Neutral Citation Number: [2023] EWHC 452 (Ch)

Case No: CR-2022-000596

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

IN THE MATTER OF SOVA CAPITAL LIMITED (COMPANY NUMBER 04621383) (IN SPECIAL ADMINISTRATION)

AND IN THE MATTER OF THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 02/03/2023

Before :

MR JUSTICE MILES

- -

On the application of:
DAVID PHILIP SODEN, IAN COLIN WORMLEIGHTON, AND STEPHEN BROWNE
(as joint special administrators of Sova Capital Limited)

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- -

Mark Phillips KC, William Willson and **Dr Riz Mokal** (instructed by **Hogan Lovells International LLP and Shoosmiths LLP**) for the **Applicants**

Stephen Robins KC and **Charlotte Cooke** (instructed by **DMH Stallard LLP**) for **Mr Boris Zilbermints**, an interested party

William Buck and **Nicholas Wright** (instructed by **Quillon Law LLP**) for **LLC Holding Company Dominanta**, an interested party

Hearing dates: 20 & 21 February 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 2 March 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Miles :

Introduction

1. The joint special administrators (**the JSAs**) of Sova Capital Limited (**Sova**) apply, by two closely interrelated applications, for a direction that they be at liberty to enter into two transactions concerning the assets and liabilities of Sova.

2. Sova is in special administration. It is an FCA authorised and regulated broker. Before the administration it provided investment brokerage services to institutional and corporate clients, mostly trading in the Russian market.

3. The applications are made under paragraph 63 of Schedule B1 to the Insolvency Act 1986 (**Schedule B1** and **the 1986 Act**). These are applicable in Sova's special administration by Regulation 15(4)(a) of the Investment Bank Special Administration Regulations 2011 (**the IBSARs**).

4. The JSAs seek the permission of the Court to perform, and to procure Sova to perform, two transactions with LCC Holding Company Dominanta (**Dominanta**).

5. These are referred to in the evidence as **the Dominanta Transaction** and **the Further Dominanta Transaction** (together, **the Transaction**). Dominanta is one of the largest unsecured creditors of Sova with an admitted claim of c.£233m.

6. In very broad terms the Transaction would result in Dominanta acquiring from Sova a portfolio of Russian securities in return for Dominanta waiving all or a portion of its claims against Sova. The JSAs say that they have agreed this deal because it is the best way of realising Sova's Russian securities which are effectively trapped.

7. The applications are opposed by Boris Zilbermints (**BZ**), who is a creditor of Sova with an estimated claim of £19.9 million. BZ is also part of a consortium which wishes to acquire the same Russian securities. The consideration offered by the consortium is a combination of £125m of cash and the waiver of BZ's claims against Sova of c.£20m.

8. At the first hearing of the applications, which was on 13 January 2023, I adjourned the applications and gave directions for an expedited hearing. This included a timetable for the service of further evidence and consolidated skeleton arguments. I also considered that the adjournment would give a chance for the competing bids to be fully assessed and for any further competitive tension to be exploited.

9. The evidence is extensive. The applications are supported by ten witness statements of Mr Soden, one of the JSAs. The exhibits include three memoranda prepared by the JSAs' UK and US solicitors concerning the possible application of UK, US and EU sanctions. BZ has served two statements. Mr Trakhtenberg has served a statement for Dominanta.

10. I have carefully considered this evidence. I have also been assisted by the very full written submissions and oral submissions of the parties. Much of the factual background is not controversial and I have drawn on the parties' written submissions in preparing this judgment.

Background to the applications

11. In broad outline the background to the applications (as explained by Mr Soden in his statements) may be summarised as follows.

12. A large part of Sova's estate consists of financial assets which are held in depositaries in Russia. Many of these Russian securities trade on the Moscow Stock Exchange (**MOEX**) and are either: securities issued by entities incorporated in and under the laws of Russia; securities issued by entities within corporate groups with material operations in Russia; or securities issued by the Russian government (together **Russian Securities**). As explained below Sova cannot trade on MOEX.

13. Russia invaded Ukraine on 24 February 2022.

14. This created turmoil in the markets on which the Russian Securities are traded. Assets issued by Russian entities and traded on Russian markets fell in value, counterparties holding them by way of collateral issued margin calls, and MOEX and related market infrastructure closed. This severely impaired Sova's liquidity and it was unable to leverage or finance its Russian Securities. This rendered Sova cashflow insolvent.

15. On 3 March 2022, on the application of its directors, Sova was placed in special administration by order of Leech J.

16. The UK, the EU and the US introduced sanctions in response to the invasion (**Western Sanctions**). The Russian government imposed countermeasures (**Russian Restrictions**). As a result of the Western Sanctions and the Russian Restrictions (together **the Sanctions Regimes**), the JSAs and Sova are unable to realise the Russian Securities by normal means for the benefit of Sova's estate.

17. Russian Securities amount to about 87% by value of the total securities Sova owns (valued as at 11 November 2022). These are illiquid or otherwise unrealisable other than for a much reduced price.

18. Adding more detail, MOEX ceased trading in late February 2022. It has not reopened to securities trading for foreign residents in countries designated under the Russian Restrictions as 'hostile' (which include the UK, the US and the EU member states). So the JSAs cannot trade on MOEX and cannot sell the Russian Securities on-exchange on a line-by-line basis. The only option is an over-the-counter sale. Such an over-the-counter (**OTC**) sale could be either to a Russian buyer (or potentially to a non-Russian buyer from a non-hostile jurisdiction) or to a non-Russian buyer from a 'hostile' jurisdiction.

19. As for a sale to a Russian buyer (or a non-Russian buyer from a non-hostile jurisdiction), under the Russian Restrictions, as Sova is incorporated in a hostile jurisdiction, any transaction it enters with a Russian buyer in relation to the Russian Securities is subject to approvals (**Government Commission Consent**) from the relevant Russian authority, the Government Commission for Control of Foreign Investment in the Russian Federation (**the Government Commission**).

20. Additionally Sova would need to find a buyer who is not subject to Western Sanctions. A material target population of buyers for the Russian Securities would have been Russian financial institutions. However, many Russian financial institutions are subject to Western Sanctions.

21. The Russian Restrictions also make it difficult for Sova to repatriate cash from Russia to the UK. Generally, this would require the approval of the Central Bank of Russia (**the CBR**), and there is a lack of clarity in relation to this process and the operation of the different Russian laws which creates potential uncertainty when entering cash transactions with such buyers.

22. On this last point, BZ has submitted evidence of Russian law and practice which concludes that Government Commission Consent to a transaction would satisfy the requirements concerning approvals of the transfers of cash. The JSAs' position is that there is a risk that further CBR approval would be needed. There was no cross-examination of witnesses and the court is not in a position to resolve this difference of view.

23. A sale to a buyer in a 'hostile' jurisdiction (such as a Western buyer) would be extremely challenging. Though theoretically allowed under Russian law, there would have to be a buyer willing to invest in Russian assets at a time when most such parties are exiting Russian markets. The buyer would also have to be willing to hold the assets for an extended period since it would not be able to trade on MOEX and would be subject to the same restrictions on selling as Sova faces.

24. The JSAs say that these unusual conditions make it extremely hard for them to realise the value of the Russian Securities through a normal marketing process.

25. It is against this background that they seek the court's approval for the JSAs to perform and procure Sova to perform the Dominanta Transaction and the Further Dominanta Transaction.

26. The Dominanta Transaction relates to 71 of some of the highest value Russian Securities held by Sova (**the First Target Russian Securities**); the Further Dominanta Transaction relates to a further 18 such securities (**the Second Target Russian Securities**; together **the Target Russian Securities**).

27. The terms of the Dominanta Transaction are set out in a portfolio transfer agreement dated 2 December 2022, as amended on 30 December 2022 and 10 February 2023 (**PTA1**). The terms of the Further Dominanta Transaction are set out in a portfolio transfer agreement dated 30 December 2022, as amended on 13 February 2023 (**PTA2**).

28. The parties to each of these PTAs are Sova and the JSAs on the one hand and Dominanta, a Russian entity, on the other.

29. Dominanta is one of Sova's largest unsecured creditors by virtue of having taken assignments of certain claims against Sova. Dominanta is ultimately beneficially majority-owned by Mr Roman Avdeev (**Mr Avdeev**), a dual Russian and Cypriot national, who is also the ultimate beneficial owner of Sova. According to the JSAs' due diligence, Dominanta is not owned or controlled by persons subject to UK, EU, or US sanctions.

30. By the two PTAs, the JSAs have caused Sova to agree to transfer a large bulk of its Russian Securities (i.e. the First and Second Target Russian Securities, respectively) to Dominanta, in return for Dominanta waiving its admitted claim of £233,261.442.85 against Sova. This amount has been admitted for proof by the JSAs (**the Dominanta Adjudicated Claim**).

31. The JSAs have calculated a cash equivalent value to Sova of the Transaction. The calculation works like this: (a) Start with the final dividend payable to creditors assuming

that the Transaction does not take place. (This will be a positive number even if the relevant Russian Securities cannot be realised as there are other realised or realisable assets in the insolvent estate.) (b) Then assume that the Transaction happens (and that the full amount of the Dominanta Adjudicated Claim is waived) and determine the final dividend for the other creditors. (c) Then calculate the amount that would have to be contributed to the estate to pay the dividend that would be payable under (b) above, but on the assumption that the Dominanta Adjudicated Claim remains. This is the cash equivalent value (**CEV**) of the Transaction to Sova.

32. The CEV analysis can of course be applied to any offer which involves the waiver of the creditor's claim in the insolvent estate. As explained below it has been applied to the claim waiver element of BZ's offers for comparative purposes.

33. Mr Soden explains that the CEV can also be understood by (notionally) assuming that a creditor such as Dominanta (and this example uses Dominanta as an illustration) (i) receives an initial dividend (from assets otherwise available to the estate) and (ii) successfully bids this dividend for a proportion of the Target Russian Securities. It then (iii) receives another dividend (being its pari passu share of the amount paid into the estate at (ii)), and (iv) bids that dividend for another portion of the Target Russian Securities. It iteratively receives and bids subsequent dividends until it has acquired all the Target Russian Securities. The total amount of the dividends that would have been received and paid back to Sova in order to acquire Target Russian Securities is the same as the CEV. Mr Soden describes this as the **Dividend Bid Model**. This is best seen as a way of conceptualising how the amounts contributed by a bidder swell the estate; it is not a description of the way things will actually happen under the Transaction.

34. It will be seen that an input into the CEV calculation is the final dividend rate payable to Sova's creditors. This cannot be known until the conclusion of the special administration. The JSAs have however calculated projected final dividends (assuming no Transaction and no other realisations from the Russian Securities) on the basis of assumptions about the overall admitted creditors of the estate, realisations of other assets, and expenses. They have calculated a **Low case** and a **High case**. They have also shown a **Mid case** as the median between the other two.

35. There have been various iterations of these cases as the administration has progressed.

36. In the latest (given in Mr Soden's eighth statement of 14 February 2023), in the Low case the total claims against Sova are estimated at £862.4m and net realisations are estimated at £316.4m. In the High case the total claims are the same and net realisations are £390.8m.

37. On the JSAs' latest Low case the projected final dividend rate (assuming the Transaction does not happen and no other realisation of value from the Russian Securities) is 36.7% (i.e. 316.4/862.4).

38. If the Dominanta Adjudicated Claim were waived the final dividends for Sova's other creditors would increase from 36.7% to 50.3% (i.e. 316.4/(862.4-233.3)). The CEV of the Dominanta claim is therefore £117.3m. Expressed in numbers, that is: 50.3% = 433.7/862.4; and £433.7m minus £316.4m = £117.3m.

39. Using the Dividend Bid Model, on the Low case, Dominanta's estimated dividend (assuming no Transaction) would be c. £85.6 million (being 36.7% of £233.3 million). If Dominanta

was (notionally) treated as iteratively bidding these dividends for the assets the amount returned to the estate would be £117.3m.

40. On the High case the projected final dividend rate (assuming the Transaction does not happen and no other realisation of value from the Russian Securities) is 45.3% (i.e. 390.8/862.4). Waiver of the Dominanta Adjudicated Claim increases projected dividends for Sova's other creditors to 62.1% and the CEV of the Transaction is £144.9m.

41. In the Mid case (i.e. the median case) the projected dividend rate for other creditors (assuming the Transaction happens) would be 56.2% and the CEV of the Transaction would be £131.0m.

42. The JSAs have estimated the value of the Target Russian Securities of c. £274 million to those able to trade in them unimpeded by the Sanctions Regimes.

43. It was common ground before me however that Sova and the JSAs are seriously affected by the Sanctions Regimes and that they cannot realise the Target Russian Securities at or even close to £274 million. The realisable value of the assets is far lower.

44. The £274 million figure is therefore merely a nominal value for the Target Russian Securities from the JSAs' and Sova's perspective (and I shall adopt the parties' coinage **the Nominal Value**).

45. Russian securities are of course likely to have a much higher value for a Russian market participant than they have for a holder in the position of Sova. A Russian owner would be able to use MOEX to deal in the securities and would not need to obtain the consent of the Government Commission. This asymmetry in value for different holders has provoked much of the argument on these applications. Put simply, a Russian buyer of the Target Russian Securities (such as Dominanta) is likely to be able to sell them for far more than the JSAs are able to achieve and may even be able to realise the Nominal Value. I shall return to this issue when addressing the arguments below.

46. Returning to the numbers, the CEV of the Transaction represents 42.8% of the Nominal Value of the Target Russian Securities in the Low case and 52.8% in the High case.

47. The evidence of the JSAs, which was not challenged, is that it is completely uncertain when, if at all, Sova might be able to sell the Target Russian Securities unimpeded by the Sanctions Regimes. Nor is there any certainty as to how the value of the Target Russian Securities might change in the meantime.

48. The JSAs are therefore of the view that the Transaction will realise the best price reasonably obtainable in the circumstances for the Target Russian Securities for the benefit of Sova and its (remaining) creditors.

49. The parties' obligations in each PTA are subject to conditions precedent (**CPs**). As relevant these are for the JSAs to obtain the court's approval and for Dominanta to obtain Government Commission Consent.

50. The Government Commission Consent was obtained on 11 January 2023. The only outstanding CP is therefore the approval of the court.

51. I turn to the position of BZ. As already explained, he is an unsecured creditor. His claim is estimated by the JSAs at just under £20m.

52. He is also a joint bidder for the Target Russian Securities in conjunction with Limited Liability Company TPM-PLUS (**TPM**).

53. There has been much correspondence between the JSAs and BZ and his solicitors. I was taken to the material parts. For present purposes, the position may be summarised as follows. In late October 2022, he made several offers to purchase some of the Russian Securities in consideration of the waiver of his claim against Sova. In December 2022 he made a further "hybrid" bid via a mixture of claim waiver and cash funding. The JSAs told BZ they would not be progressing the initial offers on 18 November 2022; and on 5 December 2022 the JSAs confirmed that they would not be proceeding with his hybrid offer.

54. On 10 January 2023 BZ and TPM (**the Joint Bidders**) made another "hybrid" bid involving waiver of BZ's claim together with £120 million in cash. BZ also sought an adjournment of the JSAs' applications to enable the JSAs to consider the new offer and potentially exploit competitive tension for the benefit of creditors. BZ alternatively asked the court to dismiss the applications because the Transaction offends the pari passu principle and the statutory scheme; or because the JSA had surrendered their discretion; or because the Transaction may now not represent the best price reasonably obtainable.

55. The JSAs opposed the adjournment.

56. I decided that the time estimate for the hearing and pre-reading was inadequate. This has proved right in that the hearing lasted two very full days. I also expressed the view that the JSAs should use the additional time to explore whether either of Dominanta or the Joint Bidders were minded to improve their respective offers.

57. The JSAs invited Dominanta and the Joint Bidders to state whether they were prepared to improve their offers. Dominanta stuck to its existing offer.

58. On 24 January 2023 the Joint Bidders submitted **the Final BZ Offer**. The cash element of the offer was raised from £120 million to £125 million. Under the terms of the Final BZ Offer, if the Court held the claim waiver element of that offer (alongside the same element of the Transaction) to be contrary to the pari passu principle, then the Final BZ Offer would consist of the cash component of £125 million alone.

59. The JSAs have calculated the CEV of the Final BZ Offer using the same method as described above. The CEV is £134.9 million (against £117.3 million for the Transaction) in the Low case, £136.3 million (against £131.0 million) in the Mid case, and £137.2 million (against £144.9 million) in the High case.

60. The JSAs have explained that because the amount of the waiver of debt under the Dominanta offer is much higher, there is an amplifying effect depending on the estimated final outcomes for the estate. The lower the expected dividends the less favourable is the comparative amplifying effect of the Dominanta offer and vice versa.

61. Mr Soden says that the JSAs have concluded that in value terms the Final BZ Offer is reasonably comparable to the Transaction. The former is marginally better than the latter in

the Low case and marginally worse in the High case. Mr Soden also says that these cases are not intended to be more probable than one another but are each prudent estimates.

62. The JSAs say that they nonetheless have serious concerns about the deliverability of the Final BZ Offer. I shall return to this aspect below.

63. Sova's creditors are institutional and professional parties. The creditors who have filed proofs of claim have indicated their approval of the Transaction. In an indicative vote which took place from 9 to 13 February 2023, in which the creditors were asked to express their preference for the Transaction or the Final BZ Offer (or for both or neither), some 97% by value of non-conflicted creditors who voted by the closing date for voting (constituting over 72% of all the creditors who have filed proofs of claim) supported the Transaction (and only a single creditor representing 0.6% of those voting, and being 0.4% of those who have filed proofs of claim, supported the Final BZ offer). After the closing date for voting four further indicative votes were received, of which three (1.3% by value) supported the Transaction and one (0.2% by value) supported neither.

64. The JSAs have undertaken a detailed analysis of the compliance of the Transaction with Western Sanctions with the assistance of legal advice (privilege in which has been waived). They have concluded that the Transaction complies with Western Sanctions. I shall return to this below.

Broad summary of the parties' positions

65. The JSAs seek the Court's permission to enter the Transaction. They say, first, that the Russian Securities that are likely to be transferred to Dominanta by the Transaction form a large proportion of Sova's estate, and Dominanta's claim against Sova, which will be waived (together with the dividend received in respect of it), constitutes a significant proportion of Sova's liabilities. They say that completion of the Transaction would therefore be "particularly momentous" for Sova (in Robert Walker J's words, as cited by Hart J in *Public Trustee v Cooper* [2001] WTLR 901, 922). Second, BZ has objected to the Transaction on the grounds that it infringes fundamental principles of insolvency law and public policy and the JSAs seek the court's guidance concerning their powers. Third, at the hearing on 3 March 2022 when the administration order was made, Leech J indicated that in the event that any Sanctions-related issue arose in Sova's administration, the JSAs could and should return to the Court for directions. The completion of the Transaction potentially gives rise to such issues.

66. The JSAs contend that the court should approve the Transaction for various reasons, which may be summarised broadly as follows.

67. First, it will benefit Sova and its broader creditor population by increasing the dividend rate to the remaining creditors: the (current) projected final dividend will increase from 36.7% to at least 50.3% (in the Low case) and may increase to 62.1% or more (High case).

68. Second, the value provided by the Transaction (on the JSAs' best estimates) equates to some 42.8% of the Nominal Value of the Target Russian Securities (Low case) and may amount to 52.8% or more (High case). On the evidence that is a good return.

69. Third, by reducing the exposure of Sova to a large and otherwise illiquid Russian securities portfolio, the remainder of Sova's business may become more attractive to potential investors, who may in turn make an offer to rescue all or part of the same.

70. Fourth, the JSAs consider that overall (taking into account value and deliverability together) the Transaction remains the best offer in relation to the Russian Securities currently available to the broader creditor population.

71. Fifth, the completion of the Transaction may form the basis for similar transactions with other creditors, which may have further value to the estate in due course. There are hundreds of other Russian Securities which the JSAs still need to realise over and beyond the Target Russian Securities (as well as Russian related securities held in Western depositories).

72. Sixth, while the Transaction and the Final BZ Offer are broadly comparable in value (see above) the JSAs have serious concerns about the deliverability of the latter.

73. In his eighth statement Mr Soden says that it remains uncertain whether the Final BZ Offer will obtain Government Commission Consent; and that there is also a risk that the terms of any such Consent (if given) would seriously alter the commercial nature of the transaction.

74. As to this, new criteria were introduced by the Russian Ministry of Finance on 30 December 2022 (**the MinFin Criteria**) under which (a) the Government Commission may require the payment to the foreign seller to be deferred by 1-2 years and/or (b) the Commission may require the making of (what is described in translation as) a "voluntary payment" of at least 10% of the transaction amount to the Russian federal budget and/or (c) Sova is prohibited from selling the Russian Securities at more than 50% of its market value. The JSAs say that the imposition of any or all of these conditions through a Government Commission Consent for the Final BZ Offer would make its value much worse than the Transaction and, if it involved a payment to the Russian government, would in any case be unacceptable to the JSAs.

75. It was common ground that these criteria would not apply to existing Government Commission Consents, such as that obtained by Dominanta.

76. BZ has served a report from Mr Murygin, a Russian lawyer. He notes that there is another condition in the MinFin Criteria – namely establishing key performance indicators for new shareholders. He says that there is therefore an argument that the decision of 12 December 2022 (i.e. the creation of the MinFin Criteria) was concerned with exit sales, i.e. sales of large equity stakes in Russian businesses by exiting foreign companies, and that on this basis these additional conditions do not apply to sales of diversified portfolios such as the Target Russian Securities. He says that the risk that the conditions apply to such portfolios cannot be completely excluded. He accepts that there is uncertainty about the position. He also says that he has "arranged through my contacts an unofficial discussion of this issue with the Ministry of Finance and it was confirmed that the additional conditions are intended to apply to corporate exits and not to the acquisition of a diversified securities portfolio." There has been no cross examination and I cannot resolve this dispute. I can only proceed on the footing that it is uncertain whether the MinFin criteria will apply to the Final BZ Offer.

77. The JSAs also say that the time required to obtain the Government Commission Consent is uncertain, and there is a risk that changes in the Sanctions Regimes in the meantime may render any transaction unviable.

78. Seventh, the JSAs say that the views of the independent creditors, while not binding, are persuasive support for the rationality of the JSAs' view that Sova should enter the Transaction. The creditors are institutional or professional investors who are able to assess the commercial options. They are able in particular to assess the risks and rewards of the competing courses, which included entering either of the two live bids or rejecting both. The creditors are also aware that Dominanta may obtain a benefit by selling the securities on MOEX at a profit. The JSAs also provided the creditors with the correspondence from BZ's solicitors explaining the merits of the Final BZ Offer. 97% of the votes cast were for the Transaction, as compared to 0.6% for the Final BZ Offer.

79. Eighth, the JSAs argue that the position they are in requires urgent action. It is impossible to predict the duration or course of the war in Ukraine. More sanctions or Russian countermeasures may be imposed at any time. The JSAs do not consider it to be in the interests of Sova's creditors as a whole to await (a) the end of the war and (b) the relaxation of the Sanctions Regimes before seeking to realise the Russian Securities. Further changes in the Sanctions Regimes may reduce the Russian Securities that the JSAs are able to use in the way currently envisaged pursuant to the Transaction to realise value for the benefit of Sova's creditors as a whole, and/or may make the process of doing so harder or practically impossible.

80. Dominanta supports the applications.

81. BZ opposes the approval of the Transaction.

82. As already explained, he is an unsecured creditor for an estimated amount of just short of £20m. He is also a joint bidder for the Target Russian Securities in conjunction with TPM.

83. I shall address BZ's legal objections to the Transaction in some detail below. In broad outline, he submits first that the Transaction was outside the powers of the JSAs or was contrary to public policy because it would infringe the pari passu principle. That requires equal treatment of creditors and the Transaction will result in one creditor, Dominanta, benefiting at the expense of the others.

84. BZ submits second that the Final BZ Offer was preferable to the Transaction in some of the projected outcomes, including the Low Case. He says the Joint Bidders are confident that Government Commission Consent would be forthcoming and that the MinFin Criteria do not apply to the offer as it is not an equity exit transaction of the kind covered by them. The cash element would be paid outside Russia and any requirement of CBR consent would be implicit in the consent of the Government Commission.

85. BZ submits third that the JSAs could not show that they had reasonably achieved the best price for the Target Russian Securities. They had not taken the kinds of marketing steps to be expected of administrators and it was unclear whether they had achieved the best possible deal with Dominanta.

86. BZ submits fourth that the JSAs have wholly surrendered their discretion to the court and that the court should not assume the task of exercising that discretion in their place.

Further background

87. Before turning to the issues raised by the parties' positions I should flesh out some further factual details. I shall do this under a number of heads.

Sova's business and assets

88. Sova is incorporated in England and Wales and is authorised by the FCA to undertake regulated financial activities under Part 4A of the Financial Services and Markets Act 2000. Sova provided a full range of investment brokerage services, included trading and execution services in all major asset classes and sectors, to institutional and professional clients.

89. Sova's products included equities and derivatives, FX trading, commodities and fixed income. The primary focus of Sova's business was to provide international investors with access to the Russian market. It is not a deposit-taker. It is an investment bank for the purposes of the IBSARs and was placed into special administration on that basis: see Leech J's judgment at [2022] EWHC 814 (Ch), at [5].

90. Sova's clients are sophisticated institutional or professional investors. Sova was not authorised to and did not provide services to retail clients.

91. Before the special administration, Sova had 72 employees at its London office and 248 at its Moscow branch, which numbers were reduced to 27 and 103 as of 23 November 2022.

92. It was managed by a team of four (**Management Team**), none of whom is a "Designated Person" for the purposes of the UK Sanctions regime. The JSAs have continued to seek support from the Management Team during the special administration. It is by this means that they are able to conduct day to day business in Moscow.

93. The JSAs' appointment in relation to Sova is not recognised in Russia, with the result that, but for the Management Team, the JSAs would be unable to operate Sova's Russian bank accounts, access its assets, or pay its employees in Moscow.

94. Sova mainly operated under three sets of legal agreements with its clients. Since no point was taken on the calculation of the claims there is no need to recite the terms or the evidence concerning them.

95. As at 11 November 2022 (following some realisations by the JSAs) Sova held (as its own property) 741 securities with an estimated value of approximately US$585.3 million. Of these, 579 positions worth approximately US$506.6 million (87% of the total value of the portfolio) consist of Russian Securities. (Where figures are given in currencies other than sterling, they have been converted using an appropriate exchange rate.)

96. These Russian Securities are held in an account in Russia with the National Settlement Depository (**NSD**), Russia's central securities depository, either directly or on Sova's behalf by a Russian custodian, Region Broker Company LLC (**Region**). 28 of the securities relevant to the Transaction are held by the NSD either at Euroclear or at Clearstream.

97. The remaining 162 securities are held in non-Russian depositories and have an estimated value of US$ 78.7 million.

The special administration

98. By IBSAR 10, the special administration may pursue any of the three statutory objects, prioritising them as the JSAs see fit: (1) the return of client assets as soon as is reasonably practicable; (2) timely engagement with market infrastructure bodies and relevant authorities; and (3) either (a) rescue of the investment bank as a going concern or (b) its winding up in the best interests of its creditors.

99. On 26 April 2022 the JSAs published their statement of proposals for achieving the purpose and the objectives of the special administration.

100. Since their appointment, the JSAs have pursued all three objectives equally without prioritising one over others. In relation to objective (1) they have identified and returned client assets to clients. In relation to (2) they have continued to liaise with market infrastructure bodies and relevant authorities, including the FCA, the Office of Financial Sanctions Implementation (OFSI), securities exchanges, clearing houses and depositaries.

101. As to objective 3, the JSAs considered that Sova's business could not be sold or recapitalised whilst there was significant uncertainty about its assets (including in an uncertain sanctions and restrictions environment). The JSAs have prepared for a winding-up in the event a rescue of the business is not possible.

Constraints on Sova's ability to deal with the Russian Securities

102. As already explained Sova cannot easily realise the Russian Securities because of outright prohibitions pursuant to the Sanctions Regimes, or where transfer is subject to approval or authorisation.

103. The first constraint arises because Sova cannot trade on MOEX. The Russian Securities generally trade on MOEX, which has since February 2022 been closed to foreign residents of countries designated as 'hostile' by the Russian authorities. The accounts of such investors, including Sova, were designated as "C" or "S" accounts and the holder of such an account cannot trade on MOEX.

104. This is part of the reason that the trading prices of the Russian Securities published by MOEX are inaccessible to Sova and the JSAs.

105. The JSAs have explained (and I accept) that they are forced to treat such prices as no more than Nominal Values of such Securities.

106. The second constraint arises from the need for Sova to obtain Government Commission Consent to enter into an OTC trade with a Russian buyer.

107. Such consent is discretionary, may be withheld, and may take an uncertain length of time to obtain even if eventually given. A prospective Russian buyer may be required to set aside funds to complete the purchase, in circumstances where it was uncertain whether and, if so, when it would obtain such Consent.

108. There is a particular issue concerning the MinFin criteria, which were published on 30 December 2022. These apply prospectively. As already explained there is uncertainty (which I cannot resolve) about the application of these criteria. If they were to apply to the Russian Securities they would impose serious restrictions because of the 50% value limit,

the requirement of 1-2 year deferment and/or the requirement to pay at least 10% to the Russian federal budget.

109. These potential costs and uncertainties also mean that a potential Russian buyer may prefer to trade with a Russian seller (on exchange).

110. This is another reason why MOEX prices for the Russian Securities are no more than nominal for Sova.

111. A third set of constraints concerns the ability of Sova to extract cash from a sale. Banks are subject to high capital charges for balances in currencies from 'hostile' jurisdictions. As a result, prospective Russian buyers of Russian Securities find it difficult to access foreign currencies in Russia. Further, the JSAs' Russian law evidence is that a Russian buyer seeking to make a payment outside Russia would generally require the consent of the CBR.

112. Absent such consent, a Russian buyer would only be permitted to pay in roubles into Sova's 'C' account in Russia. Payment in Russia would be very unattractive to the JSAs as they are subject to significant constraints in repatriating cash from Russia to the UK.

113. BZ's position is that in practice Government Commission Consent would carry with it the consent of the CBR. The JSAs' evidence is that this is not clear and that it is possible that separate consent is required. They say that CBR permission is separate from Government Commission Consent and that the CBR is not likely to approve a transfer of funds. I am unable to resolve this issue on these applications. Hence I proceed on the basis that this is another potential constraint.

114. The fourth set of such constraints arise under Western Sanctions. Sova and the JSAs cannot deal with a Designated Person (or its equivalent). The most likely buyer of a significant portfolio of Russian Securities would be a Russian financial institution. However, as Mr Soden explains, most significant such institutions are subject to sanctions and/or asset freezes. This severely limits the universe of potential buyers.

115. Sales to a Western buyer are unlikely for all the above reasons. Any such buyer would be subject to the same constraints. More generally most Western parties who were previously active in the Russian market have exited or are seeking to exit that market, which again limits the population of buyers.

116. I raised with the JSAs during the hearing whether there might be a class of non-Russian buyers in jurisdictions which have not been branded as hostile by the Russian government. I was informed that such buyers have not been at all active in acquiring Russian securities and that the JSAs do not consider them to constitute a realistic population of buyers. This was confirmed in Mr Soden's tenth statement.

117. A member of staff at Sova made some very rudimentary inquiries of a number of Western institutions, including Citibank and Goldman Sachs, which showed no interest in acquiring Russian securities.

118. The JSAs have also invited all Sova's creditors to make bids for the Russian Securities. The creditors include BCS Global Markets, an independent (non-sanctioned) Russian broker, which was Sova's principal competitor. Though some indicative offers were made, no solid bid capable of acceptance has been made by any of the other creditors.

119. The result is that the only serious offers the JSAs have received for the Russian Securities are the Transaction and the Final BZ Offer.

120. The JSAs' contend that the position of parties able to trade in the Russian Securities without being significantly constrained by the issues explained above is analogous to that of special purchasers.

The JSAs' treatment of the Russian Securities in Estimated Outcome Statements

121. The JSAs have produced an Original Estimated Outcome Statement and an Interim Estimated Outcome Statement for the administration. These assume no realisation in respect of the Russian Securities (with three limited exceptions).

122. Mr Soden explains that this is because the JSAs considered these assets to be either difficult or practically impossible to realise, or that the quantum of any such realisation was so uncertain that any estimate would be a best guess based on little or no evidence.

123. The EOSs represent a prudent assessment of the potential realisations, and the JSAs considered it appropriate to ascribe a nil or minimal value to the assets to avoid overstating the financial position.

124. Mr Soden explains that the nil valuation of the Russian Securities in the Original EOS and the Interim EOS does not affect the assessment of the different bids that are now being advanced, nor the comparative fairness of those bids.

Dominanta

125. Dominanta is a company incorporated in Russia, and with premises in Moscow. It is (indirectly) majority owned by Mr Avdeev. Mr Avdeev is not a sanctioned individual under the UK, EU, or US Sanctions Regimes. He is a sanctioned person under Ukrainian law. I shall return to this below.

126. At the commencement of the special administration, Dominanta was not a creditor of Sova. It then took assignments of claims originally held by five Sova creditors and submitted a proof in Sova's estate of £233,261,442 and US$ 20,075,724.

127. The first element of this proof has been admitted for dividend purposes. This is the Dominanta Adjudicated Claim. It consists of four claims assigned by four parties.

128. The second element of the proof has not yet been adjudicated. This element represents the claim assigned to Dominanta by a party (**the ISDA Assignor**) affected by Western Sanctions.

129. Dominanta is a member of the creditors' committee (as constituted on 8 June 2022) and holds about 29% of the unsecured claims against Sova (including the unadjudicated part acquired from the ISDA Assignor).

The Dominanta offers

130. Dominanta made an offer to the JSAs initially in draft on 18 August 2022, and then in final form on 22 August 2022.

131. Dominanta offered to acquire a portfolio of Russian Assets (to be agreed between the parties) with a Nominal Value (by reference to a source and exchange rate to be agreed) equal to its debt divided by 85% in return for the full discharge and release of the debt owed to it by Sova. This was initially intended to apply to Dominanta's claim in full. However, due to sanctions constraints regarding the ISDA Assignor, this offer was subsequently limited to the Dominanta Adjudicated Claim. The transaction was expressed to be subject to approval by the Government Commission.

132. The result of the Transaction, if successfully completed, would be the release by Sova of the entire £233,261,442 Dominanta Adjudicated Claim in return for the transfer by Sova to Dominanta of Russian Securities with a Nominal Value of £274,425,226.88.

133. On 20 October 2022 Dominanta updated the terms of its offer. While the core commercial terms remained the same, Dominanta: (a) clarified that the target securities were certain of those securities held by Sova with the NSD either directly or indirectly, (b) provided an updated list of target securities in order of priority, and (c) introduced a condition that any Target Russian Securities and Other Russian Securities should not be disposed until after the Dominanta Adjudicated Claim had been satisfied in full.

134. In relation to negotiations between the JSAs and Dominanta, Mr Soden explains that the initial communications were made to the JSAs via the Management Team, but subsequent engagement has been directly between the JSAs and Dominanta. He says that the terms of the Transaction (and without waiving privilege) have been negotiated directly between the JSAs and Dominanta (including the parties' respective legal representatives). The JSAs have had no direct contact with Mr Avdeev.

135. There was no direct evidence about the course of the negotiations with Dominanta. In particular there was no evidence about the extent to which the JSAs pushed back on the 15% discount proposed by Dominanta. I was however informed by the JSAs during the hearing that the JSAs had sought to negotiate this and had not succeeded. It has not been the subject of evidence.

Market testing

136. Mr Soden gives evidence of what he calls market testing following receipt of Dominanta's initial offer in August 2022. They concluded that there was limited market interest in acquiring these securities from Sova for cash.

137. Mr Soden refers to Sova approaching Sova's traditional market counterparties (Citigroup Global Markets, Goldman Sachs, JP Morgan and BCS). BCS is the largest independent broker in Moscow and was (as mentioned above) Sova's primary competitor. "Market testing" is to my mind a rather grand word for what happened. It appears that a very brief inquiry was made of these houses through an online chat function concerning their appetite for some lines of Russian Securities. Nonetheless it appears to me that the lack of appetite of the Western entities to invest in Russian securities was entirely predictable.

138. BCS is Russian, but as already explained, it is a member of the creditors' committee and has been invited to make its own bid for the Russian Securities.

139. The JSAs have also of course informed BCS (along with other creditors) about the Transaction and the BZ offers and BCS could, if it thought the securities were being seriously

undervalued, have made its own offer. The JSAs indeed invited offers along the same lines as the Dominanta offer (see further below).

140. Mr Soden also says that the JSAs approached seven distressed debt funds (which are used to transacting in illiquid assets in distressed situations) and that they showed no interest.

141. None of the parties approached by the JSAs have made more than indicative quotes, which were between 20-50 cents in the US$. These were not real offers, in the sense that they were price indications only.

142. The JSAs considered that many other relevant market participants would have been notified as part of the creditor bidding process in circumstances where Sova's creditors include parties who originally transacted with Sova in relation to these types of assets.

143. These creditors included a number of brokers, asset managers and other market participants with operations in Russia and elsewhere (eg Cyprus and the UK) who would usually be the target for portfolio placement of line-by-line securities. These included ITI Invest, Region and SPB Bank. These parties were made aware of the opportunity to bid for the securities held by Sova.

144. The JSAs also contacted (via the Management Team) Veles, Aton and Rencap to investigate their potential appetite for transacting in the Russian Securities.

145. The JSAs contend that they made what, in the circumstances, were reasonable efforts to market the Russian Securities in the relevant markets to the proper audience.

146. BZ criticises the JSAs for failing to appoint an independent Russian brokerage or investment adviser to assist them in seeking to market the Russian Securities. He says that there are grounds for concluding that the JSAs may not have taken the steps reasonably available to them to test the market. He also says that the initial negotiations appear to have come via staff at Sova who may have been conflicted. I shall revert to these complaints below.

147. However I record at this stage that I am satisfied that there has been widespread knowledge of the JSA's wish to dispose of the Russian Securities through the JSA's communications with creditors, who are likely to include a broad cross-section of Russian market participants.

148. In any event as things stand the position is that there are only two realistic offers for the Russian Securities – the Transaction and the BZ Final Offer. As already explained, these effectively place a value on the Target Securities (on different projected outcomes) of £117m to £144m, being 42.8% to 52.8% of the Nominal Value of the Target Russian Securities of c. £274m.

149. Moreover the court's decision in January 2023 to adjourn the hearing of the JSAs' applications created a further period of competition between Dominanta and the Joint Bidders. This led to an increase in the bid of the latter. I conclude that these bids (which are reasonably comparable in value) are good evidence of the current realisable value of the Target Russian Securities for Sova.

The securities: valuation and the consideration

150. The Target Russian Securities which are the subject-matter of the Transaction comprise (a) bonds issued by the Russian government, (b) bonds issued by the Credit Bank of Moscow, (c) bonds issued by other legal entities incorporated in Russia, (d) equities issued by legal entities incorporated in Russia, and (e) bonds and equities issued by members of corporate groups with substantial operations in Russia.

151. The First Target Russian Securities and the Second Target Russian Securities ostensibly have a respective estimated Nominal Value of approximately £188.2 million (PTA1) and £104.5 million (PTA2) (based on a combination of OTC prices agreed between the JSAs and Dominanta, and 13 January 2023 prices based on MOEX and FX rates).

152. The JSAs have however concluded that (for the reasons already given above) this is not the value to Sova of the Target Russian Securities.

153. In relation to 32 of the First Target Russian Securities and four of the Second Target Russian Securities, the relevant securities are fixed income positions and a single equity position, and ones where there has been minimal trading since the Appointment Date. On the basis that recent public market prices covering material trading volumes are not available, and the latest prices are not an accurate reflection of each security's value and/or may be inflated in any event, the JSAs have agreed an OTC fixed price with Dominanta which, together with accrued interest as at 13 January 2023, gives a Nominal Value of £84.0 million and £6.4 million respectively.

154. In relation to the remaining 39 of the First Target Russian Securities and 14 of the Second Target Russian Securities, there is no fixed value set out in the relevant transfer agreement, and the final value will be determined by reference to an agreed pricing methodology. Clause 4.8 of the transfer agreements provides Sova with protection against trading prices being negatively impacted by any volume trading in the relevant securities by Dominanta and its affiliates.

155. There are twelve First Target Russian Securities and three Second Target Russian Securities which it appears require the approval of the Russian President in order to be transferred on the basis they are of strategic interest (**Russian Strategic Securities**). These have been removed from the PTAs. The consequence of this is the removal of approximately £15.3 million (8.1%) by Nominal Value of the First Target Russian Securities from Schedule 1 of PTA1, the reduction of the Nominal Value of the First Target Russian Securities to £172.9 million and the increase of the residual claim to be addressed by the Further Dominanta Transaction to £86.3 million. In turn, the value of the Second Target Russian Securities would reduce by £5.4 million to £99.1 million. This gives a total value for the First Target Russian Securities and the Second Target Russian Securities, excluding Russian Strategic Securities, of c. £274.0m (or £272.0m using revised FX rates as at 13 January).

PTA1 and PTA2

156. The JSAs and Dominanta entered PTA1 on 2 December 2022.

157. As already explained, a subset of 71 of some of the highest-value Russian Securities held by Sova will be offered to Dominanta as partial consideration for the extinguishment of the Dominanta Adjudicated Claim.

158. PTA1 (which is in materially the same terms as PTA2) has the following features:

(a) It is subject to the CPs, including the confirmation of the making of the Court order on the First Application. The other CP, obtaining Government Commission Consent, has been satisfied.

(b) The agreement contains a mechanism for selection of securities, as (a) market prices on the MOEX will continue to fluctuate, (b) exchange rates will continue to fluctuate, and (c) certain of the Target Russian Securities may be redeemed or otherwise become incapable of transfer. These contingencies mean that it is not currently possible to determine the precise extent of the securities that Dominanta will receive. Clauses 4.4, 4.5 and 4.6 therefore create a process for the selection of the final list of Target Russian Securities. In short, at the Valuation Date (being the date upon which the Court's approval is obtained such that the remaining CP is satisfied), Sova will assign value to each of the Target Russian Securities that does not have already have a fixed value, such that every security on Schedule 1 is ascribed a value. This will allow Sova to determine the extent of the securities which need to be transferred to extinguish the Dominanta Adjudicated Claim. Sova will then select the securities to be transferred in descending order, starting with the first listed security and ending with the "Cut-Off Security" at the point that the aggregate value of the securities transferred equals or exceeds the value of the Dominanta Adjudicated Claim. Any Target Russian Securities listed after the Cut-Off Security will not be transferred.

(c) In the event that the Nominal Value of the Final Target Russian Securities (x 85%) is less than the value of the Dominanta Adjudicated Claim, a Residual Creditor Claim will remain to be dealt with under PTA2.

159. By an amendment agreement dated 30 December 2022, the JSAs and Dominanta agreed to some (limited) changes to the agreement. These are not material.

160. PTA2 was executed on 30 December 2022. This was because, in late November 2022, it was realised that Hogan Lovells International LLP (which includes its UK offices) would be unable to act in relation to all the Target Russian Securities that were ultimately included within the scope of the Transaction because of US Sanctions.

161. Sova instructed a second firm of solicitors, Shoosmiths LLP, to act in relation to these securities.

162. Sova executed PTA2 on 30 December 2022. It is the same as PTA1 (as amended) other than in relation to the list of securities set out at Schedule 1. PTA2 includes a subset of 18 Russian Securities held by Sova. If the 15 Russian Strategic Securities are unable to be transferred (because it is finally determined that they are such securities and the requisite presidential approval is not received), then based on 13 January 2023 Nominal Values, it is anticipated that these Russian Securities, in conjunction with those under PTA1, would not be sufficient to extinguish the Dominanta Adjudication Claim in full. As such, further transactions would be needed in order to extinguish the Dominanta Adjudicated Claim in full.

Further amendments to the PTAs

163. PTA1 and PTA2 were further amended, respectively, on 10 February 2023 and 13 February 2023. These changes were proposed by the JSAs in order to address the argument advanced by BZ that the PTAs infringe the pari passu principle.

164. The material changes were these:

(a) Three new terms were defined. The 'Final Dividend Percentage' was defined as a percentage value currently estimated to be between 50.3% and 62.1%, being the aggregate total dividend percentage ultimately paid by Sova to its unsecured creditors after completion of the Transaction. 'Value' was defined as the Nominal Value of that Security multiplied by 85% of the Final Dividend Percentage. 'Creditor Claim Value' was defined as the Dominanta Adjudicated Claim multiplied by the Final Dividend Percentage.

(b) Cl. 4.1 was inserted which defined the consideration each party received. By transferring a Target Russian Security to Dominanta, Sova would give Dominanta consideration worth the Value of that Security (such that if sufficient Russian Securities were transferred, Dominanta would acquire securities with a value of £274.4 million x 85% x the Final Dividend Percentage). In return, Dominanta would waive that proportion of the Dominanta Adjudicated Claim which has the same Creditor Claim Value as the Value of the Security transferred to it by Sova (such that if sufficient Russian Securities were transferred, Dominanta provide consideration with a value of £233.3 million x the Final Dividend Percentage).

(c) By multiplying the Dominanta Adjudicated Claim by the Final Dividend Percentage, the parties were therefore agreeing that the Dominanta Transactions would only result in Dominanta getting the same value as the other creditors.

165. As already explained, these changes were designed to spell out the respective benefits to the parties. The overall substance of the Transaction has not however changed: the essential bargain is that Dominanta will receive the Russian Securities and Sova will receive a waiver of Dominanta's claims in exchange.

The Final BZ Offer

166. The Final BZ Offer is an offer to buy the Russian Securities (including the Strategic Russian Securities but excluding the Excluded Russian Securities) for a consideration consisting of: (i) £125 million in cash; and (ii) the discharge of Mr Zilbermints' claim in the sum of £19.9 million (if this is legally permissible), on the basis that each £1.00 of Russian Securities will discharge £1.00 of his claim.

167. In the event that the value of the Russian Securities to be transferred (excluding the Strategic Russian Securities) is ultimately lower than £274,425,226.88 on the transfer date, the cash component will be reduced proportionately.

168. Further, if the court holds that it is not permissible for the JSAs to transfer assets to a creditor (see below), the consideration will consist solely of £125 million in cash.

169. The Final BZ Offer is set out in the letter dated 24 January 2023 from BZ's solicitors. This was accompanied by: KYC information in respect of TPM; a guarantee from AresBank dated 23 January 2023; a Loan Facility Agreement between AresBank and TPM dated 23 January 2023; and a statement of Chairman of the Board of AresBank in relation to Aresbank's asset position dated 23 January 2023.

170. On 25 January 2023 the JSAs were provided with the opinion of Russian counsel, addressing the legal and regulatory requirements and deliverability. An updated Russian opinion

(addressing the MinFin criteria) has also been provided. There has also been further correspondence between the solicitors for BZ and the JSAs concerning the Final BZ Offer.

Principles concerning the approval by the court of a transaction

171. There was no real dispute about the relevant legal principles concerning the court's approval of a transaction to be undertaken by insolvency office holders.

172. The starting point is the excerpt from Robert Walker J's judgment set out by Hart J in *The Public Trustee v Cooper* [2001] WTLR 901, 922:

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

173. *In re MF Global UK Ltd (No 5)* [2014] EWHC 2222 (Ch) was a case concerning a compromise of claims by administrators. At [32] David Richards J explained the Court's function in Category 2 cases by approving the following statement from Lewin on Trusts:

> "The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

174. At [41] David Richards J said:

> "In commercial matters, administrators are generally expected to exercise their own judgment rather than to rely on the approval or endorsement of then court to their proposed course of action: see *In re T&D Industries plc* [2000] 1 WLR 646. While the compromise of claims raising difficult legal issues may not be on all fours with a purely business decision, administrators commonly exercise the powers of compromise without recourse to the court and in general apply to the court for directions only if there are particular reasons for doing so: see *In re Lehman Brothers International Europe* [2014] BCC 132."

175. In the *T&D Industries* case cited there, Neuberger J said at p. 675 that "a person appointed to act as an administrator may be called upon to make important and urgent decisions. He has a responsible and potentially demanding role. Commercial and administrative decisions are for him, and the court is not there to act as a sort of bomb shelter for him".

176. This finds echoes in another decision of David Richards J in *Re T&N Ltd (No 2)* [2004] EWHC 2361 (Ch). At [76] he said:

> "The administrators have wide powers to realise assets of the companies. The exercise of these powers, and other powers associated with the management of the company's business, are regarded by the court as matters for the commercial judgment of the administrators, rather than as appropriate matters for directions by the court…The court would not normally give directions to an administrator as to the means by which he should market assets, any more than as to which particular deal to make."

177. In *Re Nortel Networks (UK) Ltd* [2016] EWHC 2769 (Ch), [49]-[50], having cited the same passage from Lewin on Trusts, Snowden J said:

> "For my part, whilst noting that the position of an administrator seeking directions under the Insolvency Act 1986, and a trustee seeking directions under the Trustee Act 1925 are not identical, I see no obvious reason why most of the same considerations should not apply when the court considers giving directions to an administrator who wishes to enter into a compromise which is particularly momentous. In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed.
>
> …But having regard to the fact that its approval will prevent subsequent challenge, the court will require the administrator to put all relevant material before it, including a statement of his reasons, and the court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action."

178. In *Nortel* Snowden J was concerned with a case where there was a potential conflict of interest and there was no issue about the administrators' powers to compromise claims. Snowden J referred to the passage from *MF Global* at [41] (see above). That highlights the limitations on the willingness of the court to approve the decisions of office-holders on

commercial matters. Snowden J was satisfied that there were particular reasons for the administrators' application.

179. In the context of Russian sanctions, in *In re Petropavlovsk plc* [2022] EWHC 2097 (Ch), [73], Jonathan Hilliard QC, sitting as a Deputy Judge of the High Court, applied the same principles. To the extent that the judgment went further than the earlier cases I would not follow it.

180. There was some discussion before me of the extent to which an order by which the court approves a transaction will immunise an office holder from subsequent proceedings. I was referred to *Denaxe v Cooper* [2022] EWHC 764 (Ch) where the point directly arose. In that case receivers appointed by way of equitable execution (rather than office-holders under the Insolvency Act) applied for approval of a sale to their preferred bidder. Marcus Smith J approved the sale. The owner of the sold assets then sued the receivers for negligence for selling the assets as a package and for failing to obtain the best price reasonably obtainable. Fancourt J struck out the claims. He held that the receivers were immune from any challenge to the transaction and that it did not matter whether the claim was framed as one for breach of fiduciary duty or in negligence. It was the necessary consequence of Marcus Smith J's order that the receivers had acted properly in the sense of undertaking a proper decision making process. Fancourt J said at [84] that, to attract immunity, the wrong alleged against the office holder must relate to the decision making process or the aspects of the transaction that the court has sanctioned. If the breach alleged relates to an unconnected decision or other conduct of the office-holder there would be no immunity. He explained at [85] that if the court is asked to approve a sale what is approved is the decision to sell at the time. There is no endorsement of any decision taken previously not to sell the asset.

181. This decision has been appealed. None of the parties before me suggested that it was wrongly decided or directed any real argument to it.

182. It appears to me that the scope of any subsequent immunity where the court is asked for directions from an office-holder must be sensitive to the particular facts: it depends on the specific nature of the question(s) before the court on the application and of any answer(s) given by the court. I do not think there can be a blanket rule of law that the court's approval of a transaction automatically generates full immunity in all respects concerning the transaction. It depends on the issues raised and the court's answers.

183. It is unnecessary to express any concluded views on this issue as the JSAs explained that the purpose of the applications was not to seek sanctuary or immunity from suit and, moreover, that it would be open to the court on giving its approval to spell out the nature of such approval.

184. I add these observations (drawn from the caselaw and the court's practice):

(a) Administrators are professionals who fulfil a commercial role in conducting the business and affairs of the company in administration. They are generally required to make their own commercial decisions and cannot expect to rely on the approval of the court in those respects.

(b) There may in this regard be differences between trustees of private trusts and office-holders appointed under the insolvency legislation. Office-holders are required routinely to take momentous commercial decisions and to weigh up the risks and

rewards of competing courses. As Snowden J observed in *Nortel* the principles may be similar, but they may not be identical in all respects.

(c) The question whether there are particular reasons for applying to the court cannot depend on whether the commercial decision is more or less difficult. Even hard commercial decisions are for the administrators, not the court. Nor can the scale of the transaction be the touchstone. Administrators should not assume that the court will entertain an application for directions simply because the matter is hard or large.

(d) It may be appropriate to seek the court's approval where doubts have been expressed about the administrators' powers or there are potential conflicts of interest or where there may be potential issues as to the legality of a proposed transaction. This is not an exhaustive list but, putting it negatively, the court is unlikely to give directions in a case which is in truth seeking the blessing of a commercial decision.

(e) The court may in an appropriate case also be asked to consider the rationality of the proposed course of action (for the purposes of the proper purpose rule). Where it does so, it does not necessarily follow from a ruling on rationality that the court is satisfied that there are no possible claims against the office holder (for example in negligence) concerning the process which has led up to the relevant decision. The scope of any immunity will depend very much on the facts (see above).

(f) The court is not a sanctuary or bomb shelter for office-holders. There is no blanket or automatic rule about the scope of any immunity for the office-holder. The scope of any immunity depends on what precisely the court decides.

(g) What most matters for office-holders and others interested in the estate is that the transaction covered by the approval is secure against future challenge (absent some flaw in the approval process).

(h) On an application for directions, the court does not have the benefit of disclosure or cross examination. The court depends on the administrators to make complete and candid disclosure of the necessary material but the court is not in the position of making a full investigation of the position. A directions hearing should be comparatively short and contained. It is not intended to be a trial, even a mini one. This is a further reason why the court will be cautious about reaching findings of fact going beyond those strictly required by the directions sought.

The principal issues for determination

185. The principal issues may now be identified:

(a) Have the JSAs surrendered their discretion to the court and is it otherwise appropriate in principle for the JSAs to seek the court's approval of the Transaction?

(b) Is the JSAs' decision to commit Sova to the Transactions within their statutory powers and/or does it comply with the principles of insolvency law?

(c) Is the JSAs' decision to enter the Transaction rational and honest?

(d) Is there a real risk that the Transaction breaches applicable sanctions laws?

Issue (a): have the JSAs surrendered their discretion to the court and is it otherwise appropriate in principle for the JSAs to seek the court's approval of the Transaction?

186. BZ submitted that, because the JSAs will only proceed to completion of the Transaction if the court approves it, the JSAs have surrendered their discretion to the court.

187. I am unable to accept this submission.

188. To my mind the entry by the office-holder into an agreement which is conditional on the court's consent does not mean that the office-holder has (without more) surrendered his or her discretion. On the contrary the office-holder has already exercised his or her discretion by deciding to execute the transaction but wishes to obtain the approval of the court as a pre-condition to its being effective. This is no different in substance from the office-holder seeking the court's advance approval before entering the transaction.

189. I agree with counsel for the JSAs that the relevant question in this respect is essentially whether the administrators are asking for approval of a course already decided on or leaving the decision to the court.

190. The caselaw shows an office-holder may commit to a transaction on condition that the court gives its approval to the transaction and then apply to the court for such approval. In *Nortel* the administrators sought directions that they be at liberty to perform a global settlement agreement of disputes that had arisen concerning the affairs of the Nortel group. The agreement had already been executed but was subject to a condition that the administrators should obtain the approval of the court.

191. On the present facts it is clear that the JSAs have already decided to exercise their discretion in a specific way by entering the Transaction. They have not thrown the decision onto the court on the footing that they cannot decide how to act. They are sure that the Transaction is the right course (but have structured it as dependent on obtaining approval). The JSAs have decided that they have the power to commit Sova to enter into the PTAs and in the circumstances, the Transaction is the appropriate way of discharging their duties and functions.

192. They have therefore pursued the Transaction by negotiating its terms, seeking the views of creditors and the creditors' committee, causing Sova to enter it, agreeing to cause Sova to use its reasonable endeavours to obtain the court's approval, engaging in extensive due diligence to ensure compliance with sanctions law, and, when making these applications, positively advocating the Transactions.

193. I also consider that in principle this was an appropriate case for the JSAs to seek the court's approval. The applications concern the disposal of a substantial part of Sova's estate. They also arise in very unusual circumstances in which there is a sharp asymmetry in the value of the relevant property from the perspectives of Sova and any Russian buyer, including Dominanta. The legal mechanism of the Transaction (the transfer of the securities in return for the waiver of Dominanta's claim) appears to raise novel issues which have not previously been decided by the courts. The decision to enter the Transaction has been challenged root and branch by BZ who says that the JSAs are acting in excess of their powers and contrary to the most basic principles of insolvency law. The Transaction also raises the potential application of sanctions laws and the court will plainly not approve any action by its officer holder where there would be a realistic risk of breaching such laws. I am also satisfied there

is urgency in that there may be further changes in the Western and Russian legal regimes which may make it still more difficult for the JSAs to realise value from the Russian Securities.

194. For these reasons I am satisfied that these were proper applications to bring before the court. I should add that I am not persuaded that the scale of the Transaction makes it a particularly momentous one which would, on its own, justify an application. It is commonplace for administrators to sell or dispose of the assets of the company. They often indeed sell all of the assets at once. These are commercial decisions and they are for the administrators to make, not the court. To my mind this applies whether the sale is of all, most or only some of the assets.

(b) Is the JSAs' decision to commit Sova to the Transactions within their statutory powers and/or does it comply with the principles of insolvency law?

195. The parties' submissions under this head ranged broadly over some basic principles of insolvency law.

196. I shall refer to the parties' submissions in more detail below. But before that I should identify the statutory provisions and general principles of insolvency law relied on by the parties. It helps to recite them here so that the parties' submissions are easier to follow. These principles were common ground. The real debate was about their application.

The statutory insolvency scheme

197. The first general principle is that creditors are entitled to require the company's assets to be distributed in accordance with the statutory scheme. See *Re Buckingham International plc (No. 2); Mitchell v Carter* [1998] BCC 943 in which Millett LJ explained at 686-87:

> "The making of a winding-up order divests the company of the beneficial ownership of its assets which cease to be applicable for its own benefit. They become instead subject to a statutory scheme for distribution among the creditors and members of the company. The responsibility for collecting the assets and implementing the statutory scheme is vested in the liquidator subject to the ultimate control of the court. The creditors do not themselves acquire a beneficial interest in any of the assets, but only a right to have them administered in accordance with the statutory scheme. These principles were established in *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1975] 2 All ER 537, [1976] AC 167. They apply to all the assets of the company, both in England and abroad, for the making of a winding-up order is regarded as having worldwide effect. The powers of the court are, of course, more limited. But it has power to take whatever steps are open to it within the territorial limits of its own jurisdiction to enable the liquidator (one of its own officers) to get in and realise for the benefit of the creditors all the assets of the company which are subject to the statutory scheme, wherever in the world they may be".

198. See also *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 at 176E-177F and 180D-G per Lord Diplock, *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 at 208D-F per Lord Brightman and *Re International Tin Council* [1987] Ch 419 at 446A-G per Millett J.

199. The rights of creditors are materially the same in administrations, as Stanley Burnton LJ explained in *Bloom v Harms Offshore GmbH & Co* [2009] EWCA Civ 632 at [24].

200. The right of creditors to have the company and its assets dealt with in accordance with the statutory scheme is an enforceable statutory right, as David Richards J explained in *Re HIH Casualty and General Insurance Ltd* [2005] EWHC 2125 (Ch) at [115]:

> "The statutory scheme of insolvency is not only seen as binding on liquidators and the courts but also as conferring enforceable rights on creditors. Creditors do not have a proprietary interest in the assets of the company in liquidation, but they do have a personal right to the administration and distribution of the assets in accordance with the statutory scheme"

The pari passu rule or principle

201. The pari passu principle requires that the distribution among unsecured creditors of assets available in an insolvent estate should be equal: see *Revenue and Customs Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch) at [63].

202. The principle is reflected for present purposes in rule 149 of the Investment Bank Special Administration (England and Wales) Rules 2011 (**the 2011 Rules**) (which is materially the same as Rule 14.12(2) of the Insolvency (England and Wales) Rules 2016). This provides:

> "Debts, other than preferential debts, rank equally between themselves in the special administration and, after the preferential debts, shall be paid in full unless the assets are insufficient for meeting them, in which case they abate in equal proportions between themselves".

203. The Supreme Court has recently confirmed that the pari passu rule "embodies the fundamental principle of equality": *Re Lehman Bros (International) Europe (in administration) (No.4)* [2017] UKSC 38 at [20] per Lord Neuberger; see also *Re New Cap Reinsurance Corporation Ltd (in liquidation)* [2012] UKSC 46 at [94] per Lord Collins.

204. Arden LJ explained in *Lehman Brothers International (Europe) v CRC Credit Fund Ltd* [2010] EWCA Civ 917 at [76] that the

> "basic principle … [is] that creditors who rank on the same footing should be entitled to distributions pari passu and rateably": "The maxim that equality is equity … expresses in a general way the object both of law … and equity, namely to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned".

205. There are a number of exceptions to the pari passu rule, such as insolvency set-off under Rules 14.24 and 14.25 of the Insolvency (England and Wales) Rules 2016 and Rule 164 of the 2011 Rules. See, generally, Goode, Principles of Corporate Insolvency, 5th ed., [8-16] and [8-18] to [8-34].

Variation of creditors' rights under the statutory scheme

206. The rights of creditors under the statutory scheme may be varied by way of the unanimous agreement of the creditors, provided that the variation does not prejudice the interests of shareholders: see, e.g., *Longley v ACN 090 609 868 Pty Ltd* (2010) 81 ACSR 517.

207. Where the creditors do not agree unanimously to a variation of their rights under the statutory scheme, the variation must take place by way of a binding statutory arrangement, such as a scheme of arrangement under Part 26 of the Companies Act 2006, in order for the variation

to be binding on the non-agreeing creditors. See, e.g., *Re Trix Ltd* [1970] 1 WLR 1421; *Re Calgary and Edmonton Land Co Ltd* [1975] 1 WLR 355; *Equity Trust (Jersey) Ltd v Halabi Investec Trust (Guernsey) Ltd v Fort Trustees Ltd* [2022] UKPC 36 at [311]; and *Re Stanford International Bank Ltd* [2019] UKPC 45 at [109].

208. A variation of creditors' rights may now also be achieved by way of a restructuring plan under Part 26A of the Companies Act 2006 or a company voluntary arrangement under Part I of the Insolvency Act 1986.

209. As stated in Goode, Principles of Corporate Insolvency, 5th ed., [8-31], these statutory arrangements, which are capable of binding dissentients, provide a recognised exception to the pari passu rule. At [8-31], footnote 180, the same text states that "the position unsecured creditors would be in were the company to be liquidated is relevant to determining the fairness of the scheme".

Pre-insolvency contracts which infringe the pari passu principle

210. The pari passu principle applies to any distribution whether or not it is expressly triggered by the relevant insolvency procedure. It is enough if the relevant contractual or other provision would lead to an asset being distributed or applied to an unsecured creditor at or following the commencement of the insolvency procedure in a non-pari passu way.

211. This is shown by *Ex p Mackay, Ex p Brown, In re Jeavons* (1873) LR 8 Ch App 643; *British Eagle International Airlines Ltd v Cie National Air France* [1975] 1 WLR 758; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 at 226 per Peter Gibson J ("where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in accordance with [the statutory pari passu rule] … then to that extent the contract as a matter of public policy is avoided"); *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Commissioners intervening)* [2011] UKSC 38at [7]-[12] per Lord Collins; and the *Football League* case per David Richards J at [65]:

> "It is enough that the effect of the relevant contractual or other provision is to apply an asset belonging to the debtor at or following the commencement of the insolvency procedure in a non-pari passu way, as was the case in *British Eagle*. Contracts conflicting with the pari passu principle are void without any need to show that their purpose was to avoid a pari passu distribution. The purpose of the parties is irrelevant and, as in the *British Eagle* case, a contract may be void once an insolvency proceeding commences even though it is a bona fide commercial arrangement made for reasons unconnected with insolvency".

Distributions in specie

212. Rule 151(1) of the 2011 Rules provides:

> "The administrator may, with the permission of the creditors' committee, or if there is no creditors' committee, the creditors, divide in its existing form amongst the investment bank's creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold".

213. Rule 151(1) of the 2011 Rules is the equivalent of Rule 14.13 of the Insolvency (England and Wales) Rules 2016 (which applies to liquidations and administrations) and s.326 of the

Insolvency Act 1986 (which applies to bankruptcy). A provision in materially the same form has existed since s.27 of the Bankruptcy Act 1869.

214. Three things may be noted at this stage about Rule 151(1):

(a) The power to distribute assets to creditors in specie applies only in respect of any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

(b) Where the power to distribute assets to creditors in specie arises, the administrator is entitled to divide such property in its existing form amongst the investment bank's creditors. Any distribution in specie must take place rateably, on a pari passu basis.

(c) Where the power to distribute assets to creditors in specie arises, the property in question must be distributed according to its estimated value. Rule 151(2) requires the administrator to "state the estimated value of the property" and "provide details of the basis of the valuation". On this basis, Rule 151 provides protection for (i) any creditors with claims ranking below the ordinary unsecured claims (such as claims for statutory interest) and (ii) shareholders.

The powers to sell or otherwise dispose and do other things

215. Para 60 of Schedule B1 to the 1986 Act, read with IBSAR 15(4) and Table 1, confers on the JSAs the powers in Schedule 1 to the 1986 Act.

216. Para 2 of Schedule 1 confers on the JSAs the power to sell or otherwise dispose of the property of the company by public auction or private contract.

217. Section 167(1) of the 1986 Act, read with IBSAR 15(4) and Table 2, confers on the JSAs the powers in Schedule 4 to the Act.

218. Para 13 of Schedule 4 to the Act, read with Table 2 of the IBSARs, confers on the JSAs the power to do all such things as may be necessary for pursuing the special administration objectives.

The proper purpose rule

219. In exercising their powers to cause Sova to commit to and perform the Transaction, the JSAs must use their powers for proper purposes. This is explained in Lightman and Moss, The Law of Administrators and Receivers of Companies (6th edn), at paragraph 12-037 (footnotes omitted):

> "The 'proper purposes' control on the exercise of office-holder powers derives from the 'fraud on a power' doctrine in trusts law and its variant in corporate law, the duty of a company director to exercise powers for the purpose for which they are conferred, now codified in the Companies Act 2006 s.171(b). Its effect is to prohibit the administrator from exercising his powers for a purpose, or with an intention, beyond their scope. It follows that the administrator must not act perversely or irrationally or for irrelevant or extraneous reasons as, properly understood, in doing so he would be abusing his powers by acting beyond their scope. As an office-holder, he must also take reasonable steps to acquire information relevant to his decisions, including, if appropriate, taking relevant

> professional advice. If the administrator seeks advice (in general or specific terms) from apparently competent advisers as to the implications of the course he is considering taking, and follows the advice so obtained, then it would appear that the administrator would not be in breach of his fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to him was materially wrong."

220. The concept of reasonableness in this context was explained by the Court of Appeal in *In re Edennote Ltd* [1996] BCC 718, 722:

> "(fraud and bad faith apart) … the court will only interfere with the act of [an officeholder] if he has done something so utterly unreasonable and absurd that no reasonable man would have done it."

The parties' submissions on issue (b)

221. The JSAs submitted in outline as follows.

222. First, the Transaction is a sale or other disposal of the company's property within the JSAs' powers under para 2 of Schedule 1. (I shall use "sale" below as shorthand for "sale or other disposal".) As a matter of general law the waiver of a claim by a creditor may constitute the consideration for the sale or disposal by the debtor of its property. There is nothing in the insolvency legislation to prevent a transfer of assets in return for a waiver of claims, or to require such a transaction being characterised otherwise than as a sale. BZ is wrong to contend that the Transaction amounts to a distribution to Dominanta.

223. Second, such a sale of the company's property does not infringe the pari passu principle. The principle is concerned with distributions to creditors and the Transaction is not properly to be characterised as a distribution.

224. The JSAs submitted that in characterising the Transaction the court must consider its substance by looking at the terms used in the PTAs. There is no such thing as the substance divorced from the words used. Generally when the law is looking at the substance of a matter it is normally concerned with its legal substance, not its economic substance (if different). They relied on *McEntire v Crossley Brothers* [1895] AC 457, 462; *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609, 614h-615b and *Re Polly Peck International* [1996] 2 All ER 443j-444e.

225. Third, the matter may be tested by considering analogous situations. Suppose that the JSAs were to declare an interim distribution. The pari passu rule would not prevent a creditor from using the distribution to buy property of the company. The creditor is acting in two capacities, as creditor in receiving the distribution and as buyer in buying the assets. The pari passu rule applies to the first aspect but not the second.

226. The analogy may be taken through further steps: suppose that there was an interim distribution and the creditor used it to buy property; that would generate further property available for distribution and, one may assume, a further distribution, which the relevant creditor uses to buy more property from the company; and so on, iteratively, until the amount being paid to the creditor in the relevant round shrinks to a negligible one. This is what the JSAs have called the Dividend Bid Model. The amounts that would have been paid into the estate are the equivalent of the CEV calculated by the JSAs.

227. The JSAs accept of course that there has been and will be no actual iterative series of interim distributions and purchases by Dominanta, but they say that the fact that such dividend bids would not infringe the pari passu principle strongly demonstrates that a sale of the company's property in return for a waiver of claims (which necessarily involves a waiver of the right to distributions) is permissible.

228. Fourth, there is always a constraint on the exercise of the power of sale, namely, the requirement that the sale be for a proper price. An office-holder is under a duty to take reasonable care to obtain the best price that the circumstances permit (see *Re Charnley Davies Ltd* [1990] BCC 605, 618A-C).

229. It follows from this that it would not be open to the JSAs to sell Sova's property to a creditor without regard to the value of the assets or the size of the claim. This is the relevant constraint on the exercise of the power, rather than the pari passu rule (as submitted by BZ).

230. Fifth, office-holders may sell claims (thus, property) belonging to an insolvent estate and there is nothing to stop a sale to a creditor. It is also common for such claims to be sold in return for a share of the proceeds of the claim. This amount may not be known at the time of the sale. While there have been cases concerning the question whether the office-holder has obtained the best price for the claim there has never been a suggestion that the pari passu principle applies to the sale.

231. *Guy v Churchill* (1888) Ch D 481 illustrates this. By a deed of sale a trustee in bankruptcy transferred a right of action vested in him to one of the creditors, F. The deed recited that the trustee was not disposed to take on the risk of the action, and provided that F would carry on the action at his own expense and would share any proceeds of the litigation with three-quarters going to F and one-quarter to the trustee. F would be entitled to a dividend from the estate and would therefore share in the one-quarter going to the trustee. The defendants to the action contended that the arrangement was champertous. This failed on the principle that the bankruptcy laws permitted such arrangements. The JSAs observed that there was no suggestion that the arrangement was contrary to the pari passu principle.

232. Sixth, the other creditors will benefit from the Transaction. The Transaction will lead to a waiver of Dominanta's claims (in part or in full). To the extent that the claims are waived the available assets will be divided among a smaller class of unsecured creditors, and this may be regarded as having a CEV for the insolvent estate. The numbers have been given above.

233. Seventh, it may be the case that the Russian Securities acquired by Dominanta are worth more to Dominanta than their realisable value for Sova. The JSAs accept that Dominanta may be able to make a profit from the transaction. But that arises from the unusual circumstances in which Dominanta (like other Russian purchasers) are in the position of special purchasers. It does not mean that there is an impermissible distribution of assets to Dominanta or any other infringement of the statutory scheme.

234. Eighth, the fact that Dominanta is connected with Sova by way of Mr Avdeev's interest in both companies does not impair the JSAs' power to commit Sova to the two PTAs. Such a connection is relevant to the exercise of the JSAs' powers but they have assessed the commercial value of the Dominanta Offer with the benefit of legal advice and negotiated the commercial terms of the deal with Dominanta at arm's length. They have also explained that Mr Avdeev's involvement was disclosed to creditors and is now explained to the Court.

235. BZ submitted in outline as follows.

236. First, under the statutory scheme, BZ has a right to receive his pari passu share of realisations of Sova's assets. He is also entitled to insist that no other unsecured creditor is treated differently or receives a better return.

237. Second BZ is also entitled to insist that Sova's assets are distributed in specie only in accordance with Rule 151 and not otherwise.

238. Third, there has been nothing to vary Mr Zilbermints' rights.

239. Fourth, the Transaction is contrary to Rule 149. In summary, if the Transaction is implemented, Dominanta will receive 117% of its claim in specie, whereas the other unsecured creditors (including BZ) will receive between 50% and 62% in cash. This is a major departure from the principle of equal treatment of creditors which is embodied by the pari passu rule.

240. Fifth, what is proposed is some sort of novel and unprecedented contravention of creditors' rights to equal treatment in circumstances which do not fall within any of the well-established and limited number of exceptions to the pari passu rule.

241. Sixth, by contrast, if the Transaction does not proceed, the JSAs will be able to sell the Russian Securities for a cash consideration (to the Joint Bidders), which will be distributed pari passu amongst the unsecured creditors, pursuant to Rule 149.

242. Seventh, the proposition that the Transaction is an impermissible contravention of the pari passu principle and the statutory insolvency scheme may be tested by reference to the hypothetical scenario in which (prior to the commencement of Sova's administration) Sova had entered into a transaction with a creditor in materially the same terms as the Transaction, providing that, in Sova's administration, the creditor would receive Sova's assets in specie in discharge of the creditor's claim.

243. Such a transaction would obviously be void on the principles in *Ex p Mackay*, and *British Eagle* (see above). If a transaction in the terms of the Transaction would be void if entered into by Sova before the commencement of its administration on the basis that it is contrary to the pari passu principle, it is difficult to see how such a contract could properly be entered into by Sova after the commencement of its administration. It would still contravene the pari passu principle in the same way and would be void.

244. Eighth, the Transaction is contrary to Rule 151 in that, first, the Russian Securities are not property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold (as demonstrated by the Final BZ Offer itself). Secondly, the Transaction does not provide for the Russian Securities to be divided in their existing form amongst the investment bank's creditors. Instead, the Transaction provides for the Russian Securities to be transferred to a single creditor, Dominanta. Thirdly, the Transaction does not provide for the Russian Securities to be distributed in specie "according to [their] estimated value" with £1.00 of assets discharging £1.00 of claims. Rather, as explained above, Dominanta will receive £1.00 of assets for every £0.85 of claim discharged, resulting in the substantial overpayment of Dominanta, which will receive 117% of its claim.

245. Ninth, it follows that the Transaction falls outside the scope of the JSAs' powers and/or is contrary to the pari passu principle and/or the statutory scheme of insolvency law. Accordingly, it should not be approved.

246. Tenth, at the very least, the Court cannot be satisfied in these circumstances that there is "no real doubt" that the Transaction is within the JSAs' powers (see *Nortel*, [48]; *MF Global*, [32]).

247. Dominanta supported the position of the JSAs essentially for the reasons given by them.

Conclusions on issue (b)

248. I prefer the submissions of the JSAs.

249. First, I consider that the administrators' power to sell or otherwise dispose of the company's property is broad enough to cover a transaction whereby a creditor waives its claim against the company. I see no reason to read the power down to exclude such a transaction.

250. Second, as the JSAs submit, in exercising such power an administrator is required to act reasonably to obtain the best price in the circumstances as they reasonably appear to the administrator. This places an important constraint on the exercise of the power. It prevents an administrator from simply transferring assets to a particular creditor in return for the claim of the creditor where this may be at the expense of the estate. It is only if the administrator genuinely and rationally believes proper value is being obtained that the power is exercisable.

251. It also seems to me that *Guy v Churchill* provides at least some support for the view that the pari passu principle has no application to a sale by an office-holder. The agreement in that case would have infringed the pari passu principle if the sale were to be seen as a distribution. The buyer of the right of action stood to keep three-quarters of the proceeds and also share in a distribution in respect of the other quarter. It is fair to observe that nobody argued the pari passu point, but it seems to me that is probably because the principle simply has no application to sales (as opposed to distributions). The case does not amount to binding authority as the point was not argued but I think it illustrates the way the court has generally approached sales.

252. Third, in my judgment the Transaction is properly characterised as a sale or other disposal rather than a distribution. I agree that the proper approach to characterisation is found in the cases cited by the JSAs (*McEntire*, *Lloyds & Scottish* and *Polly Peck*). The court must determine the substance of the transactions and not their mere form. But this connotes legal and not economic substance and the court must assess the terms of the Transaction to determine the proper description of what is happening. I am unable to accept BZ's submissions that the substance of the Transaction is a distribution. To my mind it is clearly a sale of certain assets in return for the waiver of Dominanta's claims (in full or part).

253. BZ submits that the result of the Transaction is that Dominanta will end up with the Russian Securities and these are potentially worth more to it (perhaps as much as or more than its claims) than the projected final dividend payable to other creditors. It appears to me that BZ's argument amounts to the assertion that you look at the overall outcome and ignore the legal steps or route by which it has come about. It appears to me that this is not merely an appeal to economic substance, it is a one sided one. One can equally well say that as a matter

of economic substance Dominanta has paid for the Russian Securities by giving up its rights to participate in any further dividends. This is an equally valid economic description. But it has the merit of corresponding with the legal form of the Transaction. As was said in *Polly Peck* we are concerned not with economic substance but with the law.

254. Fourth, in my judgment the JSAs are right to say that BZ's argument collapses the distinction between Dominanta's position as creditor and its position as buyer. It will receive the Russian Securities as a buyer and will (to the appropriate agreed extent) cease to be a creditor. It will not be receiving anything qua creditor (for such part of its claim as is waived) and will therefore not receive a distribution.

255. Fifth, for these reasons I do not consider that the pari passu principle has any relevant application or more specifically that it undermines the powers of the JSAs to sell the Russian Securities to Dominanta. The principle is concerned with equality of distribution and does not apply to sales of assets. Of course if a distribution is dressed up as a sale and in reality is a distribution the rule would apply. But for the reasons just given I do not think there is any basis for saying that the Transaction is a disguised distribution.

256. Sixth, I agree with the JSAs' submission that BZ's argument also ignores the difference in the value of the assets to a Russian entity such as Dominanta and their value to Sova. As administrators they are and can only be interested in the realisable value of the Russian Securities by Sova. Of course the fact that a Russian bidder may stand to make a profit is a factor the JSAs have to take into account when seeking to negotiate a sale and when assessing the commercial appeal of any given bid. There are starkly asymmetrical values for non-Russian and Russian owners of Russian securities. But these arise from the various legal restrictions (Western and Russian) and not from any action or choice of the JSAs. They are a feature of the world in which the JSAs are having to operate. I agree with the JSAs that it is simply unreal to suggest that Sova would be able to realise anything like the Nominal Value of the Russian Securities.

257. In short I agree with the JSAs that if it should turn out that Dominanta (as a special purchaser) should do better economically than the other creditors, that is not because of the distribution of the assets of the estate; it is because of the various legal restrictions which have strangled Sova's ability to obtain full value for its assets (in the sense of the value that a Russian could obtain). It is in this sense a collateral consequence.

258. Seventh, I accept the JSAs' submission that the fact that Dominanta is connected with Sova by way of Mr Avdeev's interest in both companies does not impair the JSAs' power to commit Sova to the two PTAs. Such a connection may be relevant to the exercise of the JSAs' powers (for instance, in requiring them to take steps to ensure that a proper price and terms have been negotiated), but not to the existence of those powers. They have explained that Mr Avdeev's involvement was disclosed to creditors and is now explained to the Court.

259. Eighth, I do not think that the question is properly to be tested by reference to a hypothetical pre-insolvency contract under which Dominanta would have been allowed to buy in the event of the insolvency of Sova. This argument simply takes you back to the question of whether the Transaction is a sale or other disposal rather than a distribution. If it is a sale the question is whether it is for proper consideration (in the sense described above), not whether it would result in a non-pari passu outcome.

260. For these reasons in my view the Transaction does not infringe the statutory scheme. The Transaction will not operate contrary to Rule 149 and Rule 151 is not engaged.

261. Having had the benefit of full argument on the point, I have reached a clear conclusion on this issue and do not think there is a real doubt about the powers of the JSAs to enter the Transaction.

Issue (c): Is the JSAs' decision to enter the Transaction rational and honest?

262. The JSAs have invited the court to approach the applications by asking whether their decision to enter the Transaction is rational and honest. This approach is derived from the statements of principle in *MF Global* and *Nortel.*

263. As explained in [219] above, the administrator must not act perversely or irrationally or for irrelevant or extraneous reasons as, properly understood, in doing so he would be abusing his powers by acting beyond their scope.

264. I have set out the JSAs' approach to the Transaction in some detail above. The JSAs say in summary that they were in a difficult predicament and that the various restrictions constrained their ability to obtain anything like the Nominal Value of the Russian Securities. They sought other quotes which were unfavourable. They then negotiated with Dominanta to obtain the best terms they could. They sought offers from the other creditors, who included key Russian market participants. They obtained a number of offers from BZ. The Final BZ Offer is broadly comparable in value to the Transaction (with the outcome being marginally better in some possible cases and marginally worse in others) but is subject to execution risks.

265. It is also subject to the risk that the MinFin criteria may apply, which would materially affect the economics of any such sale and might indeed make it unworkable (if for instance it required the payment of part of the purchase price to the Russian government). The adjournment of the hearing in January allowed a period of competitive tension and nothing more was produced from Dominanta. The JSAs also said that the bird in the hand should not be allowed to fly away. They also referred to the overwhelmingly supportive vote of the non-conflicted voting creditors as evidence of the rationality of their decision.

266. The JSAs also submitted that it is not unreasonable for the officeholder to prefer a transaction which settles a greater part of the company's affairs than another even if the latter may, on its own more limited terms, bring greater value into the company's estate.

267. BZ said that the court should not permit the JSAs' to enter the Transaction. He submitted in summary, that the JSAs' did not take reasonable care to achieve the best price that circumstances permit. For example, they did not appoint an independent Russian unsanctioned broker (such as Renaissance Capital, Aton and BCS) to market the portfolio among unsanctioned family offices in Russia or larger Russian banks with sufficient capital (such as Bank Saint Petersburg, Zenit Bank and Ak Bars Bank). Instead, they relied on Sova's management to propose the Dominanta Transactions and to conduct very limited market testing to justify the Dominanta Transactions.

268. BZ also raised concern about the lack of independence between management of Sova (who were involved in the early stages of the negotiations and the market testing) and Dominanta, particularly given Mr Avdeev's role in relation to both companies.

269. BZ also submitted that there was no evidence about the course of the negotiations between Dominanta and the JSAs. For instance Dominanta asked for a 15% discount to the market value of the Russian Securities and this was reflected in the PTAs.

270. He submitted that the court cannot properly be satisfied that the Dominanta Transaction represents the best price that circumstances permit. He also submitted that the Court should be cautious about expressing views about the merits of the decision, particularly given the absence of disclosure or cross-examination.

271. I have concluded that the decision of the JSAs to enter the Transaction is an honest one. I accept that they genuinely consider that the Transaction is in the interests of the creditors of Sova.

272. I have also concluded that the JSAs' decision is rational in the sense of being one that could be reached by reasonable honest office-holders seeking to fulfil their functions – or putting it negatively, is not one that can be regarded as perverse or irrational.

273. First, I consider that the JSAs are seeking to make the best of a challenging set of constraints, which have effectively strangled their ability to sell the Russian Securities for anything approaching their Nominal Value. They have sought to find a way of realising value for the creditors, who might otherwise have had to wait for many years, which is obviously unpalatable given the time value of money and the radical uncertainty about what may happen.

274. Second, it also appears to me that looking strictly at the position they are in now, the JSAs' comparative assessment of the rival bids cannot be seen as perverse or irrational. They have explained the economics of the bids by assessing their CEVs, and no issue has been taken with this methodology (though of course the use of a waiver of claims has been attacked on the legal grounds already addressed). There is uncertainty about the timing of any government consents for the BZ Final Offer. There is also uncertainty about the applicability of the MinFin Criteria. If the criteria do apply, there would be a material impact on the economics of the sale.

275. I also consider it is rational, in the light of these uncertainties - and the possibility of more severe legal constraints on a sale process - for the JSAs to conclude that they should enter the Transactions now, rather than waiting to see whether they might at some uncertain future time be able to obtain a higher price for the Russian Securities. Things could very well get worse.

276. Third, I consider it rational for the JSAs to put to one side any concerns that might be thought to arise from the fact that Dominanta and its beneficial owner may (in a sense) profit as a special purchaser of the Russian Securities. The ability to make a turn would accrue to any Russian purchaser of the Russian Securities, including the Joint Bidders. It is built into the asymmetry of value which arises from the various legal constraints on an owner in a state branded "hostile" by the Russian government. The fact that a Russian buyer is able to make a turn might be unpalatable, but it is collateral to the decision the JSAs now face.

277. Fourth, I also consider the landslide indicative vote of the creditors supports the JSAs' position. The non-aligned creditors are institutions and professionals. They are likely to be the best judges of their commercial interests. They are able to assess the competing deals and are also likely to be able to assess the benefits of doing nothing. They are also of course

aware of the involvement of Dominanta and its beneficial owner. A vote of this kind is not of course binding in the way that it would be in a scheme of arrangement. However the JSAs have sought to give the creditors the type and quality of information they would get in the case of a scheme. This has included, in relation to the latest vote, BZ's solicitors' own letter setting out the reasons why the BZ Final Offer is to be preferred.

278. Fifth, I accept the submission of the JSAs that it is not unreasonable for the officeholder to prefer a transaction which settles a greater part of the company's affairs than another even if the latter may, on its own more limited terms, bring greater value into the company's estate.

279. Overall I have concluded that the decision of the JSAs to enter the Transaction is an honest and rational one, within the scope of their powers.

280. However I am not expressing a more general view as to the conduct of the JSAs. I do not e.g. express any view as to whether a different outcome could have been achieved had the JSAs taken the steps now suggested by BZ to market the assets. Nor do I express any view about the negotiations of the Transaction or whether better terms could have been reached. Nor do I express any overall view as to whether the JSAs have achieved the best price reasonably achievable. In setting out these reservations, I do not wish it to be understood either that I am suggesting that the JSAs have failed to act reasonably or have failed to achieve the best price. I am simply making no ruling either way. I return to something I explained earlier: the commercial decision to enter the Transaction is one the JSAs have already taken and by giving them permission to carry it out I am not seeking to remake or second guess the decision.

Issue (d): Is there a real risk that the Transaction breaches applicable sanctions laws?

281. As already explained the JSAs, with the help of their UK and US solicitors (and leading counsel with expertise in UK and EU sanctions law), have undertaken a detailed review of the possible application of Western sanctions. The JSAs relied on three memoranda of advice. They also made written and oral submissions about them. There was no suggestion by BZ that the Western sanctions would be breached.

282. In my judgment, there is no realistic risk that the Transaction will infringe UK sanctions. I also conclude (to the extent it is material) that the Transaction does not infringe US or EU sanctions. I shall set out a summary of my conclusions by reference to UK, US and EU sanctions in turn.

UK Sanctions

283. The relevant sanctions regime in the UK is found in Russia (Sanctions) (EU Exit) Regulations 2019 (**2019 UK-Russia Regulations**). It applies to conduct inside and outside the UK but, in the case of the latter, only where it is committed by a "United Kingdom person" (regs 3(1) and (2)). Since Sova is incorporated in the UK, the 2019 UK-Russia Regulations apply to it (reg 2 and s.21 of the Sanctions and Anti-Money Laundering Act 2018). Broadly speaking, they restrict Sova's dealings with specific persons and assets. Taking these in turn:

(a) "Designated Persons". Reg 5 gives the Secretary of State the power to "designate persons" based on the criteria in reg 6. Designated Persons are inter alia subject to asset-freezing restrictions (reg 10). This means that entities subject to the 2019 UK-

Russia Regulations (ie Sova and the JSAs) must not (i) deal with funds or economic resources owned, held or controlled by Designated Persons (reg 11), or (ii) make funds or economic resources directly or indirectly available to them or for their benefit (regs 12-15).

(b) The asset-freezing restrictions also apply against legal entities that are "owned or controlled directly or indirectly by" Designated Persons. The definition of "owned or controlled" is set out at reg 7. There are two criteria. Either (a) the Designated Person holds directly or indirectly more than 50% of the shares or voting rights, or the right to appoint or remove the majority of the board of directors, of the relevant entity, or (b) it is reasonable, having regard to the circumstances of the case, to expect that the Designated Person would be able to, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that the affairs of the relevant entity are conducted in accordance with the Designated Person's wishes.

(c) The 2019 UK-Russia Regulations also enact sanctions on specific assets. First, regs 16(1) to 16(4H) deal with transferable securities (including shares, bonds, and any form of negotiable securitised debt) issued by certain named entities, or entities owned by such named entities, on or after 1 March 2022. Secondly, reg 18B prohibits UK Persons from acquiring (but not alienating) any of a wide range of ownership interests or control over corporate persons connected with Russia. However, by reg 60ZZA (2)(b) and (c), this does not apply to company shares, bonds, or other forms of securitised debt which were (a) admitted to trading on a regulated market prior to 19 July 2022 or (b) not issued for a prohibited purpose.

284. Having examined the JSAs' due diligence about the various parties and assets involved and heard submissions from the JSAs' counsel I am satisfied that there is no real risk that the Transaction breaches these Regulations.

(a) The relevant Russian Securities are owned, held, or controlled by Sova which is neither a Designated Person nor controlled by one.

(b) Neither Dominanta nor the person who controls Dominanta – Mr Avdeev, who indirectly holds 82.9% of its share capital and voting rights – are Designated Persons.

(c) Neither the parties who assigned the relevant claims to Dominanta nor their apparent owners are Designated Persons.

(d) Region and its apparent owners are not Designated Persons.

(e) Although the NSD (not itself a Designated Person) was initially thought to be controlled by Bella Ilyinichna Zlatkis, who is a Designated Person, it was ultimately concluded that she no longer has any influence over NSD. NSD's ultimate beneficial owner is MOEX, a publicly listed Russian company mainly owned by individual investors. Thus, no one person is in control of NSD.

(f) Such of the Russian Securities which were issued by a sectorally sanctioned entity (or by an entity owned by the same or acting on behalf or at the direction of the same) were issued prior to 1 Aug 2014 and none of the Russian Securities was issued after 1 March 2022.

(g) The Russian Securities were admitted to trading on a regulated market prior to 19 July 2022 and were not issued for a prohibited purpose.

285. Accordingly, neither the parties nor the assets involved in the Dominanta Transactions trigger the 2019 UK-Russia Regulations.

US Sanctions

286. The US sanctions regime has two relevant categories: (i) primary sanctions, which apply when a "US nexus" is present; and (ii) secondary sanctions, which apply extraterritorially even when there is no US nexus.

287. In relation to primary sanctions, there may be a US nexus where (a) the activity is taking place in the US, (b) US persons are involved directly or indirectly or (c) there is any other US nexus (eg US origin goods or services).

288. Secondary sanctions are imposed at the discretion of the US Department of the Treasury's Office of Foreign Assets Control (**OFAC**). This typically involves a determination whether a particular activity involves provision of material support.

289. Non-US persons can also be targeted by US secondary sanctions where such persons are determined to have operated in designated sectors in the Russian economy.

290. In general, US persons are restricted from dealing with persons on the Specially Designated Nationals and Blocked Persons (**SDN**) List.

291. As Dominanta has confirmed that it will not perform the Transaction in the US, and nor is there any other US nexus, the only issue is whether there are US Persons and/or SDNs involved in the transaction.

292. None of Dominanta, Mr Avdeev, the TTCA Assignors, Region and Mr Sudarikov and NSD are SDNs or appear on any other list of sanctioned entities maintained by OFAC. Second, some of the Russian Securities were issued by SDNs (**SDN Securities**). As such, no US Persons may be directly or indirectly involved with transactions involving them. However, although Hogan Lovells counts as a US Person, it was not involved in the Portfolio Transfer Agreement containing the SDN Securities (which were covered by PTA2 and the second application).

293. I am accordingly satisfied that there is no realistic risk of a breach of US primary sanctions law.

EU Sanctions

294. The EU sanctions regime is contained in EU Council Regulations 833/2014 and 269/2014 (**EU-Russia Regulations**). They apply (a) within the territory of the EU, including its airspace, (b) to any person inside or outside the territory of the EU who is a national of a Member State, (c) to any legal person, entity or body, inside or outside the territory of the EU, which is incorporated or constituted under the law of a Member States and (d) to any legal person, entity, or body in respect of any business done in whole or in part within the EU.

295. Sova is not incorporated within an EU Member State and will not perform any activity in connection with the Transaction in any EU Member State. While 28 of the relevant Russian Securities are ultimately held within the EU, the transfer of ownership interests entailed by the Transaction only needs to be registered at NSD in Russia. No action (or omission) is required within the EU. Sova and the Transaction are therefore not subject to the EU regime.

Ukrainian Sanctions Law

296. Though the point was not raised in advance, at the hearing BZ observed that Mr Avdeev, who controls both Sova and Dominanta, is a sanctioned person under Ukrainian sanctions law.

297. However I do not consider that this has any bearing on the decision for the court. First, Ukrainian law is not the governing law nor is Ukraine the place of performance of the Transaction. Second, there was no suggestion that there would be any material connection or nexus between the Transaction or its performance and Ukraine. Third, and in any event, counsel for BZ did not identify any respect in which the Transaction or its performance would breach Ukrainian law.

Disposition

298. I shall make an order permitting the JSAs to enter the Transaction.