unsecured creditor and be placed in a separate class from the other unsecured creditors in Class B.

[338] The Applicant to pay costs fixed at RM 40,000.00 to the 2nd Intervener, RM 20,000.00 to the 4th Intervener, RM 20,000.00 to the 1st, 3rd, 10th and 11th Interveners and RM 20,000.00 to 5th, 6th, 7th, 8th and 9th Interveners. All costs are subject to payment of the allocator.

Dated: 19 February 2021

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(**ONG CHEE KWAN**)
Judicial Commissioner
High Court of Malaya, Kuala Lumpur,
Commercial Division, NCC2.

COUNSEL:

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   (Messrs. Foong & Partners (Kuala Lumpur))

2. Kwan Will Sen together with Joyce Lim for the 1st, 3rd, 10th and 11th Interveners

   (Messrs. Lim Chee Wee Partnership (Kuala Lumpur))

3. Leong Wai Hong together with Claudia Cheah, Shannon Rajan, Laarnia Rajandran and Chong Hong Kiat for the 2nd Intervener

   (Messrs. Skrine (Kuala Lumpur))

4. Sharon Chong together with Janice Ooi for the 4th Intervener

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5. David Hoh together with Shelina Razaly for the 5th, 6th, 7th, 8th and 9th Interveners

   (Messrs. Abdullah Chan & Co. (Kuala Lumpur))

6. Wong Teck Fung for the 12th Intervener

   (Messrs. Zaid Ibrahim & Co. (Kuala Lumpur))

7. Mark La Brooy together with Yenne Chow for the 13th and 14th Interveners

   (Messrs. Raja, Darryl & Loh (Kuala Lumpur))

8. Vijakumar Varatha Rajoo together with Raiza binti Zakaria and Dahrick Sivam for the 15th Intervener

   (Messrs. Albar & Partners (Kuala Lumpur))

9. Yap Chean Hong watching brief for Japanese Aviation Association

   (Messrs. Azmi & Associates (Kuala Lumpur))

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