Supreme Court

New South Wales

Case Name:	In the matter of Boart Longyear Limited (No 2)
Medium Neutral Citation:	[2017] NSWSC 1105
Hearing Date(s):	4 and 5, 13, 14, 27 July, 9, 14 August 2017
Decision Date:	22 August 2017
Jurisdiction:	Equity - Corporations List
Before:	Black J
Decision:	The Court approves the proposed schemes of arrangement as altered pursuant to s 411 of the Corporations Act 2001 (Cth)
Catchwords:	CORPORATIONS — Arrangements and reconstructions — Schemes of arrangement or compromise — Applications for approval of creditors' schemes of arrangement – where Plaintiffs seek approval of schemes in altered form – whether schemes would be approved by honest and intelligent creditor – whether schemes unfair to shareholders – whether schemes unlawful – whether schemes should be approved with alterations
Legislation Cited:	- Australian Securities and Investments Commission Act 2001 (Cth) - Companies Act 1936 (NSW), s 133 - Companies Act 1958 (Vic), s 92 - Companies Code, s 315(6) - Corporations Act 2001 (Cth), Chs 2E–2F, 6, Pts 2J.1, 5.1, ss 12, 53, 208, 210–229, 233, 259A(c), 411, 553, 563A(2), 606, 611, 625(1) - Corporations Amendment (Sons of Gwalia) Act 2010 (Cth) - Corporations Law, s 15 - Corporations Regulations 2001 (Cth), reg 5.6.23, Sch 8 cl 8303

- Evidence Act 1995 (NSW), s 136
- Joint Stock Companies Arrangement Act 1892 (NSW)
- Securities Act 1933 (US), s 3(a)(10)
- Supreme Court (Corporations) Rules 1999 (NSW), r 2.13
- Uniform Companies Act 1961, s 181

Cases Cited:

- Australasian Meat Industry Employees Union v Meat & Allied Trades Federation of Australia [1991] FCA 672; (1991) 32 FCR 318
- Australian Securities & Investments Commission v Australian Investors Forum Pty Ltd (No 2) [2005] NSWSC 267; (2005) 53 ACSR 305
- Australian Securities Commission v Marlborough Gold Mines Ltd [1993] HCA 15; (1993) 177 CLR 485
- Australian Trade Commission v WA Meat Exports Pty Ltd (1987) 14 ALD 314; 75 ALR 287; 7 AAR 248
- Bacnet Pty Ltd v Lift Capital Partners Pty Ltd (in liq) [2010] FCAFC 36; (2010) 183 FCR 384
- Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd (19950 13 WAR 407; 16 ACSR 501
- Bateman v Newhaven Park Stud Ltd [2004] NSWSC 566; (2004) 207 ALR 406; 49 ACSR 597
- British America Nickel Corporation Ltd v M J O'Brien Ltd [1927] AC 369
- Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd [2010] NSWSC 233; (2010) 238 FLR 384; 77 ACSR 410
- Carruth v Imperial Chemical Industries Ltd [1937] AC 707
- First Pacific Advisors LLC v Boart Longyear Ltd [2017] NSWCA 116
- Fowler v Lindholm [2009] FCAFC 125; (2009) 178 FCR 563
- Goodfellow v Nelson Line (Liverpool) Ltd [1912] 2 Ch 324
- IPT Systems Ltd v MTIC Corporate Pty Ltd [2000] WASC 316; (2000) 158 FLR 349; 36 ACSR 454
- Mercedes Holdings Pty Ltd v Waters (No 2) [2010] FCA 472; (2010) 186 FCR 450; 78 ACSR 118
- Mount Gibson Iron Ltd [2008] ATP 4
- Orrong Strategies Pty Ltd v Village Roadshow Ltd [2007] VSC 1; (2007) 207 FLR 245
- Perpetual Custodians Ltd (as custodian for Tamoran

Pty Ltd as trustee for Crivelli) v IOOF Investment Management Ltd [2013] NSWCA 231; (2013) 304 ALR 436
- Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3) [1989] VR 665
- Primacon Holding GmbH v Credit Agricole [2011] EWHC 3746 (Ch); [2013] BCC 201
- Re Alabama, New Orleans, Texas and Pacific Junction Railway Co [1891] 1 Ch 213
- Re Aldridge Uranium Ltd (No 2) [2010] FCA 1424
- Re Amcom Telecommunications Ltd (No 4) [2015] FCA 720; (2015) 107 ACSR 341
- Re Anglo American Insurance Ltd [2001] 1 BCLC 755
- Re Anglo-Continental Supply Co Ltd [1922] 2 Ch 723
- Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch); [2015] 4 All ER 572
- Re Application of NRMA Ltd (No 1) [2000] NSWSC 82; (2000) 156 FLR 349
- Re Application of NRMA Ltd (No 2) [2000] NSWSC 408; (2000) 156 FLR 412
- Re Aston Resources Ltd [2012] FCA 229
- Re Atlantic Gold NL (No 2) [2014] FCA 869
- Re Atlas Iron Ltd [2016] FCA 366; (2016) 112 ACSR 554
- Re Atlassian Corporation Pty Ltd [2013] FCA 1451
- Re Australian Co-operative Foods Ltd [2008] NSWSC 1221
- Re Bluebrook Ltd [2009] EWHC 2114; [2010] 1 BCLC 338
- Re Boart Longyear Ltd [2017] NSWSC 567
- Re Boart Longyear Ltd [2017] NSWSC 756
- Re British Aviation Insurance Co Ltd [2005] EWHC 1621 (Ch); [2006] 1 BCLC 665
- Re BRL Hardy Ltd [2003] SASC 97; (2003) 45 ACSR 397
- Re BTR Plc [2000] 1 BCLC 740
- Re Central Pacific Minerals NL [2002] FCA 239
- Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust) [2011] NSWSC 1465; (2011) 86 ACSR 584
- Re Chevron (Sydney) Ltd [1963] VR 249
- Re City of Melbourne Bank Ltd (1897) 19 ALT 80
- Re CSR Ltd [2010] FCAFC 34; (2010) 183 FCR 358;

77 ACSR 592
- Re David Jones Ltd (No 2) [2014] FCA 720; (2014) 101 ACSR 381
- Re Dee Valley Group Plc [2017] EWHC 184 (Ch)
- Re Direct Acceptance Corporation Ltd (1987) 5 ACLC 1037
- Re Dominion Insurance Company of Australia Ltd (subject to scheme of arrangement) [2017] NSWSC 730
- Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385
- Re Equitable Life Assurance Society [2002] EWHC 140 (Ch); All ER (D) 109; 2 BCLC 510
- Re Glendale Land Development Ltd (in liq) [1982] 2 NSWLR 563; (1982) 7 ACLR 171; 1 ACLC 562
- Re Hawk Insurance Co Ltd [2001] EWCA Civ 241; 2 BCLC 480
- Re HIH Casualty and General Insurance Ltd [2005] NSWSC 240; (2005) 190 FLR 398; 53 ACSR 12
- Re HIH Casualty and General Insurance Ltd [2006] NSWSC 485; (2006) 57 ACSR 791
- Re Holders Investment Trust Ltd [1971] 2 All ER 289; 1 WLR 583
- Re Independent Practitioner Network Ltd (No 2) [2008] FCA 1593; (2008) 26 ACLC 1249
- Re Investorinfo Ltd [2005] FCA 1848; (2005) 24 ACLC 44
- Re Jax Marine Pty Ltd [1967] 1 NSWR 145
- Re Kalgoorlie Lake View Pty Ltd [2005] FCA 1440; (2005) 56 ACSR 144
- Re Landmark Corporation Ltd [1968] 1 NSWR 759
- Re Linton Park Plc [2005] EWHC 3545 (Ch); [2008] BCC 17
- Re Matine Ltd (1998) 28 ACSR 268
- Re National Bank Ltd [1966] 1 All ER 1006; 1 WLR 819
- Re PCCW Ltd [2009] HKCA 177; 3 HKC 292
- Re Permanent Trustee Co Ltd [2002] NSWSC 1177; (2002) 43 ACSR 601
- Re Professional Investment Holdings Ltd (No 2) [2010] FCA 1336
- Re Seven Network Ltd (No 3) [2010] FCA 400; (2010) 267 ALR 583; 77 ACSR 701

	- Re Stemcor (SEA) Pte Ltd [2014] EWHC 1096 (Ch); 2 BCLC 373 - Re Summit Resources (Aust) Pty Ltd [2012] WASC 125; (2012) 42 WAR 401; 88 ACSR 60 - Re TDG Plc [2008] EWHC 2334 (Ch); [2009] 1 BCLC 445 - Re Telewest Communications Plc (No 1) [2004] EWHC 924 (Ch); [2005] 1 BCLC 752 - Re Telewest Communications Plc (No 2) [2004] EWHC 1466 (Ch); [2005] 1 BCLC 772 - Re V & M Diagnostic Services Pty Ltd (1985) 9 ACLR 663 - Re Wollongong Coal Ltd [2017] NSWSC 201; (2017) 317 FLR 426 - Sovereign Life Assurance Company v Dodd [1892] 2 QB 873 - UDL Argos Engineering and Heavy Industries Co Ltd v Li Oi Lin [2001] HKCFA 19; [2002] 1 HKC 172; [2001] 3 HKLRD 634 - Waters v Mercedes Holdings Pty Ltd [2012] FCAFC 80; (2012) 203 FCR 218; 90 ACSR 45 - Winepros Ltd [2002] ATP 18; (2002) 43 ACSR 566 - Zenyth Therapeutics Ltd v Smith [2006] VSC 436; (2006) 60 ACSR 548
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Category:	Principal judgment
Parties:	Boart Longyear Limited (First Plaintiff) Boart Longyear Management Pty Limited (Second Plaintiff) Boart Longyear Australia Pty Limited (Third Plaintiff) Votraint No. 1609 Pty Limited (Fourth Plaintiff)
Representation:	Counsel: I M Jackman SC/R Higgins/M Izzo/L Rich (Plaintiffs) M Oakes SC (Centerbridge Partners LP) J Gleeson SC/N Bender (First Pacific Advisors LLC) P M Wood (Ares Management LP and Ascribe II

Investments LLC)
R P Austin/N Mirzai (Snowside Pty Limited as trustee for the Snowside Trust and Maurici Nominees Pty Ltd as trustee for AP Maurici & Associates Pty Ltd Superannuation Fund)
D Barnett (Australian Securities & Investments Commission) (amicus curiae)

Solicitors:
Ashurst Australia (Plaintiffs)
Minter Ellison (Centerbridge Partners LP)
Gilbert & Tobin (First Pacific Advisors LLC)
Arnold Bloch Leibler (Ares Management LP and Ascribe II Investments LLC)
Speed & Stracey (Snowside Pty Limited as trustee for the Snowside Trust and Maurici Nominees Pty Ltd as trustee for AP Maurici & Associates Pty Ltd Superannuation Fund)

File Number(s): 2017/122411

JUDGMENT

The nature of the application and outline

1 By Originating Process filed on 24 April 2017, the Plaintiffs, Boart Longyear Ltd ("BLY") and several associated companies, initially sought orders approving two interdependent schemes of arrangement between the Plaintiffs and their secured and unsecured creditors. As will emerge below, the Plaintiffs now seek an order that those schemes be approved in an altered form including significant amendments.

2 This judgment addresses matters of some complexity, given the nature of the schemes, the matters in issue and the proposal for the altered schemes, and it will be helpful if I first outline the manner in which I proceed. I first set out the background to and the parties to this application, the circumstances in which the Court ordered a mediation after several days of a second hearing in respect of the schemes and an altered scheme was then proposed by BLY which has the support of all voting secured creditors (which represented 99.63% of debt under the Secured Creditor Scheme) and all voting unsecured

creditors (which represented 96.19% of debt under the Unsecured Creditor Scheme) other than one creditor whose attitude is not known, but is opposed by two shareholders in BLY. I then turn to the lay affidavit and expert evidence, which was extensive given the nature of the schemes. Next, I review the case law as to the issues to be determined at a second court hearing in respect of a scheme, the scope of the proposed alterations to the original schemes and the applicable principles in respect of such alterations, and conclude that the Court has power to approve the schemes with those alterations under s 411(6) of the *Corporations Act* 2001 (Cth).

3 I then consider the questions of procedural requirements and satisfaction of conditions precedent to the schemes and the wide range of issues raised in opposition to the original and altered schemes. I address the relevance of the majorities achieved at the Secured Creditor Scheme meeting to the exercise of the Court's discretion to approve the schemes, which involves several subissues, and also address issues as to the conduct of the Secured Creditor Scheme meeting, which include a challenge to the adequacy of an expert report contained in the explanatory statements for the schemes. I also deal at that point, for convenience, with criticisms made of another expert report provided to a shareholders' meeting which approved the issue of shares under the schemes under s 611 item 7 of the *Corporations Act*, which approval was a condition precedent to the schemes, and the expert evidence led by the objecting shareholders to seek to establish that BLY has substantial equity value, notwithstanding that it is presently unable to pay interest that is past due on its secured debt and is, I will find, insolvent or near insolvency.

4 I then address issues as to substantive fairness of the original schemes, the expert evidence that is led in respect of the proposed alterations to the schemes and the wide range of matters raised by the two shareholders that oppose approval of the schemes as altered in opposition to those schemes. I finally deal with issues as to collateral benefits and ss 411(11) and 411(17) of the *Corporations Act.*

The background and the parties

5 The background to the application is largely uncontentious and I have drawn on my earlier judgment ([2017] NSWSC 567) ("Earlier Judgment"), by which I ordered that scheme meetings be convened, in describing that background below. The Plaintiffs sell drilling products and provide drilling services and equipment for mining and drilling companies globally, operate in more than 20 countries in respect of drilling services and 40 countries in respect of drilling products, and have more than 4,000 employees globally. There is little doubt that BLY and the Boart Longyear Group ("BLY Group") are in financial difficulty, having incurred substantial operating losses and substantial losses after tax in 2015 and 2016 and owing principal debt in an amount of nearly US$760 million at the commencement of the restructuring process. The BLY Group borrowed US$35 million under a delayed draw term loan on 4 January 2017 and a Second-Out ABL Facility on 2 April 2017, with that funding having been provided by entities associated with Centerbridge Partners LLP ("Centerbridge"), Ares Management LP ("Ares") and Ascribe II Investments LLC ("Ascribe"), which support the schemes. A condition precedent to the schemes contemplates a further borrowing by the BLY Group under a new revolving asset-based lending facility ("New Money ABL") in the amount of US$75 million, less any amount raised pursuant to a share purchase plan, which is to be "backstopped" by Centerbridge, Ares and Ascribe and will be used to replace three existing facilities. That borrowing is to be implemented in a varied form to which I refer below.

6 On 1 April 2017, BLY defaulted on payment of interest due on notes under a 10% Senior Secured Notes Indenture dated 27 September 2013 as amended or amended and restated from time to time ("SSNs"); the cure period for that default has now expired and BLY contends that it is or will be insolvent unless the schemes (as now altered) and a wider restructuring associated with them are implemented, or some other restructuring is implemented. Mr Gleeson, who appears with Mr Bender for First Pacific Advisors LLC ("First Pacific"), which opposed the schemes in their original form but supports the schemes in their altered form, accepted in oral submissions that it was essentially common ground that the BLY Group faced a heavy and unsustainable debt, had a very

tight cash position and was near insolvency. Mr Gleeson also submitted, and it appears to be common ground, that the BLY Group's position at least partly reflects a "cyclical" decline in the resources industry and that the BLY Group is starting to see improvements, consistent with its management's objectives, but subject to its debt problems (T83).

7 On 2 April 2017, BLY and the Second Plaintiff, Boart Longyear Management Pty Ltd ("BLM"), entered into a Restructuring Support Agreement ("RSA") with some, but not all, of their major creditors, namely Ares, Ascribe and two Dutch entities which are affiliates of Centerbridge. On 3 April 2017, BLY made an announcement to Australian Securities Exchange Ltd ("ASX") in respect of the restructuring and the proposed schemes, which referred to their objectives, the matters considered by BLY's independent directors in developing them and the need to reduce the Plaintiffs' debt and interest costs and improve their liquidity, extend the maturity of their debt and adjust interest arrangements on the debt. That announcement also referred to additional financing facilities provided to BLY by Centerbridge, Ares and Ascribe outside the schemes and to other steps involved in the restructuring, also outside the schemes, including the issue of shares to entities associated with Centerbridge that are holders of Term Loan A securities under an agreement dated 22 October 2014 as amended or amended and restated from time to time ("TLAs") and the holders of Term Loan B securities under an agreement also dated 22 October 2014 as amended or amended and restated from time to time ("TLBs") under a Share Subscription Deed between those entities and BLY ("Subscription Deed") in exchange for a reduction of the interest rate under those facilities and the entry into Director Nomination Agreements in favour of Centerbridge, Ares and Ascribe. First Pacific was not party to those additional arrangements and it and other holders of the SSNs (other than Centerbridge, Ares and Ascribe) did not obtain any benefits under them, other than any wider benefit from avoiding the Plaintiffs' insolvency by a successful restructuring.

8 On 4 May 2017, I made orders under s 411(16) of the *Corporations Act* restraining further proceedings against the Plaintiffs (whether or not such proceedings had already been commenced) except by leave of the Court and subject to such terms as it imposes, to facilitate consideration of the schemes,

and those orders were subsequently recognised by the United States Bankruptcy Court.

9 The Plaintiffs subsequently sought orders convening the two scheme meetings. One of those schemes ("Secured Creditor Scheme") is an arrangement between the Plaintiffs and the SSN holders and the holders of the TLAs and TLBs. Those debts exceeded US$450 million as at 1 April 2017, comprising US$204 million outstanding under the SSN debt, an amount in excess of US$113 million outstanding under the TLA debt and an amount in excess of US$137 million outstanding under the TLB debt (Rasetti 21.4.17 [32]).

10 The SSNs within the scope of the Secured Creditor Scheme are relevantly held by entities or funds associated with Centerbridge, which together hold approximately 8.5% of the SSNs; entities or funds associated with Ares which together hold approximately 18.7% of the SSNs; entities or funds associated with Ascribe which together hold approximately 23.5% of the SSNs; entities or funds associated with First Pacific which together hold approximately 29% of the SSNs; entities or funds associated with Corre Partners Management LLC ("Corre") which together hold approximately 5.8% of the SSNs; entities or funds associated with HPS Investment Partners LLC (including Watford Re Ltd) ("HPS") which together hold 7.8% of the SSNs; entities or funds associated with Lonestar Capital Management LLC ("Lonestar") which together hold approximately 2.4% of the SSNs; and entities or funds associated with Varde Partners Inc ("Varde") which together hold approximately 7.3% of the SSNs. Unusually, substantially all of the secured creditors voted at the Secured Creditor Scheme meeting and were represented at this hearing or communicated their views to the Court by letters, to which I will refer below. Each of Corre, HPS, Lonestar and Varde opposed approval of the schemes in their original form but supports the schemes with the alterations now proposed by the Plaintiffs.

11 The Secured Creditor Scheme (in its original form) would bring about several amendments to the relationship between the Plaintiffs on the one hand and the holders of the SSNs and TLAs and TLBs on the other. In the case of the SSNs, they would be reinstated with accrued interest (at a rate of 12% per annum)

paid in kind ("PIK") from 1 January 2017 to the day before the recapitalisation is completed. The Secured Creditor Scheme would extend the maturity of the SSNs and the TLAs and TLBs to a common date, in the case of the SSNs from 1 October 2018 to 31 December 2022 and in the case of the TLAs and TLBs from 4 January 2021 to 31 December 2022. BLY would be allowed an option, with retrospective effect to January 2017, to pay interest in kind under the SSNs at a rate of 12% per annum until December 2018, rather than to pay cash interest at a rate of 10% per annum. There is no corresponding change in respect of the TLAs or TLBs under the Secured Creditor Scheme, under which interest was already payable in kind to Centerbridge. I observed, in the Earlier Judgment, that it seemed to me that there was a potential practical significance to that difference, once the schemes were implemented in their original form, so far as BLY would potentially then have the capacity to pay interest after its solvency was restored by the schemes, but would not be required to do so in cash in respect of the SSN debt until December 2018. The Secured Creditor Scheme also provides for an amendment to the terms of the SSNs and TLAs and TLBs including a waiver of rights arising from any change of control event, so that an SSN holder will have no right to call in its debt when a substantial number of shares are issued to Centerbridge entities under the Subscription Deed in exchange for a reduction in the interest rate payable under the TLAs and TLBs, with the result that Centerbridge, which already likely has practical control of BLY, would obtain legal control of BLY.

12 The other scheme is an arrangement ("Unsecured Creditor Scheme") between the Plaintiffs and the holders of notes under a 7% Senior Unsecured Notes Indenture dated 28 March 2011 as amended or amended and restated from time to time ("SUNs"). Those debts total nearly US$294 million, comprising principal of US$284 million and accrued interest of nearly US$9.5 million as at 1 April 2017 (Rasetti 21.4.17 [32]). The unsecured creditors within the scope of the Unsecured Creditor Scheme include entities associated with Ares which holds approximately 42.9% of the SUNs, Ascribe which holds approximately 45.5% of the SUNs and other entities which hold the balance of the SUNs.

13 The Unsecured Creditor Scheme provides for cancellation of approximately US$196 million owing to holders of SUNs in exchange for the issue of ordinary

equity which will amount to approximately 42% of BLY's ordinary equity after the schemes are implemented, such that entities associated with Ares are issued 18% of the equity in BLY, Ascribe is issued 19% of the equity in BLY and other unsecured creditors, including funds affiliated with Corre and HPS, together receive 4.8% of the equity of BLY. (The equity to be issued to Ares and Ascribe under the Unsecured Creditor Scheme is slightly reduced under the proposed alterations to the schemes noted below.) The Unsecured Creditor Scheme also provides for extension of the maturity date of the SUNs from 1 April 2021 to 31 December 2022 and subordination of the priority of SUN holders to unsecured interest accrued on the TLAs and TLBs, so that Centerbridge will take priority over unsecured debts owing under the SUNs in respect of that unsecured interest. The Unsecured Creditor Scheme also releases the claims of subordinate claimants within the meaning of s 563A(2) of the *Corporations Act*, except to the extent of the net proceeds of any policy of insurance that would respond to such a claim.

14 Other arrangements between the BLY Group and the Centerbridge entities that are partly outside the schemes, but are conditions precedent to it, also confer additional rights on Centerbridge, Ares and Ascribe. The Subscription Deed between BLY and Centerbridge entities, execution of which is a condition precedent to the schemes, provides for BLY to issue shares to Centerbridge or its nominees, as holders of the TLA and TLB debt, so that it will hold 56% of shares in BLY following implementation of the schemes subject to any dilution under the warrants, in exchange for a reduction of the interest rate payable under the TLAs and TLBs. (The equity to be issued to Centerbridge under the Subscription Deed is reduced to 54% in connection with the proposed alterations to the schemes noted below.) Under the Director Nomination Agreements, Centerbridge obtains a once only right to nominate an additional director for election to the board of BLY, in addition to the four directors as to which it already has such a nomination right, and Ares and Ascribe also each obtain a once only right to nominate a director each to BLY's board, and a third director to be nominated by them jointly. These arrangements were disclosed in the explanatory statements for the schemes, and that disclosure was

reinforced by a table which addressed, inter alia, these matters and by an additional paragraph included in the "no" case in the explanatory statements.

15 An application for orders convening the scheme meetings was heard on 4 and 5 May 2017, I delivered the Earlier Judgment on 10 May 2017 and made orders for the relevant scheme meetings to be convened and an appeal from the Earlier Judgment was dismissed by the Court of Appeal on 26 May 2017 ([2017] NSWCA 116). First Pacific brought an application for special leave to appeal from the decision of the Court of Appeal to the High Court of Australia but has agreed to discontinue that application as part of a settlement reached between BLY and the substantial majority of secured and unsecured creditors, in relation to the proposed alterations to the schemes, to which I will refer below.

16 The two scheme meetings were held consecutively in Sydney on 30 May 2017. The result of the vote taken at the Secured Creditor Scheme meeting was declared on the basis that 25 votes, being 56.82% of the number of votes cast, were in favour of the scheme resolution, and 19 votes, being 43.18% of the number of votes cast, were against the scheme resolution; and debt representing $364,232,795.26 or 78.49% of the value of debt owed to secured creditors present and voting was cast in favour of the scheme and debt representing $99,798,658.20 or 21.51% of the value of debts owed to secured creditors present and voting was cast against the scheme resolution (Derwin 10.6.17 [29]). The debt in favour of the scheme included unsecured interest owed to Centerbridge in respect of the TLAs and TLBs, a matter which I will address below.

17 It was common ground that, on the results of the Secured Creditor Scheme meeting declared by the chairperson, the majority of secured creditors present at that meeting, by number and by value, resolved to agree to the Secured Creditor Scheme, with or without alterations or conditions approved by the Court, provided that such alterations or conditions did not change the substance of that scheme including specified steps referred to in the explanatory statement in any material respect. Where the Plaintiffs now seek approval of the Secured Creditor Scheme with alterations, a question arises as

to the interaction between a resolution at a scheme meeting that seeks to limit such alterations or conditions, including by reference to particular steps contained in the explanatory statement, and s 411(6) of the *Corporations Act* which authorises the Court to approve a compromise or arrangement subject to such alterations or conditions as it thinks fit. I will address that question below.

18 At the Unsecured Creditor Scheme meeting, 19 SUN holders comprising 79.17% of unsecured creditors present and voting by number voted in favour of the scheme; five SUN holders comprising 20.83% by number of such holders present and voting voted against that scheme; SUN holders to a value of $261,300,000 comprising 91.83% of SUN holders by value voted in favour of that scheme and SUN holders holding debt of $23,254,400 comprising 8.17% by value of SUN holders present and voting voted against that scheme (Derwin 10.6.17 [51]). It was common ground that, on the results declared by the chairperson, the resolution at the Unsecured Creditor Scheme meeting was passed by the requisite majorities by number and by value.

19 Resolutions to permit the issue of shares to Centerbridge, Ares and Ascribe were passed by significant majorities at BLY's annual general meeting on 13 June 2017 (Ex FR-3, 577–579), including in respect of one resolution where Centerbridge could not vote its shares.

20 As I noted above, the Plaintiffs sought orders that the Secured Creditor Scheme (in its original form) and the Unsecured Creditor Scheme (in its original form) be approved under s 411(4)(b) of the *Corporations Act*. The hearing of that application took place over three days and part of a fourth day, on 4–5 and 13–14 July 2017. I should pause here to acknowledge the substantial efforts of Counsel and their instructing solicitors in assembling evidence and submissions in the preparation and conduct of the first and second scheme hearings and the application to alter the schemes that I will address below. That involved leading a substantial amount of evidence and addressing a range of complex issues within a relatively short time. Inevitably, given the nature of the approval process for schemes of arrangement, a particularly heavy burden fell on the Plaintiffs, their solicitors and their Counsel, who had to lead a large volume of evidence to address the formal and

substantive requirements of complex schemes as well as addressing the more controversial issues raised in this hearing. All parties' efforts and efficiency in addressing those issues should be recognised.

21 The application heard at the second court hearing for approval of the schemes (as well as the application at the first court hearing to convene the scheme meetings in the classes proposed by the Plaintiffs) was opposed by First Pacific which holds approximately 29% of the SSNs. The grounds of that opposition were set out in a Statement of Particulars as to why the Court should refuse to approve the schemes of arrangement, filed on 15 June 2017 by First Pacific. First Pacific no longer opposes the schemes in a form incorporating the alterations proposed by the Plaintiffs.

22 Two shareholders of BLY, Snowside Pty Ltd as trustee for the Snowside Trust and Maurici Nominees Pty Ltd as trustee for the AP Maurici & Associates Pty Ltd Superannuation Fund ("Snowside companies") were also granted leave to be heard in their capacity as contributories of BLY under r 2.13 of the Supreme Court (Corporations) Rules 1999 (NSW) and also opposed the orders approving the schemes. The Snowside companies together hold 26,773,181 shares in BLY, comprising approximately 2.82% of its shares, and are together the third largest shareholding group in BLY, after Centerbridge and another entity (McKenzie 3.7.17 [8]; Ex FR-3, 461). The effect of implementation of the schemes of arrangement would be to reduce their collective shareholding in BLY to approximately 0.1%. The Snowside companies oppose the schemes both in their original form and with the alterations proposed by the Plaintiffs.

23 In June 2017, the Snowside companies commenced separate proceedings against BLY and its directors alleging, inter alia, misleading and deceptive conduct in contravention of the *Corporations Act* and the *Australian Securities and Investments Commission Act* 2001 (Cth) in respect of the distribution of the explanatory statement for a notice of meeting of BLY to approve shares issues to Centerbridge, Ares and Ascribe and involvement of the directors in the alleged breach, breaches of an equitable duty of disclosure owed by the directors of BLY to shareholders including the Snowside companies and oppressive conduct within the scope of Ch 2F of the *Corporations Act*. An

application for interlocutory relief to restrain BLY from bringing resolutions before its annual general meeting to approve that issue of shares was dismissed on 13 June 2017 by Brereton J ([2017] NSWSC 756). As I will note below, the interests of the Snowside companies were also potentially affected by the Unsecured Creditor Scheme, so far as it may have an effect upon those claims.

24 Centerbridge was also heard under r 2.13 of the Supreme Court (Corporations) Rules and supported the application for approval of the schemes, although it made only brief submissions where the relevant issues had been fully exposed in submissions for the Plaintiffs on the one hand and First Pacific and the Snowside companies on the other. Centerbridge has several interests in the schemes, as a holder of SSNs, as the holder of all of the TLAs and TLBs, as a holder of substantial equity in BLY and as party to ancillary arrangements to the schemes. Centerbridge presently holds 48.9% of the shares in BLY, although its holding would be substantially reduced to 3.7% by the Unsecured Creditor Scheme and then increased to 56% (under the original terms of the schemes and associated arrangements) or to 54% (under the proposed alterations to the schemes) as the result of the issue of shares contemplated by the Subscription Deed associated with the schemes. Centerbridge would also be allowed the right to nominate five directors for election to the board of BLY under the Director Nomination Agreements associated with the schemes, increasing from the four directors whom it is presently entitled to nominate under 2015 restructuring arrangements.

25 Ares and Ascribe were also heard under r 2.13 of the Supreme Court (Corporations) Rules and supported the application for approval of the schemes, although they also made only brief submissions where, as I noted above, the relevant issues had been fully exposed in submissions for the Plaintiffs on the one hand and First Pacific and the Snowside companies on the other.

26 The Australian Securities and Investments Commission ("ASIC") also appeared at the second court hearing as amicus curiae and made helpful submissions as

to the applicable legal principles although it did not express a view as to whether the schemes should be approved.

27 After completion of submissions on the fourth day of the second court hearing, on 14 July 2017, I adjourned that hearing to 27 July 2017 to allow the opportunity for satisfaction of an important condition precedent relating to the New Money ABL, which had not then been satisfied. I also then took the somewhat unusual step, at least in a scheme hearing, of ordering a mediation between the parties, in the unusual circumstances that the parties to the Secured Creditor Scheme and the Unsecured Creditor Scheme were highly sophisticated entities and had largely either been represented at the hearing or had advised the parties and the Court of their attitude to the schemes. I took that course because, as I noted in my ex tempore judgment as to that matter delivered on 14 July 2017, interests other than those of the entities before the Court, including employees of the Plaintiffs and the communities in which they operated, both in Australia and internationally, could be adversely affected if the schemes were ultimately not approved and the Plaintiffs were placed in external insolvency administration. I also noted that, if the parties were able to reach agreement as to a potential variation of the schemes, it may be open to the Court to amend the schemes by order made after the creditors' meetings.

28 The Plaintiffs and the parties to the Secured Creditor Scheme and the Unsecured Creditor Scheme reached agreement as to alterations to the schemes following the mediation, as set out in a Settlement Terms Sheet Proposal ("Terms Sheet"), a subsequent Deed of Settlement and Release dated 9 August 2017 ("Settlement Deed") between BLY, several other entities in the BLY Group and entities associated with Centerbridge, Ares, Ascribe and First Pacific (Ex P-3) and amended terms for the Secured Creditor Scheme and the Unsecured Creditor Scheme. By Interlocutory Application dated 9 August 2017, the Plaintiffs now seek orders that Secured Creditor Scheme and the Unsecured Creditor Scheme should be approved with alterations under s 411(6) of the *Corporations Act.* The Secured Creditor Scheme and the Unsecured Creditor Scheme, as altered, are set out in an exhibit to the affidavit of Ms Camilla Clemente, who is a solicitor with the Plaintiffs' solicitors, sworn 5 August 2017 (Ex CC-2), and with successive further variations in an exhibit to

the affidavit of Ms Clemente sworn 9 August 2017 (Ex CC-3) and, in the form tendered on 14 August 2017, as Exhibits P6 and P7. That application is now supported by First Pacific, Centerbridge, Ares and Ascribe and several other SUN and SSN holders but is opposed by the Snowside companies.

Affidavit evidence

29 I now turn to address the affidavit evidence, the legal principles in respect of approval of the schemes, the issues as to the alterations that the Plaintiffs seek to the schemes and then the issues as to approval of the Secured Creditor Scheme and the Unsecured Creditor Scheme in turn. In identifying and addressing these matters, I have had regard to summaries of key issues served by the Plaintiffs (and adopted by Centerbridge, Ares and Ascribe), First Pacific, the Snowside companies and ASIC, which identified the key propositions which they respectively advanced. I will address evidence led and submissions made, primarily by the Plaintiffs, First Pacific and the Snowside companies, in respect of the original form of the schemes, which were not abandoned although First Pacific supports the schemes with the alterations to which I have referred above. These matters were also adopted, in large part, by the Snowside companies. I will also address evidence led and submissions made in respect of the altered schemes below. As I noted above, the Plaintiffs necessarily had to lead a substantial volume of evidence to describe the schemes and their background and to establish the formal requirements for approval of the schemes. The satisfaction of the majority of those requirements was uncontroversial and what remains in issue are substantial disputes as to valuation and the substantive fairness of the schemes in both their original and altered forms that I will address below.

30 The Plaintiffs rely on several affidavits of Mr Fabrizio Rasetti, who is the company secretary of BLY, a director and company secretary of BLM and other entities within the BLY Group and Senior Vice President and General Counsel of BLY. Several of those affidavits were also read in respect of the first court hearing. Mr Rasetti's first affidavit dated 21 April 2017, with an exhibit in three volumes, refers to the structure of the proposed schemes of arrangement, the background to the schemes and correspondence between the legal representatives of First Pacific and BLY in respect of the schemes. Mr Rasetti's

second affidavit dated 4 May 2017, with an exhibit in two volumes, provides further information as to the directors and officers of the scheme companies and shares on issue by BLY and refers to the steps which were taken to verify the explanatory statements for the Unsecured Creditor Scheme and the Secured Creditor Scheme. That affidavit also elaborates on the background to the schemes, the terms of the RSA, the Plaintiffs' financial position and the views reached by KordaMentha in their independent expert's report included in the explanatory statements for the schemes. I will address issues as to that report which received substantial focus at the second court hearing below. That affidavit also refers to the implementation steps which would be required for the schemes.

31 The Plaintiffs also rely on an affidavit of Mr Rasetti dated 21 June 2017, which addresses amounts drawn down by BLY under a Revolving Credit and Security Agreement as at 4 May 2017, amounts outstanding under the TLAs and TLBs as at 4 May 2017 and amounts outstanding under the SSNs and SUNs as at the voting entitlement record date for the schemes. An affidavit dated 28 June 2017 of Mr Rasetti addresses the terms of a Recapitalisation Implementation Agreement between entities within the BLY Group, including BLY, and an entity associated with Centerbridge, dated 23 October 2014; existing legal proceedings against BLY, including the oppression proceedings brought by the Snowside companies against, inter alia, BLY, which were commenced in June 2017; the result of BLY's shareholder meeting held on 13 June 2017, which included resolutions relating to the approval and implementation of the issue of shares to Centerbridge, Ares and Ascribe under the Subscription Deed associated with the schemes; and evidence of satisfaction of several conditions precedent to the schemes.

32 The Plaintiffs relied on a further affidavit of Mr Rasetti dated 3 July 2017 which indicated that, as at that date, the Plaintiffs' negotiations with potential third party providers had not resulted in an offer to provide a New Money ABL in the amount of US$75 million, as contemplated by one of the conditions precedent to the schemes, and that a third party funder with which the Plaintiffs currently intended to enter into the finance agreement was only willing to fund a portion

of the New Money ABL. The Plaintiffs were then negotiating the terms on which the remaining amount would be provided by Centerbridge, Ares and Ascribe.

33 The Plaintiffs relied on a further affidavit of Mr Rasetti dated 26 July 2017 which addressed the satisfaction of several remaining conditions precedent to the schemes. Mr Rasetti's evidence was that he was not aware, at the time he swore his affidavit on 27 July 2017 (Sydney time), of any fact or circumstance which would mean that the Obligors Deeds Poll (as defined in respect of the Secured Creditor Scheme and the Unsecured Creditor Scheme) had been terminated or did not continue to benefit their beneficiaries; that Delaware Trust Company had been appointed as new trustee under the SUNs in place of US Bank National Association, in accordance with cl 7.08 of the SUN Indenture which permitted the replacement of a trustee that resigned, and had executed the Undertaking (as defined) in respect of the Unsecured Creditor Scheme; and that KPMG Financial Advisory Services (Australia) Pty Ltd ("KPMG") had confirmed that the withdrawal of a resolution in respect of an election of Centerbridge's nominee as a director of BLY, at the annual general meeting of BLY, did not affect its expert report. I will address Mr Rasetti's evidence as to the satisfaction of other conditions precedent below. Mr Rasetti also gave evidence of execution of finance facilities comprising the New Money ABL, by way of an Amended and Restated Revolving Credit and Security Facility in respect of US$50 million ("PNC ABL") and a Term Loan Securities Agreement in respect of specified amounts ("Backstop ABL") to which I refer below.

34 The Plaintiffs also relied on the affidavit of Mr Paul Denaro who is an experienced United States legal practitioner. By his affidavit dated 2 May 2017, read at both the first scheme hearing and this hearing, Mr Denaro sets out the structure for the issue of the SSNs and the SUNs and the manner in which they are held by a nominee for the clearing system, the Depository Trust Company (US) ("DTC") although beneficial owners of the notes are treated as persons entitled to vote in respect of a reorganisation plan under the United States Bankruptcy Code. I adopted the same approach to voting entitlements in the Earlier Judgment.

35 The Plaintiffs also relied on several affidavits in respect of the convening and conduct of the scheme meetings. By his first affidavit dated 2 May 2017, Mr James Daloia, who is director of solicitation and disbursements at Prime Clerk LLC, a United States information agent, set out the way in which scheme creditors hold the relevant debt, the manner in which records are maintained by the DTC and registered participants under United States practice, and the process which would be adopted for distribution of documents and information to scheme creditors under United States practice, so that the ultimate beneficial owners of the secured and unsecured notes would receive the documents relating to the schemes and would be afforded the opportunity to vote at scheme meetings. Mr Daloia also set out the role which would be played by Prime Clerk in tabulating votes submitted in respect of the scheme meetings. A second affidavit of Mr Daloia dated 9 June 2017, read at the second court hearing, dealt with service of materials relating to the scheme meetings and publication of information concerning those meetings, the collation of voting forms in respect of the scheme meetings and the calculation of interest which was admitted to vote at the scheme meetings. A third affidavit of Mr Daloia dated 21 June 2017 amended the information previously provided as to the result of voting to include additional information and addressed the calculation of interest in respect of the TLAs and TLBs and the total amounts voted at the scheme meetings.

36 By his affidavit dated 4 May 2017, Mr Marcus Derwin, who is a senior managing director of FTI Consulting and has substantial experience in corporate financing and restructuring, consented to act as chairperson of the proposed meetings of creditors in respect of the Secured Creditor Scheme and the Unsecured Creditor Scheme. By his affidavit dated 2 May 2017, Mr Michael McCreadie, who is also an experienced restructuring practitioner, consented to his proposed appointment as alternate chairperson of the two scheme meetings. The Plaintiffs also relied, at the second court hearing, on an affidavit dated 10 June 2017 of Mr Derwin, who had acted as the chairperson of the scheme meetings, who addressed matters relating to the convening of, the tabulation and adjudication of proof of debt forms at, questions raised at, voting

at and the results of the poll at, each of the Secured Creditor Scheme meeting and the Unsecured Creditor Scheme meeting.

37 The Plaintiffs also relied on several affidavits of partners and employees of their legal representatives in respect of formal aspects of the schemes, including the satisfaction of conditions precedent. By her first affidavit dated 3 May 2017, Ms Clemente refers to consultation with ASIC and correspondence with First Pacific's legal advisers in respect of the schemes. By her second affidavit dated 4 May 2017, Ms Clemente refers to further correspondence with ASIC and to several minor amendments made to the draft explanatory statements to the schemes. By her affidavit also dated 4 May 2017, Ms Sarah Dulhunty, a partner with the Plaintiffs' solicitors, exhibited, subject to a non-publication order which was not continued at this hearing, an independent expert's report prepared by KPMG in respect of whether the proposed recapitalisation, including the schemes, was fair and reasonable for the shareholders of BLY. By an affidavit dated 5 May 2017, Mr Dennis Dunne, who is a partner in the firm that is United States counsel for the Plaintiffs, referred to a number of amendments to be made to the Fourth Supplemental Indenture, which is relevant to the Unsecured Creditor Scheme, and the First Supplemental Indenture which is relevant to the Secured Creditor Scheme.

38 An affidavit dated 20 June 2017 of Ms Bianca Newton dealt with service of the explanatory statements for the schemes on the legal representatives of First Pacific and ASIC. An affidavit dated 21 June 2017 of Mr Gerard Kane, a solicitor with the Plaintiffs' solicitors, dealt with amendments made to the explanatory statements that formed part of the Secured Creditor Scheme meeting materials and the Unsecured Creditor Scheme meeting materials, made following the first court hearing. An affidavit dated 30 June 2017 of Mr Eftim Ancev, a solicitor employed by the Plaintiffs' solicitors, addressed publication of notices in respect of this hearing. An affidavit dated 3 July 2017 of Mr James Marshall, a partner with the Plaintiffs' solicitors, related to the service of notices of appearance by the Snowside companies and ASIC and indicated that Mr Marshall was not aware of any other notices of appearance served in connection with the proceedings, and also addressed a notice to produce served by First Pacific and the Plaintiffs' response to that notice to

produce. Mr Marshall's further affidavit dated 4 July 2017 exhibited undertakings executed by the agent in respect of the Agent Deed Poll relating to the Secured Creditor Scheme, the trustee and the scheme companies in respect of the Trustee Deed Poll for the Secured Creditor Scheme, and the trustee and the scheme companies in respect of the Trustee Deed Poll for the Unsecured Creditor Scheme. An issue later arose by reason of the resignation of and need to replace that trustee.

39 An affidavit dated 13 July 2017 of Ms Lucienne Cassidy, a solicitor with the Plaintiffs' solicitors, provided an update as to the position in respect of the New Money ABL and backstop facility contemplated by the RSA, enclosing a preliminary memorandum of terms and conditions in respect of the New Money ABL and a draft Backstop Credit Agreement between the scheme companies and Centerbridge, Ares and Ascribe. Ms Cassidy's further affidavit dated 14 July 2017 addressed an aspect of satisfaction of a remaining condition precedent of the schemes, namely clearance of the transaction by the Federal Anti-Monopoly Service of Russia.

40 Turning now to the proposed alterations to the schemes, the Plaintiffs relied (as I noted above) on Ms Clemente's affidavit dated 5 August 2017 which exhibited (Ex CC-2) an amended Secured Creditor Scheme, including two schedules to that scheme that were proposed to be amended, being an amended Scheme Administrator's Steps Register and an amended First Supplemental Indenture. That affidavit also exhibited an amended Unsecured Creditor Scheme and two amended schedules, an amended Scheme Administrator's Steps Register and an amended Fourth Supplemental Indenture. Ms Clemente's affidavit also referred to, and exhibited, proposed amendments to the Subscription Deed and the Backstop ABL, which are part of the commercial context for the scheme, and a waiver letter signed by PNC Bank in respect of cl 8.2(q) of the PNC ABL addressing a matter which had been raised at the hearing on 27 July 2017.

41 By a further affidavit dated 9 August 2017, Ms Clemente exhibited a bundle of documents (Ex CC-3) containing further amendments to the Secured Creditor Scheme and the Unsecured Creditor Scheme. The amendments to the Secured Creditor Scheme (MFI 2) largely dealt with the possibility of a potential

redomiciliation of BLY, which had been disclosed in the explanatory statements for the schemes. The amendments to the Unsecured Creditor Scheme (MFI 1) were of a similar character. By a further affidavit dated 14 August 2017, Ms Clemente referred to proposed further amendments to the Secured Creditor Scheme dealing with the implementation date for the scheme and the identification of participants in the scheme, to the extent that they had not voted at the Secured Creditor Scheme meeting, and the amount of their debts, and corresponding amendments to the Unsecured Creditor Scheme, and an amendment to the Fourth Supplemental Indenture to make a change which had previously been identified in the First Supplemental Indenture. The Snowside companies did not seek to be heard in respect of those further amendments. The Plaintiffs now seek approval of the Unsecured Creditor Scheme incorporating those amendments (Ex P6) and the Secured Creditor Scheme incorporating those amendments (Ex P7).

42 First Pacific relied, by way of lay evidence at the first court hearing and this hearing, on an affidavit of Mr Abhijeet Patwardhan dated 2 May 2017. Mr Patwardhan referred to First Pacific's communications with the restructuring advisers to the Plaintiffs and to its unsuccessful attempts to be included in negotiations with other major creditors when a restructuring proposal for the BLY Group was formulated, to its receipt of a balance sheet restructuring proposal from BLY on 13 February 2017 and to subsequent counterproposals put by First Pacific to Centerbridge and to BLY's financial advisers, Houlihan Lokey, but not accepted by BLY. Mr Patwardhan also indicated that, if the Court convened the meetings sought by the Plaintiffs in connection with the proposed schemes, First Pacific did not intend to vote in favour of the Secured Creditor Scheme. In the event, First Pacific voted against that scheme at the relevant scheme meeting, opposed the approval of the schemes in their original form and now supports approval of the schemes as altered.

43 First Pacific also relied on an affidavit dated 2 May 2017 of Mr David Clee, a partner in the firm of solicitors representing it in Australia, which exhibited, subject to a confidentiality order, a presentation prepared by BLY's financial advisers dated 20 January 2017 which referred to base case, upside and downside forecast financial results for the BLY Group to 2021. That evidence is

directed, broadly, to the question whether equity in BLY may have value, at least by 2021, to which I will refer below. First Pacific also relied on the affidavit of its solicitor, Ms Colleen Platford, dated 26 June 2017 and the exhibits to that affidavit which included, inter alia, copies of relevant transaction documents and the RSA. Ms Platford also referred to correspondence with the legal representatives for the Plaintiffs in respect of the conduct of the scheme meetings. First Pacific also relied, at the second court hearing, on a tender bundle (Ex FPTB) which included documents by way of background to the schemes, including the Third Supplemental Indenture dated 2 April 2017, the slides presented by BLY at its 2017 annual general meeting presentation and ASX announcements made by BLY on 26 June 2017 and 3 July 2017.

44 First Pacific also tendered letters from several other creditors, Lonestar, Corre and HPS, indicating their opposition to the schemes (in their original form) which were admitted with a limiting order under s 136 of the *Evidence Act* 1995 (NSW) that they established the attitude of those entities, and not as proof of the asserted facts. It will be convenient to refer to those creditors' views before turning to the expert evidence led at the hearing. By its letter dated 21 June 2017, Lonestar advised the Court that it, as a holder of SSNs, had voted against the Secured Creditor Scheme (in its original form). It expressed its disapproval of that scheme (in that form) in strong terms, primarily by reference to the proposition that the treatment of secured creditors other than Centerbridge was different, as between members of the same voting class, by reason of the allocation of equity control of BLY to Centerbridge. Lonestar indicated its view that the allocation of equity in BLY was significant because of the potential enterprise value of BLY on an improvement in the mining cycle and that "the option to capture that value" represented by that equity had material value. Lonestar expressed the conclusion that the schemes (in their original form) were oppressive to and unfairly prejudicial to minority senior secured creditors and should not be approved by the Court.

45 Corre, by its letter dated 21 June 2017, identified a divergence of economic interest between Centerbridge and other secured creditors by reason of Centerbridge's holding of secured debt and equity. Corre also expressed the view that the schemes (in their original form) allowed Centerbridge "extremely

favourable and unfair" treatment by contrast with other secured creditors. Corre pointed to the sacrifice made by SSN holders of extending the maturity of the SSNs and to its belief that equity would have substantial value, implicitly on the basis that BLY's performance improved. Corre also expressed the view that the waiver of the put option on change of control by holders of SSNs was a valuable concession for which they receive no compensation under the schemes (in their original form). By letter dated 22 June 2017, HPS set out its reasons for voting against the Secured Creditor Scheme (in its original form), which emphasised that it, as a secured creditor, was not given an opportunity to receive equity in return for interest concessions contemplated by the Secured Creditor Scheme. It also expressed the view that the valuation put on BLY's equity did not have regard to its potential future value, and submitted that the value (or potential value) of equity was demonstrated by Centerbridge's, Ares' and Ascribe's wish to obtain it. It also referred to the significance of a waiver of the change of control put option under the SSNs and that it received no benefit for that waiver.

46 As I noted above, Lonestar, Corre, Varde and HPS now support the schemes incorporating the alterations now proposed by the Plaintiffs, as confirmed by letters dated 3 August 2017 (Ex P4).

47 The Snowside companies relied on an affidavit of their solicitor, Mr Grae McKenzie, dated 3 July 2017 which indicated that the Snowside Trust owned 18,960,439 ordinary shares in BLY, comprising approximately 2% of its issued ordinary shares, and the A P Maurici & Associates Pty Ltd Superannuation Fund owned 7,812,742 ordinary shares in BLY, comprising approximately 0.82% of BLY's issued ordinary shares, prior to implementation of the schemes.

Expert evidence

48 The parties led substantial affidavit evidence in respect of the independent experts' reports contained in the explanatory statements for the schemes (in their original form) and for a shareholder meeting to approve the issue of equity to Centerbridge, Ares and Ascribe. A controversy arose at the second court hearing as to the views expressed in those reports, which I will address below.

A question also arose as to whether the expert evidence, so far as it addressed questions of the enterprise value of the BLY group and its solvency, was potentially affected by the alterations of the terms of the SSNs proposed by the Plaintiffs and that question was addressed by further expert evidence to which I refer below.

49 By his affidavit dated 3 May 2017, Mr Scott Kershaw of KordaMentha confirms that he holds the opinions set out in KordaMentha's independent expert's report which was included in the explanatory statements for the schemes in their original form. I will refer to the substance of that report below. By her affidavit dated 3 May 2017, Ms Jenny Nettleton of KordaMentha confirms that she was also involved in the preparation of KordaMentha's independent expert's report and also confirms her consent to act as scheme administrator.

50 First Pacific relied on Mr Wayne Lonergan's affidavit dated 26 July 2017, which exhibited his report (Ex WL-1) in respect of the schemes, which addressed the approach of the expert reports prepared by KordaMentha in respect of the schemes in their original form and by KPMG in respect of shareholders' resolutions to approve the issue of equity to Centerbridge, Ares and Ascribe, a presentation dated January 2017 made by BLY's financial advisers to First Pacific and the value of BLY's equity following implementation of the proposed recapitalisation of BLY.

51 The Snowside companies relied on the affidavits of Mr Jeffrey Hall affirmed 28 June 2017, 29 June 2017 and 3 July 2017. Mr Hall's first affidavit annexed his expert report dated 2 June 2017 and his supplementary expert report dated 28 June 2017, which set out the reasons he considered the KPMG valuation of BLY was too low. Dr Austin, who appears with Mr Mirzai for the Snowside companies, placed limited weight on Mr Hall's first report dated 2 June 2017 in oral submissions, and treated that report as background to the other reports of Mr Hall on which he placed primary reliance. Mr Hall's second affidavit dated 29 June 2017 and his report dated 29 June 2017 set out the reasons he considered the KordaMentha valuation of BLY was also too low. Mr Hall's third affidavit dated 3 July 2017 and his third supplementary expert report dated 30 June 2017 elaborated his reasons as to the cyclical nature of the BLY

business, the comparability of several companies in order to determine an earnings multiple and the limitations as to KordaMentha's work, beyond those set out in his report dated 29 June 2017.

52 The Snowside companies also relied on the affidavit of Mr Antony Samuel affirmed 3 July 2017 and an associated report, which addressed the extent of inquires as to the BLY Group's solvency made by KordaMentha; and the affidavit of Mr Brian Silvia sworn 3 July 2017, annexing his report of the same date, which addressed the question of the adequacy of the investigation of the BLY Group's solvency in the KordaMentha report. I will address these matters below.

53 Turning now to expert evidence led by the Plaintiffs in reply, by his further affidavit dated 30 June 2017, Mr Kershaw responded to Mr Lonergan's report dated 26 June 2017, addressed the manner in which the analysis of KordaMentha would be affected if interest on the TLA in an amount of US$18.5 million formed part of the secured claim amount against the relevant obligors, and also addressed a question raised by a legal representative of First Pacific at a scheme meeting in respect of the valuation of intellectual property of BLY. The Plaintiffs also relied on an affidavit of Mr Ian Jedlin, a partner of KPMG, dated 29 June 2017 which confirmed the views held by Mr Jedlin and expressed in an independent expert's report dated 29 June 2017 (Ex IJ-1) which also responded to Mr Lonergan's report. Mr Jedlin also responded to Mr Hall's first report by his letter dated 8 June 2017 (Ex IJ-3) and to Mr Hall's supplementary report by his letter dated 30 June 2017 (Ex IJ-2).

54 The parties also led expert evidence as to the effect of the proposed alterations to the schemes which I will address below.

The issues to be determined at a second court hearing in respect of a scheme

55 At a second court hearing, the court must ordinarily be satisfied that the relevant procedural requirements have been satisfied, including that the resolutions agreeing to the schemes have been passed by the required majority by number and value of properly informed creditors at meetings that were duly convened and held and that the other procedural requirements of Part 5.1 of the *Corporations Act*, including in respect of class composition,

have been satisfied. The parties proceeded on the basis that there was no further issue at the second court hearing as to the constitution of the class in the Secured Creditor Scheme, where that matter was determined by the Earlier Judgment and the appeal from it, subject to First Pacific's application for special leave to appeal to the High Court of Australia.

56 Both the Plaintiffs and First Pacific referred to Barrett J's helpful summary of the applicable principles in *Re Permanent Trustee Co Ltd* [2002] NSWSC 1177; (2002) 43 ACSR 601 at [8]–[10], where his Honour observed that the Court's role in an application to approve a scheme at a second court hearing is to assess the scheme as a whole, having regard to the totality of the give and take that is the compromise or arrangement between the Plaintiffs and their creditors, and determine whether it is satisfied of the reasonableness of the schemes. I recognise that, as Barrett J there noted (at [8]):

> "There is no exhaustive statement of the matters as to which the court must be satisfied before granting approval. Indeed, courts have been reluctant to attempt any comprehensive or compendious statement of relevant criteria."

Nonetheless, the Court will exercise its discretion whether to approve the scheme in accordance with well-established principles: *Re Seven Network Ltd (No 3)* [2010] FCA 400; (2010) 267 ALR 583; 77 ACSR 701.

57 I must have regard, in determining whether to approve the schemes, to the fact that a scheme of arrangement may have a compulsive effect upon minority shareholders and creditors. In *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 at 238–239, Lindley LJ observed that, in sanctioning a scheme, the Court must consider whether "the majority has been acting bona fide" and that:

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

58 Bowen LJ there emphasised (at 243) that the object of a scheme of arrangement is "not confiscation" and not "that one person should be a victim, and that the rest of the body should feast upon his rights". Fry LJ also observed (at 247) that the Court is

> "bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it".

59 The Plaintiffs refer to *Re BRL Hardy Ltd* [2003] SASC 97; (2003) 45 ACSR 397 at [21] as an example of the application of the test derived from the observation of Fry LJ in *Re Alabama*, *New Orleans, Texas and Pacific Junction Railway Co* above. Dr Austin accepts that that decision applied that test although he also points out that that decision involved an uncontested members' scheme and it is, in that sense, not closely comparable with the contested creditors' scheme at issue in this application. However, that decision is one of many which have treated Fry LJ's observations as applicable to the question whether a scheme should be approved, including the decisions in *Re Application of NRMA Ltd (No 2)* [2000] NSWSC 408; (2000) 156 FLR 412; *Fowler v Lindholm* [2009] FCAFC 125; (2009) 178 FCR 563 at [79]; *Re Permanent Trustee Co Ltd* above at [9] and *Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust)* [2011] NSWSC 1465; (2011) 86 ACSR 584 at [37].

60 In *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 583, to which I referred in the Earlier Judgment at [32], Bowen LJ also observed that the statutory mechanism in respect of schemes:

> "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 interests of the minority."

61 As the Plaintiffs point out, the Court will recognise that properly informed creditors are generally the best judges of their own commercial interests and will give substantial weight to their views expressed at a scheme meeting, although the Court must nonetheless also be satisfied that the proposed arrangement is fair and reasonable and that creditors have voted in good faith and for proper purposes: *Re Central Pacific Minerals NL* [2002] FCA 239; *Re*

Seven Network Ltd (No 3) above at [35]–[36]; *Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust)* above at [35]–[37]. The Court will also have regard to the adequacy of disclosure made to securityholders and whether the proposed arrangement is contrary to public policy: *Re Seven Network Ltd (No 3)* above at [38]–[40]; *Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust)* above at [38]–[44].

62 The Plaintiffs rightly accept that, although the Court will have regard to the wishes of the majority of creditors, it must nonetheless be satisfied as to the fairness of the scheme proposal, although they also submit that proof that the statutory majority of creditors has agreed to the scheme is prima facie evidence of fairness and that, beyond the test of fairness that involves assessing whether intelligent and honest creditors, acting in respect of their interests as creditors, might approve of the scheme, the Court will not substitute its own commercial judgement for that of creditors. The Plaintiffs also submit, and I accept, that the Court will not decline to approve a scheme merely because one or more creditors have reasonable objections to that scheme and that the Court will be cautious in upholding an objection from a creditor on the basis that the consideration under the scheme was unfair: *Re Linton Park Plc* [2005] EWHC 3545 (Ch); [2008] BCC 17 at [20]–[21]; *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch); [2006] 1 BCLC 665 at 684–685; *Re Stemcor (SEA) Pte Ltd* [2014] EWHC 1096 (Ch); 2 BCLC 373 at [29]–[37].

63 It is also necessary to have regard to the authorities that address the position where some or a majority of the persons who approve a scheme have interests that differ from other participants in the scheme. That case law should be understood in the context of the principles concerning the duties of creditors voting at a class meeting and the potential discounting of votes of creditors with special interests at a class meeting. In *British America Nickel Corporation Ltd v M J O'Brien Ltd* [1927] AC 369, the Privy Council observed that, in the context of a power under a trust deed, a class member was generally entitled to consider his own interests in exercising his vote, but, where a vote was exercised as a member of a class, it was "bound to exercise it with the interests

of the class itself kept in view as dominant" (at 378) and pointed to two principles which co-exist, namely that:

> "[U]sually a holder of shares or debentures may vote as his interest directs, [but] he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly."

64 The Plaintiffs acknowledge that the Court can, in a proper case, take into account the extraneous interest of creditors or members in the outcome of a scheme in determining whether to approve the scheme and will assess whether a scheme meeting fairly represented the relevant class; that the Court must give particular care to the consideration of the fairness of a scheme that confers benefits on some members of a class; and that the Court will be more cautious in accepting that creditors are better judges of their commercial interests where a significant number of them have extraneous interests. The Plaintiffs also point to relevant factors identified in the authorities, including whether voting rights have been exercised in good faith; whether votes have been cast for the purpose of benefiting or promoting the interest of the class as a whole and not merely the interests of individual creditors; and whether the majority has unfairly coerced the minority in such a way as to promote special interests that are adverse to the interests of, or not shared by, the class as a whole: *Re Aldridge Uranium Ltd (No 2)* [2010] FCA 1424 at [5]; *Primacon Holding GmbH v Credit Agricole* [2011] EWHC 3746 (Ch); [2013] BCC 201 at [49].

65 These propositions emerge from a substantial body of case law. In *Re English Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at 409, in a passage noted in G B Parker and M Buckley, *Buckley on the Companies Acts* (14th ed, 1981, vol 1, pp 473–474) and approved in several later English cases to which I refer below, Lindley LJ observed that:

> "[T]he Court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive,

> because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.
>
> While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to show that there has been some material oversight or miscarriage."

66 In *Goodfellow v Nelson Line (Liverpool) Ltd* [1912] 2 Ch 324 at 333–334, Parker J observed that, where there are diverse interests between participants in a scheme and those diverse interests are specially provided for, then "the Court ought to consider carefully the fairness of any scheme by which a majority … seeks to bind a minority".

67 In *Carruth v Imperial Chemical Industries Ltd* [1937] AC 707, in a decision of the House of Lords relating to a reduction of capital, Lord Russell of Killowen observed that the Court should decide the question of fairness or unfairness of the scheme on the evidence before it where the large number of votes in favour of a scheme, at a meeting of deferred shareholders, was exercised by persons who also held ordinary shares. Lord Maugham similarly observed that, while it is generally the case that shareholders acting honestly were usually better judges of their commercial advantage than the Court, the vote of the majority is not a valuable guide in considering whether a scheme is fair where it is proved that the majority of a class may have voted in the way they did because of their interests as shareholders in another class.

68 In *Re Chevron (Sydney) Ltd* [1963] VR 249 at 255, in an observation approved by Street J in *Re Landmark Corporation Ltd* [1968] 1 NSWR 759 at 766, Adam J observed that:

> "The true position appears to be that where the members of a class have divergent interests because some have and others have not interests in a company other than as members of the class the Court may treat the result of the voting at the meeting of the class as not necessarily representing the views of the class as such, and thus should apply with more reserve in such a case the proposition that the members of the class are better judges of what is to their commercial advantage than the Court can be. In so far as members of a class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the views of the class *as such* although they are counted for the purposes of determining

> whether the statutory majority has been obtained at the meeting of the class." [emphasis in original]

His Honour also there held that, where it did not appear from the evidence whether members of the class had voted in that case for the scheme for other reasons, it was necessary that he be satisfied as to the benefits that might reasonably be considered to accrue to members of the class from the scheme "without paying too much regard to the majority obtained at the meeting".

69 A passage in *Buckley on the Companies Acts* (14th ed, 1981, vol 1, pp 473–474), approved in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012; 1 WLR 819 at 829 and in *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch); All ER (D) 109; 2 BCLC 510 at 520, noted that, in exercising its power of sanction of a scheme:

> "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."

70 In *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 at 148, Street J observed that, when an application for approval of a scheme comes before the Court:

> "…there is ample room within the Court's statutory discretion to decide the petition in accordance with the requirements of justice and equity as those requirements appear to affect the rights of the class and its members. Quite frequently it is necessary to discount, even to the point of discarding from consideration, the vote of a creditor who, although a member of a class, may have such a personal or special interest as to render his view a self-centred view rather than a class-promoting view. … This Court is accustomed on the hearing of petitions under s 181 (that is to say at the second stage of the proceedings) to recognizing and taking appropriately into account any special motives or factors affecting particular creditors."

71 In *Re Holders Investment Trust Ltd* [1971] 2 All ER 289; 1 WLR 583 at 586, Megarry J emphasised the importance of an examination of the evidence to determine:

> "whether the majority was honestly endeavouring to decide and act for the benefit of the class as a whole, rather than with a view to the interests of some of the class and against that of others".

His Honour held there (at 590) that a resolution for the modification of class rights was not effective, where the majority shareholders had voted with regard to their own interests as equityholders without asking themselves what was

best for majority shareholders as a class, and the company had not then established the fairness of the transaction, since the advantages of an exchange for preference shares into unsecured stock did not compensate for its disadvantages.

72 In *Re Direct Acceptance Corporation Ltd* (1987) 5 ACLC 1037, McLelland J declined to approve a scheme on its merits, where a significant number of shareholders had voted against the scheme, and his Honour found that the scheme was capable of having a substantial deleterious effect on their investments in the company. His Honour reached that result, notwithstanding he recognised the well-established principle that a majority of members are generally better judges of their commercial advantage than the Court.

73 In *Re BTR Plc* [2000] 1 BCLC 740 at 747, Chadwick LJ observed, in a passage approved by Lewison J in *Re British Aviation Insurance Co Ltd* above at 682, that:

> "…the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court".

74 The authorities also indicate that the role of the Court includes to be satisfied as to whether the statutory majority reflects a true and fair representation of the class summoned to the meeting and as to the objective reasonableness of the compromise: *Re Application of NRMA Ltd (No 1)* [2000] NSWSC 82; (2000) 156 FLR 349 at [41]; *Re Application of NRMA Ltd (No 2)* above at [22].

75 Mr Gleeson also refers to observations of Lord Millett in *UDL Argos Engineering and Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCFA 19; [2002] 1 HKC 172 at 182–183; [2001] 3 HKLRD 634 at 645 where his Lordship approved the observations of Street J in *Re Jax Marine Pty Ltd* which I have quoted above. In a passage in that decision that was applied by Lewison J in *Re British Aviation Insurance Co Ltd* above and by Barrett J in *Re HIH Casualty and General Insurance Ltd* [2006] NSWSC 485; (2006) 57 ACSR 791 at [69], and which was also quoted with approval in the Earlier Judgment (at

[34]) and in the Court of Appeal's judgment (at [79]), his Lordship also observed (at 185) that:

> "The Court will decline to sanction a scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question".

76 In *Re Telewest Communications Plc (No 2)* [2004] EWHC 1466 (Ch); [2005] 1 BCLC 772, David Richards J had to consider an application for approval of two interrelated schemes of arrangement providing for the cancellation of unsecured bonds issued by the scheme companies in exchange for new shares denominated in dollars in a new holding company. Several sterling bondholders opposed the application for approval of the schemes, on the basis that the exchange rate adopted was adverse to them. David Richards J approved those schemes, having regard, inter alia, to the sophistication of the participants in them and the fact that the scheme was supported by a number of substantial holders of bonds which were in a similar position to the bondholders that opposed the schemes. As will emerge below, the participants in the schemes at issue in this case are similarly sophisticated, but secured creditors other than Centerbridge, Ares and Ascribe do not support the Secured Creditor Scheme. David Richards J also held there was no inherent unfairness in the schemes such as to require the Court to refuse its sanction, where a formula directed to limit the risks of volatility of currency markets was not inherently unfair.

77 David Richards J there referred to the passage in *Buckley on the Companies Act*, quoted in *Re National Bank Ltd* above, which he noted (at [20]) had been approved and applied on many occasions, and noted that that test required that the scheme be such that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve", although it need not be the only fair scheme or the best scheme, and that "in commercial matters members or creditors are much better judges of their own interests other than the courts", but with the qualifications there set out (at [21]–[22]). David Richards J also there gave weight to the fact that the

choice of the average exchange rate had there been made by a bondholders' committee, followed detailed negotiations involving the company, the bondholders committee and others, and pointed to the evidence that established the reasons for the adoption of the average exchange rate. I will refer below to a distinguishing feature of this application, namely the absence of any clear evidentiary justification for the number of shares to be issued to Centerbridge, Ares and Ascribe.

78 In *Re British Aviation Insurance Co Ltd* above at 696, Lewison J observed that:

> "… the cases emphasise that the court is not required simply to endorse the majority vote; if it considers that the meeting is unrepresentative, or that those voting at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective creditor. For as long as the court retains this power (and some might say duty), the votes of the majority are not conclusive."

79 In *Re PCCW Ltd* [2009] HKCA 177; HKC 292, Lam J at (at [130]ff) distinguished the position in respect of opposition to the scheme on the basis of unfairness, where those who contend that the interests of the minority are being unfairly overridden, and must prove that proposition, and the question of the weight to which a Court can give the decision of the majority, and referred to *Carruth v Imperial Chemical Industries Ltd* above for the proposition that the vote of the majority will be of less value as a guide to the Court when that majority "may have voted" in the way they did because of other commercial interests.

80 The Plaintiffs also refer to *Bacnet Pty Ltd v Lift Capital Partners Pty Ltd (in liq)* [2010] FCAFC 36; (2010) 183 FCR 384 at [151], where Keane CJ and Jacobson J observed that a scheme must:

> "meet the test of fairness to the body of creditors as a whole; the test is not fairness to a particular creditor in the peculiar circumstances of its case."

In its submissions as amicus curiae, ASIC points out, and I accept, that that observation should be understood as directed to a scheme which generally treats creditors equally, but affects particular creditors who have particular factual circumstances differently, and not as indicating that the Court would not have regard to inequalities of treatment of creditors inter se.

81 The view expressed by Street J in *Re Jax Marine Pty Ltd* above was approved by McKerracher J in *Re Amcom Telecommunications Ltd (No 4)* [2015] FCA 720; (2015) 107 ACSR 341 at [69]. His Honour there held that votes of shareholders in both the acquiring company and the company to be acquired should not be disregarded, where the receipt of a dividend from the acquired company was not sufficient that "they had such a personal or special interest as to render their view a self-centred, rather than a class-promoting, view". It was implicit in his Honour's approach that, had he not reached that conclusion as a matter of fact, then the votes of those shareholders might have been discounted or disregarded.

82 I also have regard to the observations of Sir Geoffrey Vos in *Re Dee Valley Group Plc* [2017] EWHC 184 (Ch), when considering the question as to the constitution of classes, which referred to *Re National Bank Ltd* above and *Re TDG Plc* [2008] EWHC 2334 (Ch); [2009] 1 BCLC 445 and identified the issues arising in the Court's exercise of its discretion to sanction a scheme of arrangement (at [3]) as including whether:

> "(ii) the class of shareholders, the subject of the court meeting, was fairly represented by those who attended the meeting, and that the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent;
>
> (iii) an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme; and
>
> (iv) there is no blot on the scheme."

83 Vos C also there observed (at [38]) that the Court's discretion should more readily not give effect to a resolution by allowing it the Court's sanction if "those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective [security] holder" and (at [42]) that the Court must consider:

> "whether the class attending the meeting the court called was fairly represented by those attending the meeting, whether the statutory majority were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent."

The principle that members voting at a class meeting directed by the Court must exercise their power to vote "for the purpose of benefiting the class as a whole, and not merely individual members only", as formulated by Viscount

Haldane in *British America Nickel Corporation Ltd v MJ O'Brien Ltd* above was also approved by Vos C in *Re Dee Valley Group Plc* above at [47].

84 The reference to the concept of a "blot" on the scheme, referred to in *Buckley on the Companies Acts* (14th ed, 1981, vol 1, pp 473–474), and approved in *Re National Bank Ltd* above, *Re Equitable Life Assurance Society* above, *Re British Aviation Insurance Co Ltd* above and *Re Dee Valley Group Plc* above is sufficiently wide to permit the Court to have regard, not only to the interests of the members or creditors who are bound by a scheme, but also the interests of other affected parties, including at least shareholders and potentially other claimants against the company: *Re CSR Ltd* [2010] FCAFC 34; (2010) 183 FCR 358; 77 ACSR 592. In *Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust)* above at [26], Barrett J noted that the Court may have regard, in approving a scheme, to its impacts upon "others with a legitimate interest in the deployment of the company's assets". His Honour also noted (at [27]):

> "[T]he court's consideration is not confined to the direct results of the relevant schemes' operation. If a scheme is proposed and will take effect in a wider and inseparable context – particularly a contractual context – involving indirect consequences, it is appropriate for those consequences to be taken into account."

The latter observation is of particular significance in this case, where the Secured Creditor Scheme (in its original form) interacted not only with the effect of the Unsecured Creditor Scheme, so far as Ares and Ascribe (and some but not all SSN holders) participated in that scheme, but also with the Subscription Deed under which Centerbridge would acquire equity in BLY and the Director Nomination Agreements by which Centerbridge, Ares and Ascribe would acquire rights to nominate directors to BLY.

The alterations to the original schemes now proposed by the Plaintiffs

85 As I noted above, the Plaintiffs now seek to have the Court approve the schemes as altered in several respects, with the support of Centerbridge, Ares and Ascribe and their affiliates, which had supported the schemes in their original form, and also of First Pacific, Lonestar, Varde, Corre and HPS which had opposed the schemes in their original form.

86 The alterations to the Secured Creditor Scheme contemplated by the Terms Sheet include that PIK interest on the SSNs accrues at the rate of 12% from 1 October 2016, rather than at 10% to 31 December 2016 and at 12% thereafter. Those alterations also include the introduction of a call schedule ("Call Schedule") within the SSN Indenture, which specifies redemption or repurchase prices for the SSNs, expressed as a percentage of the outstanding principal amount, which will apply in the case of an optional redemption by the issuer of the SSNs or required asset sale offer (as defined). The redemption and repurchase price ranges between 100.9% of the outstanding principal amount, as at 31 December 2017, increasing gradually to 124.4% of the outstanding principal amount as at 31 December 2022. The amendment makes clear that, upon an acceleration of the maturity of the SSNs following an Event of Default (as defined), the SSNs will be payable at par plus any accrued but unpaid interest and, for the avoidance of doubt, no premium will be payable. The amendments also indicate that, for the avoidance of doubt, upon maturity of the SSNs on 31 December 2022, the redemption price will be 124.4% of the outstanding principal amount and retain a provision for a Change of Control Event under the SSN Indenture. It seems to me that these are significant amendments to the SSN Indenture and to the schemes and are favourable to the SSN holders who consent to them. I will address the questions whether these and the other proposed alterations to the schemes are within the scope of s 411(6) of the *Corporations Act*, and how the amendments introducing the Call Schedule affect the fairness of the Secured Creditor Scheme, below.

87 The proposed alterations to the Secured Creditor Scheme and associated arrangements also provide for a reallocation of ordinary shares to be issued by BLY pursuant to the schemes, without increasing the number of new ordinary shares to be issued by it, so that 4% of outstanding ordinary shares after giving effect to the schemes will be issued to the holders of SSNs including First Pacific, Centerbridge, Ares and Ascribe, pro rata based on their holdings of SSNs. The number of shares issued to Centerbridge, Ares and Ascribe, other than as holders of SSNs, will be reduced in the case of Centerbridge by 2% of the outstanding ordinary shares after giving effect to the schemes and, in the case of each of Ares and Ascribe, by 1% of the outstanding ordinary shares

after giving effect to the schemes. It seems to me that this alteration is also material, but, to the extent that it is unfavourable to Centerbridge, Ares and Ascribe, they consent to it and support the alterations to the schemes, and it is favourable to other SSN holders who voted against the Second Creditor Scheme in its original form but now support it in its altered form. I will address the impact of this alteration on the fairness of the schemes below.

88 The amendments also provide that First Pacific will, or will procure another holder of SSNs other than Centerbridge, Ares or Ascribe to, become party to and an "initial purchaser" under the New Money ABL and will provide 50% of Ares' existing commitment under that facility. The existence of that facility is a condition precedent to the schemes, but its relevance to the schemes is to ensure additional funds to the BLY Group. To the extent that that amendment requires First Pacific to assume obligations, it consents to them; to the extent that it changes who will participate in the New Money ABL, each of Centerbridge, Ares and Ascribe as the existing participants consent to it. The interest of BLY, SSN holders, SUN holders and indeed shareholders in BLY is otherwise only in the fact that new money becomes available to the BLY Group.

89 The detail of the alterations to the Secured Creditor Scheme in turn includes, inter alia, new definitions of the terms "New Shares" and "Total Principal Amount", proposed amendments to the condition precedent as to Court approval and to the steps set out in cl 7.5 of the Secured Creditor Scheme to provide for calculation of the number of New Shares (as defined) to be issued and for the issue of those shares. An amendment to the First Supplemental Indenture provides for the inclusion of a premium payable on redemption of the SSNs, consistent with the Call Schedule as set out in the Terms Sheet, amends the provision for repurchase of SSNs from SSN holders and introduces a provision for optional redemption of the SSNs by the issuer. The alterations to the Unsecured Creditor Scheme amend the formula for shares to be issued to Ares and Ascribe under that scheme. An amendment to the Fourth Supplemental Indenture, attached to that scheme, includes a new recital referring to the PNC ABL, and an amendment to the Subscription Deed reduces the number of shares to be issued to Centerbridge and its affiliates

from 56% to 54% of the shares in BLY, consistent with the Terms Sheet. Clauses 3.1(p) and (q) and 10.4 in both schemes, which might otherwise limit alterations to the schemes, are also to be amended.

90 I note, for completeness, that the agreement reached between the Plaintiffs and secured and unsecured creditors also provides for BLY to reimburse First Pacific for its reasonable documented out-of-pocket fees and expenses incurred in connection with the schemes and related proceedings, up to an aggregate amount not exceeding US$3 million, although this does not require an alteration of the schemes. In the ordinary course, it is likely that First Pacific would have recovered its costs of these proceedings, so far as it is plain that the objections it raised to the schemes in their original form were, at least, strongly arguable.

The parties' submissions as to the scope of the alteration power and the case law

91 It is now necessary to determine whether the proposed alterations are within the scope of the Court's power to order alterations to a scheme under s 411(6) of the *Corporations Act*. As I noted above, that section provides that:

> "The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just."

Alterations within the scope of that power may be suggested by the company: *Re Independent Practitioner Network Ltd (No 2)* [2008] FCA 1593; (2008) 26 ACLC 1249 at [16].

92 I will consider the case law concerning this section below in some detail. However, it must first be recognised that the section confers a discretion on the Court, to be exercised judicially, having regard to its statutory purpose in the light of the whole of the circumstances surrounding the matter, but unconfined by any particular statutory criteria as to its exercise. I should not approach that discretion on the basis of any assumption that it may only be exercised in a manner that it has previously been exercised, particularly if an analogous situation has not arisen in previous cases. Many of the cases in which this power has been exercised relate to alterations that are of a technical or minor character. However, it does not seem to me that that has the consequence that the alteration power cannot be used in a case where the amendment is of a

substantive character, those who are most directly affected by it consent to it, and it is otherwise just to make that alteration. That, obviously, will be a relatively rare case and that may readily explain the lack of earlier examples of alterations of that nature in the case law.

93 The Plaintiffs submit that the power of alteration conferred by s 411(6) of the *Corporations Act* is unconfined, and should be given a broad interpretation. They refer to the policy reflected in the observation of Finkelstein J, albeit in a different context, in *Fowler v Lindholm* above at [73] that:

> "Provisions of s 411 are intended to provide a flexible mechanism to facilitate compromises and arrangements between insolvent companies and their creditors as an alternative to liquidation."

94 The Plaintiffs accept that the changes now proposed to the schemes would not have been within the reasonable contemplation of creditors at the time they voted to approve the schemes but submit that that matter, although noted in the case law as to s 411(6), is not an essential precondition to the exercise of the power of alteration of a scheme, but only one relevant consideration to the exercise of that power. They point out that Centerbridge, Ares and Ascribe, which give up equity under the proposed alterations, consent to those alterations, and that all of the voting SUN holders also consent to the alterations, other than for one SUN holder which holds notes of a relatively small value which has not indicated its view.

95 The Plaintiffs also refer to *Re Independent Practitioner Network Ltd (No 2)* above at [17], where Lindgren J observed that the Court would not approve a scheme, subject to alterations, unless it was satisfied that the scheme as proposed to be altered would have been agreed to by the requisite statutory majorities. That observation does not, in terms, require that the views of creditors be determined as at the date of the meeting rather than by reference to, for example, subsequent changes in their positions. The Plaintiffs contend that creditors who voted in favour of the original schemes would likely have voted in favour of the altered schemes. It seems to me that the Plaintiffs are likely correct as to the effect of the amendments on how those who previously opposed the schemes would have voted at the earlier meetings, although the attitude that Centerbridge, Ares and Ascribe would then have taken is more

uncertain. The answer to that question may depend, in part, on whether that question was to be approached on the basis that the creditors, in considering the altered scheme at the earlier meeting, are treated as then having the knowledge that they now have of the force of the complaints that were made in respect of the original schemes. I can comfortably be satisfied that the schemes in their altered form would now be, and are, approved by secured and unsecured creditors generally. I prefer to approach this question, at least in the particular circumstances, not by applying Lindgren J's observation as though it were a statutory test, but instead by reference to the statutory test identified in s 411(6), namely whether the proposed alterations of the scheme are fit for the Court's approval. The present view of participants in the schemes, where that is known to the Court, seems to me to have greater weight than speculation as to what creditors would have done at the earlier meeting in that regard.

96 ASIC, as amicus curiae, submitted that approval of the altered schemes was within the scope of the Court's power under s 411(6) of the *Corporations Act* and would be an appropriate exercise of that power, given the width of the language in s 411(6) and other provisions of the *Corporations Act* which require the Court to exercise similar discretions. ASIC also drew attention to the decision in *Re V & M Diagnostic Services Pty Ltd* (1985) 9 ACLR 663, to which I will refer below.

97 The Snowside companies submitted that the proposed amendments are outside the scope of the alteration power under s 411(6) of the *Corporations Act* and accordingly the Court has no power to approve the schemes in their altered form. They submit that the amendments are substantive and material in nature and I understand that to be common ground between the parties. Dr Austin also submits, and I accept, that the amendments sought are more substantial than amendments of a "peripheral" or "minor and technical" kind to which reference was made in several of the earlier cases. As will emerge below, I do not, however, accept that the Court's power to approve an alteration to a scheme, under s 411(6) of the *Corporations Act*, is limited to alterations of that character.

98 Dr Austin draws attention to the legislative history of s 411(6) of the *Corporations Act*. I recognise that that provision dates back at least until the *Joint Stock Companies Arrangement Act* 1892 (NSW), which adopted similarly wide language to the present section in permitting the alteration or variation of an arrangement or compromise where the Court "shall think just". Dr Austin points to the absence of a statutory discretion to vary an arrangement under the corresponding United Kingdom legislation since 1908, to the omission of that power in s 133 of the *Companies Act* 1936 (NSW) and its reintroduction in s 92 of the *Companies Act* 1958 (Vic), s 181 of the *Uniform Companies Act* 1961 and continuing in the *Companies Code* and *Corporations Law*. The reintroduction of that provision emphasises the legislative intent that such a power should exist. Dr Austin also refers to case law considering the relevant provision, to which I will refer below, which he submits indicates the "metes and bounds" within which Courts have employed the discretion. I accept that the case law indicates the circumstances in which Courts have previously exercised that jurisdiction, although the majority of the cases to which the parties refer arise in a different factual context. However, the Court's statutory power to alter a scheme under this section is not confined by a listing of circumstances where such an alteration has previously been made.

99 Turning now to the case law in more detail, in *Re V & M Diagnostic Services Pty Ltd* above at 667–668, the Court made a more substantial alteration to a scheme where a creditors' scheme was amended to omit the Commissioner for Payroll Tax from the definition of "creditor", so as to preserve his then priority status in a winding up. The scheme was approved at a creditors' meeting, both in its original form which would have excluded such priority and in an alternative form which would give priority over other unsecured creditors. That amendment was plainly one of substance, so far as it significantly altered the operation of the scheme. It seems to me that it could more readily be made where creditors had indicated their assent to it, by the passage of the alternative resolution at the scheme meeting. In this case, all voting secured creditors and all voting SUN holders (with the one exception noted above whose view is not known), including those who had previously opposed the scheme in its original form, now indicate their assent to the alterations to it.

100 In *Re Matine Ltd* (1998) 28 ACSR 268 at 281ff, Santow J considered a proposed amendment to a scheme which would abridge the period of notice of an application to extend the time for satisfaction of the conditions precedent under the scheme. That amendment had substantive effect, so far as it left open the possibility that the scheme could take effect in the next financial year. His Honour observed (at 284) that:

> "The discretion of the court under s 411(6) is at large, but the court would obviously have regard to whether the proposed variation was so novel or substantial as to take the varied scheme beyond the reasonable contemplation of shareholders at the time they agreed to it."

That observation treats that matter as a relevant factor rather than as determinative of the question whether an alteration to a scheme should be approved.

101 In *Re Permanent Trustee Co Ltd* above, Barrett J approved a scheme with amendments that were of a minor and technical character. Similarly, in *Re Investorinfo Ltd* [2005] FCA 1848; (2005) 24 ACLC 44, Gyles J approved a scheme subject to an alteration to overcome "a technicality arising from the drafting of the scheme" (at [8]). In *Re Kalgoorlie Lake View Pty Ltd* [2005] FCA 1440; (2005) 56 ACSR 144, Mansfield J approved a scheme with a more substantial alteration, that omitted a requirement for deregistration of four companies by a specified date, where that might have changed the priority of exploration licence applications by some of the companies.

102 In *Zenyth Theraputics Ltd v Smith* [2006] VSC 436; (2006) 60 ACSR 548, Dodds-Streeton J declined to approve an options scheme in its then form, but subsequently approved the scheme in an amended form that provided for optionholders to receive consideration being the greater of the valuation of their options determined by the company or an independent expert, so that no optionholder received consideration that was less than the independent expert's valuation. That is a change of some substance to the commercial terms of the scheme, but its character made clear that it was of advantage to optionholders. In *Re Australian Co-operative Foods Ltd* [2008] NSWSC 1221, Barrett J made orders under s 411(6) altering the commercial terms of a scheme, in that case by changing the record date for a special dividend to be paid in connection with the scheme, so as to fit with a taxation ruling that had

been obtained, and treated the absence of prejudice or disadvantage to members as a relevant factor.

103 In *Re Independent Practitioner Network Ltd (No 2)* above, Lindgren J approved a scheme of arrangement which substituted a subsidiary of a company for that company as the entity which was to take title to shares under a scheme. His Honour's approach in that case indicates that whether an alteration is fundamental in character depends upon the circumstances. In that case, his Honour noted that a change in the identity of the acquiring entity may be fundamental in one sense, but was not of that character in the circumstances of the particular case. His Honour also observed that the power to approve a scheme subject to alterations was introduced by s 181(3) of the *Uniform Companies Act* 1961 and retained in s 315(6) of the *Companies Code* and then in s 411(6) of the *Corporations Act*; that the authorities "do not purport to limit the circumstances in which it would be appropriate for the Court to exercise the power"; and that:

> "the Court will not approve subject to alterations unless it is satisfied that the scheme as proposed to be altered would still have been agreed to by the requisite statutory majorities."

104 In *Re Professional Investment Holdings Ltd (No 2)* [2010] FCA 1336, Jacobson J exercised that power to include a critical, although omitted, figure into the scheme, namely the number of ordinary shares in the bidder to be issued as scheme consideration, in circumstances where that figure had been disclosed elsewhere in the scheme booklet. His Honour there approved (at [39]) a proposition drawn from the decision of Santow J in *Re Matine Ltd* above at 284 and adopted by Mansfield J in *Re Kalgoorlie Lake View Pty Ltd* above at [7]–[8] that:

> "… under s 411(6) the court is empowered to approve a compromise or arrangement of the scheme as put forward to the members with such alterations and additions as it thinks just. The discretion of the court is at large but the court has regard to whether the proposed variation was so novel or substantial as to take the varied scheme beyond the reasonable contemplation of shareholders at the time they agreed to it."

Again, that observation treats that factor as relevant rather than as determinative of whether such an alteration should be permitted.

105 In *Primacon Holding GmbH v Credit Agricole* above at [35], in dealing with the inherent jurisdiction to alter a scheme under English law rather than a statutory jurisdiction, Hildyard J referred to the parties' acceptance that there were three boundaries to the alteration power, namely that:

> "… first the court would be anxious to ensure that the scheme was not so different from the scheme which was before the scheme creditors at the class meetings that their votes would really not be on that scheme at all. Second, the court would be against modification if it would alter the class compositions; and, thirdly, the court would be against modification if, thereby, the explanatory statement would be falsified or proven irrelevant."

106 The nature and scope of the alterations also do not seem to be inconsistent with any decided case, although, as I noted above, they likely go beyond any application of s 411(6) in the decided cases. As in *Zenyth Theraputics Ltd v Smith* above, it seems to me that the Court can here be satisfied that the alterations to the Secured Creditor Scheme are of advantage to secured creditors, both because they afford them more favourable terms for their participation in the scheme, but also because of their support for the altered scheme and, as in *Re Australian Co-operative Foods Ltd* above, the Court can be satisfied of the absence of prejudice and disadvantage to creditors that are participants in the schemes by reason of their support for the proposed alterations. The alterations do not infringe the principles identified in *Primacon Holding GmbH v Credit Agricole* above, where they would make the Secured Creditor Scheme more favourable to secured creditors, but not change its essential features; they would not alter class composition, since each of the secured creditors would receive the same benefit under the alterations; and the explanatory statements for the schemes would not be falsified or made irrelevant, although they would not have included reference to the additional benefits that would now be conferred on secured creditors.

107 Mr Jackman, who appears variously with Dr Higgins, Mr Izzo and Ms Rich for the Plaintiffs, points out, and I accept, that the terms of the schemes and the resolutions approved by creditors at each scheme meeting permitted alterations to the scheme, where, in effect, they did not change the substance of the scheme in any material respect (Secured Creditor Scheme, Ex JD-1, 3; Unsecured Creditor Scheme, Ex JD-1, 922). The proposed alterations to the schemes expand that power in order to facilitate the alterations to the

schemes. As I have noted above, those alterations do change the schemes in material respects, although the creditors affected by those changes support them. It seems to me that the terms of those resolutions cannot confine the Court's power under s 411(6) of the *Corporations Act*, although they are plainly relevant to the exercise of the Court's discretion whether to approve the schemes as altered. The fact that BLY presses the alterations, and creditors who voted for resolutions in that form support the alterations (again, with the exception of the one voting SUN holder whose attitude is not known) indicates that the Court should be prepared to approve the schemes with those alterations if they are otherwise appropriate, despite the limited terms of the resolutions.

108 It seems to me that the proposed alterations to the schemes, to which I have referred above, are within the scope of s 411(6) of the *Corporations Act* for several reasons, although it will be necessary to address the question whether the Court can be satisfied that it should approve the schemes as altered below. As I noted above, I proceed on the basis that s 411(6) of the *Corporations Act* confers a discretion on the Court, to be exercised judicially, having regard to its statutory purpose and in the light of the whole of the circumstances surrounding the matter. It seems to me that the Court could, in principle, think it "fit" to approve the schemes in this case with material alterations where the schemes and those alterations provide a proper mechanism to implement a complex compromise or arrangement; substantial costs and resources have plainly been devoted to developing them; the Plaintiffs are insolvent or near insolvency and would likely not have the luxury of restarting their restructuring again from the beginning; the Plaintiffs and all voting secured creditors and substantially all voting unsecured creditors affected by the alterations support them; and there would be no utility in ordering further creditors' meetings where it is already clear that an overwhelming majority of the voting secured creditors and voting unsecured creditors support the alterations. I am satisfied that the proposed alterations are within the scope of the alteration power under s 411(6) of the *Corporations Act* for those reasons, although the alterations involve a novel application of the section.

109 I therefore proceed on the basis that I should determine whether the schemes, as altered as proposed by the Plaintiffs, can properly be approved by the Court, although it will be necessary to address a range of submissions in respect of the schemes in their original form and the altered schemes in order to do so.

Procedural requirements and satisfaction of conditions precedent

110 I am satisfied, on the basis of the comprehensive evidence led by the Plaintiffs, that the Plaintiffs have complied with the orders that convened the scheme meetings, including in respect of preparation of the explanatory statements, service and publication of documents relating to the schemes, and the convening and conduct of the scheme meetings, although the Plaintiffs fairly acknowledge a minor delay in the commencement of the Unsecured Creditor Scheme meeting which took place after the close of the Secured Creditor Scheme meeting.

111 The Plaintiffs have provided a helpful schedule which summarises the conditions precedent to the schemes, and the evidence of their satisfaction, which I will place in the Court file. I need not address the detail of that schedule, although I should refer specifically to several important conditions precedent. By his affidavit dated 26 July 2017, Mr Rasetti referred to the amendment of the Fourth Supplemental Indenture and the Amended Term Loan A and Amended Term Loan B, consequential upon the replacement of US Bank National Association with Delaware Trust Company as trustee of the SUNs and TLAs and TLBs, and otherwise confirmed the satisfaction of the condition precedent in cl 3.1(k) of each of the Secured Creditor Scheme and the Unsecured Creditor Scheme. Mr Rasetti also there addressed the satisfaction of conditions precedent in respect of subsequent term loan amendments under cl 3.1(m) of the schemes, regulatory approvals under cl 3.1(n) of the schemes, warranties under cl 3.1(o) of the schemes and the fact that the RSA had not been terminated for the purposes of cl 3.1(t) of the schemes. Mr Rasetti otherwise confirmed his belief that all of the conditions precedent to the schemes had been satisfied subject to the Court's approval of the schemes at the second court hearing, satisfaction by the scheme companies of any conditions imposed by the Court in approving the schemes

and the schemes becoming effective, as that term was defined in them. Mr Rasetti also referred to certificates signed by him to the effect that the conditions precedent to the schemes, other than those noted above, had been satisfied. Lenders under the Backstop ABL have waived a condition precedent in cl 4.02(k) of that facility relating to entry into a subordination agreement, where I infer that concerns may otherwise have arisen as to the ability to satisfy that condition precedent, and a corresponding condition precedent in cl 8.2(q) of the PNC ABL has also been waived.

112 I am satisfied, by the evidence to which I have referred above, that the conditions precedent to the schemes have been satisfied, with the exception of conditions precedent that are related to or consequential on the orders sought from the Court approving the schemes.

The relevance of the majorities achieved at the Secured Creditor Scheme meeting to the exercise of discretion

113 I now turn to the matters raised by First Pacific in opposition to the Secured Creditor Scheme in its original form. It will be necessary to address these matters in respect of the schemes in their original form, both because they were not abandoned by First Pacific (although it supports the schemes in their altered form) and because voting at the Secured Creditor Scheme meeting took place when the schemes took that original form. I also sought clarification from the Snowside companies as to whether they also pressed the matters raised in First Pacific's particulars of why the Court should refuse to approve the schemes. The Snowside companies responded, in effect, that they largely press First Pacific's objections to the schemes, with some qualifications that are not material for present purposes. I must therefore address those grounds of opposition, although recognising the effect of the proposed alterations of the schemes on those matters as applicable. I will generally deal with these grounds of opposition in the order they are identified in First Pacific's particulars as to why the Court should refuse approval of the schemes. Although I will address these matters sequentially, I am conscious that they overlap and I have regard to their impact not only individually but as a whole.

The weight to be given to the statutory majorities at the Secured Creditor Scheme meeting

114 First Pacific (although it now supports the altered schemes) had submitted that the statutory majorities for the purposes of s 411(4)(a)(i) of the *Corporations Act* declared by the chairperson at the Secured Creditor Scheme meeting should be given no or little weight, for several reasons. I understand these matters largely to have been put as relevant to the contention that votes cast by Centerbridge, Ares and Ascribe should be discounted, or given less weight, as an indication of the views of the class of secured creditors in exercising the Court's discretion whether to sanction the scheme.

115 I should note several aspects of the factual background before turning to that submission. In the Earlier Judgment (at [74]) I had left open:

> "the question whether, at the second hearing, the Court may be satisfied that the votes of some or all of Ares, Ascribe or Centerbridge should be disregarded or given lesser weight in determining whether to approve the Secured Creditor Scheme."

In the judgment of the Court of Appeal, Bathurst CJ had also observed (at [45]–[46]) that the weight to be given to the votes of Centerbridge, Ares and Ascribe was properly a matter for consideration at the second hearing.

116 The chairperson at the Secured Creditor Scheme meeting held a proxy for five secured creditors representing a total of $276,781,444.06 of debt or 59.65% of debt of the secured creditors present and voting which were in favour of the approval of the Secured Creditor Scheme. Each secured creditor, including Centerbridge as holder of the TLAs and TLBs, was admitted for the aggregate amount of its principal debt plus interest accrued on that debt up to and including 4 May 2017. The voting forms in respect of SSNs provided for the creditor to specify the principal amount of the notes to which the claim related, and interest was calculated by applying an interest factor to that principal amount. The interest claimed by Centerbridge under the TLAs and TLBs in its voting forms already included interest, including interest that was unsecured under the terms of the TLAs and TLBs.

117 Several funds and entities associated with Centerbridge, Ares and Ascribe voted in favour of the resolution to approve the Secured Creditor Scheme at the Secured Creditor Scheme meeting and it is common ground that

Centerbridge voted $52,172,097 of unsecured interest under the TLAs and TLBs at the Secured Creditor Scheme meeting. The voting results by number at the Secured Creditor Scheme meeting reflect the fact that the secured creditors held secured debt in separate funds which are counted separately as beneficial owners of the debt.

118 On the results of the Secured Creditor Scheme meeting declared by the chair, the majority of secured creditors present at that meeting, by number and by value, resolved to agree to the Secured Creditor Scheme, with or without alterations or conditions approved by the Court, provided that such alterations or conditions did not change the substance of that scheme, including the Steps (as defined in the explanatory statement), in any material respect. In written submissions, First Pacific accepted that, on the voting results declared by the chairperson at the Secured Creditor Scheme meeting, the statutory majorities under s 411(4)(a)(i) of the *Corporations Act* had been satisfied such that the Court has power to sanction the Secured Creditor Scheme, in its original form, but submitted that the Court should decline to exercise its discretion to do so.

119 The first matter on which First Pacific relied in support of the submission that the statutory majority should be given lesser weight (in respect of the schemes in their original form) was that:

> "Even if the majority declared by the Chairperson to exist were taken at face value, the Secured Creditors' Scheme only barely achieved the statutory majorities, that is … the headcount only achieved 56.82% and the debt only achieved 78.49%."

The relatively narrow margin by which the Secured Creditor Scheme was approved is relevant to the exercise of the Court's discretion whether to approve the scheme, particularly where combined with the other matters to which I refer below.

120 The second matter on which First Pacific relied (in respect of the schemes in their original form) was that:

> "… taking the votes at face value, the only reason that the statutory majorities were achieved was because of the votes of 3 Secured Creditors (Centerbridge, Ares and Ascribe) and their affiliates and who were contractually bound to support the Secured Creditors' Scheme and had a special interest in it."

121 This submission was directed to Centerbridge's, Ares' and Ascribe's commitment to support the schemes under the RSA. First Pacific also submitted that the votes of Centerbridge, Ares and Ascribe should be discounted on the basis that the power of a majority to bind a minority cannot be exercised other than for the purpose of benefiting the class as a whole, and not merely individual members, and that Centerbridge, Ares and Ascribe were bound by the RSA to vote their debt in favour of the Secured Creditor Scheme and were thereby precluded from any bona fide consideration of the interests of the class. First Pacific also submitted that that matter had the potential to generate majorities at the Secured Creditor Scheme meeting which did not reflect a true attempt to consult the class of the secured creditors as a whole in the common interest.

122 Mr Jackman responded (T69) that the fact that undertakings to support the scheme had been obtained by BLY, before it committed time and resources to implementing the transaction, would not in itself be a factor that caused the votes of supporting creditors who had given such undertakings to be given less weight, or undermined the fairness of the scheme. Mr Jackman refers to *Re Telewest Communications Plc (No 1)* [2004] EWHC 924 (Ch); [2005] 1 BCLC 752 at [53], where David Richards J observed that the fact that a bondholder had committed to vote in a particular way was not a substantial objection to that bondholder remaining in the relevant class, provided that it could not reasonably have voted differently in the absence of the agreement, although he also observed that such a voting agreement "would be relevant to the exercise of the discretion to sanction the scheme" and also recognised (at [54]) that a "serious issue would arise if in consideration of its agreement to vote in favour of the scheme, or collaterally to it, the bondholder received benefits not available to the other bondholders." It may be that the RSA goes well beyond any mere undertaking to support the scheme, so far as it extends, for example, to contemplating further steps by, and the maintenance of the relative interests of, Centerbridge, Ares and Ascribe if the schemes are not implemented. I have not found it necessary to determine whether the RSA requires discounting of the votes of Centerbridge, Ares and Ascribe in this case, given the conclusions that I have reached on other grounds below, and the fact that the voting

creditors that previously opposed the schemes now support them in their altered form.

123 The third matter on which First Pacific relied (in respect of the schemes in their original form) was that:

> "… every Secured Creditor who was not part of the camp comprised of Centerbridge, Ares and Ascribe voted against the Secured Creditors' Scheme."

In its submissions as amicus curiae, ASIC similarly submitted that the fact that the statutory majority of creditors voting in favour of the Secured Creditor Scheme (in its original form) comprised only those who obtain additional benefits under the scheme (or, more precisely, the persons and their associated entities who receive benefits under that scheme, the Unsecured Creditor Scheme and associated arrangements) significantly diminishes the weight that is to be placed on their vote as demonstrating fairness, and that significant weight should be placed on the commercial judgement of other secured creditors who do not obtain such benefits as reflected in their rejection of the scheme. ASIC also submitted that a factual inference is available that, where those secured creditors who did not obtain additional equity (excluding those associated with Ares) had voted against the scheme, then the votes of Centerbridge, Ares (including those funds which did not hold equity) and Ascribe in favour of the Secured Creditor Scheme were influenced by the equity which they would acquire under the schemes and associated arrangements. ASIC also submitted that the Court should place substantial weight on the votes of those who are not to obtain particular benefits, which are best placed to determine how their commercial interests are affected by the schemes (in their original form), where it is not the Court's role to make that commercial judgement.

124 I recognise that, as Mr Jackman pointed out, there was not a perfect correlation between the receipt of equity in BLY under the Unsecured Creditor Scheme and voting in favour of the Secured Creditor Scheme, since Corre and HPS received equity in BLY under the Unsecured Creditor Scheme on the same basis as Ares and Ascribe, but voted against the schemes. The evidence nonetheless established that the only parties who voted in favour of the

Secured Creditor Scheme (in its original form) were those who would receive equity under arrangements associated with the schemes or are (as in the case of the several Ares funds) associated with those who receive equity under those arrangements. That would at least have been relevant to the exercise of the Court's discretion to approve the schemes, in their original form, in the sense that that position is very different from that which would exist had secured creditors other than Centerbridge, Ares and its associated entities and Ascribe, which did not obtain the benefits they obtain under the schemes, been satisfied of the merit of the Secured Creditor Scheme in its original form so as to vote to approve it. Obviously, the position has now changed somewhat, although not in a way that directly affects the exercise of votes at the Secured Creditor Scheme meeting, where all of the secured creditors now support the Secured Creditor Scheme incorporating the alterations proposed by the Plaintiffs. I will have regard to the effect of those alterations in addressing the fairness of the schemes below.

125 I recognise that, as Mr Jackman submitted in oral submissions (T66), it is possible that the assessment of at least some creditors as to whether to support the schemes may have been influenced by their assessment as to whether failure of the original schemes would prompt a more generous proposal to creditors other than Centerbridge, Ares and Ascribe, rather than BLY's insolvency, as much as by whether they do or do not receive equity under the schemes as they stand. However, that does not undermine the conclusion, which I reach below, that Centerbridge's, Ares' and Ascribe's interests in the receipt of equity and director nomination rights were a substantial factor in their exercise of their votes in favour of the Secured Creditor Scheme, which should be given less weight as indicating the view that they or other class members would take, absent those interests. In the event, that more generous proposal has now emerged in the altered schemes.

126 I also note, for completeness, that the Plaintiffs submitted that less weight should be given to the votes of Lonestar, Varde, Corre and HPS opposing the Secured Creditor Scheme (in its original form) because they had provided proxies to First Pacific's solicitors to vote against the Secured Creditor Scheme; there was considerable doubt that their votes were independent of

First Pacific; and they appeared to have been “corralled” by First Pacific into voting against the scheme. I do not accept that submission. There is no reason that less weight should be given to the votes of those creditors because they took the obviously convenient course of giving a proxy to another party which was voting in the same manner as they presumably wished to vote; there is no evidence to suggest they are not independent from First Pacific; and the fact that they also oppose the Secured Creditor Scheme does not itself imply any lack of independence, as distinct from a common attitude to the issues. As I noted above, Lonestar, Corre and HPS have each indicated the reasons for their opposition to the Secured Creditor Scheme (in its original form) in correspondence, admitted with a limiting order under s 136 of the *Evidence Act* as proof of their attitudes and not the asserted facts, although they support the schemes in their altered form.

127 Fourth, First Pacific submitted that:

> “It is highly material in assessing the weight to be given to the vote to consider that the votes of affiliates represent a single voice. If that step is taken, the headcount test would have failed (38.7%) while the value test would remain unchanged.”

128 First Pacific pointed out that, if affiliated entities were grouped together for the purpose of the headcount test, Centerbridge, Ares and Ascribe and their affiliates, comprising three creditors, voted in favour of the resolution and five other secured creditors, First Pacific, Corre, HPS, Lonestar and Varde, voted against the resolution. Mr Gleeson also submitted that the commonality of interest between the Ares funds, and Centerbridge and Ascribe, is such that, although those funds may be counted individually in determining whether the statutory requirement as to number is satisfied, they should be treated as three voting interests in the exercise of the Court’s discretion whether to approve the schemes. The Plaintiffs respond that each of the entities associated with Centerbridge, Ares and Ascribe should be treated as a separate creditor, in determining whether the requisite majorities by number were obtained under s 411(4)(a)(i) of the *Corporations Act*, where each such creditor is an ultimate beneficial owner of the SSNs and is properly treated as a secured creditor for the purpose of the Secured Creditor Scheme.

129 It does not seem to me that s 411(4) of the *Corporations Act* authorises a grouping of votes of different entities in that manner in order to determine whether the statutory majority by number was achieved, and I did not understand Mr Gleeson to contend to the contrary. There is no suggestion that the holding of secured debt in separate funds was an artifice or adopted in order to manipulate the votes in respect of the scheme. The Plaintiffs also point out, and I accept, that s 411(4)(a)(i), dealing with a creditors' scheme, does not contain the language "unless the Court orders otherwise" contained in s 411(4)(a)(ii) in respect of a members' scheme which allows the Court a discretion as to whether a majority in number of members is required, or is sufficient, to approve a members' scheme in an appropriate case. That matter is, however, relevant to the weight to be given to the majority by number achieved for the Secured Creditor Scheme in determining issues as to fairness of the scheme and in the exercise of the Court's discretion.

Other matters on which First Pacific relied

130 First Pacific (although it now supports the altered schemes) had submitted that several other matters were highly material to assessing the weight to be given to the voting result, which overlap with its substantive challenge to the fairness of the schemes in their original form. The first of those matters was that:

> "Each of Ares and Ascribe alone amongst the Secured Creditors stands to receive equity and the right to nominate a director each in their capacity as Unsecured Creditors and pursuant to the Unsecured Creditors' Scheme and documents associated with it which represents a special interest not shared by other Secured Creditors. If their debt is excluded, the total debt voted in favour of the Secured Creditors' Scheme would be reduced to 73.5% and only one of 6 (16.67%) of the Secured Creditors present and voting (assuming affiliates are grouped together), i.e. Centerbridge, would have voted in favour of the Secured Creditors' Scheme, both of which results are below the statutory thresholds."

131 First Pacific submitted that the votes of Ares and Ascribe at the Secured Creditor Scheme meeting should be discounted, first, because their votes "say nothing about the desirability to Secured Creditors of the Secured Creditor Scheme", by reason of the equity which they receive under the Unsecured Creditor Scheme. Mr Gleeson submitted that the size and scale of the collateral benefit available to Ares and Ascribe, by the issue of equity to them under the Unsecured Creditor Scheme, is such that it must have gone to the

heart of their decisions to support the schemes, and has the result that their votes are not representative of the class of secured creditors in that respect (T115). Mr Gleeson also emphasises the suggested disproportion (in the schemes in their original form) between the position where, prior to the schemes, Ares and Ascribe held a substantial majority of SUNs which would likely have no value on insolvency and are allowed a substantial equity interest for surrendering a proportion of those notes, by contrast with the position where SSN holders were allowed no equity (T116). First Pacific also refers to a question asked at the Secured Creditor Scheme meeting as to whether Ares and Ascribe would have supported the scheme (in its original form), had they not been issued equity, which the legal representative who represented Ares and Ascribe at the Secured Creditor Scheme meeting did not address. ASIC also submits that if the Court finds (as I will below) that affiliates of Ares which did not receive equity voted according to their affiliation, the result would be that the group of companies within the class that received additional benefits had carried the statutory majorities and the Court would carefully scrutinise the fairness of the schemes in such a case.

132 The Plaintiffs respond that the Court would be less likely to reach a finding that a party or parties with a collateral interest were influenced to vote differently from how they would have if the interest did not exist, if the collateral interest is of minor economic effect, relative to the creditors' overall exposure: *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch); [2015] 4 All ER 572 at [191]. The Plaintiffs also rely on the observation of Hildyard J, in that decision, that an opposing creditor must show:

> "that an intelligent and honest member of the class without those collateral interests could not have voted in the way that he did. It is not sufficient simply to show that the collateral interest is an additional reason for voting in the manner in which he would otherwise have voted."

133 I recognise that, as Hildyard J observed in *Re Apcoa Parking Holdings GmbH* above at [190], in some circumstances, an inference that creditors are motivated by separate interests or other benefits which they will achieve from a scheme may be displaced by a larger common interest, including in the avoidance of insolvency, and that was a matter to which I also referred in the Earlier Judgment and which the Court of Appeal also addressed in the appeal.

In this case, it is plain from the evidence that I have addressed above that the risk of insolvency is a significant consideration, but I am not satisfied that it is a sufficient consideration to displace the other interests affecting Centerbridge, Ares and Ascribe. I more readily draw that inference where, by contrast with the position in cases such as *Re Apcoa Parking Holdings GmbH* above, no secured creditor other than those entities and their associates supported the Secured Creditor Scheme in its original form.

134 I will find below that the equity to be issued to Centerbridge, Ares and Ascribe under the schemes in their original form and associated arrangements is presently of no real economic value but would be of significant economic value if the mining cycle improves or BLY is able to return to profitability or both. It seems to me that opportunity cannot fairly be described as of minor effect, even relative to Centerbridge's, Ares' and Ascribe's other exposures to the BLY Group.

135 First Pacific also submitted that the test for the impact of a separate interest as formulated by Hildyard J in *Re Apcoa Parking Holdings GmbH* above is set at too exacting a level, and ASIC also submitted that that test was in the nature of obiter dicta and was also set at too high a level (T164). I am inclined to think that test was put at too high a level, and that it should be sufficient to establish that an interest was likely to have, for example, a real or substantial impact on the vote of a member of a class, to raise a question whether that class member's vote is representative of the class as a whole. It should also be recognised that, in *Re Apcoa Parking Holdings GmbH* above, supporting creditors gave evidence of their interest in avoiding insolvency proceedings and their support for the restructuring in issue in that case on that basis. By contrast, while legal representatives of Ares and Ascribe made statements of a similar character during the Secured Creditor Scheme meeting, no doubt in accordance with their instructions, no executive of Ares or Ascribe gave affidavit evidence to establish that view, on oath or on affirmation, in this application, notwithstanding it was plain that that matter was squarely in issue.

136 Mr Jackman also sought to displace any inference that the voting of Ares and associated funds in the Secured Creditor Scheme was substantially influenced

by the receipt of equity under the Unsecured Creditor Scheme by pointing to the fact that ten of the funds associated with Ares that voted in favour of the Secured Creditor Scheme did not receive any equity. I give little weight to that matter. Any proposition that funds associated with Ares reached independent decisions, in determining to support the schemes, irrespective of whether Ares or some of the funds would obtain equity under the Unsecured Creditor Scheme, is undermined by the facts that Ares Management LLC had committed those funds to support the schemes in the RSA, suggesting a coordination of interest and position as between those funds, and that each of the proxies in respect of the funds was also given by Ares Management LLC in its capacity as portfolio manager in respect of the relevant funds. I consider that I can properly infer that the funds controlled by Ares voted consistently with Ares' wider commercial interests and can more readily draw that inference where Ares did not lead affidavit evidence to rebut that inference or establish independent decision-making among its funds.

137 I recognise that, in *Re Linton Park Plc* above, Lewison J had observed (at [12]) that the evidence that a person voted for a collateral motive at a scheme meeting must be "cogent and strong before the Court would countenance its disenfranchising one of the shareholders entitled to vote". Applying that standard, it seems to me that the weight to be given to the votes of Ares and Ascribe at the Secured Creditor Scheme meeting would have to be discounted, on the basis that they were not representative of the views that a holder of SSNs that did not hold their additional interests as a recipient of equity under the Unsecured Creditor Scheme would take in respect of the schemes. That matter would have been of significance, both because of the narrow margin by which the Secured Creditor Scheme in its original form was approved at the Secured Creditor Scheme meeting, and because of the extent of opposition to the schemes (in their original form) by those secured creditors who did not receive the equity that Ares and Ascribe would receive under the Unsecured Creditor Scheme. The difference in the interests of SSN holders is plainly reduced under the proposed alterations to the Secured Creditor Scheme which provide for the issue of 4% of the equity in BLY to SSN holders in proportion to their holdings of SSNs, but that reduction postdates the voting at the Secured

Creditor Scheme meeting and does not exclude the need to approach the votes cast by Ares and Ascribe at that meeting with care and to give particular attention to the fairness of the schemes, as now proposed to be altered by the Plaintiffs.

138 The second of the matters on which First Pacific relied as material to the weight to be given to voting results was that:

> "Centerbridge alone amongst the Secured Creditors stands to receive equity and the right to nominate 5 directors pursuant to the Secured Creditors' Scheme and documents associated with it which represents a special interest not shared by other Secured Creditors. If its debt is excluded, the total debt voted in favour of the Secured Creditors' Scheme would be reduced to 46.7% and only 2 of 7 (28.57%) Secured Creditors (assuming affiliates are grouped together) would have voted in favour of the Secured Creditors' Scheme, both of which results are below the statutory thresholds."

139 It is necessary to address this matter because it is directed to the position as it existed when Centerbridge voted at the Secured Creditor Scheme meeting, and it was not abandoned by First Pacific in respect of the original scheme, although First Pacific supports the schemes with the alterations to which I have referred above. As I noted above, I understand the Snowside companies also now press this submission. First Pacific submitted that Centerbridge's votes at the Secured Creditor Scheme meeting should also be disregarded or discounted on the basis that Centerbridge would acquire a controlling equity stake and the right to nominate the majority of directors of BLY under arrangements associated with the scheme. In oral submissions, Mr Gleeson submitted that it was impossible to regard Centerbridge's vote at the Secured Creditor Scheme meeting as being representative of the class of secured creditors, having regard to the benefits which it obtained under arrangements associated with the Secured Creditor Scheme (T131). I recognise that Centerbridge receives such equity and the director appointment right under arrangements outside, but connected with, the Secured Creditor Scheme to which I have referred above. I recognise also that the percentage of shares to be issued to Centerbridge is somewhat reduced under the proposed alterations to the schemes.

140 The Plaintiffs responded that the equity to be issued to Centerbridge, its ability to acquire legal control by obtaining a 56% shareholding in BLY (reduced to

54% under the proposed alterations to the schemes), where it already has de facto control of a 48.9% holding (which would be reduced to 3.7% by implementation of the Unsecured Creditor Scheme), and the once only right to nominate five directors for election to the board of BLY are of little significance in the circumstances. Those propositions were put as matters of inference rather than established by evidence, and I am not persuaded they were correct. It seems to me that I can properly infer that the issue of equity and director nomination rights was of significance to Centerbridge in the exercise of its votes at the Secured Creditor Scheme meeting, where it bargained for them in respect of the schemes and associated arrangements and led no evidence to suggest that those matters were matters of indifference to it. Any proposition that the equity to be issued to Centerbridge is of no value, at least in a commercial sense, is starkly inconsistent with the submission of Senior Counsel for the Plaintiffs at the first court hearing that Centerbridge insisted on the issue of equity, so as to obtain legal control, "as part of the recapitalisation package" (T80). I may also more readily draw that inference in respect of Centerbridge where it was apparent, at least since the first court hearing, that the impact of the issue of equity on the votes that would be cast by Centerbridge would be in issue, and Centerbridge did not lead affidavit evidence, which could readily have been given by an appropriate decision-maker, that that equity was immaterial to its decision-making or that it would have voted in the same way had it not been issued to it.

141 In oral submissions, Mr Jackman also responded to First Pacific's submission (which was again not abandoned although First Pacific supports the schemes with the alterations to which I have referred above) that Centerbridge's, Ares' and Ascribe's votes should not be taken as representative of the class of secured creditors as a whole by referring to the transcript of the Secured Creditor Scheme meeting and submitting that the primary concern that their legal representatives expressed at that meeting was to avoid the BLY Group's insolvency (T66). It does not seem to me that the statements made by legal representatives at the Secured Creditor Scheme meeting, which are not supported by evidence led by Centerbridge, Ares or Ascribe at this hearing, can be treated as of significant probative weight as to those entities'

commercial positions. In any event, it seems to me that the question raised by First Pacific's submissions is less one of the subjective intentions of Centerbridge, Ares and Ascribe in respect of the exercise of their votes, but whether their judgement as to the Secured Creditor Scheme (in its original form) in their particular circumstances can be relied upon to conclude that the scheme (in its original form) is in the interests of a class which did not (at that time) share those commercial interests, in the receipt of equity and director nomination rights, although their respective rights (as distinct from interests) under the schemes (in their original form) are not materially different.

142 I consider that I can properly draw the inference that at least the issue of equity to entities associated with Centerbridge had a real and substantial impact upon the exercise of its votes at the Secured Creditor Scheme meeting, and that its commercial interests differed significantly from the interests of secured creditors who did not receive substantial equity and voted against the Secured Creditor Scheme in its original form. That difference in commercial interests is also reduced under the proposed alterations to the Secured Creditor Scheme which provide for the issue of 4% of the equity in BLY to SSN holders in proportion to their holdings of SSNs, but that reduction postdates the voting at the Secured Creditor Scheme meeting and does not exclude the need to approach the votes cast by Centerbridge at that meeting with care and to give particular attention to the fairness of the schemes, as now proposed to be altered by the Plaintiffs.

The treatment of interest on the TLAs and TLBs

143 The third and fourth of the matters on which First Pacific relied as material to the weight to be given to voting results were that:

> "Part of the value of the debt of Centerbridge relates to unsecured interest in respect of which it had a special interest not shared by the other Secured Creditors. If that debt is excluded, assuming the correctness of [BLY's] assertions as to the value of it (which is continuing to be investigated by First Pacific), the total debt voted in favour of the Secured Creditors' Scheme is reduced to 75.87%, which is the barest of margins.
>
> There is also uncertainty as to whether any of the PIK interest accreted and accrued on the TLA and TLB debt is secured at all (investigations as to which are also continuing). If that debt is excluded, the total debt voted in favour of the Secured Creditors' Scheme is reduced to 74.72%, such that the statutory threshold test would fail."

144 This issue raised a question as to the treatment of partly unsecured interest on the TLAs and TLBs which I will address here although it also arises in other aspects of First Pacific's submissions. First Pacific submitted that part of Centerbridge's debt under the TLAs and TLBs relates to unsecured interest and, if the amount of unsecured interest owing to Centerbridge under the TLAs and TLBs is excluded from the debt voted at the scheme meeting, the amount of debt voted in favour of the scheme is reduced to 75.77%. Mr Gleeson emphasised, in oral submissions, that the interest which Centerbridge, as holder of the TLAs and TLBs, voted at the Secured Creditor Scheme meeting was largely unsecured, because the amount secured under debt facilities could not exceed a limit set under the SUN Indenture, of approximately US$420 million, and the amount of interest under the TLAs and TLBs was largely in excess of the cap on such security (T102–103). Mr Gleeson noted that that had the consequence that interest under the TLAs and TLBs was largely unsecured, at the time of the Secured Creditor Scheme meeting, and would also largely be unsecured into the future, unless there were significant changes in debt cap arrangements (T103).

145 As First Pacific pointed out, KordaMentha's report was prepared on the basis that it was instructed that accrued PIK interest due to Centerbridge under the TLAs and TLBs did not form part of the secured claim against the relevant obligors, and the KordaMentha report attributed nil value to that debt in a winding up and following implementation of the restructure. It appears that BLY now contends that, as at 28 February 2017, TLA interest in the amount of US$18,500,000 was secured, and refers to Mr Rasetti's sixth affidavit (30.6.17 [9]) in support of that proposition. BLY accepts that, by the voting entitlement record date, a smaller amount of US$17 million was secured, and that appears to be the relevant figure for present purposes. BLY accepts that, as at 4 May 2017, the amount of interest payable to Centerbridge on the TLBs was not secured. It follows that the substantial amount of TLA interest and TLB interest was not secured.

146 The issues as to the extent of PIK interest under the TLAs and TLBs that is secured depend on a complex calculation, involving a debt cap under the SUN Indenture and the extent of indebtedness of BLY and some of its subsidiaries

from time to time (Ex CAP-1, 743–746), with the result that if the indebtedness of a specified character of BLY and the several subsidiaries is US$420 million, then PIK interest under the TLAs and TLBs is not secured. That question was explored, at a factual level, in the second court hearing and the evidence indicates that the substantial part of the accrued PIK interest on the TLAs and TLBs is in fact unsecured, and would therefore have no value on a winding up or after implementation of the schemes, on KordaMentha's assessment. First Pacific submitted, and I accept, that there is also uncertainty as to the extent to which interest under the TLAs and TLBs would be secured, after implementation of the schemes, where that depends on a prediction of the future indebtedness of BLY and its subsidiaries.

147 It seems to me that the unsecured claims for interest owed to Centerbridge under the TLAs and TLBs were "debts or claims" within the meaning of s 411(4)(a)(i) of the *Corporations Act*, and Centerbridge was entitled to vote those debts or claims under the terms of the Secured Creditor Scheme, so far as they were claims by a holder of the TLAs and TLBs that was entitled to vote in that scheme. I accept the Plaintiffs' submission that that debt is not otherwise excluded by reg 5.6.23 of the Corporations Regulations 2001 (Cth). No submission had been made, at least at first instance at the first court hearing, that any modification to the voting procedures was required in that respect. For these reasons, I do not consider that the Court has power to exclude the amount of unsecured interest on the TLAs and TLBs in determining whether the statutory majorities for the Secured Creditor Scheme are satisfied. In any event, as the Plaintiffs point out, the statutory majorities by number and by value would still have been satisfied, even if the unsecured interest on the TLAs and TLBs had not been voted by Centerbridge in respect of the scheme.

148 The extent of that unsecured interest on the TLAs and TLBs that was voted by Centerbridge in support of the Secured Creditor Scheme is nonetheless a matter that affects the weight to be given to Centerbridge's voting that interest at the Secured Creditor Scheme meeting and would be relevant to the exercise of the Court's discretion whether to approve the Secured Creditor Scheme (in its original form) and also, it seems to me, to the Court's discretion whether to

approve the schemes as altered in the manner now proposed by the Plaintiffs. It seems to me that Centerbridge's votes cast in respect of interest arising under the TLAs and TLBs at the Secured Creditor Scheme meeting should be discounted, although not excluded, in determining the weight to be given to Centerbridge's vote at that meeting. That discount is necessary to reflect the fact that Centerbridge's commercial interest, in respect of unsecured PIK interest that would not be recoverable in a winding up, differs from the commercial interest of SSN holders in respect of secured debt which would likely be recoverable in substantial part in a winding up.

149 A further question arose, in the course of submissions, as to a transaction on 2 April 2017 by which an amount of approximately US$15 million was advanced to BLY, under a Second Out ABL facility, and, by amendment made under the Third Supplemental Indenture (Ex FPTB, 104, cl 2) the debt cap was amended to exclude that borrowing, preserving the security over interest on the TLAs and TLBs as to that amount. The Plaintiffs submit that the relevant amendment was made to allow the additional debt under the Second Out ABL to be incurred, while leaving the calculation of the secured debt cap unaffected. First Pacific submitted that, but for that amendment, the amount of secured debt voted in favour of the Secured Creditor Scheme at the Secured Creditor Scheme meeting would have been reduced below the statutory threshold.

150 Mr Gleeson put, in oral submissions, that this transaction was a matter of "concern" and that the effect of that transaction was that Centerbridge obtained a security for interest which it did not have under arrangements prior to 2 April 2017, and the amount secured was excluded in determining the extent to which TLAs and TLBs were secured, at the time of the Secured Creditor Scheme meeting. Mr Gleeson submitted that the statutory majorities in respect of the scheme were only satisfied by including debt that was temporarily given a secured character, or debt that was unsecured and that matter is relevant to the exercise of the Court's discretion whether to approve the scheme (T106). In the Plaintiffs' submissions in reply, Dr Higgins rightly pointed out that this matter was not raised in First Pacific's particulars of the basis on which it opposed the Secured Creditor Scheme, although I appreciate that all parties have addressed the issues in this application under time pressure, and that

First Pacific has been required to investigate the facts of this transaction as the matter proceeded. I need not determine whether this matter can fairly be raised, since I do not accept that it has any consequence as to the approval of the schemes.

151 In the Plaintiffs' submissions in reply, Dr Higgins pointed out that the amendment had an obvious commercial rationale, since it was of advantage to BLY to enter into that facility on terms that did not prevent further secured borrowings, by reason of the debt cap, rather than leaving itself with no capacity to undertake any further borrowing on a secured basis. Although that amendment preserved the security over interest in the TLAs and TLBs for a period, it did so only because the BLY Group also preserved the ability to undertake further secured borrowings during that period. I am not satisfied that this transaction was directed to, or gave rise to, any inappropriate effect on voting at the scheme meeting or any matter which adversely affects the exercise of the Court's discretion as to the schemes.

152 For completeness, I should note that First Pacific also referred, in its initial grounds of opposition to the schemes, to uncertainty as to whether any of the PIK interest accrued on the TLAs and TLBs was secured, although that issue did not receive significant attention at the hearing, and is addressed in dealing with other issues as to voting and conduct of the scheme meetings in this judgment. First Pacific also submitted that if the amount of unsecured debt owed to Centerbridge was excluded, the total debt voted in favour of the Secured Creditor Scheme would be reduced to 75.77%, which it characterised as the "barest of margins". It seems to me that the lesser weight to be given to the votes of interested creditors, in the exercise of the Court's discretion whether to approve the schemes, in their original or altered forms, is not a mathematical exercise. Nonetheless, these matters have some significance where the vote in favour of the Secured Creditor Scheme (in its original form) was only achieved on a narrow margin of secured creditors present and voting by value.

153 The fifth of the matters on which First Pacific relied as material to the weight to be given to voting results related to matters raised by First Pacific in separate

proceedings, now discontinued, which are addressed elsewhere in this judgment.

154 I therefore accept First Pacific's submission that the weight to be given to Centerbridge's, Ares' and Ascribe's votes at the meeting to approve the Secured Creditor Scheme (in its original form) should be significantly discounted by reason of their special commercial interests, such that they should be given limited weight in determining the view that an SSN holder which did not have those interests would take, acting reasonably and its own interests. That matter does not, in itself, have the result that the Court would not have approved the Secured Creditor Scheme in its original form where it achieved the statutory majority at that meeting, or will not approve that scheme as altered in the manner now proposed by the Plaintiffs. However, it does have the result that the relatively narrow statutory majorities achieved at that meeting, over the opposition of secured creditors which would not receive the equity to be issued to Centerbridge, Ares and Ascribe and were not their affiliates, would not displace issues as to the objective fairness of the Secured Creditor Scheme which arose in respect of the original schemes, but will now need to be addressed in respect of the schemes incorporating the alterations proposed by the Plaintiffs. The fact that secured creditors who originally opposed the Secured Creditor Scheme, in its original form, now support that scheme incorporating the alterations proposed by the Plaintiffs will be a significant matter in the assessment of the fairness of that scheme and the exercise of the Court's discretion whether to approve it.

The conduct of the Secured Creditor Scheme meeting

155 The second ground on which First Pacific relied related to the conduct of and discussion at the Secured Creditor Scheme meeting. I have referred to aspects of the conduct of that meeting above, and transcripts of that meeting were in evidence. This matter also needs to be addressed in respect of the schemes in their original form, because the Secured Creditor Scheme meeting addressed the scheme in that form, although I recognise that the proposed alterations to the schemes are also relevant to this matter.

The chairperson's approach to interest on the TLA and TLB debt

156 First Pacific provided lengthy particulars of this ground. Its first aspect related to the treatment of unsecured interest on TLA and TLB debt at the Secured Creditor Scheme meeting, which I have addressed above. First Pacific advanced an additional criticism of the chairperson's approach to this issue at the Secured Creditor Scheme meeting as follows:

> "The proponents of the Secured Creditors' Scheme and the Chairperson were squarely on notice from the proceedings before Black J and the Court of Appeal that a relevant factor for the second Court hearing would be identification of how much TLA and TLB debt was unsecured and how this might impact on discussion at the meeting and the significance of the outcome.
>
> The failure of the Chairperson to address this matter at the meeting after a proper request … substantially undermined the ability of the meeting to consult in a common interest and the weight to be given to the voting."

157 First Pacific drew attention to the fact that the chairperson of the Secured Creditor Scheme meeting was asked to disclose how much interest on the TLAs and TLBs had been admitted for the purposes of voting on the scheme resolution and how much of the PIK interest owing under the TLAs and TLBs was unsecured and did not do so. The Plaintiffs respond, and I accept, that the chairperson was not required to disclose such information under the orders made by the Court for the conduct of the scheme meetings, although that is not to say that it would not have been appropriate and preferable for him to do so. First Pacific also contended at that meeting that the chairperson should not admit unsecured interest owing under the TLAs and TLBs to vote and the chairperson admitted the full amount of the TLA and TLB debt claimed for voting purposes. For the reasons noted above, I accept that TLA and TLB holders were entitled to vote the full value of the TLA and TLB debt at that meeting, under the orders previously made by the Court, and there was therefore no error in the chairperson's approach to that matter. As I noted above, the fact that such unsecured interest was voted by Centerbridge is relevant to the exercise of the Court's discretion whether to approve the schemes.

Adequacy of discussion at the Secured Creditor Scheme meeting

158 First Pacific's second ground of criticism of the conduct of the Secured Creditor Scheme meeting related to the adequacy of the discussion at that meeting, as follows:

> "A transcript of the meeting indicates that there were important matters that were raised for discussion and there was either an inability or refusal on the part of the participants of the meeting generally, being those participants who stand to benefit from the Schemes, to engage in discussion to ascertain a common interest … .
>
> Further, and more specifically, when the topic was raised as to why Centerbridge was being given benefits under the Secured Creditors' Scheme (and Ares and Ascribe receiving similar benefits through the Unsecured Creditors' Scheme) that were not made available to other Secured Creditors, nothing of substance was exposed about which the Secured Creditors were capable of discussing in a common interest."

159 First Pacific submitted that the representatives of Centerbridge, Ares and Ascribe approached the decision whether to approve the Secured Creditor Scheme, at the meeting in respect of that scheme, "heavily influenced by their own special interests arising from the differential treatment afforded to them by the Schemes". First Pacific relied on responses to questions which its legal representatives raised at the Secured Creditor Scheme meeting as to the manner in which the schemes were developed for that proposition. First Pacific also points to an observation, by a representative of Centerbridge, that Centerbridge believed that it was getting less value than it was providing, under the Secured Creditor Scheme, so far as it was giving up TLA and TLB interest with a face value of approximately US$83 million. Although I am not persuaded that that proposition is correct, for the reasons that I indicate below, it does not seem to me that Centerbridge's expressed belief in it supports any conclusion, as a matter of fact, as to its motivations at the Secured Creditor Scheme meeting.

160 First Pacific also advanced several other criticisms of responses by Centerbridge, Ares and Ascribe to propositions that First Pacific's legal representatives advanced at the Secured Creditor Scheme meeting and of attempts made by the chairperson of that meeting to focus discussion upon the terms of the schemes to be considered at the meetings. I recognise that, in the course of the Secured Creditor Scheme meeting, representatives of First

Pacific contested the view expressed by the Plaintiffs, including in the explanatory statements for the schemes, that insolvency was the only alternative to approval of the schemes. First Pacific submitted that those supporting the scheme also did not address important matters raised for discussion at the scheme meeting and that nothing of substance was exposed about why Centerbridge was receiving benefits under (or more precisely, in connection with) the Secured Creditor Scheme and Ares and Ascribe were receiving benefits under the Unsecured Creditor Scheme that were not made available to other secured creditors. First Pacific submitted that the conduct and result of the scheme meeting therefore undermined any confidence in the ability of the meeting to deliberate collectively and rationally in the common interest of secured creditors. Conversely, the Plaintiffs submit that an examination of the transcript does not establish that matter and that First Pacific was:

> "not interested in deliberating collectively and rationally about the Scheme proposed, but rather [was] interested in historical matters".

161 I recognise that discussion at the Secured Creditor Scheme meeting was somewhat stilted, as might have been expected when it was undertaken by the legal representatives of the relevant parties who each took the opportunity to advance their respective clients' points of view and seek to undermine the other parties' views at that meeting. I do not consider that there is any utility in a detailed review of the generally self-serving propositions advanced in that manner, whether by criticism of the schemes and their genesis by First Pacific or responses to those criticisms by Centerbridge, Ares and Ascribe. It is perhaps to be expected that no consensus between the secured creditors emerged at the Secured Creditor Scheme meeting, when Centerbridge, Ares and Ascribe had committed to support the scheme by the RSA prior to that meeting, First Pacific had committed to vote against it in correspondence prior to the first court hearing, and the evidence led at the first court hearing had exposed that their respective commercial interests in respect of the Secured Creditor Scheme and associated arrangements (in their original form) were very different, although I had held at the first court hearing that the impact of the schemes on their legal interests was not such as to require separate class

meetings of secured creditors, and the Court of Appeal had upheld that decision.

162 It nonetheless seems to me that the secured creditors had the opportunity to address the issues of common interest at that meeting, including the risk of insolvency and their respective attitudes to the schemes, and whether those schemes were fair inter se, even if they did not take full advantage of that opportunity. It does not seem to me that any issue as to the conduct of the Secured Creditor Scheme meeting impugns the Secured Creditor Scheme in its original form. The differences between the treatment of secured creditors under that scheme are also substantially reduced by the Plaintiffs' proposed alterations to the schemes which I will address further below.

Another issue as to interest on the TLAs and TLBs

163 First Pacific also raises a further criticism of the conduct of the Secured Creditor Scheme meeting to the effect that the Plaintiffs and Centerbridge now assert that some or all interest foregone by Centerbridge in consideration for the equity that it was receiving was secured, which would have been inconsistent with statements in the explanatory statement for the Secured Creditor Scheme meeting. That submission does not seem to have been pursued by the Plaintiffs and Centerbridge at the second court hearing and that issue need not be addressed. To the extent that Centerbridge elected to vote unsecured debt in respect of the interest on TLAs and TLBs, as it was entitled to do, then that is a matter that is relevant to the extent to which its votes should be discounted, rather than a failure in respect of the conduct of the Secured Creditor Scheme meeting.

Adequacy of KordaMentha's and KPMG's expert reports

164 First Pacific also impugned the conduct of the meeting for the Secured Creditor Scheme on the basis (which was not abandoned although First Pacific supports the schemes with the alterations to which I have referred above) that:

> "The meeting was asked to deliberate upon an expert's report that did not fully and fairly expose the value that the equity issued to Centerbridge, Ares and Ascribe under the Secured Creditors' Scheme or the value that a controlling equity stake would have once the Secured Creditors' Scheme took effect and [BLY] was solvent and resumed trading."

165 That criticism overlaps with criticisms advanced by the Snowside companies of KordaMentha's expert report contained in the explanatory statements for the schemes. I will now address the several criticisms made of that report. I will also address the criticisms made of KPMG's expert report (Ex FPTB, 8ff), which was prepared for the purpose of a shareholder meeting considering the issue of shares to Centerbridge, Ares and Ascribe under s 611 item 7 of the *Corporations Act* and provided to BLY's equityholders, and was referred to, but not contained in, the explanatory statements for the Secured Creditor Scheme and the Unsecured Creditor Scheme. I also here deal with the expert evidence on which First Pacific and the Snowside companies relied which overlaps with this issue.

166 In dealing with these matters, I have regard to observation of Brooking J in *Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3)* [1989] VR 665, cited with approval by Dodds-Streeton J in *Zenyth Therapeutics Ltd v Smith* above at [119], that:

> "[G]enerally speaking, the outcome of an application for approval of a scheme of arrangement is not to be determined by whether the judge finds the expert's report persuasive: whether the report is persuasive is a question for the members. But if the Judge takes the view that the report has a tendency to mislead or confuse, then that is another matter."

Dr Austin fairly accepted in submissions (T151) that if I reached the view that the opinions held by KordaMentha and KPMG were opinions held on reasonable grounds, that may not be sufficient to support the Snowside companies' attack on their reports or, to the extent that it is relevant in an application to approve the schemes rather than a challenge to the shareholders' meeting, the shareholders' approval for the issue of shares to Centerbridge, Ares and Ascribe under s 611 item 7 of the *Corporations Act*. That concession was rightly made and is of considerable importance.

167 I have regard to the fact that Mr Kershaw of KordaMentha and Mr Jedlin of KPMG were each cross-examined by Mr Gleeson for First Pacific and Dr Austin for the Snowside companies and that Mr Lonergan, whose report was led in First Pacific's case, and Messrs Hall and Samuel whose reports were led in the Snowside companies' case were not cross-examined. Nonetheless, at least in an application of this character, the Court is entitled to review an

expert's report, seek to assess its reasoning and determine the extent to which it assists, even where that expert has not been cross-examined: *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch); [2010] 1 BCLC 338 at [42].

The cashflow forecast adopted in the KordaMentha report

168 Turning first to KordaMentha's report contained in the explanatory statements for the schemes (Ex SK-1), KordaMentha express the view that the BLY Group would be solvent after the implementation of the proposed schemes, but would be insolvent from 1 April 2017 if it was required to pay the interest due on the SSN debt on that date. KordaMentha assess the enterprise value of the BLY Group on a capitalisation of future maintainable earnings approach in the range of US$246 million–US$286 million, which is lower than the valuation reached by KPMG in its report to BLY's shareholders, and substantially lower than the valuations on which First Pacific and the Snowside companies rely. That valuation has regard to BLY's audited financial results for the year ended 31 March 2016 and a management budget included in the BLY Group's budget model for the year ended 31 December 2017 and, by contrast with the KPMG report, is not undertaken on a "through the cycle" basis. KordaMentha adopt an earnings before interest, tax, depreciation and amortisation ("EBITDA") multiple in the range of 6.0–7.0, applied to a forward forecast period of one year, in reaching that valuation. As cross-checks on that valuation, KordaMentha assess the value of BLY on a discounted cashflow valuation in the range of US$210 million–US$280 million and on a net tangible business assets basis as approximately US$250 million. On that basis, KordaMentha express the view that the amount owing under the BLY Group's finance facilities exceeds its enterprise value by about US$500 million, as matters stand.

169 KordaMentha also express the view that the implied value for beneficiaries after implementation of the schemes is significantly higher for SSN holders and Centerbridge (as the TLA and TLB holder) than on a winding up; that unsecured scheme creditors and subordinate claims holders would likely receive no recovery in either a winding up or under the schemes; and that, if the schemes are not implemented, the Australian companies in the BLY Group would likely be placed in external administration and other companies would seek bankruptcy protection in their respective jurisdictions.

170 Mr Kershaw of KordaMentha accepted in cross-examination that KordaMentha were comfortable as to BLY's solvency, following implementation of the schemes, to the end of the United States financial year ending December 2018 by reference to the base case cashflow forecast contained in the BLY Group's budget model (T20). He also accepted that, at least in the context of assessment of solvency, he had formed the view that BLY's downside case appeared to be conservative and that its base case cashflow forecast was reasonably reliable through to 31 December 2018 (T20). Mr Kershaw accepted that, for the purposes of KordaMentha's calculation of its implied value of BLY, it took BLY's maintainable future earnings from its downside case, rather than the higher forecast earnings in its base case, and the latter forecast that BLY will make profits by the financial year ending 31 December 2020 and larger profits by the financial year ended 2021 (T23). Mr Kershaw also accepted that, if BLY achieved its base case forecast over the next five years, then the enterprise value of the BLY Group is likely to exceed its total debt balance by the financial year ended 2021 (T24). It should be noted, however, that that conclusion depends upon its premise. Mr Gleeson also explored in cross-examination whether Mr Kershaw was merely agnostic as to BLY's medium term forecasts but it was apparent that Mr Kershaw had concerns as to BLY's ability to achieve those forecasts, which seemed to me to have been reasonably founded given BLY's history and the matters to which Mr Kershaw referred.

171 Mr Kershaw accepted in cross-examination that KordaMentha's brief did not extend to an analysis of how BLY's profits have moved over the last five years or how they were likely to move over the next five years (T27). He was cross-examined at some length as to the approach adopted in KordaMentha's report in calculating a notional dividend to creditors in the hypothesis that the BLY Group's business was sold and the value returned to stakeholders after the scheme was implemented (T29ff). I am not persuaded that there was any error in KordaMentha's approach to that calculation, which was a reasonable means of determining the market value of the BLY Group's business after the schemes were realised. That seems to me to have provided useful information to BLY's creditors, notwithstanding that other approaches to valuation could no

doubt also be adopted. It does not seem to me that, as Mr Gleeson put to Mr Kershaw in cross-examination, KordaMentha should have sought to estimate what a private equity fund might consider to be the value of the BLY Group, on emerging from its present difficulties, which is a matter that such private equity funds can no doubt determine for themselves.

172 Mr Kershaw accepted that the result of KordaMentha's analysis is that the schemes would address BLY's insolvency, at least until the end of the 2018 financial year, but the market value of the BLY Group's business would then be about half of its current secured debt (T30). Mr Gleeson put to Mr Kershaw, and he did not accept, that there was a "tension" or logical inconsistency between a solvency assessment on an assumption that the BLY Group was trading for another 18 months and an assessment of implied value on an assumption that its business was sold off after the scheme was approved. I also do not accept that there is any such inconsistency. The latter approach reflects a common and well-accepted approach to the assessment of the market value of a company's business. There also seems to me to be no inconsistency in KordaMentha being prepared to accept the BLY Group's base case, for a solvency calculation over a short term, but not being satisfied that they should accept the corresponding cashflow forecast for a valuation over a longer period.

173 Mr Kershaw acknowledged in cross-examination by Dr Austin that KordaMentha did not consider that they could "get comfortable" or rely on the BLY Group's management's medium and long term forecasts (T40). Although he acknowledged that that matter was not specifically stated in KordaMentha's report, it seems to me that the approach adopted in that report would have made clear to the sophisticated creditors which participated in these schemes that KordaMentha had only had regard to shorter term management forecasts, and the reasons for that position would have been plain enough given the BLY Group's present position, its history and the content of KordaMentha's report.

Criticisms of the KordaMentha report

174 First Pacific and the Snowside companies criticise KordaMentha's valuation of BLY and seek to establish that the valuation understated the value of equity in

BLY, and raise an associated issue related to the approach adopted by KordaMentha to the BLY Group's management forecasts and prospective future earnings. First Pacific and the Snowside companies also drew attention to a difference in the valuation approaches adopted in the KordaMentha report and the KPMG report, which was released to ASX, and to which reference was made in the explanatory statements to the schemes, although it was not included in those already voluminous documents. That report (to which I will refer in more detail below) took a "through the cycle" approach to the BLY Group's maintainable earnings, rather than the approach adopted by KordaMentha of assessing maintainable earnings at a point in time, and assessed the equity value of the BLY Group, following implementation of the schemes, as between US$33 million and US$133 million. Mr Jedlin of KPMG was cross-examined as to the KPMG report and explained, in cross-examination, that KPMG took the "through the cycle" approach because the business had a cyclical character, and they were seeking to take that into account as to future maintainable earnings (T44). However, Mr Jedlin did not accept that the approach adopted by KordaMentha of having reference to the BLY Group's 2017 earnings was incorrect, and considered that matter involved a question of judgement (T45).

175 The Snowside companies also relied on the affidavit of Mr Samuel affirmed 3 July 2017 and an associated report. Mr Samuel's report, while advancing criticisms of KordaMentha's report, makes clear that Mr Samuel has conducted no analysis that would allow him to express his own opinion as to the enterprise value of BLY and that he was not instructed to do so. Mr Samuel notes that KordaMentha's methodology has produced forecast revenues that are materially lower than, and forecast gross profits lower than, the BLY Group's budget model upside and base cases.

176 Mr Samuel criticises KordaMentha's approach on the basis that KordaMentha should have taken into account management's views as to the future prospects of BLY's business. It seems to me to be plain from KordaMentha's report that they have in fact taken into account management's views and budget models, although they have not adopted the more optimistic of those models, and Mr Samuel's report, given its limited scope, provides no basis for considering that

they ought to have done so. The fact that budget forecasts were prepared by BLY's management does not in itself establish that they were or are achievable, particularly in circumstances where the BLY Group has failed to pay interest that is presently due and payable under the SSNs, and is therefore insolvent or close to insolvency. Mr Samuel does not himself undertake any substantive review of the achievability of management forecasts to demonstrate any reason that they should be adopted or to displace the reservations as to their achievability identified by KordaMentha. Mr Samuel, not surprisingly, derives substantially higher enterprise values for the BLY Group by adopting management's budget model and a discounted cashflow valuation method on a similar basis to KordaMentha, but that analysis provides no support for any affirmative conclusion that the management forecasts on which he relies are likely to be achieved or should be adopted in preference to KordaMentha's approach.

Limitations to the scope of KordaMentha's report

177 First Pacific and the Snowside companies also advance criticisms of limitations to the scope of KordaMentha's report. KordaMentha's report indicates that it complies with the requirements of Accounting Standard APES 225, but on the basis that the report is a limited scope valuation engagement. Mr Kershaw's oral evidence in chief was that the limitation of KordaMentha's report to a limited scope valuation engagement reflected the fact that KordaMentha were not comfortable with medium term forecasts presented by BLY, including as to increases in gross margin and revenue; were also not comfortable that BLY's capital expenditure would be sufficient given a substantial decline in the value of plant and equipment; and were also not comfortable with estimates of future cash tax payments which did not increase although forecast earnings increased substantially; but he nonetheless considered the work done by KordaMentha could be relied on by creditors in assessing their options, where that work was effectively directed to a comparison with insolvency (T19).

178 Mr Hall expressed the view that the limited scope of inquiries made by KordaMentha was non-compliant with the requirements of APES 225. Mr Kershaw was also cross-examined as to this matter by Dr Austin, who sought to establish that the valuation undertaken by KordaMentha for the purposes of

the explanatory statements for the schemes should have been undertaken as a valuation engagement for the purposes of APES 225 rather than as a limited scope valuation, and that KordaMentha should have undertaken further inquiries in respect of their report contained in the explanatory statements for the schemes, of a kind that they expressly disclosed that they had not undertaken. Mr Kershaw observed, in cross-examination, that the matters which KordaMentha were asked to address as to the BLY Group's solvency and its position after a scheme of arrangement was implemented were very different from a valuation undertaken in respect of an equity scheme of arrangement (T39). It seems to me that that proposition was correct.

179 Dr Austin also addressed several suggested deficiencies in the extent of KordaMentha's inquiries in oral submissions (T151ff). It seems to me that, as I observed in the course of Dr Austin's oral submissions, the criticism of KordaMentha's report on the basis that they have not taken certain steps, and consider they are obliged to describe their report as a "limited scope report", would only be material if there was a mandatory requirement that that report be something more than a limited scope report or the steps that KordaMentha had not taken were necessary to prepare an adequate report. Neither of those matters was established. As Dr Higgins pointed out in oral submissions in reply, cl 8303 of Pt 3 of Sch 8 to the Corporations Regulations does not require a report on the fairness and reasonableness of a creditors' scheme and KordaMentha were entitled to direct attention to the narrower questions which they were asked, as to the BLY Group's present and future solvency, in preparing their report.

180 I am not satisfied that APES 225 required KordaMentha to undertake a wider valuation in respect of a creditors' scheme, where the example in it refers to a valuation engagement in respect of a members' scheme, and a creditors' scheme in respect of a company that is in significant financial difficulty is very different from a members' scheme in respect of a solvent and profitable company. I see no reason to think that it is preferable that creditors be deprived of an independent expert assessment of the BLY Group's financial position, if the expert considers that he cannot undertake the full range of matters contemplated by a valuation engagement under APES 225 in the case of a

creditors' scheme. By way of example, the Plaintiffs submit, and I accept, that any criticism of KordaMentha for a failure to make inquiries with local management of the BLY Group, as distinct from executive management of the Group, has insufficient regard to the geographic scale of the Group's operation across some 42 countries and to the practical difficulties in, and likely lack of benefit from, consulting with local management in those countries for a report of this character.

181 It seems to me that the KordaMentha report fairly disclosed the inquiries that KordaMentha had made, and those that they had not made, and the sophisticated creditors involved in these schemes could readily take that matter into account. The criticism of KordaMentha's failure to make further inquiries did not establish that the making of such inquiries would have led to any different result, so far as conclusions reached by KordaMentha were concerned.

Adequacy of investigations undertaken by KordaMentha as to the BLY Group's solvency after implementation of the schemes

182 As I noted above, the Snowside companies also rely on Mr Silvia's report which expressed the view that the level of analysis and interrogation undertaken by KordaMentha, including of the BLY Group's cashflow and forecast profit and loss statements, was insufficient to support a reliable conclusion as to the BLY Group's solvency after implementation of the schemes, particularly in circumstances where the pro-forma balance sheet showed a net liability position of US$155 million and the Group's short term asset position was indicative of liquidity concerns. Mr Silvia identifies additional steps which he considers should have been taken, including interrogating the cashflows of the companies making up the corporate group of which BLY is part; seeking to identify any cyclical performance of companies within the BLY Group, by reference to a forecast increase in gross margins; considering the BLY Group's debt covenants and ability to service those covenants within the forecast period; and considering taxation considerations in respect of the schemes and debt for equity conversion. I accept that those steps could have been undertaken, although I am not satisfied that those steps necessarily had to be taken, and Mr Silvia does not seek to demonstrate that any different

conclusion would have been reached had they been taken. I should add that, had Mr Silvia's report expressed any substantive conclusion adverse to the BLY Group's solvency after implementation of the schemes (which it does not and could not, given the limited scope of his report), then that report would potentially have been inconsistent with the Snowside companies' reliance on Mr Hall's and Mr Samuel's reports to establish that the shares in BLY would have substantial value even if the schemes were not implemented.

183 Dr Austin also put to Mr Kershaw in cross-examination that KordaMentha should have undertaken a number of steps in order to support a reliable opinion on the solvency of the BLY Group after implementation of the schemes (T41). Mr Kershaw accepted that some of those steps were not undertaken; no doubt, some of those steps could have been undertaken; but it does not seem to me that Mr Kershaw's cross-examination, or other evidence, established that any of them were necessary to the provision of useful information to creditors of the BLY Group in the KordaMentha report. I am not persuaded that, given the range of matters that KordaMentha were required to address, and the immediacy of the issues presently facing the BLY Group including an existing default on interest payable by the BLY Group to SSN holders, that those steps were necessary to provide a reasonable basis for the views expressed by KordaMentha.

Criticisms of the KPMG report

184 In broad terms, the KPMG report assessed the maintainable earnings of the BLY Group at US$100 million–US$130 million, selected a multiple at the lower end of the earnings range of 5.5 and at the higher end of the range of 5.0, and estimated the enterprise value for the BLY Group as US$550 million–US$650 million, being less than total debt at 30 April 2017 of approximately US$776.5 million. (I note that, contrary to Dr Austin's submissions, it does not seem to me to be odd that the multiple that KPMG applied to the higher end of that earnings range was lower than the multiple applied to the lower end of that range, where greater risk would attach to whether the higher end of the earnings range was achievable.) KPMG then made further adjustments that reduced the amount of debt taken into account in that calculation, and determined that BLY shares had a negative equity value prior to

implementation of the schemes, and a positive value in the range of $0.0011–$0.0045 per share after implementation of the schemes.

185 The Snowside companies advanced criticisms of the KPMG report. It was put to Mr Jedlin in cross-examination that KPMG's analysis did not take into account the benefit that BLY was achieving by paying reduced interest under the terms of the scheme. Mr Jedlin's evidence was that KPMG's valuation was undertaken on a pre-interest basis, so that matter was irrelevant to that valuation (T49). By contrast, Mr Lonergan, whose evidence I will address below, expresses the view that the valuation of BLY should take into account the reduction in the amount of interest that it has to pay by reason of the schemes. Mr Jedlin accepted that a company which had lower interest obligations would be more attractive to investors, but his view is that the treatment of interest was taken into account in KPMG's approach, including its discounted cashflow valuation. Specifically, Mr Jedlin's evidence was that the interest payable by BLY was a matter relevant to the overall multiple, which reflects the overall risks of achievability of earnings going forward (T51). Mr Gleeson also put to Mr Jedlin that the multiple did not change on implementation of the schemes, and Mr Jedlin's response was that that multiple did not reflect the business in a distressed state (T51). Mr Jedlin's evidence was that he considered there was no difference in the valuation, from the perspective of BLY's equityholders to which KPMG's valuation was directed, because the face value of the debt had not been reduced (T52). It does not seem to me that any error has been demonstrated in KPMG's approach, since it has not been demonstrated that the saving in interest had any material impact on the valuation of equity, which was not already reflected in KPMG's selection of an appropriate multiple, or that there is any error in KPMG adopting a maintainable EBITDA of BLY at an enterprise level and then reducing it by the value of the debt that it owed to estimate its equity value after the scheme was implemented (T53).

186 Dr Austin in turn cross-examined Mr Jedlin as to a range of matters, including the selection of comparable companies to determine the appropriate EBITDA multiple for BLY (T54). By contrast with Mr Jedlin, Mr Hall, to whose evidence I will refer below, considered that the multiples for the Asia Pacific region that

were preferred by KPMG were less comparable where BLY was not headquartered in Australia. Mr Jedlin pointed out in cross-examination that the companies that KPMG had taken into account in determining its multiple were not restricted to Asia Pacific entities (T55). Dr Austin also addressed the question of KPMG's selection of comparable companies in order to select an appropriate EBITDA multiple to apply to BLY in oral submissions (T145ff). While the choice of multiple no doubt involves matters of judgement, and Mr Hall's view seems to me to be open, it does not seem to me that it has been demonstrated that KPMG's report is in error for this reason. A shareholder who received KPMG's report would have little difficulty in applying a different multiple, with or without the aid of professional advice, if he or she took a different view as to the range of comparable entities.

187 Mr Jedlin was also cross-examined by Dr Austin as to a difference in emphasis between the range of matters that were there identified as relevant to the identification of the appropriate multiple in KPMG's report provided to BLY shareholders and the emphasis in Mr Jedlin's response to Mr Hall's first report (Ex IJ-3) on the Asia Pacific region as relevant to the choice of multiple. It seems to me that there was a shift in emphasis between KPMG's report to shareholders and that response, but it does not seem to me that the identification of that shift in emphasis demonstrates any error in KPMG's initial report or demonstrates that Mr Hall's approach is preferable to, as distinct from simply an alternative to, KPMG's approach.

Mr Lonergan's criticisms of KPMG's approach and assessment of BLY's value

188 As I noted above, First Pacific relied on the report of Mr Lonergan, who assesses the equity of BLY as having higher value than KPMG's assessment, following implementation of the schemes, on the basis that BLY's debt should be discounted to less than its face value following implementation of the schemes. Mr Lonergan was not cross-examined.

189 Mr Lonergan expresses the view that a through the cycle measure, adopted by KPMG but not by KordaMentha, better reflects the cyclical nature of BLY's business for valuation purposes and is consistent with valuation theory and practice applicable to earnings based valuations. Mr Lonergan also accepts

that the lower end of an EBITDA multiple range of 5.0–5.5 is reasonable given the uncertainties that presently exist as to BLY's recapitalisation and future prospects. However, Mr Lonergan assesses the enterprise value of BLY (excluding surplus assets) post-restructure as in the range of US$550 million–US$650 million, adopting KPMG's through the cycle EBITDA of US$100 million–US$130 million and KPMG's EBITDA multiple of between 5.0 and 5.5, but using the market value of BLY's debt rather than its face value in determining the value of equity after the restructuring. On that basis, he assesses the equity value of BLY after the restructuring as in the higher range of US$129.6 million–US$229.6 million.

190 That assessment depends on Mr Lonergan's view that it is inconsistent for KPMG to assess the enterprise value of BLY in market value terms, but to assess the value of its debt at face value rather than at market value. Mr Jedlin did not accept that criticism, and I am not persuaded by that criticism. As the Plaintiffs point out, the premise of the schemes is that they will restore BLY's financial viability and place it in a position to meet its debt, at least in the short term, and the KordaMentha report provides support for the view that it is likely to do so. The parties that criticised the expert reports on which the Plaintiffs rely generally contended that BLY's position would be stronger, rather than weaker, after the schemes were implemented. In that case, it seems to me that BLY's debts are properly valued at their face value, and that Mr Lonergan's approach fails to reflect the fact that BLY's creditors have a prior claim on its assets to its shareholders. Given that view, I need not address BLY's further response that the use of a market value for debt would only be appropriate if BLY could repurchase its debt in the market, and that BLY would not have the capacity to do so, even after the schemes, or First Pacific's rejoinder that that misunderstands Mr Lonergan's approach.

191 Mr Lonergan also expresses the view that, as the projected cyclical upturn in the mining industry materialises, the applicable EBITDA multiple for BLY would be revised upward to the higher end of the normal industry EBITDA multiple range of between 6 and 7 and, if the through the cycle earnings remained at US$100 million–US$130 million, then the applicable multiple would increase to the upper end of the range to around 7. On that basis, he indicates that the

future value of equity in BLY would be in the range of US$233.8 million–US$443.8 million. That approach is criticised in Mr Jedlin's response. I am not persuaded that the use of a higher multiple of 7 would be justifiable on the prospect of future earnings increases and future profitability of BLY, where BLY's ability to achieve such future profitability remains to be established. If, as Mr Gleeson suggests, that multiple addresses the position if BLY's prospects improve, then it addresses a different question from KordaMentha's and KPMG's valuation of the BLY Group where such improvement has not yet been substantially realised. I am not persuaded that Mr Lonergan's approach should be adopted in preference to that of KordaMentha or KPMG.

Mr Hall's assessment of BLY's value

192 As I noted above, the Snowside companies rely on several reports of Mr Hall. By contrast with the KPMG report, Mr Hall assesses the enterprise value of the BLY Group as at the date of the explanatory statements for the schemes as US$805 million–US$920 million, with a mid-point valuation of approximately US$862 million. Mr Hall's second supplementary report dated 29 June 2017 identified suggested failures by KordaMentha to have regard to BLY management's forecasts of future earnings. Mr Hall's third supplementary report expanded on issues as to the cyclical nature of BLY's business, his criticisms of the choice of companies used by KordaMentha to determine its EBITDA multiple and his criticisms of the limited scope valuation engagement undertaken by KordaMentha.

193 Mr Hall adopts the mid-point of maintainable earnings adopted by KPMG, but reaches his higher valuation of BLY by applying substantially higher multiples of between 7.0 and 8.0, which he considers should reflect North American comparisons, where the BLY Group has a globalised business and significant activities in North America. It seems to me that Mr Hall's reasoning, so far as he adopts an EBITDA multiple of 7.0–8.0 by reference to the average multiple of North American companies or all companies, or the upper half of companies that KPMG identified, does not appropriately recognise the significant risk that currently attaches to the BLY Group's financial position. Mr Hall also expresses the view that KPMG apply too high a discount rate in their discounted cashflow calculation, and that the risk and uncertainty attached to BLY does not justify a

higher discount rate for it than would be appropriate to the mining services industry generally. Again, it seems to me that that approach does not have sufficient regard to the particular risks attached to the BLY Group's present financial position.

194 Mr Hall also criticises KPMG's report for applying a lower multiple to the high end of its earning range and he applies the higher multiple to the higher end of that range. It seems to me that, as Brereton J observed in *Re Boart Longyear Ltd* [2017] NSWSC 756 at [29], KPMG's approach to that matter was neither novel nor illogical, and it also seems to me that Mr Hall's valuation fails to recognise that greater risk is associated with the high end than the low end of BLY's earning range. I am not persuaded that KPMG's approach was inappropriate, given the risks attached to the BLY Group. Conversely, there are obvious difficulties with Mr Hall's approach of combining a high earnings estimate with a correspondingly high risk with a high multiple. Mr Hall also expresses the view that KPMG's conclusion as to BLY's enterprise value is substantially lower than that implied by its proposed share purchase plan. Mr Hall's reliance on the price contained in BLY's share purchase plan is undermined by the facts that, as KPMG point out in a letter to BLY dated 8 June 2017, that price was negotiated and did not necessarily reflect fair value and the amount raised under that plan is capped at AUD$9 million and cannot be extrapolated to the whole of the equity of the BLY Group.

195 Mr Hall calculates the value per BLY share prior to the recapitalisation in a range of US$0.1115–US$0.2313 and after the recapitalisation in the range of US$0.0097–US$0.0136, with the reduction in share value reflecting the dilution effect of the issue of further shares. On that basis, Mr Hall identifies a transfer of value from non-associated shareholders of BLY to Centerbridge, Ares and Ascribe in the range of $65 million–$139 million. It follows from the views that I have expressed above as to particular aspects of Mr Hall's approach that I am not persuaded that calculation is correct.

196 It seems to me that First Pacific's and the Snowside companies' criticisms of the KordaMentha and KPMG reports do not provide any substantial basis for criticism of the conduct of the scheme meetings, and that the expert reports on

which First Pacific and the Snowside companies rely establish only that, if the mining cycle or the BLY Group's performance in fact improves, or if different views are taken as to matters where experts, creditors and shareholders may reasonably take different views, then the BLY Group and its equity may have greater value than indicated by the KordaMentha and KPMG reports. That possibility is the product of its premises and would be self-evident at least to the sophisticated parties that hold the SSNs and the SUNs, and very likely also to BLY's shareholders. That matter does not establish a basis to decline to approve the schemes in either their original or altered forms.

Issues as to substantive fairness of the original schemes

197 First Pacific's third ground of opposition to the schemes in their original form was that:

> "The Schemes confer valuable rights and opportunities upon Centerbridge, Ares and Ascribe which are not made available to the Secured Creditors as a whole and for which Centerbridge, Ares and Ascribe have provided inadequate consideration to [BLY] and/or the other Secured Creditors with the result that there has been no reasonable quid pro quo."

198 I will refer below to a number of submissions that were made by the parties as to the fairness of the schemes in their original form. Those submissions were not abandoned although First Pacific supports the schemes with the alterations to which I have referred above, and I also proceed on the basis that those submissions are pressed by the Snowside companies. In dealing with those submissions, I recognise below that some of the issues raised are now displaced, or arise only in a different form, by reason of the alterations now proposed by the Plaintiffs to the schemes.

199 I have referred to the authorities as to the matters that are relevant to the Court's exercise of its discretion at the second court hearing above, and those matters include the fairness of a scheme to the body of creditors as a whole. The Plaintiffs submit that most cases of unfairness will be associated with inadequate disclosure, as Santow J noted in *Re Application of NRMA Ltd (No 2)* above at [30], and also refer to the observation in T Damien and A Rich, *Schemes, Takeovers and Himalayan Peaks* (3rd ed, 2013, p 155) that:

> "provided there has been full and fair disclosure of all material information, the Court will generally be reluctant to decline to approve the scheme as part of the exercise of its fairness discretion."

I do not doubt the correctness of that proposition, as a generalisation, but it plainly does not exclude the possibility that unfairness may arise in other ways in a particular case.

200 Mr Jackman also submits (T82) that a scheme need not treat all creditors equally in order to be considered fair, especially if there is a commercial rationale for a difference in treatment: *Fowler v Lindholm* above at [75]–[80]; *Re Stemcor (SEA) Pte Ltd* above; *Re Apcoa Parking Holdings GmbH* above. In *Fowler v Lindholm* above, Finkelstein J found on the relevant facts that the benefit given to the litigation funder was reasonable in the circumstances. In *Re Stemcor (SEA) Pte Ltd* above, the Court found that the opportunity to participate in a new facility was open to all creditors equally and creditors had been treated fairly on that basis. Neither of those cases addresses a position where disproportionate treatment of creditors was established, or is authority that fairness can be established if there are substantial differences in the treatment of parties which are in a corresponding interest and there is no reasonable commercial rationale for that difference in treatment. In oral submissions in reply, Dr Higgins similarly submitted that mere differences of treatment, where creditors are in different positions, would not be sufficient to attract a conclusion of unfairness (T183). While I accept that proposition, significant differences of treatment in respect of creditors who do share significant common characteristics — in this case, Centerbridge, Ares and Ascribe on the one hand and First Pacific on the other, in their capacity as SSN holders — were not justified by evidence that they were proportionate to the differences in their positions as TLA or TLB holders or unsecured creditors. Those differences seem to me to go to unfairness in the Secured Creditor Scheme and also to go to whether an honest and intelligent creditor would reject the scheme on that basis.

201 The English authorities have treated the question whether the Court can be satisfied of the fairness of a scheme as involving two connected questions, namely whether the majority that voted to approve the scheme fairly represented the relevant class, and whether the scheme is one that a

reasonable person would approve: *Re Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723 at 736; *Re Anglo American Insurance Ltd* [2001] 1 BCLC 755 at 762; *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; 2 BCLC 480; L Gullifer and J Payne, *Corporate Finance Law, Principles and Policy* (2nd ed, 2015, p 744). The English cases also recognise that, although the Court's role at a second court hearing is not to substitute its view for the views of those who have properly voted in favour of a scheme, and the majority vote in favour of a scheme will be given substantial weight, the Court may refuse to approve a scheme where the votes necessary to secure that approval were cast to promote the special interest of creditors that was not shared by the class as a whole, or where those voting at the meeting had done so to promote a special interest which differs from that of other creditors: *Re BTR Plc* above; *Re Equitable Life Assurance Society* above; L Gullifer and J Payne, *Corporate Finance Law, Principles and Policy*, p 745.

202 The Plaintiffs submit, and I accept, that the schemes (in their original and altered forms) have significant benefits for the scheme companies, so far as they will at least reduce their debt and improve their liquidity, if they exercise the option for interest payable in kind on the SSNs which is introduced by the schemes, and extend the maturities of the BLY Group's debt. The Plaintiffs also point to the significant proportion of creditors which voted at both the Secured Creditor Scheme meeting and the Unsecured Creditor Scheme meeting. That matter provides little assistance in determining the fairness of the original schemes, given the significant level of opposition to the Secured Creditor Scheme at the meeting in respect of that scheme. The support of substantially all voting creditors for the altered schemes is of greater significance.

203 The Plaintiffs submit that a creditors' scheme that yields a clear commercial benefit to the general body of creditors would generally be considered one that an intelligent and honest creditor might approve. In oral submissions, Mr Jackman submitted that the Court was only concerned with the question of approval of these schemes and not, as I observed in the Earlier Judgment at [28], with whether they are the best schemes that could be propounded. Mr Jackman also submitted that it was open to an honest and intelligent creditor to

form a view that, if these schemes are not approved, then the result will be that BLY and associated companies may well be placed in an external administration (T66). I have regard to, but need not repeat, the views expressed by KordaMentha as to the risk of external administration if the schemes are not implemented, and as to the higher returns to holders of the SSNs, TLAs and TLBs under the schemes, by comparison with their position on a liquidation, and that SUNs are likely to have no value in either an external administration or a liquidation. I have referred above to the controversy as to whether the information provided to creditors and shareholders undervalued BLY, and have held above that I am not persuaded that there was any error in the approach adopted by KordaMentha or KPMG. I do accept that the schemes (in both their original and altered forms) yield a commercial benefit to creditors of BLY, including secured creditors, so far as they should avert the likelihood of an external insolvency administration of BLY and associated companies.

204 There is a contest as to the likely outcome if the schemes are not approved. First Pacific submitted that, if the schemes are not approved, there are alternatives to external administration, in which either the RSA is terminated and BLY is free to negotiate alternative arrangements with creditors, or Centerbridge, Ares and Ascribe develop an alternative proposal as contemplated by the RSA. The Snowside companies also submit that, notwithstanding the views of KordaMentha, the Court should not find that insolvent external administrations for entities in the BLY Group are likely if the schemes are not approved, and refer to the obligation of Centerbridge, Ares and Ascribe under cl 10.3 of the RSA to work together in good faith to cause BLY to implement an alternative restructuring, in a three month period after, inter alia, the schemes not being approved. The Plaintiffs respond that that clause does not bind the BLY Group. Mr Wood, who appears for Ares and Ascribe, emphasises the prospect that the directors of BLY would place BLY in voluntary administration, if the schemes failed, because default already exists in respect of amounts payable under the SSNs, which are debts presently due and payable, and the orders previously made by the Court under s 411(16) of the *Corporations Act* would lapse when the schemes lapsed. I am satisfied that it is likely, on the evidence of BLY’s present position and its present inability to

pay interest due on the SSNs, that BLY and its affiliates will be placed in external administration if the schemes are not approved and the orders presently made by the Court restraining the commencement of proceedings against BLY without leave then lapse. I accept that that result is not inevitable and that the alternatives identified by First Pacific and the Snowside companies could possibly occur. I therefore approach the question of approval of the schemes, in their altered form, in the context that an external insolvency administration of BLY and its affiliates is the likely alternative if the schemes are not approved.

205 Mr Gleeson submitted (T91–92), with some force, that the Plaintiffs' submissions tended toward the proposition that, if a scheme would avoid a company's insolvency and improve the position of creditors by comparison with insolvency, then the scheme should be approved if it reaches a majority vote. First Pacific submitted that that proposition cannot be accepted. Mr Gleeson submitted (T95) that it is relevant, in determining the fairness of a scheme, to have regard to the position of creditors inter se after the scheme is implemented, so as to determine whether there is a reasonable proportion between what has been surrendered by creditors, inter se, in giving effect to the scheme and what is obtained by creditors, inter se, when the scheme was implemented. That raises the possibility that, when the scheme is implemented, one or more groups of creditors may obtain benefits that are disproportionate to what they have given up, so as to cause difficulty for the fairness of the scheme. Mr Gleeson also accepted that there may be schemes where something different is offered to someone in a class, but that there will generally be valuation evidence, or at least a clear commercial rationale, to establish why there is a fair distribution of different benefits or opportunities between different members of the class (T102).

206 In ASIC's summary of key issues, it emphasises that fairness involves more than a comparison to insolvency, and requires reference to matters such as the benefits and burdens created and imposed by the scheme on creditors inter se; evidence of the process by which the scheme was formulated, including matters such as whether additional benefits were offered to all or were formulated under a fair and inclusive process, and evidence of reasons for any

differential treatment. In its written submissions, ASIC also submits that the question of fairness of the scheme involves considering the treatment of creditors inter se and is not to be addressed solely or even predominantly by reference to a comparison to the position in the absence of the scheme. ASIC submits that:

> "[F]airness cannot be assessed solely by reference to a comparison to the absence of any scheme (in this case a winding up). Fairness must include a comparison between what is received under the scheme by creditors inter se. Otherwise, scheme terms could be formulated, whether by scheme companies or their creditors, to 'buy' a sufficient majority of votes, subject only to a minimum requirement that those creditors not obtaining additional benefits be better off than on a winding up."

207 In oral submissions, Mr Barnett, who appears for ASIC, submits that, where different benefits are being given to different creditors who are said to give up different things, then the Court needs to assess the totality of what has occurred including the relativity of what has been given up against what has been obtained, by reference both to the process adopted and to the ultimate position in order to assess the fairness of the scheme (T163–164). ASIC also points out, with substantial force, that the Court's discretion whether to approve a scheme will only arise after the statutory majorities of creditors or members have already voted in favour of the scheme, but that discretion is nonetheless one of substance. ASIC also submits, again with substantial force, that the weight to be given to the commercial judgement of the majority is qualified, where a scheme treats creditors or members differently and those differences are not reflected in separate classes. I pause to note that that situation can readily arise, if the relevant differences affect the commercial interests of the parties, rather than their legal rights, and will likely not require the creation of separate classes. ASIC also submitted that the honest and intelligent creditor to which the Court would have regard, for the purposes of the test in *Re Alabama*, *New Orleans, Texas and Pacific Junction Railway Co* above is a creditor who does not receive additional benefits under the scheme. I accept that the honest and reasonable creditor would at least vote in the interests of the relevant class generally. It is otherwise not necessary to determine this question given the other findings that I have reached.

208 The Plaintiffs respond that the creditors in these schemes are bound together by their common interest in avoiding insolvency and that the Court of Appeal had determined that the differences that exist do not predicate different classes. It seems to me that that response is undermined by the facts that, first, creditors may both have a common interest in avoiding insolvency and other commercial interests which are not in common and, second, that the existence of a single class is not inconsistent with the existence of different commercial interests among creditors, as distinct from different legal rights.

209 I do not accept that a scheme should be approved simply because it achieves the statutory majority and avoids a company's insolvency. A scheme that met that test would likely not be approved if it was nonetheless unfair to creditors inter se, including if substantial benefits of implementing it accrued to persons who do not incur substantial detriment rather than those who did incur such detriment.

The issue of equity to Centerbridge, Ares and Ascribe

210 First Pacific's previous opposition to the schemes (in their original form) on the basis of fairness was supported by lengthy particulars, which referred to the structure of the schemes (in their original form) including that Centerbridge would increase its shareholding from 3.7% to 56% (reduced to 54% by the proposed alterations to the schemes) and that those shares would have positive value after the recapitalisation. First Pacific also previously contended that other aspects of the schemes gave rise to unfairness, including that Centerbridge would gain the right to appoint 5 of 9 directors, gain control of BLY, gain priority over SUN holders in respect of the unsecured component of the TLA and TLB debt and suffer a substantially shorter (approximately two year) extension of the maturity date of its debt when compared to that of the SSN holders.

211 First Pacific in turn emphasised that:

> "the other Secured Creditors will receive no equity or board appointment rights, sacrifice their right to call in their debt upon a change of control, sacrifice their right to cash interest in exchange for PIK interest payable on maturity and have had no opportunity to negotiate any alternative restructuring options with [BLY] including for the issue of equity."

212 The parties' submissions as to fairness of the schemes, and particularly fairness of the Secured Creditor Scheme (in its original form) as between secured creditors inter se, focused on two related issues, namely whether, first, the Secured Creditor Scheme and associated arrangements (in their original form) did not adequately compensate SSN holders for the rights they were required to surrender and were so unfair that they would not be approved by an honest and intelligent secured creditor or the Court on that basis; and, second, whether the Secured Creditor Scheme and associated arrangements (in their original form) treated Centerbridge, Ares and Ascribe unreasonably favourably in the issue of equity and the grant of director nomination rights to them, and whether that gave rise to unfairness to secured creditors inter se so that the Secured Creditor Scheme would also not be approved by an honest and intelligent secured creditor or the Court on that basis.

213 I will now address these issues with reference to the schemes and associated arrangements incorporating the alterations proposed by the Plaintiffs. As will emerge below, the criticisms made by First Pacific of the original schemes are largely displaced by the proposed alterations to the schemes, which provide for the issue of equity to SSN holders on a pro rata basis and also provide consideration to SSN holders, by an increased payment on redemption of the SSNs, for the extension of their term and the conversion of the right to cash interest to PIK interest.

Whether there was a fair quid pro quo for the detriment to SSN holders under the Secured Creditor Scheme

214 First Pacific submitted that several amendments to the SSNs under the original schemes (which are continued in the altered schemes, which First Pacific now supports) were disadvantageous to SSN holders. These matters are now addressed by the alterations to the schemes, which provide a quid pro quo for that disadvantage, but I should refer to the Plaintiffs' wider responses to these matters before addressing the relevant amendments to the SSNs and the proposed alterations to the schemes.

215 The Plaintiffs submitted that the rights of the SSN holders are not substantially affected by the schemes (in their original form) because the face value of their debt remains, their secured position remains and the interest rate remains the

same or is increased if BLY elects to pay interest in kind rather than in cash. The Plaintiffs also submitted that the SSN holders' concessions are less than the concessions that were made by holders of SUNs whose debt was converted to equity and by TLA and TLB holders in reducing rates of interest that were already payable in kind from 12% to 10% and then 8% until maturity. In oral submissions in reply, Dr Higgins also emphasised the Plaintiffs' position that the SSN holders were being asked to concede little because, as matters stood, BLY could not pay outstanding further interest in cash and, if SSN holders were to exercise a change of control put option, BLY would not be able to repay the face value of their notes (T185). The latter is not a complete answer to First Pacific's position, because SSN holders could rely on their security over the BLY Group's assets on an Event of Default and the evidence indicates that they would likely recover a portion of the amounts owed to them on the exercise of that security, albeit at the cost of the Plaintiffs likely being placed in external administration in Australia and under equivalent insolvency regimes in other countries.

216 First Pacific relied on the waiver of SSN holders' rights to call in debt on a change of control under the original schemes, with effect that:

> "All Secured Creditors will waive their separate and individual right to call in their debt if there has been a change of control (as there will be following the issue of shares to and appointment of directors by Centerbridge), which waiver will inure for the sole benefit of Centerbridge."

217 In my view, that waiver would be disadvantageous to the SSN holders and to the commercial advantage of Centerbridge since it would remove SSN holders' ability to require repayment of the SSN debt on the change of legal control arising from the issue of shares to Centerbridge as contemplated by the Subscription Deed, which will allow Centerbridge to obtain legal control of BLY. By that waiver, SSN holders are deprived of the opportunity to exit their debt, by reason of a change of control, at a point that BLY is in a position of insolvency or near insolvency and, if the schemes are implemented, the maturity dates of their debts will be extended and their rights to receive interest in cash will potentially be substituted by the receipt of interest on a PIK basis for a period, which will extend their exposure to BLY until that interest is paid in cash or money's worth.

218 I have not neglected that BLY would not be able to pay SSN holders' debt in full, if each of them was to exercise that change of control right, even after entry into the schemes. Nonetheless, each SSN holder is deprived of the prospect of full or substantial repayment, if a minority of them exercised that right and others did not on a change of control, or of part repayment at an earlier point in time and thereby avoiding further exposure to the credit risk of BLY, if all of them were to exercise that right after Centerbridge acquired legal control of BLY by the schemes and associated arrangements. To the extent that exit as a secured lender to BLY may be a rational strategy for an SSN holder in the present circumstances, depriving it of a change of control right which would permit that exit on implementation of the schemes and associated arrangements is a significant detriment to that SSN holder, and that detriment does not depend on identifying any particular advantage to Centerbridge in moving from its present position of likely practical control of BLY to legal control of BLY.

219 Second, First Pacific relied on the conversion of interest payable under the SSNs, at BLY's option, to PIK interest for a period of two years, with effect that:

> "The holders of SSNs may, at [BLY's] option, relinquish their right to cash interest for a period of 2 years commencing from 1 January 2017 with interest during that period being capitalised at a rate of 12.00% per annum with no corresponding change to the interest payable by Centerbridge which under the terms of the TLA and TLB accrues only PIK interest that is payable at maturity."

220 It seems to me that this amendment to the SSNs was also disadvantageous to the SSN holders, so far as the option is permitted for BLY to pay interest on a PIK basis, albeit at a higher interest rate, for a two year period. The present right to receive interest in cash may well be of greater value to an SSN holder than a future right to receive interest at a higher rate, which will be recovered if the BLY Group has capacity to pay it or the SSN holders' security is sufficient, in a default or insolvency, again with the qualification that this is ultimately a matter for evidence (which was not led) rather than for logical deduction. At the least, that SSN holder would be deprived of the opportunity to exercise its rights in that period if cash interest is not paid when due, and left to the risk that interest which has accrued in kind will not be recovered, if the BLY Group's

financial position has not improved and its security is insufficient, at the end of the period in which payment in kind was permitted.

221 Third, First Pacific relied on the different extent of the change in the maturity date for the debt owed under the SSNs and the TLAs and TLBs, although the maturity date for each debt would be extended to the common date of 31 December 2022. Mr Gleeson submitted, in oral submissions, that the extension of the maturity date for the SSNs for some four years, which is a longer extension than that in respect of the TLAs and TLBs, is of significant benefit to BLY, and involves a significant sacrifice by SSN holders. That matter, in itself, may involve a limited detriment to SSN holders, when BLY likely could not presently repay their debt and they would receive only a portion of that debt in an external insolvency administration. First Pacific also relied on the grant of priority of the unsecured PIK interest owed to Centerbridge over unsecured debt owed to SUN holders and dilution of equity of shareholders, other than SUN holders and Centerbridge, by the Unsecured Creditor Scheme. I need not address these matters given the conclusions that I have reached on other grounds, and the fact that voting creditors who previously opposed the original schemes (with the one exception of the SUN holder whose attitude is not known) now support the altered schemes.

The consideration given by Centerbridge for the benefits which it obtains under the original scheme

222 First Pacific submitted that the Secured Creditor Scheme and associated arrangements in their original form treated Centerbridge, Ares and Ascribe unreasonably favourably in the issue of equity and the grant of director nomination rights to them. That issue is also addressed by the proposed alterations to the schemes, so far as additional benefits provided to SSN holders reduce any differential treatment of SSN holders and also share, to some extent, any benefit obtained by Centerbridge, Ares and Ascribe from the issue of equity with SSN holders.

223 First Pacific relied, first, on the issue of equity and grant of director nomination rights to Centerbridge, Ares and Ascribe under the combination of the Subscription Deed, Unsecured Creditor Scheme and Director Nomination Agreements and particularised its complaint as follows:

> "By operation of the Secured Creditors' Scheme and agreements upon which it is conditional [in their original form], Centerbridge will (A) increase its shareholding from 3.7% to 56% (after allowing for the dilution that will occur by reason of the issue of 42% of [BLY's] share capital to the SUN holders); (B) be entitled under a Director Nomination Agreement to appoint 5 (of 9) persons to the board of [BLY]; and (C) thereby assume control of [BLY].
>
> By operation of the Unsecured Creditors' Scheme and agreements upon which it is conditional [in their original form], Ares and Ascribe (as SUN holders) will between them receive approximately [38.5]% of [BLY's] issued share capital and the right to appoint one director each to the board of [BLY].
>
> No other Secured Creditor will be issued with any equity in [BLY] or receive any board appointment rights (except for Ares and Ascribe which will receive equity and appointment rights in their separate capacity as Unsecured Creditors)."

224 First Pacific also submitted that Centerbridge, Ares and Ascribe gave inadequate consideration for the rights allocated to them so as to give rise to unfairness in the schemes in their original form. That allegation was particularised with effect that:

> "The unsecured future PIK interest foregone by Centerbridge and the unsecured debt under the SUNs foregone by Ares and Ascribe as consideration for the issue of equity to them were ascribed nil value in a winding up by [KordaMentha]. …
>
> The shares that will be received by Centerbridge and by Ares and Ascribe in consideration for some of the unsecured debt owing under the SUNs will have positive value after the recapitalisation. …
>
> The value of the shares that will be received by Centerbridge will include a premium for control."

225 The Plaintiffs placed some weight on the fact that additional equity was to be issued to Centerbridge pursuant to the Subscription Deed which, they contended, operated outside the Secured Creditor Scheme. It seems to me that the Court must properly have regard to issue of equity to Centerbridge under the Subscription Deed in considering the fairness of the schemes, where the issue of that equity is an essential step in the implementation of the schemes, including by reason of the conditions precedent addressing that matter. It also seems to me that the Court should have regard to the rights conferred by the Director Nomination Agreements in assessing the fairness of the schemes, where those arrangements are conditions precedent to the schemes and they are also plainly closely connected with Centerbridge's, Ares' and Ascribe's participation in the schemes. That position is reinforced by, although it does not depend upon, the fact that these rights were initially

treated as components of the schemes when the schemes were announced to ASX.

226 This issue requires an assessment of, first, the value of the benefits obtained by Centerbridge, Ares and Ascribe under the Secured Creditor Scheme and associated arrangements and, second, what is given up by them in exchange. Turning first to the value of what is acquired, I recognise that, in the appeal from the Earlier Judgment, Bathurst CJ noted that, or the likelihood that, Centerbridge would not obtain any significant financial advantage by the grant of equity (at [94]). Additional evidence was led as to that matter at this hearing, beyond the evidence that was led at the earlier hearing and was available before the Court of Appeal. In these circumstances, I do not consider that I am bound by that observation for the purposes of this hearing, although I reach substantially the same result on the evidence now led at this hearing.

227 The Plaintiffs submitted that the equity issued to Centerbridge (and also Ares and Ascribe and other participants in the Unsecured Creditor Scheme) has only speculative value. First Pacific submitted that the equity issued to Centerbridge (and Ares and Ascribe) nonetheless has “option” value, which would be realised in an upturn in the mining industry and the BLY Group’s performance. In oral submissions, Mr Gleeson also submitted that the value of the equity issued to Centerbridge, Ares and Ascribe was uncapped, in the sense that equity would potentially continue to increase in value as the fortunes of the BLY Group improved, by contrast with the capped amount of the unsecured debt that was given up by them (T131). The potential relevance of “option” value in this sense was recognised in *British America Nickel Corporation Ltd v M J O’Brien Ltd* above, concerning the exercise of a power under a trust deed rather than a scheme of arrangement, where their Lordships recognised the significance of the fact that stock which was then of little value might increase in value if, in that case, the price of nickel subsequently rose.

228 It seems to me that the evidence to which I have referred above indicates that Centerbridge, Ares and Ascribe (and other SUN holders and equityholders) do not obtain any significant present financial advantage by the grant of equity, since that equity is presently likely to be worthless or close to worthless, even

after the schemes are implemented. However, the equity to be issued to Centerbridge, Ares, Ascribe and other SUN holders and equityholders does have real “option value” in the sense noted above, because the worth of that equity would increase, and potentially substantially increase, if the mining environment or the BLY Group’s performance or both improve.

229 I also recognise that, if Mr Lonergan’s or Mr Hall’s approach to valuation were accepted, then the equity to be issued to Centerbridge, Ares and Ascribe under the schemes and associated arrangements has significant present value, as distinct from merely speculative or option value. Mr Lonergan expresses the view that, in the absence of the proposed restructure, the SUNs would likely have no material value, and, under the proposed schemes, holders of SUNs would be given subordinated notes with a face value of US$88.2 million, new ordinary shares such that they hold 42% of BLY’s ordinary shares on issue post-restructure but before equity warrant dilution, and two tranches of 7-year equity warrants equivalent to a total of 7.5% of BLY’s ordinary shares post-restructure with different exercise prices. Mr Lonergan assesses the post-restructure market value of the subordinated notes as US$42.4 million, and assesses the post-restructure value of the 42% equity interest (pre-warrants) obtained by the SUN holders in the range of US$28.1 million–US$158.4 million, but taking into account the market value rather than the face value of BLY’s debt and, in respect of his higher figures, adopting the higher multiple of 7.0. I have addressed those approaches above and do not accept them in preference to KordaMentha’s and KPMG’s approach.

230 In its submissions as amicus curiae, ASIC submits that any proposition that the issue of equity to Centerbridge, or indeed to Ares or Ascribe, under the original schemes (and now to all SSN holders and SUN holders under the altered schemes) is of no real value (or, I interpolate, potential value) is also undermined by the observation that the secured creditors who receive it support the scheme and the secured creditors who do not receive it (I interpolate, with the exception of some funds affiliated with Ares, where other Ares funds do receive it) do not support the scheme. There is force in that submission, although I have recognised above that differing creditors’ views could also reflect their different assessment of the likelihood of insolvency or

the prospects of more favourable alternatives developing if the schemes (in their original form) failed. In the event, the schemes in the altered form now propounded by the Plaintiffs treat all SSN holders equally in respect of the issue of equity and are more favourable to them.

Premium for control

231 First Pacific initially submitted and the Snowside companies also submit that the value of shares to be received by Centerbridge should include a premium for control and advanced criticisms of KordaMentha's approach to that matter in their report included in the explanatory statements for the schemes.

232 In their further supplementary submissions, the Snowside companies objected to the approval of the schemes on the basis that Centerbridge, Ares and Ascribe would together move from an equity interest (held by Centerbridge alone) of 48.9% to 93.2% (reduced under the proposed alterations to the schemes) of the shares in BLY without payment of a premium for acquisition of control. I have real doubt whether a question properly arises as to whether a premium for control should be paid in respect of Centerbridge, Ares and Ascribe collectively, where Centerbridge alone will move to legal control of BLY when the schemes are implemented, and it is not apparent that Ares or Ascribe, acting alone or together (if permitted to do so under Ch 6 of the *Corporations Act*) would control BLY, where each would acquire a minority interest in that company and minority representation on its board. In oral submissions, Dr Austin also drew attention to Mr Hall's view that Centerbridge was achieving control of BLY at a discount rather than paying a control premium, and submitted that that is not merely a difference of opinion but a deficiency of disclosure in the KPMG report provided to shareholders. That submission seems to me to depend upon aspects of Mr Hall's report which I have not accepted.

233 Mr Kershaw of KordaMentha accepted, in cross-examination, that the ability to control BLY would generally be seen as valuable, and that control premiums payable in takeovers are generally in the range of 25% to 40% (T34). KPMG's report indicates that KPMG included a premium for control in the multiples that they adopted. Mr Hall's report takes issue with the level of that control

premium, so far as KPMG have had regard to the risk attached to the BLY Group in determining that premium, and Mr Hall expresses the view that that involves a double counting of risk which would already be taken into account in suggesting an appropriate EBITDA multiple. It does not seem to me that this is a question of double counting, since there is every reason to think that an acquirer would discount the premium that should be paid to acquire a company in financial difficulty, beyond the allowance for risk already included in the earnings multiple, and I am not satisfied that a higher control premium should be allowed if a control premium is properly applicable in this context.

234 The Plaintiffs respond that the issue of equity to Centerbridge is of less significance where it presently has de facto control of BLY. I recognise that Centerbridge presently likely has de facto control of BLY, by reason of its 48.9% shareholding; however, that shareholding would be diluted to 3.7% by reason of the Unsecured Creditor Scheme; and the subsequent increase in Centerbridge's shareholding from an equity stake of 3.7% to an equity stake of 56% of BLY's issued share capital (reduced to 54% by the proposed alterations) seems to be a reacquisition of control that would previously have been lost under that scheme.

235 I proceed on the basis that a control premium is appropriately applied in respect of the acquisition of equity in BLY, where KPMG and Mr Hall have proceeded on that basis, and Mr Kershaw accepted that matter in cross-examination. I would have had reservations as to that matter, had the experts not taken that view, where there may be reason to doubt that an acquirer of BLY would have considered it necessary or desirable to pay a premium for control of a company that is presently insolvent or near insolvency, where it presently cannot pay interest presently due to SSN holders; which the evidence indicates will likely be loss-making for some time to come; and where the premium for control which is ordinarily offered in a takeover arises in a very different context. To the extent a control premium should be applied, I am not satisfied that the approach adopted by KordaMentha or KPMG is incorrect. KordaMentha's report was directed to creditors of BLY, and primarily to issues as to the solvency of BLY, and it does not seem to me that the level of any control premium payable in respect of the acquisition of equity in BLY was

material to the issues addressed in that report. That matter was relevant to KPMG's report, which applied such a premium. I am not persuaded that a higher premium should have been applied. Assuming that a potential acquirer of BLY would be prepared to pay a control premium, it seems to me that KPMG are correct in proceeding on the basis that that premium would be discounted, by contrast with the premium an acquirer would pay for a company in a strong financial position, to take account of the financial and other risks presently faced by BLY.

What Centerbridge, Ares and Ascribe give up in exchange for equity in BLY under the original schemes

236 I turn now to the value of what Centerbridge gives up in exchange for the issue of equity under the original schemes. The Plaintiffs submit that the equity issued to Centerbridge under the Subscription Deed is justifiable by the reduction in the PIK interest rate payable under the TLAs and TLBs, the extension of the term of the TLAs and TLBs, and an agreement that future PIK interest from 31 December 2016 will be unsecured and senior only to the SUNs. First Pacific responded that Centerbridge was issued substantial equity in BLY where KordaMentha's expert report expressed the view that the PIK interest under the TLAs and TLBs to be given up by Centerbridge has no present value. First Pacific also emphasised the fact that:

> "… no attempt seems to have been made by [BLY] or any of [the] experts to value the PIK interest that is being sacrificed by Centerbridge (other than by assuming it to have its face value) in circumstances where the value of the entitlement to receive PIK interest on the TLA and TLB is the principal consideration that is being given by Centerbridge in return for 52.3% of the equity in [BLY]."

237 The Plaintiffs supported the issue of equity to Centerbridge under the Subscription Deed by reference to the reduction of PIK interest due to Centerbridge having a face value of US$83 million. It seems to me that the PIK interest payable to Centerbridge could not reasonably be valued at face value, where it is presently unsecured for the large part of that interest and the Plaintiffs are insolvent or near insolvency on the Plaintiffs' own case. However, I should recognise that the TLAs and TLBs held by Centerbridge and the SSNs have a potential future value, in a similar way that BLY's shares have such a value, in the sense that an improvement in the mining cycle or an improvement

in the BLY Group's performance may allow the full recovery of the principal and interest due under them. I have regard to that matter, in comparing what is surrendered by Centerbridge in respect of its largely unsecured interest on the TLAs and TLBs and by SSN holders under the Secured Creditor Scheme and the Unsecured Creditor Scheme respectively.

238 It would be at least seriously arguable that, as First Pacific previously contended, the reduction of the rate of interest payable to Centerbridge under the TLAs and TLBs, which is presently "paid" only in kind and would have no value in a liquidation, is not a sacrifice of such magnitude that Centerbridge is shown to have given a proportionate quid pro quo for the option value attached to a significant issue of equity under the Subscription Deed, by contrast with what was surrendered by other SSN holders. It seems to me, however, that the best evidence of the fairness of the compromise now proposed by the Plaintiffs by the altered schemes, involving a benefit to SSN holders by way of additional return, a modest reduction in the equity issued to Centerbridge, Ares and Ascribe and a modest issue of shares to other SSN holders on a pro rata basis is that it has achieved the support of all of the voting SSN holders and Centerbridge as the TLA and TLB holder (which represented 99.63% of debt under the Senior Creditor Scheme) and all of the voting SUN holders (which represented 96.19% of debt under the Unsecured Creditor Scheme) (with the one exception whose view is unknown) which are well-placed to assess the quid pro quo involved in the compromise of their rights and interests.

239 I note, for completeness, that the Plaintiffs also referred to the fact that, as I noted above, over 79% of non-associated shareholders of BLY present and voting approved the issue of equity to Centerbridge or its nominee under s 611 item 7 of the *Corporations Act*, rule 10.11 of the ASX Listing Rules and Ch 2E of the *Corporations Act* and for all other purposes at a vote at BLY's annual general meeting on 13 June 2017. I also recognise that the KPMG report expressed the opinion that the share issue and associated transactions were fair and reasonable to the non-associated shareholders of BLY, and valued equity of BLY after the schemes were implemented at a low of $0.0011 and a high of $0.0045 per share. That conclusion, however, says little as to the fairness of the schemes in their original or altered form among secured

creditors inter se, as distinct from their fairness from the perspective of equityholders whose shares (in the view of KordaMentha and KPMG) have no value absent the schemes. I will address below the extent to which the outcome of those meetings may be affected by the subsequent alterations to the schemes.

240 First Pacific also submitted that Ares and Ascribe are issued equity and other SUN holders are also issued equity in BLY in return for the surrender of part of their unsecured debt, where KordaMentha's expert report expresses the view that the SUNs also have no present value on an insolvency of BLY. That proposition also requires the qualification that the value of the SUNs could improve, where they could be repaid in full on an improvement in the BLY Group's position, just as the value of BLY's equity could improve in that situation. Nonetheless, it was at least seriously arguable that the surrender of that presently unsecured debt by SUN holders was not a sacrifice of such magnitude that the SUN holders, including Ares and Ascribe, were shown to have given a proportionate quid pro quo for the option value attached to a significant issue of equity to them under the Unsecured Creditor Scheme, where no issue of equity was to be made to secured creditors for the rights which they surrendered under the Secured Creditor Scheme in its original form. That issue is also addressed by the proposed alterations to the schemes. Again, the best evidence of the fairness of the compromise now proposed by the Plaintiffs by the altered schemes is that it has achieved the support of all of the voting SSN holders and voting SUN holders (with one exception whose view is unknown) which, as I have noted above, are highly sophisticated and well placed to assess the quid pro quo involved in the compromise of their rights and interests.

241 I note, for completeness, that the Plaintiffs also sought to rely on the fact that Centerbridge, Ares and Ascribe would provide further financial support for BLY under the Backstop ABL, as a matter going to the fairness of the schemes. In written submissions First Pacific, not surprisingly, took issue with the Plaintiffs' reliance on that matter and rightly pointed out that additional equity is issued to holders of the SUNs, other than Ares and Ascribe, on the same terms although they had not participated in that proposed additional financing. The Backstop

ABL had not been concluded at the time the Secured Creditor Scheme was approved by the majority of secured creditors and there is no evidence that that facility is not on commercial terms. It does not seem to me that this matter can support any conclusion as to the fairness of the schemes.

The Snowside companies' submissions as to the Court's discretion whether to approve the original schemes

242 Dr Austin submits, and I accept, that any prejudice to shareholders arising from a creditors' scheme would be a relevant matter in the exercise of the Court's discretion whether to approve that scheme: *Re Atlas Iron Ltd* [2016] FCA 366; (2016) 112 ACSR 554 at [54]. In oral submissions, Dr Austin rightly accepted that issues about equality of treatment within a class of creditors or whether a collateral advantage was obtained by one creditor did not directly affect the Snowside companies, which were not entitled to vote at the relevant creditors' meetings. Dr Austin submitted, however, that the Snowside companies were in a special position by reason of the separate proceedings they had brought against BLY for relief in oppression (T137). Dr Austin also submitted (T140) that the Snowside companies' attack on the KPMG report should have the result that no weight should be given to shareholders' approval for the issue of shares to Centerbridge, Ares and Ascribe under s 611 item 7 of the *Corporations Act*.

243 The Snowside companies principally rely on their valuation evidence, which I have addressed above, in opposing approval of the schemes. They submit that the Court should conclude, on the basis of that evidence, that the schemes and associated recapitalisation result in an unsupportable transfer of value from shareholders not associated with Centerbridge, Ares and Ascribe to those parties, in the order of US$65 million–US$139 million. That calculation depends on Mr Hall's valuations and, as I have observed above, I am not persuaded that those valuations should be adopted in preference to the approaches taken by KordaMentha and KPMG.

244 Dr Austin also submits that it was unsatisfactory that the KordaMentha report was a "limited scope valuation engagement" within the meaning of APES 225. I have not accepted that submission above. Dr Austin also submits that, by contrast with KordaMentha's earnings capitalisation valuation of the BLY Group

in the range of US$246.5 million–US$286.6 million (Ex SK-1 Table 9), the true enterprise value of the BLY Group is upwards of US$862 million on the analysis of Mr Hall or US$893 million on the analysis of Mr Samuel, and that amount exceeds its current debt of approximately US$779 million so that there is value in the equity of BLY. I do not accept that submission, which is consequential upon the valuation approaches of Mr Hall and Mr Samuel which I have not accepted above.

245 Dr Austin also submits that there is a material risk that the scheme proponents have failed to discharge their obligation to ensure that material information has been put before creditors entitled to vote in respect of the schemes, having regard to the suggested deficiencies in the KordaMentha and KPMG reports, and that that concern is exacerbated given the closeness of the vote. In their further supplementary submissions, the Snowside companies also submit that the KPMG and KordaMentha reports were materially misleading and there is a reasonable basis for the Court to be concerned that, in endorsing those reports and recommending that BLY shareholders vote in favour of the recapitalisation resolutions, BLY's independent directors failed to discharge their duty to provide such material information to shareholders as would fully and fairly inform them of what was to be considered at the meeting. The Snowside companies also submitted that the Court should, upon review of the expert reports, conclude that the reasons advanced in them were so unsatisfactory that the schemes should not be approved. Dr Austin's further supplementary submissions comprehensively identified the suggested deficiencies in the KPMG and KordaMentha reports, and the Plaintiffs responded to those submissions by reply submissions filed on 25 July 2017. Those referred, at some length, to Mr Kershaw's and Mr Jedlin's responses to the criticisms of their respective reports, emphasising the extent to which issue had been joined between the experts as to issues of methodology. I have addressed the relevant issues arising from those reports above. I am not persuaded by those criticisms where, as I have noted above, I am not persuaded that Mr Hall's or Mr Lonergan's valuation approaches should be adopted in preference to the approaches taken by KordaMentha and KPMG.

246 It is also important to recognise that the range of possibilities as to BLY's future earnings, from less optimistic to more optimistic, was disclosed by BLY to ASX in an announcement on 3 April 2017 headed "Disclosure of Confidential Information Provided to Lenders", which addressed the base, downside and upside cases although it also recognised the risk of unreliability in earnings projections. Where that information has been publicly disclosed, there is little prospect that the sophisticated creditors involved in this case could not take it into account in reaching their decisions as to the scheme. It seems to me highly unlikely that any of those creditors would have had any difficulty in making any adjustments which they considered appropriate to the valuations and methodology adopted in KordaMentha's and KPMG's reports in order to reach an enterprise valuation of BLY on a basis that is consistent with their assessment of its likely future prospects.

247 Dr Austin also submits that the proposed recapitalisation will not contribute cash to BLY's balance sheet, but will only result in a decrease in debt and deferred interest payments. It is, however, apparent that the BLY Group's cashflow will be improved, by both the original and the altered schemes, to the extent that the amount of debt on which interest is payable is decreased, and it has the option to pay interest on SSNs in kind rather than cash interest in the period following the implementation of the schemes. I am satisfied, for the reasons set out above in dealing with the experts' reports and Dr Austin's submissions, that these matters do not provide any reason not to approve the schemes in their original or altered forms.

Reasonable opportunity to negotiate alternative options

248 The last paragraph of First Pacific's summary of this ground of opposition to the schemes, which I have quoted above, also advanced a criticism that secured creditors other than Centerbridge, Ares and Ascribe:

> "have had no opportunity to negotiate any alternative restructuring options with [BLY] including for the issue of equity."

249 Mr Patwardhan's evidence, led in First Pacific's case, is that First Pacific and its legal advisers communicated with BLY's financial advisers in relation to restructuring options for BLY from August 2016 (Patwardhan [10]). BLY's financial advisers made a presentation to First Pacific in respect of the

restructuring proposals in late January 2017 (Confidential Exhibit DC-1; Confidential Exhibit CAP-3). First Pacific's advisers then made a presentation to Centerbridge on 16 February 2017, which was rejected on 21 February 2017, and First Pacific's advisers made a further presentation to BLY's advisers which was not accepted by BLY on 8 March 2017.

250 Mr Jackman submits that First Pacific had indeed been afforded a "meaningful" opportunity to negotiate an alternative scheme and he refers to Mr Patwardhan's evidence of the dealings noted above in support of that proposition. First Pacific took issue with that submission and submits that BLY did not engage with First Pacific's counter-proposals or rejected them. It does seem to me that there had been at least some opportunity for First Pacific to engage with the original schemes, in the sense of offering alternative proposals, although those proposals had not been accepted. It is not possible to reach any finding beyond that where the parties have not put evidence of the substance of the communications before the Court. I would not have declined to approve the schemes by reason of this matter. In any event, the process by which the proposed altered schemes have been negotiated, and are now supported by First Pacific, all voting SSN holders, Centerbridge as holder of the TLAs and TLBs and all voting SUN holders (other than one which has not expressed a view) has allowed a reasonable opportunity to negotiate the terms of the relevant arrangements.

A further basis for opposition to the original schemes

251 The fourth ground on which First Pacific previously opposed the Secured Creditor Scheme in its original form, which was consequential on the matters to which I have referred above, was that:

> "… the Court should not approve the Secured Creditors' Scheme because:
>
> (a) Centerbridge, Ares and Ascribe voted their debt otherwise than in a bona fide attempt to promote the interests of the class as a whole and instead to promote their personal interests;
>
> (b) the Secured Creditors' Scheme is not fair and reasonable so that an intelligent and honest man or woman who was a member of the class, properly informed and acting alone, might approve it;
>
> (c) it would be unfair, unreasonable and oppressive to impose the wishes of Centerbridge, Ares and Ascribe onto the other Secured Creditors; and

> (d) by procuring the Schemes to be proposed in their current form and voting their interest in favour of them so as to force the other Secured Creditors to accept the Schemes subject to Court approval, Centerbridge, Ares and Ascribe have not acted in good faith and for a proper purpose."

252 It is not necessary or appropriate that I reach any finding of lack of good faith on the part of Centerbridge, Ares or Ascribe, beyond the findings that I have reached above that the issue of equity to them and their associated funds under the Subscription Deed and the Unsecured Creditor Scheme did have a real and substantial impact upon the exercise of their votes at the Secured Creditor Scheme meeting, such that their votes were not representative of the class of secured creditors in that respect. This ground of opposition is otherwise consequential on the other matters that I have addressed above and I need not address those matters further.

253 First Pacific previously submitted that it is difficult to avoid the conclusion that the original schemes were deliberately structured so as to maximise the equity that would be given to those secured creditors who together hold sufficient debt to control the Secured Creditor Scheme meeting. First Pacific also submitted that the TLAs and TLBs were joined in the original Secured Creditor Scheme so as to ensure that the statutory majority of 75% by value could be achieved at the Secured Creditor Scheme meeting. It is not necessary to express a view as to that question, where the schemes as altered are supported by First Pacific and other voting SSN holders and voting SUN holders (with the one exception whose attitude is not known) and I will find below that they are not unfair to shareholders including the Snowside companies.

The Unsecured Creditor Scheme

254 The Unsecured Creditor Scheme confers equity rights on all SUN holders and no question arises in respect of unfairness to unsecured creditors inter se in respect of that scheme. The Snowside companies oppose the Unsecured Creditor Scheme, in both its original and its altered forms, by reference to the release, under that scheme, of the claims of subordinate claimants, within the meaning of s 563A(2) of the *Corporations Act*, except to the extent of the net proceeds of any policy of insurance that would respond to such a claim.

255 As I noted in the Earlier Judgment, s 411(5A) of the *Corporations Act* has the effect that creditors of a scheme company with subordinate claims, within the

meaning of s 563A(2) of the *Corporations Act*, will be bound by a scheme if it is approved, although they have not voted on it at a meeting convened under s 411(1) of the *Corporations Act*. Section 563A(2) of the *Corporations Act*, as amended by the *Corporations Amendment (Sons of Gwalia) Act* 2010 (Cth), in turn defines the term "claim" as a claim that is admissible to proof against a company within the meaning of s 553 of the *Corporations Act* and defines the term "subordinate claim" as a claim for a debt owed by a company to a person in his or her capacity as a member of the company (whether by way of dividends, profits or otherwise) or any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company.

256 The purpose of s 411(5A) of the *Corporations Act* was considered by Gleeson J in *Re Atlas Iron Ltd* above at [41]–[46], where her Honour referred to the Supplementary Explanatory Memorandum to the Corporations Amendment (Sons of Gwalia) Bill 2010 and observed (at [46]) that

> "The significance of subordinate claimants' financial interest in the company is highlighted in the Supplementary Explanatory Memorandum by clause [1.15] which states that, in determining whether to exercise its discretion under s 600H, a court might be expected to have regard to whether the person might reasonably be considered to possess "a real financial interest in the external administration"."

257 Dr Austin submits that the Snowside companies will potentially be prejudiced so far as cl 7.5(h) of the Unsecured Creditor Scheme provides that the right and entitlement of each Subordinate Claim Holder (as defined) to enforce any Subordinate Claim (as defined) against BLY is limited to any amount recovered by BLY under any Applicable Insurance Policy (as defined) and BLY is released from any obligation to pay any amount in excess of the relevant insurance proceeds referable to the relevant claim. Dr Austin also submits that it is "arguable" that the oppression claim brought by the Snowside companies is a subordinate claim within the scope of s 563A(2) of the *Corporations Act* as a claim that arises from the Snowside companies holding shares in BLY, and that the Snowside companies would be "Subordinate Claim Holders" (as defined) in respect of the oppression claim, so that their claim would be released by the Unsecured Creditor Scheme other than as to any proceeds of insurance. Dr Austin also foreshadows that the Snowside companies will contend, in the oppression proceedings, that the provisions of the scheme do

not override or derogate from the Court's power to make orders against BLY under s 233 of the *Corporations Act*, in respect of oppressive conduct that occurred prior to the implementation of the scheme. It seems to me plainly preferable that I do not express any view as to these questions, which may have to be determined in the oppression proceedings, where it is not necessary to do so to determine this application.

258 In oral submissions, Mr Wood responded that s 411(5A) of the *Corporations Act* could not apply to the claim brought by the Snowside companies because it was not a debt owed by BLY to a person in its capacity as a member of BLY, where no judgment or order was yet in place requiring such a payment by BLY to the Snowside companies. That submission does not seem to me to be so plainly correct as to exclude the possible application of the section, as identified by the Snowside companies. The section expressly extends beyond debts to subordinate claims as defined. If Mr Wood's submission were correct, the section could not apply in respect of a contingent claim, where no judgment had been delivered at the time a scheme of arrangement was approved. That would be an odd result, if its consequence was that a claimant in proceedings that had not yet been determined, but which later gave rise to a judgment debt that would have fallen within the scope of the section, could obtain priority over higher ranking creditors whose secured debt was converted to equity under a scheme. It is not necessary for me to express any concluded view as to that question since, if the Snowside companies' oppression claim is not a Subordinate Claim (as defined) for the purposes of the Unsecured Creditor Scheme, then that scheme does not prejudice that claim and provides no reason not to approve that scheme if it should otherwise be approved. On the other hand, and, for the reasons noted below, if their claim is such a claim, then I consider that it is properly extinguished in order to achieve a fair result between other creditors and the Snowside companies on implementation of the schemes.

259 Dr Austin also submits that:

> "It would be singularly unjust if shareholders who complain that the conduct of their company up to and including the approval and implementation of the scheme has been oppressive to them, were excluded from prosecuting that claim by the very terms of the scheme itself."

I do not accept that submission. Adopting the approach contemplated by the Supplementary Explanatory Memorandum to the Corporations Amendment (Sons of Gwalia) Bill 2010 and *Re Atlas Iron Ltd* above, I give considerable weight to the question whether the Snowside companies, as unsecured contingent claimants against BLY in litigation, possess "a real financial interest in the external administration" which, I have held, is the likely consequence if the schemes are not approved. I am not persuaded that, to the extent that the Snowside companies' oppression claim would sound in damages or a monetary payment to them, that claim should be preserved when substantial claims of unsecured creditors, including Centerbridge in respect of its unsecured debt by way of interest on the TLAs and TLBs and SUN holders in respect of their unsecured debt, will be compromised under the schemes. It seems to me that it would not be appropriate that such subordinated claims, which would not be recoverable on the insolvency of companies within the BLY Group, should continue beyond implementation of the Unsecured Creditor Scheme and potentially rank ahead of equity issued to creditors in exchange for other unsecured claims.

260 I should add that, but for the manner in which the parties conducted the case, I would also have considered that the absence of evidence as to the merits of the Snowside companies' oppression claim was a fundamental obstacle to their submission as to the unfairness of any impact of the Unsecured Creditor Scheme on that claim. No evidence was led as to the factual basis of that claim, although Dr Austin described its broad subject matter in oral submissions, and no attempt was made to seek to demonstrate that that claim was, for example, likely to succeed. But for the manner in which the parties conducted their cases, I would have thought that the mere existence of oppression proceedings, which were not commenced until after the schemes were announced, and as to which there was no evidence of their merits, should not have the result that the Unsecured Creditor Scheme is not approved. If approval of a scheme were generally withheld because such a claim exists, without inquiry as to its merits, an opponent of a creditors' scheme that would affect subordinate claims could avoid the implementation of that scheme, and frustrate the views of the general body of creditors, by the simple expedient of

commencing proceedings that assert such a claim and contending that their mere existence was sufficient basis not to approve the scheme. I do not have regard to those matters in deciding the matter, where that proposition was not put by the Plaintiffs and Mr Izzo emphasises in reply that the parties did not seek to have the Court determine any matter as to the merits of the Snowside companies' oppression claims in this application.

261 I would not have declined to approve the Unsecured Creditor Scheme in its original form by reason of its effect on subordinated shareholder claims, including any effect on the Snowside companies' oppression claim if that claim is properly characterised as a subordinated claim.

The expert evidence as to the altered schemes

262 I have referred above to the terms of the proposed alterations to the schemes and held that the proposed alterations are within the scope of the Court's power to alter a scheme under s 411(6) of the *Corporations Act*. I now turn to the expert evidence led in respect of the proposed alterations to the schemes, and then to the question whether the schemes, as altered, should be approved.

263 The Plaintiffs relied on the affidavit dated 7 August 2017 of Mr Kershaw of KordaMentha which exhibited his report dated 7 August 2017 and was prepared with reference to the Terms Sheet, the PNC ABL and Backstop ABL and an ASX announcement made by BLY on 24 July 2017. That report addressed the question whether the reasoning in KordaMentha's first report would have been materially different if the Recapitalisation Transactions (as there defined) were amended in accordance with the Terms Sheet and the New Money ABL was provided in the form of the PNC ABL and the Backstop ABL. That report expresses the view that the impacts of the alterations to the schemes are material, although they do not change KordaMentha's opinion as to the benefit of the schemes for the solvency of the BLY Group, and indicates that the issue of shares to SSN holders would not alter KordaMentha's views as to the implied value of the interests of beneficiaries of the schemes, since, as I have noted above, KordaMentha concluded that there is no equity value in BLY shares. That report assumes that PIK interest will be capitalised rather than being paid in cash until December 2018, on the basis that the BLY Group

had no current intention to redeem the SSNs before that time. That assumption is consistent with the BLY Group's evidence as to its present financial position. That report notes that the incremental increase in the principal balance of the SSNs that would be paid on redemption or maturity would be recorded in the financial statements of the BLY Group at each reporting date, but that would have no impact on the solvency of the BLY Group. Mr Kershaw was not cross-examined as to these views.

264 The Plaintiffs also relied on the affidavit dated 7 August 2017 of Mr Jedlin of KPMG, which indicated that he held the views contained in a third KPMG report dated 7 August 2017 as annexed to his affidavit. KPMG were also requested to advise whether any of the reasoning or conclusions stated in their first report would have been materially different if the Recapitalisation Transaction had been amended in accordance with the Terms Sheet or the New Money ABL (as defined) had been provided in the form of the PNC ABL and the Backstop ABL. KPMG there expressed the view that the reasoning and conclusions contained in their first report would not have been materially different, and noted that the Recapitalisation Transaction, as amended, would continue to deliver a reduction of cash interest payments by BLY until December 2018 and a reduction in interest costs in each of the calendar years 2017–2020, although they also recognised the semi-annual increase in the redemption or repurchase price of the SSNs based on the Call Schedule. Mr Jedlin was cross-examined as to that report and accepted in cross-examination that some amendments may need to be made to the calculations in that report, as noted below.

265 That third KPMG report indicates that, on the assumption that BLY would redeem the whole of the SSNs on 30 June 2020 rather than on the latest possible date of 31 December 2022, the high end of KPMG's enterprise value range for BLY would be reduced from US$133.1 million to US$116.7 million and the equity value per BLY share in Australian dollars would be reduced from $0.0059 to $0.0052. That report also indicates that, on the low end of KPMG's valuation and on the assumption that the BLY Group's option to pay PIK interest to 31 December 2018 is exercised and the SSNs are not redeemed until 31 December 2022, the increased redemption premiums under the Call

Schedule would reduce the equity value of BLY from US$33.1m to US$4.5m and reduce the equity value per BLY share in Australian dollars from $0.0015 to $0.0002.

266 The views expressed in that report may need to be qualified, as Mr Jedlin accepted in cross-examination and Mr Jackman accepted in submissions, for the fact that KPMG had not taken full account of PIK interest in the period from 30 June 2017 until 31 December 2017 or of the impact of capitalisation of PIK interest, at least if the BLY Group elected to (or had no capacity other than to) fully capitalise that interest. On the low end of KPMG's valuation, that adjustment would potentially reduce the value of equity in BLY to zero if BLY both takes up the PIK option and capitalises interest until 31 December 2018 and then does not redeem the SSNs prior to 31 December 2022. In cross-examination, Mr Jedlin rightly pointed out that it would be advantageous to BLY to pay cash rather than pay interest in kind, if it had the capacity to do so, and that he expected BLY would only capitalise interest if it had no choice (T268). The Plaintiffs submit, and I accept, that any director of BLY acting prudently would be expected to take that course. Mr Jedlin also pointed out in cross-examination that, although the capitalisation of PIK interest could lead to a negative share value at the low end of KPMG's range, BLY shares would potentially have positive value depending upon the period of capitalisation and would also have such value at the high end of KPMG's valuation range (T270).

267 The result indicated by the low end of KPMG's valuation is plainly an unattractive outcome for shareholders in BLY, although it should be recognised that the bulk of shareholders after the schemes were implemented would be Centerbridge and other SSN holders and SUN holders who have converted their debt to equity. Importantly, however, as I will note below, as a matter of commercial probability and the proper performance of the duties of BLY's directors, that outcome would likely only arise if BLY has no cheaper alternative to borrowing under the SSNs available to it, since it has the option to redeem the SSNs when it has the financial capacity to do so. As I will also note below, there seems to me to be no unfairness to the BLY Group, its creditors or its contributories in its taking the best commercial option available to it, even if that best commercial option is not a particularly attractive one.

268 The Snowside companies rely on a second report of Mr Samuel which identifies an adverse effect of the reimbursement of fees and expenses incurred by First Pacific and the effect of the amendments to the SSNs upon the equity value of BLY. Dr Austin submits, and I broadly accept, that Mr Samuel's approach is broadly consistent with the position adopted by Mr Jedlin in cross-examination, if the BLY Group capitalises PIK interest until December 2018 and does not redeem the SSNs until December 2022.

269 The Snowside companies also rely on Mr Hall's fourth supplementary expert report dated 9 August 2017. That report expresses the view that BLY shareholders are "significantly worse off" under the altered schemes by comparison with the original schemes (Ex SP-1, 7). Mr Hall was not cross-examined as to this report, but, as I noted above, the Court must assess the weight which it should give to an expert's report, even if that expert is not cross-examined. I will address that question as narrowly as I reasonably can, where there is little contest between the experts as to the effect of the relevant alterations and where, because Mr Hall was not cross-examined, he has not had an opportunity to respond to the criticisms that might be made of this report.

270 Some parts of Mr Hall's report reflect an appropriate application of his expertise, so far as he points to the effect of taking different approaches from those adopted by KPMG in respect of particular aspects of KPMG's analysis. Some parts of that report (for example, p 10, [43]ff) depend on Mr Hall's valuation of BLY, which I have not accepted in preference to KordaMentha's and KPMG's approach. Other parts of the report seem to me to give rise to difficulties including a failure to identify the assumptions on which Mr Hall proceeds (for example, p 3, [12]) or the basis of his reasoning in respect of asserted conclusions and the expression of views outside the scope of his expertise and in extravagant terms. For example, Mr Hall characterises the terms of the SSNs as a "usury penalty" (p 4, [19]) without any adequate consideration of either the risk to the SSN holders of lending to the BLY Group over an extended term or the capacity of the BLY Group to borrow a very substantial amount on more favourable terms elsewhere. In oral submissions, Dr Austin indicated (T334) that that characterisation was intended only to be a

reference to an unreasonably high interest rate. Even when that characterisation is reformulated in that more moderate fashion, it seems to me that Mr Hall does not have a proper basis for it, without an examination of the interest rate at which BLY could borrow an equivalently large amount to the SSNs from other lenders, if it could now do so.

271 Mr Hall also advances a speculation of a future conflict of interest affecting SSN holders (and, implicitly, BLY's directors, who would make any relevant decision) in respect of redemption of the SSNs (p 5, [21]). In submissions, Dr Austin sought to support Mr Hall's observation as to conflicts of interest affecting SSN holders by reference to Mr Hall's experience as a financial adviser on mergers and refinancing transactions and as an investment banker (T334). It seems to me that such qualifications or experience do not provide a proper basis for an expert to speculate as to the fact of future conflicts of interest affecting the decision of SSN holders or, implicitly, the directors of BLY, where the directors and not the SSN holders would make any redemption decision.

272 Mr Hall also asserts, without adequate supporting reasoning or analysis of the impact of the insolvency or near insolvency of BLY and associated entities, that "[f]airness between creditors and the shareholders would be achieved by pricing any debt for equity swap at the implied value per share prior to the Proposed Recapitalisation" (p 11, [48]) and that a fair recapitalisation would involve a dilution of shareholders in a ratio of no more than 3 to 1. The basis of that view was, at best, unclear, although Dr Austin, after having first had to take instructions, sought to explain it in oral submissions (T333). It is by no means clear to me, even with the benefit of that explanation, that Mr Hall's approach in paragraphs 49–51 of his report does more than illustrate the application of that view, by reference to different valuation approaches, as distinct from providing justification for it.

273 Despite my reservations as to Mr Hall's evidence in this report, his view that the revised terms of the SSNs are less favourable to BLY's shareholders is largely common ground between the accounting experts, at least in the sense that the alterations reduce the value of BLY's equity by comparison with the

original schemes, although not by comparison with the result in an external insolvency administration. It is also common ground that that reduction in value is substantially less at the high end of KPMG's valuation range and greater at the lower end of that range and its extent varies depending on whether the SSNs are redeemed prior to 31 December 2022. I proceed on that basis.

The parties' submissions as to the fairness of the altered schemes

274 The Plaintiffs submit that the proposed alterations to the schemes address the issues raised in respect of the fairness of the original schemes, including the objection that SSN holders other than Centerbridge, Ares and Ascribe were not to receive equity and First Pacific's complaint that it had not been given a meaningful opportunity to participate in negotiations leading to the RSA and the schemes, although they maintain the position that the original schemes were fair. The Plaintiffs also submit that the proposed alterations to the schemes, and the changed position of creditors which had previously opposed the schemes, meet the complaint that the schemes achieved the statutory majorities only because they were supported by Centerbridge, Ares and Ascribe. The Plaintiffs also submit that the extent of support of creditors for the altered schemes means that substantially greater weight can be given to the proposition, to which I have referred above, that creditors will generally be the best judge of their own interests.

275 In further written submissions for the hearing on 4 August 2017, and in oral submissions at that hearing, First Pacific supported the alterations to the schemes. First Pacific submitted that the Court had power to approve the altered Secured Creditor Scheme under ss 411(4) and 411(6) of the *Corporations Act* and should exercise its discretion to do so where First Pacific's objection to the original Secured Creditor Scheme did not apply to the altered scheme; the altered scheme was otherwise appropriate to be approved under s 411(4) of the *Corporations Act*; and approval of the altered scheme under s 411(6) was appropriate despite the differences in the terms of the schemes. First Pacific submitted that its objections to the original Secured Creditor Scheme related to its alleged unfairness and the alterations to the schemes had addressed that unfairness and supported Court approval of the altered schemes. First Pacific also accepted that it had now had an appropriate

opportunity to negotiate the terms of the recapitalisation and the altered scheme would allow substantial commercial benefits to SSN holders, not limited to Centerbridge, Ares and Ascribe. First Pacific also submitted that even if, contrary to its previous position, the original Secured Creditor Scheme was not unfair, the alterations would be just because they would remove the doubt as to whether that scheme should be approved.

276 First Pacific also submitted that the fact that the altered Secured Creditor Scheme was supported by all voting secured creditors removed any issue as to voting at the original Secured Creditor Scheme meeting. First Pacific submitted that the Court would not conclude that the altered Secured Creditor Scheme was objectively unreasonable, where it now had the support of the secured creditors, including those that had originally opposed it. It supported the provision for reimbursement of its costs on the basis that it had performed the role of contradictor in a productive manner and would have been entitled to its costs in any event. First Pacific also submitted, with substantial force, that the Court should more readily approve the alterations under s 411(6) of the *Corporations Act* where it was apparent from the support of secured creditors for the altered Secured Creditor Scheme that, if a meeting were now held, that scheme would be approved; the proceedings had occupied a substantial amount of Court (and, I interpolate, the parties') time and resources; and the exercise of the amendment power would give effect to a compromise reached by creditors following a court-ordered mediation, and avoid the risk to the BLY Group, in its present financial condition, of further delay to convene a further meeting and conduct a further court hearing to consider the altered schemes after that further meeting.

277 ASIC, as amicus curiae, submitted that, in assessing the fairness of the alterations to the schemes, the Court would properly place substantial weight on the views of creditors, as being the persons best able to judge substantive fairness and the impact of the alterations on their commercial interests; that settlement negotiations between well-resourced representatives of the relevant creditor interests (and, I interpolate, also the Snowside companies) amounted to a fair process; and the outcome of the altered schemes, including the

provision of equity to all secured creditors, was directed to a primary complaint made against the fairness of the original schemes.

278 The Snowside companies submit that if, contrary to their primary submission, the Court has power to approve the alterations to the schemes, it ought not to do so in the exercise of its discretion. They submit that the Plaintiffs and other parties had treated the schemes as "routine creditors' schemes" to which the Snowside companies were third parties with the consequence that the test of fairness was said to relate to the creditors that are participants in the schemes only. It did not seem to me that any of the Plaintiffs, the several creditors that have appeared in the proceedings, the other creditors that have communicated their position to the Court by correspondence, or ASIC which had intervened in the proceedings as amicus curiae, had been under any illusion that a creditors' scheme that involves a company group that trades in 40 countries, has about 4000 employees and is insolvent or near insolvency, and that had required a second court hearing extending over more than three days, a mediation, proposed alterations to the schemes and further submissions extending over parts of several days is a "routine" creditors' scheme. It also did not seem to me that any of the parties were under any illusion that different legal principles were applicable based on any classification of creditors' schemes or other schemes as "routine" or other than "routine".

279 It seems to me that the Plaintiffs and the other participants in the schemes have proceeded, correctly, on the basis that the Snowside companies are not creditors participating in either the Secured Creditor Scheme or the Unsecured Creditor Scheme, because they are neither secured nor unsecured creditors, and that they have been heard in the proceedings, by leave, because they are contributories of BLY, and may be subordinated creditors of BLY if they are ultimately successful in the oppression claim they commenced against BLY after the schemes had been announced. So far as the Snowside companies contend the Plaintiffs or other parties have sought to confine the Court's consideration, I have accepted above that the Court should have regard to the interests of persons other than creditors in determining the fairness of the schemes, although that would extend not only to the shareholders in BLY including the Snowside companies, but also trade creditors and employees and

communities in which the Plaintiffs and their associated companies conduct business.

280 The Snowside companies also point out, as has been evident throughout the proceedings, that the schemes are part of a recapitalisation that will affect both the debt and equity of BLY. I accept that the schemes must be approached in that context. It remains that the Court's function under s 411 of the *Corporations Act* is to determine, at the second court hearing, whether the schemes should be approved, now as altered, having regard to established criteria, including by reference to the exercise of informed commercial judgement by those who participate in the schemes.

281 The Snowside companies also submitted that a "fairer balance between creditors and shareholders" could have been achieved by a different approach to the recapitalisation. The Snowside companies propound a different restructuring proposal, involving a debt for equity swap at the implied value per share prior to the proposed recapitalisation, as supported by Mr Hall's report. As I have noted above, the Court should not approach the question of approval of a scheme by postulating some other scheme that could have but does not exist: *Re Application of NRMA Ltd (No 1)* above at [29]; *Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust)* above at [28]ff. It seems to me that the Court particularly should not take that approach at the invitation of persons who are not party to and not bound by such a scheme. The Plaintiffs also respond that, in assessing a creditors' scheme, the Court does not need to be satisfied of fairness between creditors and shareholders, but whether the scheme is fair in the sense that an honest and intelligent creditor acting in its own interests would approve it. I have observed above that I accept that the Court may have regard to other affected interests, but it does not seem to me that that can extend to, for example, not approving a creditors' scheme that is supported by substantially all creditors and is not intrinsically unfair because another constituency would prefer a different scheme. I also have regard to the fact that the case law establishes that less weight should be given to the interests of a party affected by a scheme which would have no real economic interest in an insolvency: *Re City of Melbourne Bank Ltd* (1897) 19 ALT 80; *Re Centro Properties Ltd (in its capacity as*

responsible entity of Centro Property Trust) above at [112]. That proposition has particular weight here where I have held that an external insolvency administration is the likely alternative to the approval of the schemes.

282 The Plaintiffs also point out that the Snowside companies' alternative proposal disregards the fact that BLY's creditors would rank ahead of its shareholders in an insolvency. Dr Austin criticises the generality of that proposition, other than in the context of insolvency, but that is the applicable context where (as I have held above) it is likely that BLY and other companies within the BLY Group will pass to an external insolvency administration if the schemes are not approved.

283 The Snowside companies also submit that, under the schemes as altered, Centerbridge, Ares and Ascribe will pay a price for their equity which includes release of a substantial debt, but that First Pacific, rather than releasing debt in return for equity, shares in the benefits created by the Call Schedule. Mr Bender responds that SSN holders accept a deferral of the maturity of their secured debt until 31 December 2022 and sacrifice their right to periodic payments of cash interest until 31 December 2018. It seems to me that First Pacific's participation in the benefits created by the Call Schedule, in which all SSN holders share, creates no unfairness where, as I have noted above, SSN holders including First Pacific suffer significant disadvantages by the extension of the term of the SSNs and the loss of a right to cash interest and the right to enforce their security if it is not paid until December 2018. To the extent that SSN holders including First Pacific are now issued equity under the altered schemes, I give substantial weight to the fact that all of the voting SSN holders and all of the voting SUN holders (with the exception of the one creditor that has not indicated its view), which presently have the substantial economic interest in BLY and its affiliates on any view, consent to the schemes as altered.

284 The Snowside companies submit, by reference to the expert evidence to which I have referred above, that the obligations imposed upon BLY and its affiliates by the Call Schedule will materially increase BLY's repayment obligations in respect of the restated amount of US$195 million to US$315.5 million at the maturity date of 31 December 2022 if (as, they submit, is likely) BLY takes up

the option for payment of interest in kind and capitalises interest until 31 December 2018. That submission depends upon several contingencies, including whether BLY will take up the option to pay PIK interest for the full period to 31 December 2018 (as, I accept, seems likely and as was assumed in KordaMentha's further report) and whether it will exercise its right to redeem the SSNs prior to 31 December 2022, at a lesser premium than would be payable under the Call Schedule on 31 December 2022. I have referred above to the expert evidence that is directed to these matters.

285 The Plaintiffs accept that the Call Schedule included in the amendments to the SSNs has the potential effect of increasing BLY's senior debt, but note that it has no effect on liquidity other than on maturity or early redemption at BLY's option; that the cost of the Call Schedule will be substantially reduced if BLY can effect an early refinancing; and that any concern about an impact of that amendment on SUN holders is mitigated by the fact that the voting SUN holders (with the exception of the one SUN holder noted above whose attitude is not known) support the proposed alterations. The Plaintiffs also rely on the KPMG report for the proposition that the alterations do not affect KPMG's view that the schemes are fair and reasonable to non-associated shareholders, and I have referred to that report and to the cross-examination of Mr Jedlin above.

286 The Snowside companies also point to the increased dilution in the value of shares in BLY as a result of the alterations to the schemes. The Plaintiffs respond, and I accept, that that comparison is not illuminating where KordaMentha had assessed BLY's shares as of nil value before and after implementation of the schemes, KPMG had assessed them as having a positive value of less than one cent after implementation of the schemes in their original form and, as I noted above, I have not been persuaded that the more optimistic view taken by Mr Hall is more likely to be correct than that taken by KordaMentha and KPMG.

287 It seems to me that the Snowside companies' attack on the schemes on this basis amounts to the proposition that the Plaintiffs' cost of borrowing under the SSNs, after the schemes are altered, will be high or very high and the schemes are therefore unfair to the shareholders in BLY including the Snowside

companies. I accept the factual basis of that submission, which was uncontroversial, but not the conclusion that the Snowside companies draw from it. Irrespective of whether the evidence led in the third KPMG report, as qualified by Mr Jedlin in cross-examination, or the view taken by Mr Hall were adopted, it is plain that the debt under the SSNs will be expensive for BLY, particularly when the escalating premium payable on repayment until 31 December 2022 is taken into account. However, the consequence of that proposition is, as the Plaintiffs pointed out in submissions, that I can readily infer that the BLY Group would exercise its rights to cause the SSNs to be redeemed, as soon as it has the financial capacity to do so, and replace them with debt that carries a lower interest rate or is otherwise on more favourable terms. In oral submissions, Dr Austin raised the possibility (to which Mr Hall's expert report had also referred) that the SSNs would not be redeemed at that point by reason of a conflict of interest affecting the SSN holders or, implicitly, the directors of BLY who would make any relevant redemption decision, although Dr Austin also fairly acknowledged that he did not submit that BLY's directors would breach their duties (T324). I do not consider that I could or should infer either that such a decision would be left to conflicted directors, rather than made by independent directors of BLY, or that those directors would not act in accordance with their duties.

288 It seems to me that the Snowside companies' submissions as to this matter cannot be accepted, first, because they attack the BLY Group's cost of borrowing under the SSNs, as altered by the schemes, without identifying any more attractive and feasible alternative to that course for the BLY Group. There is no suggestion that the BLY Group has any apparent commercial alternative, at present, to borrowing under the SSNs, on the terms available under the altered schemes, where it has been able to raise only limited bank finance, even in the context of the schemes and, in particular, was unable to borrow the full amount that it sought to borrow from PNC Bank under the PNC ABL. While the BLY Group and its shareholders would no doubt prefer that the BLY Group borrow cheaply rather than expensively, it seems to me that there is no lack of fairness to any of its constituencies, including shareholders such as the Snowside companies, where it borrows expensively in the absence of any

apparent commercial alternative to doing so, on terms that allow it to redeem that borrowing when it has the capacity to do so. Although I have referred above, in some detail, to the expert evidence as to the impact of the terms of the SSNs, as amended, that evidence does not indicate that the Plaintiffs have any real alternative (other than an external insolvency administration) to continuing to borrow under the SSNs, as amended by the altered schemes, until their position improves to the extent that they can redeem them.

289 The Snowside companies also submit that the terms of the schemes, as altered, involve "gross unfairness" to non-associated shareholders because their shares would be valueless, again on the hypothesis that BLY has taken up the PIK option and capitalises interest until 31 December 2018, and leaves the SSNs in place until 31 December 2022, which I have noted above it is only likely to do if it has no alternative to doing so. It seems to me that the proposition that that course is unfair, or grossly unfair, to non-associated shareholders also cannot be accepted, because the Snowside companies identify no realistic alternative to it. That course may be unfavourable, or detrimental, but it does not follow from that that it is unfair.

290 The Snowside companies also submit that, as a commercial court applying its commercial judgement, the Court should find that BLY retains substantial equity value. That proposition depends upon the expert evidence to which I have referred above, and I do not accept it, although I have accepted above that there is a prospect that the equity in BLY may regain value if both the mining industry and BLY's performance improve.

291 It seems to me that the Snowside companies' submissions as to these matters also cannot be accepted because they do not establish the availability of any more favourable result for BLY's shareholders than the schemes as altered. The Snowside companies' position, identified by Dr Austin in oral submissions, is that the proper comparator is the more favourable restructuring to BLY's shareholders postulated by the Snowside companies, or at least the possibility of some other scheme. However, that is a mere possibility, and inconsistent with KordaMentha's view and my finding that BLY and associated companies would likely pass into an external insolvency administration if the schemes are

not approved. A finding that the schemes are unfair, because of the possibility that a different proposal might be advanced (which might or might not be more favourable to shareholders in BLY) if the altered schemes are not approved, would be inconsistent with the approach contemplated by *Re Application of NRMA Ltd (No 1)* above at [29] and *Re Centro Properties Ltd (in its capacity as responsible entity of Centro Property Trust)* above.

292 A second possible comparator is the dismissal of the application for approval of the schemes, with the result that existing shareholders' equity is not diluted by the issue of further shares to Centerbridge and other SSN and SUN holders, without a further scheme emerging. I have found that the result of that course would likely be that BLY and other companies within the BLY Group would be placed in an external insolvency administration and that result is, on the evidence, less favourable to shareholders than the altered schemes. For completeness, a third possible comparator, which the Snowside companies did not embrace, is the original schemes that First Pacific and the Snowside companies had opposed. It is not necessary to address that possibility because the Plaintiffs do not, at least presently, propound those schemes, First Pacific and the Snowside companies oppose them, and they could not be approved where no one propounds them. The observations that I have made above, in dealing with the objections of First Pacific and the Snowside companies to the original Secured Creditor Scheme, also indicate that there would have been significant obstacles to the approval of that scheme, over the objection of SSN holders on which it appeared to impose substantial detriments.

293 The Snowside companies also advance detailed submissions as to suggested discrepancies between the Terms Sheet as provided to KordaMentha and KPMG for the purposes of their reports on the proposed alterations to the schemes and the proposed alterations contained in Exhibit CC-2. I treat those submissions as also intended to extend to the current version of the alterations for which the Plaintiffs contend in Exhibits P6 and P7. Some aspects of these submissions appear to demonstrate matters that are already common ground between the parties, including that the effect of the proposed amendments is that PIK interest may be added to the principal amount of the SSNs, and would thereafter bear interest, and would form the basis on which the applicable

premium for a redemption of the SSNs was calculated under the Call Schedule.

294 I do not consider it necessary to address these submissions at length since I have found above that the proposed alterations are material and that they are unfavourable to shareholders in BLY, at least by comparison with the Snowside companies' hypothetical restructuring on different terms and the original schemes, although they are plainly more favourable to shareholders than an external insolvency administration of the BLY Group. Even if the detail of the alterations of the schemes extended further than the Terms Sheet in any significant respect and had the consequence that the alterations were more adverse to shareholders than those set out in the Terms Sheet which were addressed in the expert reports, that proposition does not advance the Snowside companies' position, since, as I have noted above, they do not identify any alternative financing arrangement available to the BLY Group in place of continuance of the SSNs as amended by the schemes or any more favourable outcome that is capable of being achieved. As I have noted above, the likely alternative to the altered schemes would be an external insolvency administration of the BLY Group, which is substantially more adverse to shareholders than the altered schemes.

295 I am satisfied that these matters do not provide any reason not to approve the schemes in their altered form, or to adopt the Snowside companies' submission that the Court should simply reject the altered schemes, dismiss the proceedings, and leave the Plaintiffs to commence the scheme process again (if, I interpolate, they had not first been placed in external insolvency administration).

Conclusion as to issues of fairness as to the altered schemes

296 In summary, as I noted above, it seems to me that the votes of Centerbridge, Ares and Ascribe at the Secured Creditor Scheme meeting, although sufficient to meet the statutory majorities, must be discounted when the fairness of the Secured Creditor Scheme is assessed, so far as each of the secured creditors that comprise the majority that voted in favour of the Secured Creditor Scheme (in its original form) stands to benefit from the issue of equity. However, I am

satisfied that the schemes and associated arrangements, as altered in the manner proposed by the Plaintiffs, meet the fairness standard so as to warrant their approval by the Court. I have regard, in reaching that conclusion, to the matters which I have addressed above and the views that have now been expressed by the sophisticated participants in the Secured Creditor Scheme and the Unsecured Creditor Scheme, where all of the voting secured creditors and voting SUN holders (other than one SUN holder whose view is not known) now support those altered schemes. I have also had regard to the interests of shareholders in BLY and the submissions made by the Snowside companies in forming that view.

297 I have addressed the issues as to the adequacy of any consideration offered to SSN holders under the original schemes for the detriment they suffered by these alterations above. It seems to me that difficulty is addressed by the alterations to the Secured Creditor Scheme that are now proposed by the Plaintiffs, which compensate SSN holders for the detriments that are imposed upon them under that scheme. I have referred above to the terms of the proposed alterations to the Secured Creditor Scheme to include the Call Schedule within the SSN Indenture. As I have noted above, that amendment has the commercial effect that, the longer the SSNs remain in place, the more costly it is for the BLY Group to redeem or repurchase the SSNs in an optional redemption or under a required asset sale offer. These alterations seem to me to address the difficulty that arose from the fact that the Secured Creditor Scheme in its original form would extend the terms of the SSNs until 2022, restrict the opportunity for SSN holders to exit their loans to the BLY Group in that period, and place them in the less favourable position that they received interest in kind rather than in money until December 2018 and were exposed to the risk that that interest would not be received if BLY did not have the capacity to pay it when due, and provided no substantial compensation to SSN holders for that change. These alterations plainly allow a real quid pro quo for the amendments to the SSNs under the Secured Creditor Scheme.

298 I recognise that the effect of these alterations is that the BLY Group will incur relatively high borrowing costs on the SSNs, made up of PIK interest until 31 December 2018 (if it elects to or has no alternative other than to capitalise that

interest) and the premium payable above the amount of the principal on redemption or maturity of the notes but not on an Event of Default. It seems to me that does not impugn the fairness of the alterations, where that is the price that has now been negotiated for extending the terms of the SSNs and introducing provision for PIK interest to 31 December 2018; there is no suggestion that the BLY Group could presently borrow from an arm's length financier on more favourable terms; and, if the BLY Group's position subsequently improves and it can borrow funds at a cheaper rate, it has the capacity to redeem the SSNs and would likely do so.

299 I also have regard to the potential effect of the introduction of the Call Schedule and uplift in the redemption payment on shareholders in BLY, although they are not party to the schemes, where the issue of shares to Centerbridge, Ares and Ascribe was previously put before shareholders for approval under s 611 item 7 of the *Corporations Act*. I am satisfied that, where present shareholders in BLY would likely presently receive no return on an insolvency of BLY, which is the likely alternative to the approval of the altered schemes, and where the creditors that are to be issued the bulk of shares in BLY under the schemes support this alteration, that uplift is not unfair to, although it is detrimental to, BLY's existing shareholders.

300 As I noted above, the proposed alterations to the Secured Creditor Scheme also provide for a reallocation of ordinary shares to be issued by BLY pursuant to the schemes, without increasing the number of new ordinary shares to be issued by BLY, so that 4% of outstanding ordinary shares after giving effect to the schemes will be issued to the holders of SSNs including Centerbridge, Ares and Ascribe, pro rata based on their holdings of SSNs. The number of shares issued to Centerbridge, Ares and Ascribe, other than as holders of SSNs, will be reduced in the case of Centerbridge by 2% of the outstanding ordinary shares after giving effect to the schemes and, in the case of each of Ares and Ascribe, by 1% of the outstanding ordinary shares after giving effect to the schemes. This alteration seems to me to address the difficulty that potentially arose from the fact that the original schemes and associated arrangements allocated equity to Centerbridge, Ares and Ascribe but not other SSN holders. It seems to me that this alteration is not material to SUN holders, or to

shareholders in BLY, which have no interest in the question of which secured creditors receive equity in BLY, as distinct from the question of the extent of such equity that may be issued. The alteration does not change the total amount of equity that is issued.

301 The Court can also be satisfied that associated arrangements that are conditions precedent to that scheme and confer benefits on Centerbridge including the issue of substantial equity to Centerbridge, and the Unsecured Creditor Scheme and Director Nomination Agreements that confer benefits on Ares and Ascribe, are reasonably proportionate to the value of the rights that they surrender, where the sophisticated creditors who voted on the schemes (with the one exception whose attitude is not known) are now satisfied of that matter. Although the equity to be issued to Centerbridge, Ares and Ascribe and other SSN holders and SUN holders has only speculative or option value, the issue of fairness as between secured creditors inter se is addressed by the allocation of equity to SSN holders on a pro rata basis in an amount that they consider an acceptable quid pro quo for the amendments to their rights under the Secured Creditor Scheme.

302 In these circumstances, I find that the Secured Creditor Scheme, with these alterations, would be approved by an honest and intelligent secured creditor and should be approved by the Court. The Unsecured Creditor Scheme has been less controversial and I find that the Unsecured Creditor Scheme, with these alterations, would also be approved by an honest and intelligent SUN holder and should also be approved by the Court.

Two other less substantial alterations

303 The Plaintiffs also seek to alter the schemes to reflect the replacement of US Bank National Association with Delaware Trust Company as trustee of the SUNs and TLAs and TLBs, following the resignation of the former as trustee. The evidence indicates that Delaware Trust Company had been appointed as new trustee under the SUNs in place of US Bank National Association, in accordance with cl 7.08 of the SUN Indenture which permitted the replacement of a trustee that resigned, and had executed the Undertaking (as defined) in respect of the Unsecured Creditor Scheme (Rasetti 26.7.17). I am satisfied that

this alteration is not material and is within the scope of s 411(6) of the *Corporations Act* and the terms of the schemes.

304 The Plaintiffs also seek to amend the definition of "New Money ABL" in each scheme to describe it as a Revolving Credit and Security Facility in an aggregate principal amount equal to US$50 million entered into by the BLY Group and PNC Bank, National Association (the PNC ABL) and a new term loan facility entered into by the BLY Group and Centerbridge, Ares and Ascribe ("Backstop ABL"). This amendment is addressed in KordaMentha's and KPMG's further reports to which I have referred above which confirm it does not affect their views. Mr Jackman fairly noted, in oral submissions, that the Backstop ABL was not, strictly, a revolving security for the purposes of cl 3.1(j) of each of the schemes since an amount repaid under it could not later be redrawn. Mr Jackman also pointed out (T215) that KordaMentha did not place any particular emphasis on the character of the facility to be provided as a revolving facility, as distinct from a term loan, in their expert report. I am satisfied that is not a material matter, where the election to repay such an amount is within the BLY Group's control. The amendment in respect of the PNC ABL and the Backstop ABL does not seem to me to bring about any substantive alteration, and I am satisfied that this alteration is within the scope of s 411(6) of the *Corporations Act*.

The parties' submissions as to the shareholder resolution under s 611 item 7 of the Corporations Act

305 ASIC, as amicus curiae, submitted that the position of BLY shareholders in respect of the proposed alterations to the schemes potentially raised greater difficulty than the position as to creditors who supported the alterations, and advanced appropriately balanced submissions in that respect. ASIC recognised that, on the one hand, the resolutions passed by BLY's shareholders under s 611 item 7 of the *Corporations Act* had approved the issue of a maximum number of shares, which was not to be exceeded under the altered schemes; on the basis of KPMG's analysis, to which I have referred above, BLY's existing shareholders were better off under the altered schemes because BLY shares currently had no value and shareholders would receive nothing on a winding up; and the substance of the information provided to

members at the meeting under s 611 item 7 of the *Corporations Act* was directed, not to the value of their shares if the schemes were approved, but to the more favourable outcome under the schemes than under the alternative of insolvency. On the other hand, ASIC fairly recognised, and I have had regard to, the fact that the information then provided to BLY shareholders when voting under s 611 item 7 of the *Corporations Act* did not address the schemes as altered (which had not then been formulated) and that increased debt arising from the Call Schedule in respect of the SSNs potentially substantially reduces the value of equity in BLY following implementation of the schemes, implicitly, by comparison with the original schemes as described in the explanatory statement from the shareholders' meeting and KPMG's first report to shareholders.

306 ASIC also submitted that, while the Court may reach its own view of the likely impact of the amendments on members, that would involve substituting the Court's view for the views of members. I do not accept that submission. Members had an opportunity to vote on the issue of shares under s 611 item 7 of the *Corporations Act*, in the context of the proposed schemes, where the Court has a statutory power to alter the schemes if it considers fit, and the approval of members was necessarily given in the context that the schemes might be altered if the Court reached that view. In approving the schemes, the Court must have regard to the matter specified by s 411(6) of the *Corporations Act*, and that involves the Court forming a view in accordance with the statutory power conferred on the Court, not a substitution of its view for any view of BLY's shareholders.

307 ASIC also drew attention to the decision of Santow J in *Re Application of NRMA Ltd (No 2)* above, but rightly recognised the matter that distinguishes that decision from the present case, namely that that case concerned the position of members in a members' scheme, not the position of members in a creditors' scheme, and stands for the proposition that the Court should not, in the former case, permit a condition to a scheme that altered that which had been put to members for their approval to their potential disadvantage. The implication of that principle, in these circumstances, is that the Court should not impose a condition on a creditors' scheme to creditors' disadvantage, without

their consent, but that question does not arise here since those creditors which are disadvantaged by the alterations to these schemes have consented to them. The decision in *Re Application of NRMA Ltd (No 2)* above does not, in my view, stand for any proposition that the Court cannot impose a condition on a scheme that will or may disadvantage third parties generally, or third parties whose consent to which was required as a condition precedent to the schemes, although such disadvantage would be an important factor in the exercise of the Court's discretion under s 411(6) of the *Corporations Act*. The Snowside companies also relied on that decision as authority for a proposition that the Court ought not permit alterations to the schemes that are less beneficial to one affected group, namely shareholders, as against another, namely creditors. It does not seem to me that his Honour's observations are directed to that question, as distinct from a question of differential treatment as between the parties to a scheme. As I have observed above, BLY's shareholders are not parties to the schemes, although their interests should be taken into account, together with the interests of other affected constituencies, in determining whether it is just to approve the schemes as altered under s 411(6) of the *Corporations Act*.

308 Dr Austin also submits that there is no rational basis for the Court to infer or assume that, if the schemes were amended as proposed, shareholders would have approved resolutions of the kind previously put to them under s 611 item 7 of the *Corporations Act* in respect of the issue of shares to Centerbridge, Ares and Ascribe. The Plaintiffs respond that these proceedings are not directed to the conduct of the shareholders' meeting under that section and any question of the effect of the resolutions passed at that meeting would properly be determined in adversarial proceedings, where the relevant facts and the application of the *Corporations Act* and the ASX Listing Rules could be determined. I recognise that BLY shareholders had approved the issue of shares under s 611 item 7 of the *Corporations Act*, having been provided with information that described the schemes in their original form and their financial consequences. The shareholders' earlier approval under s 611 item 7 of the *Corporations Act* for the share issues contemplated by the schemes presently remains operative, in the absence of any order by a Court setting it aside in

substantive proceedings, or any shareholder resolution purporting to rescind it. It does not seem to me that I can or should speculate as to whether, if a further meeting were now called under s 611 item 7 of the *Corporations Act*, shareholders would now approve the issue of shares having been informed of the terms of the altered schemes. It seems to me that, in applying s 411(6) of the *Corporations Act*, I should apply the statutory test whether the alterations are such that the Court considers it fit to approve them. In doing so, I should have regard, inter alia, to the terms of the proposal that was previously put to shareholders and the objective impact of the alterations upon them, including the fact that KPMG's analysis shows a potential for positive value for shareholders after implementation of the schemes, in their altered form, at least at the high end of KPMG's valuation range, which would not exist on the BLY Group's insolvency.

309 Dr Austin also submits that the process provided for by s 411 of the *Corporations Act* is undermined if a scheme proponent is able to put one scenario before voting shareholders (implicitly, for approval of a share issue under s 611 item 7 of the *Corporations Act*, as a distinct step that is a condition precedent to the scheme) and the scheme can then be approved by the Court on an altered basis. I do not accept that submission, at least in its application to the very unusual facts of this case. As I noted above, when the resolution to approve the issue of shares under s 611 item 7 of the *Corporations Act* was put before BLY's shareholders, that occurred in a context where the Court had a statutory power under s 411(6) of the *Corporations Act* to approve the schemes in altered form, if it thought fit to do so. Shareholders' approval of the issue of shares under s 611 item 7 of the *Corporations Act* was necessarily given in that statutory context. The Court, in determining whether to approve the schemes as altered, will have regard to all the relevant interests, including the interests of shareholders who voted on the basis of information directed to the original schemes. That approach seems to me to implement, rather than undermine, the jurisdiction conferred on the Court under s 411 of the *Corporations Act.*

310 ASIC identified the possibility that the Court could, for example, convene a further meeting of shareholders, presumably to reconsider the resolution that shareholders had already passed under s 611 item 7 of the *Corporations Act*

on the basis of information as to the original scheme, or direct that notice be given to shareholders and they be allowed a short opportunity to object. Dr Austin also submits that it would ordinarily be thought "just" that non-associated shareholders be given an opportunity to be heard in relation to the altered schemes and one means for the Court to give them such an opportunity would be to convene a further shareholders' meeting. In response to that submission, the Plaintiffs point out that BLY had released details of the proposed amended schemes to ASX and also announced the date of the adjourned second court hearing on 14 August 2017, so that any shareholder wishing to object to the scheme will have the opportunity to appear on that date.

311 I give some, but limited, weight to the fact that an opportunity for BLY shareholders to be heard was provided in these proceedings. The proceedings have continued over a lengthy period and shareholders who wished to intervene in them have had the opportunity to do so, and the Snowside companies have in fact done so. Shareholders in BLY were also given notice of this further hearing, since the proposed alterations to the schemes and the adjourned date for these proceedings have been announced by BLY to ASX, albeit only shortly before the hearing. I recognise the weight to be given to this matter is reduced by the facts that, as Dr Austin submitted (T320) and I accept, the information released by BLY to ASX on 9 August was insufficient to place shareholders on notice of the financial effect of the altered schemes; and, as Mr Barnett submitted, the ASX announcements also did not annex the third KPMG report so as to indicate that the result of the altered schemes was at least potentially different from the result of the original schemes (T332). Dr Austin also submitted that those announcements did not disclose the grounds on which the Snowside companies had framed their objections to the altered schemes or the evidence on which they relied, and that two business days' notice was insufficient notice for shareholders to appear in Court as objectors, although those matters seem to me to be of lesser significance.

312 I accept that a members' meeting would be one way of giving members an opportunity to be heard. However, it does not seem to me that there is sufficient utility in that course to warrant the risk to the BLY Group, and indeed those shareholders, of further delay. That risk is substantial where I have found

above that BLY is presently insolvent or near insolvency and it would likely pass into external insolvency administration before such a meeting could be convened. It seems to me that the preferable course, consistent with the structure of both s 411(6) and s 611 item 7 of the *Corporations Act*, is for the Court to assess whether the alterations to the schemes are fit for approval on their merits, and to leave any challenge to the validity of the approvals given by shareholders under s 611 item 7 of the *Corporations Act* to be determined on its merits in substantive proceedings permitting a proper factual investigation of that matter. Adopting that approach, it seems to me that the schemes in the altered form would properly be approved by the Court, having regard to the fact that the schemes, as altered, allow shareholders a prospect of benefiting from positive performance of the BLY Group in future, by contrast with the likelihood of external insolvency administration if the schemes are not approved. I also have regard to the fact that, in determining whether it is proper to approve the alterations to the schemes under s 411(6) of the *Corporations Act*, not only the interests of shareholders in BLY, but also the interests of the BLY Group's creditors and employees and the communities in which the BLY Group operates are relevant.

The Snowside companies' claim that the schemes are unlawful

313 The Snowside companies submit that the Court should not approve the schemes, as altered, because they would be unlawful so far as they contemplated an issue of shares to First Pacific which has not been approved by BLY's shareholders for the purposes of Ch 2E or s 606 of the *Corporations Act* or the ASX Listing Rules. That proposition is based, first, on a suggested contravention of s 208 of the *Corporations Act* and, second, on a suggested contravention of s 606 of the *Corporations Act* if shares are issued to First Pacific, in circumstances that it is contended that it is an associate of Centerbridge, although Dr Austin recognises the possibility that an applicable exception may exist so far as shares are issued pursuant to a scheme in each case.

314 Dr Austin submits, and I accept, that the Court would not generally sanction a scheme that is inconsistent with other statutory requirements under the *Corporations Act*: *Re Glendale Land Development Ltd (in liq)* [1982] 2 NSWLR

563; (1982) 7 ACLR 171 at 178; 1 ACLC 562; *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 501–2; 10 ACSR 230 at 238–239; *Re HIH Casualty and General Insurance Ltd* [2005] NSWSC 240; (2005) 190 FLR 398; 53 ACSR 12 at [124]. Dr Austin goes further to submit that the Court would not approve a scheme where it was reasonably arguable that the scheme was unlawful. It is not necessary to determine whether this principle extends to the position where it is merely reasonably arguable that a scheme would be unlawful or inconsistent with the *Corporations Act*, because it does not seem to me that the Snowside companies have established either that the relevant schemes are unlawful or that it is reasonably arguable that they are unlawful.

315 Dr Austin submits, first, that the issue of shares to First Pacific under the altered schemes would contravene Ch 2E of the *Corporations Act.* There are several steps in that submission to which I refer below. The Plaintiffs respond that the application of Ch 2E of the *Corporations Act* would properly be determined in adversarial proceedings, in which a shareholder is party, rather than in an application for approval of the schemes in which the Snowside companies are being heard, by leave, without being party to the proceedings. I accept that I should not determine any question as to any application of Ch 2E of the *Corporations Act* in these proceedings on any final basis, where that would need to be determined in substantive proceedings and by reference to adequate evidence to support any allegation of acting in concert against Centerbridge and First Pacific. However, I must address the question whether this issue, having been raised, provides a reason not to exercise the Court's discretion under s 411 of the *Corporations Ac*t in favour of approval of the altered schemes.

316 Turning now to the relevant statutory provisions, s 208 of the *Corporations Act* prohibits a public company (relevantly, BLY) or an entity that the public company controls giving a financial benefit to a related party of the public company unless it has obtained approval from the public company's members in the way set out in ss 217–227, and gives the benefit within 15 months after that approval, or the giving of the benefit falls within an exception set out in ss 210–216. The persons who are related parties of a public company are set out

in s 228 of the *Corporations Act*, and include, relevantly, Centerbridge as an entity that has practical control of BLY. The issue of shares to Centerbridge under the schemes was previously approved by BLY shareholders in that regard. The related parties of a public company also include, in s 228(7), an entity which acts in concert with a related party of a public company on the understanding that the related party will receive a financial benefit if the public company gives that entity the financial benefit. Dr Austin submits, and I accept, that First Pacific and Centerbridge would each receive financial benefits within the meaning of s 229 of the *Corporations Act* from BLY under the altered schemes and associated arrangements, including the issue of BLY shares, the possible receipt of redemption premiums under a Call Schedule and, in the case of First Pacific, a payment by way of reimbursement of costs and expenses.

317 The first step in Dr Austin's submission is that First Pacific is a related party of BLY, within the meaning of s 228(7) of the *Corporations Act.* First Pacific would be a related party of BLY under that subsection if, relevantly, it acts in concert with a related party (Centerbridge) of the public company (BLY) on the understanding that the related party (Centerbridge) will receive a financial benefit if the public company (BLY) gives the entity (First Pacific) a financial benefit. Dr Austin contends that First Pacific is acting in concert with Centerbridge on that understanding and is a related party of BLY on that basis.

318 Mr Wood, in response, draws attention to the Explanatory Memorandum for the Corporate Law Reform Bill 1992, which described the operation of the predecessor provision to s 228(7) as follows:

> "Where a financial benefit is provided to an associate of a related party, in the expectation that a person will give a corresponding financial benefit to a related party of the public company, the associate will be a related party for the purposes of the proposed Part 3.2A. This provision is intended to address the situation where the public company enters into an uncommercial transaction with a 'friendly' third party on the understanding that a corresponding benefit will be given to a related party."

It seems to me that s 228(7) is apt to address that situation but also has potentially wider application. That section is capable of applying where, first, the entity (relevantly First Pacific) is acting in concert with the related party (relevantly Centerbridge) and, second, that occurs on an understanding of the

relevant kind, which requires at least a linkage or conditionality between the receipt of a financial benefit by the related party (relevantly, Centerbridge) and the giving by the public company (BLY) of the financial benefit to the relevant entity (First Pacific).

319 The concept of "acting in concert" used in s 228(7) of the *Corporations Act* is also used in s 12(2)(c) of the *Corporations Act* and its predecessors and has been considered in the case law. In *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 13 WAR 407; 16 ACSR 501 at 524–525 (to which Dr Austin draws attention), Owen J observed that:

> "'Acting in concert' [in s 15(1)(a) of the *Corporations Law*] involves at least an understanding as between the parties as to a common purpose or object ... It is necessary that the understanding should be consensual and that there should be some adoption of it. However, it is not essential that the parties are committed to it or bound to support it. An arrangement or understanding can be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it notwithstanding their adoption of it. ... Such an understanding may be proved by inference from the circumstances surrounding the impugned transaction and from what the parties have done as well as by direct evidence." (Citations omitted)

320 That concept is directed to "having an understanding as to some common purpose or object — not simply two persons separately and coincidentally acting in the same manner": *Mount Gibson Iron Ltd* [2008] ATP 4 at [12]. Acting in concert will only be established where there exists a real understanding, common purpose or combination or aggregation: *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* above; *IPT Systems Ltd v MTIC Corporate Pty Ltd* [2000] WASC 316; (2000) 158 FLR 349; 36 ACSR 454; *Bateman v Newhaven Park Stud Ltd* [2004] NSWSC 566; (2004) 207 ALR 406; 49 ACSR 597 at [16]ff. Acting in concert is not established simply because parties have common views as to the merits of a particular resolution proposed by another person: *Winepros Ltd* [2002] ATP 18; (2002) 43 ACSR 566; at [33].

321 As Dr Austin acknowledges, there is authority that the entry into and a common purpose of executing a transaction is also not sufficient to establish acting in concert: *IPT Systems Ltd v MTIC Corporate Pty Ltd* above at [26]; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2010] NSWSC 233; (2010) 238 FLR 384; 77 ACSR 410 at [133]–[134]. In oral submissions, Dr Austin seeks to distinguish those decisions on the basis that former s 15 of the

Corporations Law is different from s 228(7) of the *Corporations Act.* While that proposition is correct, there is no reason to think that the concept of "acting in concert" is used differently between those provisions. Dr Austin also submits that the agreements at issue in those cases resulted from the outcome of arm's length negotiations, but, as I will note below, the limited cooperation between BLY, First Pacific, Centerbridge and others contemplated by the Settlement Deed here has the same character. The Court of Appeal took the same view in *Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Crivelli) v IOOF Investment Management Ltd* [2013] NSWCA 231; (2013) 304 ALR 436 at [114]–[115], and also there approved the observations of Gray J in *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* [1991] FCA 672; (1991) 32 FCR 318 at 329 as to the difficulties in applying the concept of "in concert" too broadly, and of French J in that case (at 334) that that concept:

> "does not apply to groups of employees of different employers who, as the result of requests by a common union, engage in similar conduct for their own respective purposes".

The Court of Appeal there applied that approach to the votes of voting members in respect of a scheme of arrangement.

322 As I noted above, Dr Austin submits that First Pacific has become a related party of BLY because it is acting in concert with Centerbridge in respect of the amendments to the schemes and the Settlement Deed, and relies on cl 2.1 of the Settlement Deed to establish the relevant "acting in concert". Clause 2.1(a) of the Settlement Deed records that the Supporting Creditors (defined to include the Centerbridge, Ares and Ascribe and First Pacific entities) have

> "agreed to support the BLY Creditors' Schemes and have agreed to implement the Transaction [as defined] on and subject to the terms of this deed".

323 Clause 2.1(b) requires each party to take actions reasonably required in accordance with the Settlement Deed or requested by the Supporting Creditors or BLY in connection with the Transaction, to the extent that such action is not inconsistent with the terms of the Settlement Deed, including specified steps which, broadly, relate to the support and implementation of the Transaction (as defined). Clause 2.1(e) records the parties' acknowledgment that nothing in the Settlement Deed requires First Pacific not to press or to withdraw its grounds of

objection to the original Secured Creditor Scheme or to support or facilitate steps to implement the original Secured Creditor Scheme or not to object to any further amendment to the Secured Creditor Scheme which affects the commercial terms of that scheme in any commercially significant respect.

324 Dr Austin submits that First Pacific has become and remains a related party of BLY because it is acting in concert with Centerbridge, not during the negotiations which led to the Settlement Deed, but after a Settlement Deed was executed and in respect of the implementation of the altered schemes. Dr Austin also submits (T309) that it is sufficient for First Pacific and Centerbridge to be acting in concert for the purposes of s 228(7) of the *Corporations Act* if they are acting together in the limited sense that they presently support the altered schemes, as a result of negotiations between them and others, notwithstanding that they would again be in opposition if the altered schemes were rejected and the original schemes were again propounded.

325 The Plaintiffs respond that the suggestion that Centerbridge and First Pacific are acting in concert is inconsistent with the history of these proceedings, and First Pacific responds that there is no basis for a finding that First Pacific and Centerbridge are acting in concert, merely because they are party to a transaction, where it is not established that they are taking concerted action with a common purpose or object. First Pacific also submits, with obvious force, that First Pacific and Centerbridge have throughout been in opposite negotiating positions in relation to the proposed restructuring of the BLY Group, and remain in contest in respect of First Pacific's continued objection to the schemes in their original form.

326 It seems to me that the first difficulty with the Snowside companies' submission that First Pacific and Centerbridge are acting in concert and that First Pacific is a related party of BLY for the purposes of s 228(7) of the *Corporations Act* is that that submission depends upon isolating a particular step, the point at which they support and seek to advance the altered schemes in accordance with the Settlement Deed, from all other aspects of the relationship between First Pacific and Centerbridge in determining whether they are acting in concert. The second difficulty with that submission is that, although both First

Pacific and Centerbridge support the altered schemes, they do not in fact share a common purpose, because First Pacific does so in order to advance its interests as an SSN holder whereas Centerbridge does so in order to advance its wider and different interests as an SSN holder, a holder of TLAs and TLBs, and a significant shareholder in BLY which will again be a significant shareholder in BLY after the schemes are implemented. It seems to me that, consistent with the reasoning in *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* above and *Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Crivelli) v IOOF Investment Management Ltd* above, that that limited cooperation, or the agreement for it within a limited area, is not sufficient to establish "acting in concert" in this context.

327 A third difficulty with the Snowside companies' submission is that, in my view, it has not been established, for the purposes of s 228(7) of the *Corporations Act*, that the related party (Centerbridge) will receive a financial benefit *if* the public company (BLY) gives the entity (First Pacific) a financial benefit. As I noted above, that concept contemplates a linkage between the giving of the relevant financial benefits. Here, the condition to Centerbridge's receipt of benefits under the altered schemes is not that BLY gives a financial benefit to First Pacific but instead that the Court approves the altered schemes and they are implemented. Centerbridge would receive such benefits if the Court approves the schemes and they are implemented, even if, for whatever reason, BLY ultimately could not or did not give such benefits to First Pacific under the altered schemes. Centerbridge's and First Pacific's rights under the altered schemes are in parallel rather than in an interconnected series.

328 For these reasons, I am not persuaded that First Pacific and Centerbridge are acting in concert, or that First Pacific is a related party of BLY, for the purposes of s 228(7) of the *Corporations Act.* That is sufficient to have the result that the Snowside companies' contention that the altered schemes are unlawful under Ch 2E of the *Corporations Act* cannot be accepted, although it also cannot be accepted for other reasons noted below.

329 There are several exceptions to the prohibition under s 208 of the *Corporations Act*. Dr Austin submitted that the onus would be on First Pacific to establish a relevant exception under s 210 or s 216 of the *Corporations Act*. Earlier cases suggested that the onus was on a party alleging a contravention of Ch 2E to establish that none of the exceptions available under that Chapter applied. The contrary view was taken in *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1; (2007) 207 FLR 245 at [713]–[715] and *Mercedes Holdings Pty Ltd v Waters (No 2)* [2010] FCA 472; (2010) 186 FCR 450; 78 ACSR 118 at [74], aff'd *Waters v Mercedes Holdings Pty Ltd* [2012] FCAFC 80; (2012) 203 FCR 218; 90 ACSR 45, holding that the onus of establishing the relevant exception falls upon the person claiming it. Mr Bender accepted that the onus to establish an exception would be on the party asserting it in a substantive proceeding alleging a contravention of s 208 of the *Corporations Act*, but contended that that was not the case where the Snowside companies sought to establish the unlawfulness of the altered schemes. It is not necessary for me to determine where the onus of proof lies because, in this case, even if the onus of proof lay on BLY or First Pacific, I would readily draw the inference that the arm's length exception was satisfied in the relevant circumstances.

330 The Plaintiffs submit that the terms of the altered schemes are on arm's length terms, for the purposes of the exception in s 210 of the *Corporations Act*, where they have been negotiated between parties to strongly contested litigation which were represented by external advisers acting in their opposed interests. That section relevantly provides that member approval is not required for a public company or an entity which it controls to give a financial benefit on terms that would be reasonable in the circumstances, if the public company or entity and the related party were dealing at arm's length, or the terms are less favourable to the related party than arm's length terms. The concept of "arm's length" terms in this section involves "the relationship which exists between parties who are strangers to each other, and who bear no special duty, obligation, or relation to each other" or "the standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction": *Australian Trade Commission v WA Meat Exports Pty Ltd* (1987)

14 ALD 314; 75 ALR 287 at 291; 7 AAR 248; *Orrong Strategies Pty Ltd v Village Roadshow Ltd* above at [717]ff.

331 Dr Austin responds that the question is not whether the negotiations which led to the alterations to the schemes were conducted at arm’s length but whether the result was terms that would be reasonable if BLY and First Pacific were dealing at arm’s length. While that proposition accurately reflects the statutory test, it seems to me to neglect the practical reality that, all things being equal, parties that are in fact dealing at arm’s length are likely to reach arrangements on arm’s length terms. If s 208 of the *Corporations Act* were otherwise capable of applying in these circumstances, then I readily infer, as a matter of fact, that a negotiation between First Pacific on the one hand and the BLY Group and Centerbridge on the other generated a resolution on arm’s length terms where those entities plainly had different commercial interests and have been in an adversarial relationship throughout the proceedings.

332 Dr Austin also refers to *Australian Securities & Investments Commission v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267; (2005) 53 ACSR 305 at [455]–[458], where Palmer J observed that s 210 required the Court to assess the terms of the subject transaction against objective standards and that the parties' understanding as to the reasonableness of the terms was not decisive as to whether the terms were reasonable for the purposes of that section. His Honour noted that, in applying that test, the Court would assume that the comparator transaction was entered into by a public company which was unrelated to the other party to the transaction in any way, financially or through ties of family, affection or dependence; free from any undue influence or pressure; through its relevant decision-makers, sufficiently knowledgeable about the circumstances of the transactions, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgement as to what was in its interests; and concerned only to achieve the best available commercial result for itself in all of the circumstances. His Honour observed that the terms of the transaction in question would then be tested against the terms of a transaction which would reasonably be achieved by a hypothetical public company in that position.

333 Dr Austin accepts that BLY may have satisfied the first three of the factors identified by Palmer J in *Australian Securities & Investments Commission v Australian Investors Forum Pty Ltd (No 2)* above in this case but submits (T313) that the arm's length test cannot be satisfied because it has failed to satisfy the fourth factor, by achieving the best available commercial result for itself, because the best available commercial result for it would not damage shareholders' interests without giving them the opportunity to consider the proposal. I do not accept that submission, since it seems to me that the best commercial result for BLY, and for its shareholders, is to avoid the insolvency which I have held is the likely result of a failure to approve the schemes. So far as this submission also relied, in part, on the expert evidence led by the Snowside companies in support of that submission, it has the difficulty that I have not been persuaded by that evidence in preference to the expert reports of KordaMentha and KPMG.

334 I also do not accept Dr Austin's further submission that the arm's length exception under s 210 of the *Corporations Act* would not be available, because the redemption premiums negotiated under the Call Schedule for the benefit of SSN holders including First Pacific would not be reasonable if the parties were dealing at arm's length. While I have accepted above that the altered schemes are less advantageous to BLY shareholders than the original schemes, I do not see anything in that proposition that is inconsistent with arm's length bargaining between BLY, the SSN holders, the SUN holders and Centerbridge, where any compensation to the SSN holders for the detriments which they would suffer under the Secured Creditor Scheme would likely come at the expense of BLY and, ultimately, at the expense of lower ranking creditors and shareholders. That submission is also undermined by the lack of any apparent alternative to BLY, other than the likelihood of an external insolvency administration, a matter to which I have referred above. For these reasons, it seems to me that the exception under s 210 of the *Corporations Act* would permit the transactions contemplated by the altered schemes.

335 Dr Austin also recognised in submissions that the Court's approval of the schemes may give rise to an applicable exception to the prohibition on related party transactions under s 216 of the *Corporations Act,* so far as any financial

benefit given by or to parties to the schemes would arguably be given under an order of the Court. Dr Austin also put detailed oral submissions as to the effect of the Court's approval of a scheme, for the purposes of s 216 of the *Corporations Act* (T314ff). Dr Austin submits, and I accept, that that section does not confer a general jurisdiction on the Court to make orders excluding the operation of s 208: *Re Summit Resources (Aust) Pty Ltd* [2012] WASC 125; (2012) 42 WAR 401; 88 ACSR 60 at [43]–[48]. Dr Austin also referred to my decision in *Re Wollongong Coal Ltd* [2017] NSWSC 201; (2017) 317 FLR 426, in which I referred to that decision and took a similar approach in addressing the different question whether s 259A(c) of the *Corporations Act*, which provides an exemption to the prohibition on a company acquiring shares or units of shares in itself "under a Court order", allows an exception from the statutory regime for buy-backs under Pt 2J.1 of the *Corporations Act*. Dr Austin also submitted that several factors supported declining to exercise the power under s 411 in a manner that would exclude the operation of Ch 2E of the *Corporations Act* in the relevant circumstances. It is not necessary to determine whether s 216 of the *Corporations Act* will apply in the particular circumstances, given the conclusions that I have reached above. If that section was applicable, that would be a consequence of the Court's exercise of the powers conferred on it under s 411 of the *Corporations Act* and does not give rise to any reason not to exercise those powers in the present circumstances.

336 Dr Austin also submitted that the implementation of the altered schemes would give rise to a contravention of s 606 of the *Corporations Act,* because Centerbridge and First Pacific are acting in concert and are associates for that purpose. That section prohibits, relevantly, a person (on the Snowside companies' case, First Pacific) acquiring a relevant interest (as defined) in issued voting shares in a listed company (BLY) by a transaction (as defined) in relation to securities entered into by or on behalf of that person (First Pacific) which increases, relevantly, someone else's (on the Snowside companies' case, Centerbridge's) voting power from 20% or below to more than 20% or from a starting point that is above 20% and below 90%. The term "voting power" is defined in s 610 and extends to voting power of the relevant person (Centerbridge) and its associates.

337 Dr Austin submitted that First Pacific is an associate of Centerbridge because those entities are acting in concert for the purposes of ss 12 and 53 of the *Corporations Act*, in respect of BLY's affairs. Dr Austin submitted (T316) that First Pacific is an associate of Centerbridge under s 12(2)(c) of the *Corporations Act* because it is acting or proposing to act in concert with Centerbridge in relation to BLY's affairs; and that the issue of shares to First Pacific would increase Centerbridge's voting power in BLY, because the calculation of voting power in s 610 requires that the votes of its associate, First Pacific, be added. I am satisfied that acting in concert for the purposes of s 12(2)(c) of the *Corporations Act* is not established for the same reason that acting in concert is not established for the purposes of s 228(7) of the *Corporations Act*. That is sufficient to have the result that the Snowside companies' contention that the altered schemes are unlawful under s 606 of the *Corporations Act* also cannot be accepted.

338 Dr Austin also drew attention (T316) to my finding in *Re Wollongong Coal Ltd* above that implementation of a transaction under s 259A(c) of the *Corporations Act* would not have avoided any liability arising in that case in respect of a contravention of Ch 6 of the *Corporations Act*. The position here is distinguishable, as Dr Austin recognised, by reason of the exception from s 606 that is available under s 611 item 17 of the *Corporations Act* for an acquisition that results from a compromise or arrangement approved by the Court under Pt 5.1 of the *Corporations Act*. I should have regard to that consequence in determining whether to approve the schemes. I am satisfied, for the reasons set out above, that the schemes should be approved, as altered, notwithstanding that that exception would permit the issue of shares to First Pacific if, contrary to my view, that issue would otherwise be prohibited under s 606 of the *Corporations Act.*

339 Dr Austin also refers to several Listing Rules which the Snowside companies contend may be applicable to the transactions contemplated by the schemes, unless waivers are granted by ASX. The Plaintiffs also made submissions as to the application of the ASX Listing Rules, which I do not consider it necessary to address, where ASX would have the capacity to waive the application of those rules if it considered it appropriate to do so. I need not, and should not, address

those matters, where it will be a matter for ASX to form any view as to the application of its rules and whether they should be waived in the particular circumstances.

340 For completeness, I note that Dr Austin also advanced an oral submission, which he fairly characterised as technical, as to possible differences in the number of shares referred to in the KPMG report and the explanatory materials for the schemes. It did not seem to me that that issue was material and I need not address it further.

341 I am satisfied that these matters do not provide any reason not to approve the schemes in their altered form.

Collateral benefits

342 I observed in the Earlier Judgment, and the Plaintiffs and First Pacific accepted in submissions, that the fact that Centerbridge will obtain a controlling shareholding in BLY under the arrangements associated with the schemes, and that Centerbridge, Ares and Ascribe will obtain a right to nominate directors to BLY's board, also raises questions as to whether those entities are receiving a collateral benefit as a result of the overall recapitalisation of the BLY Group, and that is a matter to be taken into account at the second court hearing: *Re Aston Resources Ltd* [2012] FCA 229 at [35]; *Re David Jones Ltd (No 2)* [2014] FCA 720; (2014) 101 ACSR 381 at [33]. In its submissions as amicus curiae, ASIC submits that the issue of equity to Centerbridge, Ares and Ascribe should not be treated as a "collateral" interest, where it is an essential and inseverable feature of the compromise, although implemented by agreements outside the scheme.

343 The position in respect of any collateral benefit in these schemes is not directly analogous with that which arises in acquisition schemes of arrangement, where the Courts have reference by way of analogy to the prohibition on a takeover bidder's offering a collateral benefit to induce a shareholder to accept a takeover bid under s 625(1) of the *Corporations Act*: see Takeovers Panel Guidance Note 21, *Collateral Benefits*; *Re David Jones Ltd (No 2)* above at [18]; ASIC Regulatory Guide 60, *Schemes of Arrangement*. There seems to me to be substantial force in ASIC's submission that an intrinsic feature of the

schemes, or an arrangement which is closely connected with the schemes by way of conditions precedent, is different in character from an apparently separate transaction which may nonetheless induce a party to support a scheme. However, it does not seem to me that the characterisation of the equity issued to Centerbridge, Ares or Ascribe as a "collateral" interest, as distinct from an essential aspect of the schemes and their associated arrangements, would alter the substantive result of the exercise of the Court's discretion.

344 This matter provides no reason not to approve the schemes, as altered in the manner proposed by the Plaintiffs, where they treat secured and relevant unsecured creditors fairly inter se and given the other findings that I have reached above.

Sections 411(11) and 411(17) of the Corporations Act

345 I am satisfied that I should make an order under s 411(11) of the *Corporations Act* dispensing with any requirement that the Court order be annexed to BLY's constitution. I also note that the Plaintiffs intend to rely on the Court's approval for the purpose of qualifying for an exemption from the registration requirements of the *Securities Act* 1933 (US), as provided by s 3(a)(10) of the *Act*. That course is consistent with that which has been adopted in the case law: *Re Atlantic Gold NL (No 2)* [2014] FCA 869; *Re Atlassian Corporation Pty Ltd* [2013] FCA 1451.

346 Section 411(17) of the *Corporations Act* provides that the Court must not approve a compromise or arrangement under the section unless it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Ch 6, or there is produced to the Court a statement in writing by ASIC stating that ASIC has no objection to the compromise or arrangement. In its submissions as amicus curiae, ASIC notes that it ordinarily does not provide a statement under s 411(17) in respect of a creditors' scheme; compare *Re Dominion Insurance Company of Australia Ltd (subject to scheme of arrangement)* [2017] NSWSC 730 at [9]. I recognise that the outcome of the schemes and associated arrangements will be that Centerbridge and its affiliates would move from a

position where it likely already has practical control of the BLY Group, prior to implementation of the schemes, to legal control of the BLY Group after their implementation, although Ares and Ascribe and their affiliates will also have significant interests in BLY. I am satisfied that the schemes were not proposed for the purpose of enabling any person to avoid the operation of provisions of Ch 6, where the necessary approval for share issues contemplated by the schemes and associated arrangements have been obtained under s 611 item 7 of the *Corporations Act*.

Orders and costs

347 In the result, I will make orders as proposed by the Plaintiffs approving the schemes as altered, in the form of Exhibits P6 (Unsecured Creditor Scheme) and P7 (Secured Creditor Scheme). The order previously made by the Court under s 411(16) of the *Corporations Act* restraining further proceedings against the Plaintiffs (whether or not such proceedings had already been commenced) except by leave of the Court and subject to such terms as it imposes, to facilitate consideration of the schemes, will need to be discharged once the schemes take effect. I will hear the parties as to costs.

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