Case No: HC11C01320

Neutral Citation Number: [2012] EWHC 2090 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
27/07/2012

Before :

MR JUSTICE BRIGGS

Between:

ASSÉNAGON ASSET MANAGEMENT S.A.	**Claimant**
- and -	
IRISH BANK RESOLUTION CORPORATION LIMITED (FORMERLY ANGLO IRISH BANK CORPORATION LIMITED)	**Defendant**

Mr Richard Snowden Q.C. and Mr Ben Griffiths (instructed by Hill Hofstetter LLP) for the Claimant
Mr Robin Dicker Q.C. and Mr Tom Smith (instructed by Freshfields Bruckhaus Deringer LLP) for the Defendant

Hearing dates: 13,14,18 June and 17 July 2012

JUDGMENT

Mr Justice Briggs :

Introduction

1. This part 8 Claim test, for the first time, the legality under English law of a technique used by the issuers of corporate bonds which has acquired the label "exit consent". The technique may be summarised thus. The issuer wishes to persuade all the holders of a particular bond issue to accept an exchange of their bonds for replacement bonds on different terms. The holders are all invited to offer their bonds for exchange, but on terms that they are required to commit themselves irrevocably to vote at a bondholders' meeting for a resolution amending the terms of the existing bonds so as seriously to damage or, as in the present case substantially destroy, the value of the rights arising from those existing bonds. The resolution is what has become labelled the exit consent.

2. The exit consent has no adverse effect in itself upon a holder who both offers his bonds for exchange and votes for the resolution. That is either because the issuer nonetheless fails to attract the majority needed to pass the resolution (in which case both the resolution and the proposed exchange do not happen) or simply because, if the requisite majority is obtained, his bonds are exchanged for new bonds and cancelled by the issuer. By contrast, a holder who fails to offer his bonds for exchange and either votes against the resolution or abstains takes the risk, if the resolution is passed, that his bonds will be either devalued by the resolution or, as in this case, destroyed by being redeemed for a nominal consideration. This is in part because the efficacy of the technique depends upon the deadline for exchange being set before the bondholders' meeting so that, if the resolution is then passed, the dissenting holder gets no *locus poenitentiae* during which to exchange his bonds on the terms offered, and accepted in time, by the majority.

3. It is readily apparent, and not seriously in dispute, that the purpose of the attachment of the exit consent to the exchange proposal is to impose a dissuasive constraint upon bondholders from opposing the exchange, even if they take the view that the proffered new bonds are (ignoring the exit consent) less attractive than the existing bonds. The constraint arises from the risk facing any individual bondholder that a sufficient majority of his fellow holders will participate in the exchange and therefore (as required to do) vote for the resolution. The constraint is variously described in textbooks on both sides of the Atlantic as encouraging, inducing, coercing or even forcing the bondholders to accept the exchange.

4. The technique depends for its persuasive effect upon the difficulties faced by bondholders in organising themselves within the time allowed by the issuer in such a way as to find out before the deadline for accepting the exchange whether there is a sufficient number (usually more than 25% by value) determined to prevent the exchange going ahead by voting against the resolution. They were described in argument as facing a variant of the well-known prisoner's dilemma.

5. Exit consents of this type (but falling short of expropriation) have survived judicial scrutiny in the USA, in the face of challenge by minority bondholders. In *Katz v Oak Industries Inc.* (1986) 508 A.2d 873 the attachment of an exit consent designed to devalue the existing bonds in the hands of dissenting holders who declined an associated exchange offer was challenged in the Delaware

Chancery Court as amounting to a breach of the contractual obligation of good faith by the issuer, as against the bondholders. It was not suggested that the participation in the process by the majority bondholders (by committing themselves to vote for the proposed amendment devaluing the existing bonds) constituted an abuse by them of their rights under the terms of the bond issue to bind the minority to a variation of those terms. Chancellor Allen concluded that the particular exit consent in that case, (which included the removal of significant negotiated protections to the bondholders, and the deletion of all financial covenants), did not despite its coercive effect amount to a breach of the contractual obligation of good faith between issuer and bondholders in what he evidently regarded as an ordinary commercial arms-length contract.

6. By contrast, the challenge made in the present case to the exit consent technique is mainly based upon an alleged abuse by the majority bondholders of their power to bind the minority, albeit at the invitation of the issuer. The challenge is based upon the well recognised constraint upon the exercise of that power by a majority, namely that it must be exercised *bona fide* in the best interests of the class of bondholders as a whole, and not in a manner which is oppressive or otherwise unfair to the minority sought to be bound. Such limited published professional comment as there is upon the use of this technique within an English law context appears to assume that, provided the exchange offer and associated exit consent proposal is made and fairly disclosed to all relevant bondholders, no question of oppression or unfairness can arise. I was told (although it is impossible for the court to know for sure) that this technique has been put into significant, if not yet widespread, use within the context of bonds structured under English law, in particular in connection with the affairs of banks and other lending institutions requiring to be re-structured as a result of the 2008 credit crunch, so that a decision on this point of principle may be of much wider consequence than merely the amount at issue between the parties to this claim, which relates to subordinated notes in the company then known as Anglo Irish Bank Corporation Limited ("the Bank") acquired by the claimant Assenagon Asset Management S.A. in tranches between September 2009 and April 2010, for an aggregate of just over €17m.

The Facts

7. There is no dispute about the primary facts, which consist of the terms of the relevant bonds, the circumstances in which the exchange proposal was launched, succeeded and concluded, so far as affects the claimant, by redemption of its €17m Notes for a payment by the Bank of a mere €170.

8. There is by contrast not a complete unanimity as to background facts. The parties' differences related more to the relevance of parts of the background, and no request was made by either side for cross-examination. As will appear, I have not found it necessary to resolve any disputes as to fact and little of the background was of significant assistance in resolving the issues which I have to decide. These concern construction (including for that purpose implied terms), together with the allegation of infringement of the constraint upon the exercise of the power by a majority to bind a minority to which I have referred.

9. The bond issue to which this dispute relates consists of the Bank's subordinated floating rate notes due 2017 ("the 2017 Notes") issued by the Bank on 15 June 2007 pursuant to the terms of a trust deed dated 15 August 2001 between the Bank and Deutsche Bank Trustee Co. Limited ("the

Trustee") as subsequently amended and supplemented by six supplemental trust deeds. I shall refer to the re-stated form of the trust deed applicable to the 2017 Notes as "the Trust Deed". Terms particular to the 2017 Notes are also contained in written Final Terms dated 15 June 2007 ("the Final Terms"). The commercial terms of the 2017 Notes may be summarised as follows:

> i) They were to mature in 2017, for redemption at par, unless redeemed earlier at the Bank's election (also at par) on any interest payment date after 19 June 2012.
>
> ii) In the meantime they carried a floating rate of interest at 0.25% above three months Euribor until 2012 and 0.75% above three months Euribor thereafter.
>
> iii) The Notes were subordinated, so as to be prioritised for payment in an insolvency after all secured and unsecured creditors (including the Bank's depositors) and ahead only of equity shareholders. They were wholly unsecured.

10. The 2017 Notes were issued as part of the Bank's Euro Medium Term Note Programme. The Bank issued, in addition, subordinated notes due 2014 and 2016 ("the 2014 and 2016 Notes"). The nominal amount of the 2017 Notes was €750m. I am invited to assume that, for the most part, holders of the 2017 Notes were, at the time of the exchange offer, sophisticated professional investors.

11. It is necessary to focus in some detail upon the provisions in the Trust Deed providing what counsel called "note-holder democracy", namely the calling of note-holders' meetings, the extent of the powers of the majority to bind the minority, the requisite quorum and voting majorities, together with a particular voting disability prayed in aid by the claimant.

12. The 2017 Notes were issued in the form of a single global note to a depository, such that investors recorded as holding proportions of the aggregate nominal amount in the books of the depository were to be treated for all purposes under the Trust Deed as note-holders: see the definition of Noteholders (Trust Deed page 5), clause 8 of the Trust Deed and paragraph 1 of Schedule 1 thereto (incorporating terms and conditions of the Notes pursuant to the definition of Conditions on page 2 of the Trust Deed).

13. Clause 38 of the Trust Deed provided for it to be governed by English law, subject to certain irrelevant exceptions, and clause 39 contained a sufficient submission to the jurisdiction of the English courts for the purposes of these proceedings.

14. Paragraph 14 (i) of the First Schedule to the Trust Deed contained provisions as to the quorum for Noteholders' meetings. It is unnecessary to set it out, because it is replicated, with added detail, in paragraph 5 of Schedule 3, headed Provisions for Meetings of Noteholders, incorporated by clause 9 of the Trust Deed. Paragraph 2 of Schedule 3 permits the Issuer (the Bank) or the Trustee at any time to call a Noteholders' meeting, and required the Issuer to do so upon a requisition signed by the holders of not less than one-tenth in nominal amount of the Notes.

15. Paragraph 5 of Schedule 3 set out three successively stringent quorum requirements. In relation to an ordinary resolution it was one-twentieth of the nominal amount of the Notes. For an

Extraordinary Resolution (defined below) it was a clear majority in nominal amount of the Notes. Finally, for seven specified types of Extraordinary Resolution the quorum was two-thirds of the nominal amount of the Notes. Paragraph 5(b) identified "reduction or cancellation of the principal payable on the Notes or the exchange or conversion thereof or the minimum rate of interest payable thereon" as one of the seven types of Extraordinary Resolution calling for a two-thirds quorum.

16. Paragraph 13 of Schedule 3 contained provision as to who might attend or speak at Noteholders' meetings, but continued:

> "Neither the Issuer nor any Subsidiary shall be entitled to vote at any meeting in respect of Notes beneficially held by it or for its account."

17. Paragraph 18 of Schedule 3 set out in detail the powers capable of being exercised by a majority of Noteholders by Extraordinary Resolution. They included:

> "(a) Power to sanction any compromise or arrangement proposed to be made between the Issuer and the Noteholders…. .
>
> (b) Power to sanction any abrogation, modification, compromise or arrangement in respect of the rights of the Noteholders… against the Issuer or against any of its property whether such rights shall arise under these presents or otherwise.
>
> (c) Power to assent to any modification of the provisions contained in these presents which shall be proposed by the Issuer or the Trustee."

18. Paragraph 20 provided that an Extraordinary Resolution required a three-fourths majority of persons voting. Paragraph 19 provided that a resolution duly passed at a Noteholders' meeting would be binding upon all Noteholders whether present or absent, voting or abstaining.

19. By September 2008 the Bank had become the third largest bank in the Irish domestic market with €101 billion of gross assets on its balance-sheet, representing about 50% of Irish GDP. It had a particular focus on commercial property lending, and as a result of the 2008 financial crisis, with a linked rapid decline in commercial property values, the Bank faced a liquidity crisis which, unless it was rescued by the Irish Government, would have forced it into insolvent liquidation. Nonetheless, being regarded as of systemic importance to the maintenance of the stability of the Irish financial system, it was indeed rescued by the Irish government by a series of steps, which I shall briefly summarise. The first consisted of a guarantee by the Irish government of certain liabilities of Irish financial institutions, including the 2017 Notes, for the period from 30 September 2008 to 29 September 2010 pursuant to the Credit Institutions (Financial Support) Scheme 2008. The Scheme prohibited any call on that guarantee after 29 September 2010.

20. Secondly, in December 2009 the Irish government guaranteed certain eligible liabilities of participating institutions, including the Bank, pursuant to the Credit Institutions (Eligible Liabilities Guarantee) Scheme 2009. Those liabilities did not include the 2017 Notes, because they were subordinated.

21. On 21 January 2009 the Bank was nationalised, because of its systemic importance to the maintenance of the stability of the Irish financial system, pursuant to the Anglo Irish Bank Corporation Act 2009.

22. On 7 April 2009 the Minister for Finance announced the creation of the National Asset Management Agency ("NAMA") formed to purchase certain distressed loans from banks carrying on in business in Ireland. This had no direct effect upon the 2017 Notes.

23. On 29 May 2009, in view of the continued deterioration in the Bank's financial position following nationalisation, the Irish government announced its intention to make urgent provision of up to €4 billion of capital to the Bank through the purchase of new ordinary shares. This support (but not the earlier nationalisation) required approval from the European Commission which was granted on 26 June 2009. The Commission required to be satisfied that financial support by a member state to a domestic bank was provided on terms that minimised the amount of state aid to that necessary to protect the wider financial system in Ireland and, to that end, the Bank proposed to increase its Core Tier 1 capital by engaging in a "Liability Management Exercise" under which it intended to buy back subordinated loans, at a premium above the prevailing market rates no higher than "necessary only to ensure a participation rate sufficient to make the Liability Management Exercise worthwhile".

24. By December 2009 the Bank had incurred an aggregate loss of some €12.7 billion. In March, May and August 2010 the Irish government increased its support to the Bank by amounts of €8.3 billion, €2 billion and €8.58 billion respectively.

25. On 8 September 2010, just before the expiry of the October 2008 guarantee, the Minister of Finance made an announcement about the proposed re-structuring of the Bank, which contemplated its being split into a depositors' bank and an asset management entity. In the event this did not proceed. By 30 September, the day after expiry of the October 2008 guarantee, the Irish government had provided a total of €22.88 billion of capital to the Bank by way of share subscription and promissory notes, and NAMA had purchased €6.5 billion worth of distressed loans.

26. It was during the staged rescue of the Bank which I have summarised, and the currency of the October 2008 guarantee of (inter alia) the 2017 Notes, that the claimant acquired its holding of 2017 Notes in the market, at prices ranging between 0.418 and 0.420 per nominal Euro, between 23 September 2009 and 1 April 2010. The substantial discount at which the Notes were trading in the market no doubt reflected a perception that the 2008 guarantee was unlikely to be extended indefinitely, and that holders of subordinated debt could not expect to be treated with the same sympathy as the Bank's retail customers. The claimant acquired its holding as manager of two Luxembourg funds. It may safely be inferred that it did so on behalf of sophisticated investors.

27. On 30 September 2010 (immediately after the expiry of the 2008 guarantee) the Minister of Finance made a statement on the banking system in Ireland which, while stating an intention to respect all senior debt obligations in the Bank, continued:

> "The principle of appropriate burden sharing by holders of subordinated debt, however, is one with which I agree. As can be seen from the figures outlined above, the losses in the bank are substantial and it is right that the holders of Anglo's subordinated debt should share the costs which have arisen.
>
> In keeping with this approach, my Department in conjunction with the Attorney General is working on resolution and re-organisation legislation, which will enable the implementation re-organisation measures specific to Anglo Irish Bank and Irish Nationwide Building Society which will address the issue of burden-sharing by subordinated bondholders. The legislation will be consistent with the requirements for the measures to be recognised as a re-organisation under the relevant EU Directive in other EU Member States.
>
> I expect the subordinated debt holders to make a significant contribution towards meeting the costs of Anglo."

28. This announcement contemplated a two stage approach. The first was to pursue a voluntary re-structuring of subordinated debt, if possible, by agreement with Noteholders (or a qualifying majority of them). The second was to complete the process, if necessary, by legislation, capable of being enforced in relation to an English law regulated note issue in the English courts, pursuant to the EU Directive referred to in the announcement. The exchange proposal to the 2017 Notes was part of the first of those two stages.

The 2010 Exchange Offer

29. On 21 October 2010 the Bank announced exchange offers in respect of certain series of its Notes, including the 2017 Notes (as well as the 2014 and 2016 Notes). The Bank issued three documents, the first two of which substantially overlap in terms of content:

i) The Announcement

ii) The Exchange Offer Memorandum

iii) A Notice of a Noteholders' meeting in respect of the 2017 Notes

30. The Announcement and the Memorandum both began (more or less identically) by proposing to Noteholders an exchange of (inter alia) the 2017 Notes for new Notes ("the New Notes") in the exchange ratio 0.20 i.e. an offer of a holding of 20 cents New Notes for every one Euro of 2017 Notes. The New Notes were not to be subordinated. They were to carry a coupon of three month Euribor plus 3.75 per cent, to be guaranteed by the Irish government and to mature in December 2011. The Announcement continued as follows:

> "In connection with the Exchange Offers, the Bank is also convening (at the times specified in the…Memorandum) separate meetings inviting the Holders of each Series of Existing Notes (*a definition which included the 2017 Notes*) to approve, by separate Extraordinary Resolution in respect of each Series, proposed amendments to the terms and conditions of

each Series including giving the Bank the right to redeem all, but not some only, of the Existing Notes of each Series at an amount equal to €0.01 per €1000 in principal amount of Existing Notes at any time after the relevant Settlement Date…

The Bank will announce its decision whether to accept valid offers of Existing Notes for exchange pursuant to each Exchange Offer together with the final aggregate principal amount of the Existing Notes of each Series accepted for exchange and the aggregate principal amount of the New Notes to be issued as soon as reasonably practical after the Expiration Deadline applicable to the relevant Series. Each Exchange Offer begins on 21 October 2010 and will expire at (i) 4.00 p.m. London time on 19 November 2010 in respect of the 2017 Notes…unless extended, re-opened or terminated as provided in the ... Memorandum. The expected Settlement Date for the Exchange Offers is (i) 24 November 2010 in respect of the 2017 Notes Exchange Offer…"

Under the heading Accrued Interest the Bank undertook to pay interest due on the Existing Notes up and until the Settlement Date.

31. At pages 4 – 6 of the Announcement the Bank provided an intended timetable for the Exchange Offer Process in relation to each Series. The timetable for 2017 Notes was as follows:

"Commencement of Exchange Offers,

Notice of Meeting 21 October 2010

2017 Notes Expiration Deadline 4 pm 19 November 2010

2017 Notes Results Announcement

(namely whether the Bank intended to accept

the offers, and the amount of 2017 Notes

accepted for Exchange) 22 November 2010

2017 Notes Meeting 10am 23 November 2010

Announcement Results of 2017 Notes Meeting 23 November 2010

2017 Notes Settlement Date 24 November 2010"

That timetable was followed by a warning that it was subject to the right of the Bank to extend, re-open, amend and/or terminate each Exchange Offer.

32. The Memorandum had annexed to it the notice of Meeting for the 2017 Notes, describing the terms of the Extraordinary Resolution. It is unnecessary to describe it in detail. It provided for the insertion into the Final Terms of a right for the Bank to redeem the 2017 Notes on any date after the Settlement Date (i.e. 24 November 2010, unless amended) upon payment at a rate of €0.01 per €1000. By contrast with the exchange ratio of 0.20 in the Exchange Offer this amounted to a payment ratio of 0.00001.

33. In addition to replicating most of the provisions of the Announcement, the Memorandum contained the following additional provisions, the first paragraph of which (quoted below) is set out in capital letters and heavy type.

> "By offering to exchange its Existing Notes, a holder will be deemed to have given instructions for the appointment of the exchange and tabulation agent (or its agent) as its proxy to vote in favour of the relevant Extraordinary Resolution in respect of all Existing Notes of the relevant series offered for exchange by such holder and which are accepted by the Bank at the…2017 Notes Meeting…
>
> It will not be possible for Holders of a Series of Existing Notes to validly offer to exchange Existing Notes pursuant to the Exchange Offer without at the same time appointing the Exchange Tabulation Agent (or its agent) as their proxy to vote in favour of the Extraordinary Resolution in respect of the relevant Series as described above. If a Holder does not offer to exchange its Existing Notes, or if its offer to exchange Existing Notes is not accepted by the Bank, such Holder may (subject to meeting certain deadlines for making such arrangements – see '*Risk Factors and other Considerations – Deadlines for making arrangements to vote at Meetings if Exchange Instruction is rejected'*) separately arrange to be represented, and vote such Holder's Existing Notes, at the relevant Meetings."

34. Under the heading Risk Factors and Other Considerations, the Memorandum provided (inter alia) as follows:

> "If an Extraordinary Resolution is passed in respect of any Series of Existing Notes and the approved amendments are implemented by the Bank by way of publication (expected to be part of the announcement confirming the results of the relevant Meeting) of amendments to the Final Terms of the relevant Series, the amendments shall be binding on all Holders of Existing Notes of such Series, whether or not those Holders attended or were otherwise represented at the relevant Meeting and/or voted in favour of the relevant Proposal.
>
> (*heavy type*) If the Bank chooses to exercise such call right (which the Bank currently intends to do shortly after the relevant Settlement Date, although the Bank is under no obligation to do so), the redemption amounts payable to a Holder of Existing Notes (being €0.01 per €1000 in principle amount of Existing Notes) will be significantly less than the principal amount of the New Notes such Holder would have received had such Existing Notes been exchanged pursuant to the relevant Exchange Offer.

The Risk Factors statement continued with a reference to the burden sharing legislation then proposed by the Irish government, including the passage from the ministerial statement of 30 September 2010, which I have quoted above.

35. Under the sub-heading "Deadlines for making arrangements to vote at Meetings if Exchange Instruction is rejected" the Memorandum continued:

> "If a Holder's offer to exchange Existing Notes is not accepted by the Bank at the relevant Expiration Deadline and such Holder nevertheless wishes to vote at the….2017 Notes

Meeting…, such Holder must either validly request a voting certificate, or otherwise appoint the Exchange Tabulation and Agent (or its agent) as its proxy to vote in favour of or against the relevant Extraordinary Resolution at the relevant Meeting…, such request to be submitted to the Exchange and Tabulation Agent through the Clearing Systems. Holders must request a voting certificate or appoint the Exchange and Tabulation Agent (or its agent) as proxy not later than 48 hours before the relevant Meeting. (*heavy type*) The indicative timetable for the Exchange Offers is such that, if a Holder's offer to exchange Existing Notes is rejected at or after the relevant Expiration Deadline, such Holder may not have the opportunity – or may have a very limited period of time in which – to make separate voting arrangements in respect of the relevant Meeting, and accordingly may not be able to vote at the relevant Meeting."

When it is borne in mind that the timetable set out both in the Announcement and the Memorandum contemplated that the Bank would announce its decision whether, and how far, to accept Exchange Offers only one day before the 2017 Notes Meeting, that last warning was, if anything, an understatement.

36. The exchange ratio of 0.20 in the Exchange Offer broadly reflected the price at which the 2017 Notes were then trading in the market, although there is some dispute, which I need not resolve, about the then liquidity of that market. No premium over the then market price for the 2017 Notes was added as an incentive, but the combined effect of the exchange offer and the disincentive to rejecting it constituted by the linked resolution to permit the Bank to redeem the 2017 Notes (if not exchanged) for 0.00001 of their face value was sufficient to ensure that 92.03 per cent of the 2017 Noteholders by value offered their notes for exchange and conditionally bound themselves to vote in favour of the Resolution by the stated deadline of 4 pm on 19 November 2010.

37. The Bank notified acceptance of all notes offered for exchange on 22 November and the Resolution was therefore duly passed by at least the same majority at the 2017 Noteholders' meeting held on the following day. Settlement of the exchange of Existing Notes for New Notes duly then occurred in accordance with the advertised timetable and, on 30 November 2010, the Bank exercised its newly acquired right to redeem the remaining 2017 Notes at the nominal price of €0.01 per €1000 face value pursuant to which the claimant received €170 for its €17 million face value of 2017 Notes.

38. The claimant did not attend, or vote by proxy at, the 2017 Noteholders' meeting. It first complained about what had occurred on 30 November. This claim was issued on 15 April 2011.

<u>The Claimant's Case</u>

39. In their skeleton argument and in oral submissions, Mr Richard Snowden QC and Mr Ben Griffiths put the claimant's case for a declaration that the resolution purportedly passed at the 2017 Noteholders' meeting on 24 November 2010 was invalid on three independent but related grounds:

(1) The Resolution constituted, in substance, the conferral of a power on the Bank to expropriate the 2017 Notes for no more than a nominal consideration. It was therefore ultra vires the power of the majority under paragraph 18 of Schedule 3 to the Trust Deed.

(2) At the time of the Noteholders' meeting on 23 November, all those noteholders whose votes were counted in support of the Resolution held their Notes beneficially, or for the account of, the Bank. Accordingly, all those votes are to be disregarded pursuant to paragraph 13 of Schedule 3 to the Trust Deed.

(3) Even if ultra vires, the Resolution constituted an abuse of the power of the voting majority because:

(i) It conferred no conceivable benefit or advantage upon the 2017 Noteholders as a class; and,

(ii) It affected, and could by then only have affected, the Notes of that minority which had not coupled an offer of their Notes for exchange with a commitment to vote in favour of the resolution. Accordingly it was both oppressive and unfair as against that minority.

40. I will address the Bank's response to those submissions, presented by Mr Robin Dicker QC and Mr Tom Smith in due course, when dealing with each submission in turn. It is however convenient first to summarise certain general principles which have been established by English law in relation to the construction and exercise of powers conferred upon a majority to bind a minority within a class. Those principles are of ancient origin and it is common ground that they are fully applicable to the class constituted by the 2017 Noteholders, in relation to the construction and exercise of the powers conferred on a voting majority by the Trust Deed.

41. The origin of these principles may be traced back to Justinian's *Institutes*, under the title "De Societate", and they were applied as long ago as 1853 to a power given to two-thirds of the members of a partnership to expel a partner by notice in *Blisset v Daniel* (1853) 10 Hare 493. At pp 523-524 Page Wood V.C. said this:

> "It must be plain, that you can neither exercise a power of this description by dissolving the partnership, nor do any other act for purposes contrary to the plain general meaning of the deed, which must be this – that this power is inserted, not for the benefit of any particular parties holding two-third of the shares, but for the benefit of the whole society and partnership…"

42. That principle was applied to the relationship of shareholders in a limited company, both in *Re Westbourne Galleries* [1973] AC 360, at page 381 by Lord Wilberforce, and in *O'Neill v Phillips* [1999] 1 WLR 1092 by Lord Hoffmann at pages 1098 to 1101, in relation to the statutory remedy for unfairly prejudicial conduct.

43. The same principle was applied to the power of a majority of debenture holders to modify the terms of the debenture issue so as to bind a minority in *British America Nickel Corporation Ltd v MJ*

O'Brien Ltd[1927] AC 369. The generality of the principle is emphasised in the judgment delivered by Viscount Haldane at page 371 as follows:

> "To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s.13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction on such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted."

44. The basis for the application of that principle in relation to powers conferred on majorities to bind minorities is traditionally described as arising from general principles of law and equity, and by way of implication. In*Allen v Gold Reefs of West Africa* [1900] 1 Ch 656, at 671, Lindley M.R. said this, in relation to a power conferred on the majority of shareholders to alter the articles of association:

> "Wide, however, as the language of s.50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed."

In the same case Vaughan Williams LJ said, at page 676:

> "I also take it to be clear that the alteration must be made in good faith; and I take it that an alteration in the articles which involved oppression of one shareholder would not be made in good faith."

45. In *Redwood Masterfund Ltd v TD Bank Europe Ltd* [2006] 1 BCLC 149, a small minority of lenders in a syndicated loan facility sought to invoke the general principle for the purpose of challenging the decision by a two-thirds majority of lenders to alter the terms of the facility, upon the basis that it discriminated against them as a minority. The lending syndicate consisted, from the outset, of three separate lending classes with potentially different interests. In rejecting the submission that proof of its discriminatory effect was not, on its own, sufficient to compel the setting aside of the decision of the majority, Rimer J said this, at paragraphs 91-92:

"91. The starting point is that the facility agreement is a commercial contract between a large multitude of lending bankers and their borrowers. It governs not just the lenders' relationship with the borrowers, but also the relationship between the lenders themselves. The contract has been carefully and professionally drawn and cl.25 devotes itself to setting out the contractual basis on which its terms may be varied as between the lenders and borrowers. Save for the various entrenched provisions, which require unanimous consent before they can be altered, the lenders have, by their contract, empowered a two-thirds majority in value to consent to changes in the facility agreement, being changes which are capable of affecting and binding all of them. Clause 25 also empowered the majority lenders to agree to waivers under the agreement. The modified waiver letter is the fruit of the exercise of those powers.

92. The claimants' case is that that power is subject to the general principle of law relating to the manner in which a majority can bind a minority, namely that the power must be exercised bona fide for the benefit of the lenders as a whole. If so, it can only be on the basis that a principle to that effect is an implied term of the facility agreement. On ordinary principles, terms will only be implied into contracts if, as a matter of necessity, they are required for business efficacy purposes (*The Moorcock* (1889) 14 PD 64 [1886-90] All ER Rep 530), or if it is a matter of obvious inference that they were intended to apply to the contract (*Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 All ER 113 at 124, [1939] 2 KB 206 at 227 per MacKinnon LJ), of if they are necessary to give effect to the reasonable expectations of the parties (*Equitable Life Assurance Society v Hyman* [2003] 3 All ER 961 at 971, [2002] 1 AC 408 at 459 per Lord Steyn). In the present case, if the suggested term is to be regarded as implied into the facility agreement, it would appear to me that it could only be on either the second or third basis."

46. Although I doubt whether this would have made any difference to the outcome, I respectfully consider that an additional basis for the implication of this principle into provisions conferring powers on majorities to bind minorities may be that it is a term generally implied by the law in contracts or arrangements of particular types, as reflected in the speech of Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, at 253 - 255. If that is as I conceive it to be the true basis for the implication of the principle, then it must still be regulated by any contrary intention demonstrated by the parties' agreement. In any event, the extent and content of the principle is inevitably dependent on the context in which it is alleged to operate: see for example per Lord Hoffmann in *O'Neill v Phillips* at [1999] 1 WLR 1092, at 1098F to 1099B.

47. The underlying risk of abuse of power by a majority at which this principle is aimed may be combated otherwise than by the direct invocation of the principle itself. It may for example lead the court to a purposively restrictive construction of apparently torrential words in the instrument creating the power. In *Mercantile Investment and General Trust Co v International Company of Mexico* [1893] 1 Ch 484 (note) an issue of mortgage debentures was subject to wide ranging powers in the majority of debenture holders to bind a dissentient minority to any release of the mortgaged premises, and to any compromise or modification of their rights. At page 489 Lindley LJ said this:

"The main question, however, is, whether the resolution is one by which it was competent for a majority of debenture holders to bind a dissentient minority. This must depend upon the true construction of the 22nd clause of the deed of the 10th of March 1888; and, in order to arrive at that construction, attention must be paid, not only to the language of the clause, but to the objects to attain which the clause itself was inserted.

Powers given to majorities to bind minorities are always liable to abuse; and, whilst full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not be taken advantage of to strengthen them and make them applicable to cases not included in those which they were apparently intended to meet. To take the language of the clause – "the power to release the mortgaged premises" does not include a power to release the Defendant company. The power to modify the rights of the debenture holders against the company does not include a power to relinquish all their rights. A power to compromise their rights presupposes some dispute about them or difficulties in enforcing them, and does not include a power to exchange their debentures for shares in another company, where there is no such dispute or difficulty. It is a mistake to suppose that a power to compromise a claim for money becomes a power to accept less than 20s. in the pound, if the debt is undisputed and the debtor can pay. A power to compromise does not include a power to make presents. "

48. Alternatively, even in provisions conferring wide powers, the parties may include bespoke restrictions designed to avoid its exercise otherwise than for the benefit of the relevant class. It is common ground in the present case that the disenfranchisement of Notes beneficially held by or for the account of the Issuer or any Subsidiary was designed with that objective in mind, because of the likelihood that any such Notes would be voted so as to serve the interests of the Bank rather than the Noteholders.

49. Finally, statute may also intervene. There is in England and Wales the statutory remedy for unfairly prejudicial conduct now to be found in Part 30 of the Companies Act 2006. In the USA, the US Trust Indenture Act of 1939 provides at s.316 (b) a general prohibition against the modification of payment terms without the unanimous consent of all the holders of securities issued and registered with the SEC under the US Securities Act of 1933. There are however no statutory safeguards against abuse of power by a majority of the 2017 Noteholders in the present context.

Ultra vires

50. Paragraph 18 of Schedule 3 to the Trust Deed conferred upon a three-fourths majority of Noteholders power to sanction any compromise or arrangement proposed to be made between the Issuer and the Noteholders, power to sanction any abrogation, modification, compromise or arrangement in respect of the rights of the Noteholders against the Issuer, and power to assent to any modification of the provisions contained in the Trust Deed, proposed by the Issuer or the Trustee. The Notice of Meeting proposing the resolution to confer upon the Bank a power of redemption for nominal consideration purported to avail itself compendiously of all those various powers.

51. It nonetheless became common ground between counsel that the vires of the majority to pass the resolution depended entirely on it falling within the power to "sanction any abrogation…in respect of the rights of the Noteholders…against the Issuer". Although the Resolution did not as a matter of form purport to abrogate any rights but rather to confer a new right upon the Issuer, it was sensibly conceded by Mr Dicker during argument that, in substance, it constituted an abrogation of all the rights of those Noteholders against the Bank whose notes had not by the time of the Noteholders' meeting become the subject of a contract of exchange for New Notes.

52. The Resolution did not of itself sanction the exchange of the 2017 Notes for the New Notes. That was a voluntary process in which Noteholders were free to proffer (or not to proffer) their Notes for exchange and the Bank was free to accept or reject the proffered exchange. It follows that the Resolution itself did not sanction or compromise an arrangement between the Issuer and Noteholders. Viewed as a matter of substance, the Resolution did more than modify or compromise the rights of Noteholders. It conferred an unqualified right of the Bank to do away with them altogether. Thus I consider that an attempt to justify the Resolution otherwise than by reference to the power to sanction an abrogation of the rights of the Noteholders would fall foul of the analysis of Lindley LJ in the *Mercantile Investment* case which I have quoted above.

53. Mr Snowden submitted that the power to abrogate should be construed *ejusdem generis* with the other powers in paragraph 18 of Schedule 3 so as to fall short of authorising what was, in substance, a complete abandonment by the majority, binding on the minority, of all the Noteholders' rights against the Bank. No such complete abandonment could, he submitted, be for the benefit of the Noteholders as a class, so that a purposive construction of the powers of the majority in paragraph 18 necessarily fell short of a power simply to confer, in substance, an outright gift of the Noteholders' rights back to the Bank. He relied in passing upon *Re NFU Development Trust* [1972] 1WLR 1548, in which Brightman J construed the phrase "compromise or arrangement" in (section 206(2) of the Companies Act 1948) as excluding confiscation or expropriation of rights without any compensating advantage, and in which he doubted whether, in the case of a commercial company, an arrangement involving uncompensated forfeiture of the rights of fully paid-up shareholders would ever be reasonable: see page 1555 A.

54. This was a powerful submission, and might have prevailed, but for the provisions of paragraph 5(b) of Schedule 3 to the Trust Deed, which imposes a special quorum for a particular type of Extraordinary Resolution consisting of the:

> "Reduction or cancellation of the principal payable on the Notes…or the minimum rate of interest payable thereon."

The whole of paragraph 5 of Schedule 3 assumes that the special quorum regime applies to particular types of Extraordinary Resolution for which the authority must lie in paragraph 18. Paragraph 5 confers no wider powers, but simply imposes an additional quorum. It follows in my judgment that, taking the provisions of the Trust Deed as a whole, the Noteholders must be taken to have assented to the exercise of a power in the majority to bind the minority both to a cancellation of the principal payable on the Notes and to a cancellation of the minimum interest payable thereon. That would, again, be tantamount to forfeiture, confiscation or expropriation of the rights conferred by the Notes, which conferred nothing of benefit on the Noteholders other than re-payment of principal and payment of interest.

55. It follows that I am persuaded, albeit by a narrow margin, that the express provisions of paragraph 5(b) of Schedule 3 prevent a purposively narrow interpretation of the power to sanction an abrogation pursuant to paragraph 18(b) of Schedule 3, so that the power to abrogate is capable (in circumstances not otherwise amounting to an abuse) of extending to all the rights of Noteholders as against the Bank.

Disenfranchisement under paragraph 13 of Schedule 3

56. It was, as I have said, common ground that the purpose of the disentitlement to vote in respect of Notes beneficially held by the Bank or for its account was to prevent a vote designed to serve the interests of the Noteholders from being undermined by the exercise of votes cast in the interests of the Bank. Specifically, the prohibition was designed to prevent a Noteholder from succumbing to a conflict between the interests of the Noteholders and the interests of the Bank. It was also common ground that, although the language of the prohibition speaks in terms of the Issuer or its Subsidiary being disentitled to vote, it applies equally to any other person who or which holds his or its Notes for the benefit or for the account of the Bank.

57. Mr Snowden submitted that the question was whether, at the time of the Note-holders' meeting, that description was applicable to Noteholders who, by having offered their Notes for exchange with the requisite irrevocable commitment to vote for the resolution by proxy and had their offer accepted on the day prior to the meeting, then voted for the Resolution. Mr Snowden submitted that the description in paragraph 13 fitted those Noteholders for two reasons:

(i) because by then the votes of those Noteholders were held at the direction and to the order of the Bank; and,

(ii) because in any event the existence of the contract for the sale of those Notes to the Bank in return for New Notes meant that the Bank had by then become the beneficial owner of those Notes, so that they were beneficially held for the Bank, or for its account.

58. For the Bank Mr Dicker submitted that this analysis reached the wrong answer, in part because it asked the wrong question. He said that the applicability or otherwise of the prohibition in paragraph 13 should be tested not as at the date of the meeting, but rather as at the date when Noteholders decided whether or not to offer their Notes for exchange, and thereby irrevocably to commit themselves to vote for the Resolution. A purposive view of the prohibition required it to be applied at each Noteholder's moment of decision, rather than at the later date by which time the casting of his vote at the meeting had become a foregone conclusion.

59. Alternatively, Mr Dicker submitted that there was no basis for the first of Mr Snowden's points, namely to treat the prohibition as applicable wherever votes rather than the Notes themselves were held to the order of the Bank. Finally he submitted, in response to Mr Snowden's second point, that the contract for exchange between Noteholders and the Bank was not specifically

enforceable, so that no beneficial interest in the Notes subject to those exchange contracts passed until the Settlement Date, one day after the Noteholders' meeting.

60. Much the most persuasive part of Mr Dicker's analysis was his submission about the time in question, namely the date at which the applicability of the paragraph 13 prohibition should be tested. He said that this was a case where, at the time when each Noteholder decided to support the resolution (by offering his notes for exchange), he was the full beneficial owner of his Notes, capable without any conflict of deciding in his best interests as a typical Noteholder whether to vote for or against the Resolution. It would therefore be wrong to interpret the prohibition in paragraph 13 in a manner which was not calculated to implement its conflict avoidance purpose.

61. Mr Dicker gained considerable support from the analysis of a similar point by Chancellor Allen in the *Oak Industries* case (*supra*) at page 881. The terms of the bonds in that case prohibited the Issuer (Oak) from voting debt securities held in its treasury, and it was submitted that by linking its exchange offer with the giving by the bondholders of consent to the amendment to the terms of the bonds, Oak had been permitted to "dictate" the vote on securities which it could not itself vote. He continued:

> "The evident purpose of the restriction on the voting of treasury securities is to afford protection against the issuer voting as a bondholder in favour of modifications that would benefit it as an issuer, even though such changes would be detrimental to bondholders. But the linking of the exchange offer and the consent solicitation does not involve the risk that bondholder interests will be affected by a vote involving anyone with a financial interest in the subject of the vote other than a bondholder's interest. That the consent is to be given concurrently with the transfer of the bond to the issuer does not in any sense create the kind of conflict of interest that the indenture's prohibition on voting treasury securities contemplates. Not only will the proposed consents be granted or withheld only by those with a financial interest to maximize the return on their investment in Oak's bond, but the incentive to consent is equally available to all members of each class of bondholders. Thus the "vote" implied by the consent solicitation is not affected in any sense by those with a financial conflict of interest."

62. It is evident that the prohibition in the *Oak Industries* case was more narrowly framed than the prohibition in paragraph 13 of Schedule 3. It did not extend to securities which, although not in Oak's treasury, were nonetheless held for its benefit or to its order. In my judgment the paragraph 13 prohibition must be construed and applied on its own terms. The prohibition is expressly directed to the question whether Notes may be voted "at any meeting", rather than to any earlier date upon which a Noteholder may commit itself irrevocably to voting one way or the other. Such assistance as is therefore available from the language of the prohibition tends to support Mr Snowden's submission that the applicability or otherwise of the prohibition should be tested as at the date (or the time) of the relevant meeting, rather than as at the possibly large number of earlier different dates upon which particular Noteholders may have made up their minds how to vote. Such a flexible timing test, however precisely attuned to fulfilling the underlying purpose of conflict avoidance would in any event be extremely difficult for those responsible for the conduct of a Noteholders' meeting to adjudicate upon, all the more so in a case (such as the present) where

votes are cast by previously arranged proxy rather than in person and no Noteholder attends the meeting or otherwise assists those charged with its conduct by explaining when its decision was made. It is a particular consequence of the structure of the exchange offer and exit consent technique applied in this case that it can be said with confidence that Noteholders' minds must have been made up at least by the deadline for proffering their Notes for exchange. But the prohibition in paragraph 13 is plainly designed to be applied in a wide range of differing circumstances, in many if not most of which no such assumptions could sensibly be made.

63. It remains to consider the competition between Mr Snowden's and Mr Dicker's submissions on the assumption (which I have concluded is correct), that the applicability of the prohibition is to be tested as at the date (or time) of the meeting. I am not persuaded to follow Mr Snowden's purposive line in interpreting the restriction as if it concerned the question whether votes (rather than Notes) were held beneficially for the Bank or for its order, so as to apply in any case where the Bank had obtained a mere contractual commitment from a Noteholder to vote his Notes in a particular way, even if wholly unconnected with any arrangement for the purchase of his Notes, whether by exchange or for cash. Again, I consider that the prohibition must be construed as it stands, so as to relate to the beneficial holding of Notes, either in a proprietary sense or, perhaps, in an economic sense where, without conferring a proprietary interest, the Noteholder is obliged to confer upon or transfer to the Bank the whole of the economic risks and rewards arising from the Notes as at the date of the meeting.

64. I have nonetheless concluded that Mr Snowden's second submission, namely that in any event Notes by then offered and accepted for exchange were held for the benefit of the Bank by the time of the meeting, is correct. All those Notes were by that time held under contracts for sale between the relevant majority Noteholders and the Bank. Provided only that they were contracts liable to be specifically enforced, then on well settled principles they thereby conferred a beneficial interest in the Notes on the Bank from the moment of the Bank's acceptance of the offered exchange on the day before the meeting.

65. Notwithstanding Mr Dicker's submissions to the contrary, I consider it clear that the contracts for sale by exchange of the 2017 Notes which came into existence on the day before the Noteholders' meeting were specifically enforceable. Contracts for the sale of shares or securities are specifically enforceable unless damages for breach by the seller would be an adequate remedy. Damages are an adequate remedy if, but only if, there exists a ready market for the securities in question such that the buyer can use his damages to obtain the substance of what he bargained for, namely equivalent securities: see generally Jones & Goodhart on Specific Performance (2nd Edition) at pages 161-2.

66. The result is that the contract for the sale and purchase of publicly quoted shares will usually not be specifically enforceable, because of the availability of equivalent shares on a liquid market. In the present case by contrast, the purpose and intent of the contracts for the exchange of the 2017 Notes was to terminate the market for the Notes, and indeed to bring about a complete cancellation or redemption of the entire issue for the purposes of the Bank's restructuring, so as to meet the condition imposed by the Irish government (and the Commission) for the provision of rescue funding at the expense of the Irish taxpayer. It is in my view clear that damages for breach

of a contract for exchange of 2017 Notes constituted by a refusal by the Noteholder to deliver Notes for exchange on the Settlement Date would not be an adequate remedy to the Bank.

67. Mr Dicker submitted that specific performance would be unavailable for an additional reason, based upon absence of mutuality. He said that, because the Bank would have not have issued the New Notes any earlier than upon the Settlement Date, a Noteholder could not have obtained specific performance of his contract with the Bank, in the event of a refusal by the Bank to complete the contract. I disagree. As is noted in Jones & Goodhart at page 161, a contract to purchase new shares to be issued by a company may also be specifically enforced. I can see no reason why the court would deny to a Noteholder an order that, for the purpose of completing the exchange contracts made in relation to the 2017 Notes, the Bank issue the requisite New Notes for that purpose, provided only that it was within its corporate vires to do so. There is of course no suggestion that it was not.

68. The final question under this part of the case is whether the beneficial interest which ordinarily arises in favour of the contracting purchaser of shares (where the contract is specifically enforceable) is an interest of the type contemplated by the prohibition in paragraph 13 of Schedule 3. It is not an outright beneficial interest which reduces the title of the seller to that of a mere nominee. Generally, it does not even require the seller to vote the shares, pending completion, at the direction of the buyer: see *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964, and *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, at 119. This is not however an ordinary contract for sale and purchase in which the constraints upon the seller's voting rights are governed by implication, or by the general law. The contracts for exchange of the 2017 Notes expressly committed the sellers to vote the Notes, at a meeting one day before the Settlement Date, in a manner calculated to serve the Bank's interests, and permitted no discretion to the seller, whether upon the basis of a continuing unpaid vendor's lien or otherwise. When it is borne in mind that the purpose of the prohibition in paragraph 13 is aimed precisely at the avoidance of the voting of Notes in the Bank's interests rather than in the interests of the Noteholders as a class, I consider that the particular beneficial interest conferred by the exchange contracts falls squarely within the contemplation of the prohibition.

Abuse of Power

69. My conclusions thus far are sufficient to determine this case in favour of the claimant. Nonetheless, since its success thus far depends upon my decision on a point of construction in relation to which I have acknowledged there are arguments to the contrary of real substance, I shall nonetheless address this third limb of the claimant's case, upon the hypothesis that the paragraph 13 prohibition does not apply, not least because the issue as to abuse of power has been fully argued and raises the question of wide importance within the bond market. In that context Mr Snowden eventually acknowledged that if his submissions were correct (at least in their original form), they could prima facie apply to any form of exit consent which imposed less favourable consequences upon those who declined to participate in the associated exchange offer, even if not amounting in substance, as they do in the present case, to a complete expropriation of the relevant securities from the dissentient minority.

70. I have already outlined the claimant's case under this heading. In slightly more detail, it is that, viewed as at the date of the Noteholders' meeting, the only effect of the Resolution was to impose upon a by then defined minority of Noteholders (namely those who had not offered or had accepted their Notes for exchange by the Bank) the expropriation of their Notes in circumstances where the majority had by then the benefit of contracts for their exchange for New Notes of substantial value. The Resolution could not therefore be described as being of any conceivable benefit to Noteholders, and was both oppressive and unfairly prejudicial to that minority. I have already referred to the settled authority upon the basis of which it is therefore claimed that the passing of the Resolution was an abuse of power, not by the Bank, but by those Noteholders who, albeit entirely unaffected by it, voted for it.

71. For the Bank Mr Dicker QC submitted that this was an entirely misconceived approach to the matter. He submitted that the true analysis of the Bank's proposal was as follows. First, that it proposed a Resolution applicable equally to all Noteholders, but coupled (in the form of the associated exchange proposal) with a proffered inducement made openly rather than covertly, offered to all Noteholders who wished to accept it, with full and fair disclosure of the consequences of not doing so. He said that it left each recipient Noteholder free to decide in his (or its) best interests whether to accept the proposal by offering his Notes for exchange, and that the proposal, taken as a whole, could not possibly be said to be incapable of being for the Noteholders' benefit. Taking into account the exchange offer, it proffered real value for the 2017 Notes in the form of the proposed New Notes, as part of a voluntary process which, if it were not to succeed, would be likely to be followed by legislation from the Irish government forcing subordinated bondholders to bear their share of the burden arising from the Bank's predicament. He pointed to the undoubted fact that in excess of 90 per cent of the 2017 Noteholders in fact accepted the proposal by proffering their Notes for exchange.

72. I must turn to the authorities upon which that submission was based. Mr Dicker clearly made good his submission that, where the alleged abuse of a power to bind a minority lies in the offer of an inducement to support the scheme (usually to some rather than all of the class) then the objection will usually fail if the inducement is properly disclosed to all members of the class: see in particular Palmer's Company Law Volume 1 paragraph 12.068, *British America Nickel Corporation Limited v M.J. O'Brien Limited* (supra), *Goodfellow v Nelson Line (Liverpool) Ltd* [1912] 2 Ch 234, and very recently *Sergio Barreiros Azevedo v Imcopa Importacao, Exportaacao e Industria de Oleos Limitada* [2012] EWHC 1849 (Comm). But those were all cases in which it was not irrational to conclude that the proposal, ignoring the benefit of the inducement, was nonetheless itself capable of being regarded as beneficial to the class. In particular, in *Goodfellow* (which was approved in *British America Nickel)*, the proposal was to vary the rights of the holders of debentures issued by a highly solvent company, by removing the obligations of two guarantors of the company's liabilities, but at the same time increasing the interest rate payable by one half of one per cent. One of the guarantors was a debenture holder, and its support for the scheme was obtained by the offer of a fully disclosed inducement. Nonetheless, numerous other non-induced members of the class voted for the scheme, so that the offer of the inducement was, on the facts, the only basis upon which a challenge could have been mounted. Had the facts been different, as Parker J observed in the last paragraph of his judgment, a quite different challenge based upon the unfair treatment of the minority might have succeeded. In fact, the relevant minority on that hypothesis had all voted for

the scheme. I shall return to the *Azevedo* case, a decision of Hamblen J on 30th May 2012 of which there was no approved transcript until after the hearing of this case, but about which further oral submissions were made on 17th July after an approved transcript had become available.

73. Those authorities do not in my judgment constitute a statement of the whole of the abuse principle, so that wherever there is a disclosed inducement a challenge must fail. A more general and enduring expression of the generality of the principle may be found in the following passage by Sir Raymond Evershed MR in *Greenhalgh v Arderne Cinemas* [1950] 2 All ER 1120, at 1126. After referring to earlier authorities, he continued:

> "Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that "*bona fide* for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, "the company as a whole," does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think the thing can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived. When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down. It is, therefore, not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal is for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, *prima facie*, if the corporators think it is a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution because they are considering the position of themselves as individual persons."

74. In truth, the difference between counsel on this part of the case lay not so much in any disagreement as to the effect of the well-known authorities. It was a fundamental difference of analytical approach to the facts. Mr Snowden focused upon the effect of the Resolution itself, viewed (mainly but not exclusively) on the date when it was passed. Mr Dicker focused upon the entirety of the Bank's proposal, and primarily upon the exchange offer to which the exit consent (in the form of the commitment to vote for the Resolution) was attached.

75. Mr Snowden's opening position was that the only relevant question was whether the Resolution, viewed within its four corners, was capable of being beneficial to the class, and that the associated exchange offer was simply irrelevant. Nonetheless he readily acknowledged during argument (in response to questions from the court) that it would be hard to criticise a resolution designed, if passed, to destroy the value of an issue of securities, if coupled with an offer to exchange them for a potentially beneficial substitute made to all the class, and available for acceptance even after the

passing of the resolution, so that any dissentient minority could then avail itself of that which had been offered to, and had persuaded, the majority. The fact that the quid pro quo for the proposed forfeiture of the existing securities was offered outside the four corners of the resolution could not be relevant to its bona fides, nor could there be any inherent oppression or discrimination against the minority.

76. Mr Snowden's closing position was focused upon the essential distinction between that type of proposal (which he labelled a "drag-along" scheme) and the present case. The precise effect of permitting (or even forcing) the dissentient minority into the same exchange as that accepted by the majority would be to deprive the exit consent of its coercive effect. The Noteholders would be free to assess the commercial merits of the exchange in the knowledge that, if a sufficient majority of their class considered it beneficial, they would receive the same treatment despite their different view. He submitted that it can never be legitimate for a member of the class to conclude that his assistance in that exercise of coercion by the threatened expropriation of a dissenting minority is in the interests of the class as a whole. It is in that context critical to bear in mind that the coercive power of the exit consent is one which can only be wielded by the majority of the very class which the issuer wishes to coerce, and not by the issuer itself, which lacks any power to bring about an expropriatory amendment of the terms of the security.

77. For his part, Mr Dicker placed emphasis on what he suggested was the obviously beneficial nature of the proffered exchange, suggesting that the court could conclude that the in excess of 90 percent majority of Noteholders accepting it did so on its own commercial merits unaffected (or un-coerced) by the exit consent. While I readily accept that the proffered exchange may have been beneficial, in the sense that it offered real value (albeit much less than face value) for distressed securities which faced a threat of being downgraded by legislative action, this is a case where, in sharp contrast for example with the *Goodfellow* case, there was not a single Noteholder who can be said to have accepted it unaffected by the coercive effect of the exit consent (treating it as a form of negative inducement).

78. In his supplementary submissions Mr Dicker pointed out, correctly, that the same could be said of the *Azevedo* case, in which the inducement was offered and paid to all those who voted for the resolution, but that this made no difference to the outcome. More generally he submitted that there was no principled basis for distinguishing the present case from the *Azevedo* case. Having regard to the extended submissions made about the relevance and effect of the *Azevedo* case, it is right that I should address it in some detail.

79. In *Azevedo* the defendant issuer of notes with provisions for alteration by majority substantially similar to those here in issue proposed three successive resolutions postponing the payment of semi-annual interest payments, and in each case offering fully disclosed monetary inducements (described as consent payments) to all those voting in favour. The purpose of the postponements sought was to facilitate a restructuring of the issuer for the benefit of all its stakeholders. The claimant noteholder voted for the first two postponements and received the proffered inducements, but not for the third, which was nonetheless passed by the requisite majority, following which the underlying restructuring was approved by the Brazilian court.

80. The claimant challenged all of the resolutions as invalid on the grounds that:

i) The consent payments amounted to a repudiatory breach of the terms of the notes;

ii) Payments to some only of the noteholders, outside the terms of the resolutions proposed, were unlawful; and,

iii) The payments were in the nature of a bribe, and a fraud on those noteholders who were not paid.

It was not suggested that the proposed resolutions themselves were in any way unfair or oppressive; see para 68. It is the third of the claimant's grounds for challenge that is relevant for present purposes.

81. Hamblen J rejected the claimant's case, concluding in particular that the open manner in which the inducements had been offered prohibited any characterisation of them as bribery or fraud, following *Goodfellow* and*British American Nickel*. He also took comfort from the approval of 'consent payments' of a similar type by the Delaware courts and from academic comment that such payments had been a common feature of debt refinancing in the USA for some time.

82. I accept that there is, at least at first sight, some similarity between the 'consent payments' in the *Azevedo* case and the 'exit consent' technique adopted in the present case. It is just possible to characterise the offer of the New Notes as a financial inducement to vote in favour of the Resolution. Nonetheless I consider that characterisation to be flawed. The reality is the other way round. The Resolution is used as a negative inducement to deter Noteholders from refusing the proffered exchange.

83. More generally the differences between the two cases substantially outweigh their similarities. First and foremost, the resolutions to postpone the interest payments in the *Azevedo* case were the substance of that which the issuer (and in the event the majority of noteholders) wished to achieve, whereas in the present case the substance of the Bank's plan was to substitute New Notes for the Existing Notes by way of a contractual exchange. The Resolution in the present case was no more than a negative inducement to deter Noteholders from refusing the proffered exchange. Secondly it was the issuer in *Azevedo* which proffered the inducement, whereas here it is the majority of the Noteholders which (albeit at the issuer's request) wields the negative inducement constituted by the Resolution. Thirdly the postponements sought by the resolutions in *Azevedo* were plainly capable of being beneficial to noteholders, since they were designed to facilitate a reconstruction of the issuer, beneficial to all its stakeholders. Here the Resolution was designed in substance to destroy rather than to enhance the value of the Notes and was, on its own, of no conceivable benefit to Noteholders. Fourthly, no case of oppression or unfairness was advanced in *Azevedo*, only a case of bribery. Here by contrast the case is centred on alleged oppression, and bribery is not alleged at all.

84. After some hesitation, I have concluded that Mr Snowden arrived eventually at the correct question, which is whether it can be lawful for the majority to lend its aid to the coercion of a

minority by voting for a resolution which expropriates the minority's rights under their bonds for a nominal consideration. In my judgment the correct answer to it is in the negative. My reasons derive essentially from my understanding of the purpose of the exit consent technique, as described at the beginning of this judgment. It is not that the issuer positively wishes to obtain securities by expropriation, rather than by the contractual exchange for value which it invites the bondholders to agree. On the contrary, the higher percentage of those accepting, generally the happier the issuer will be. Furthermore, the operation of the exit consent (here the Bank's new right to redeem for a nominal consideration) is not the method by which the issuer seeks to achieve the reconstruction constituted by the replacement of existing securities with new. The exit consent is, quite simply, a coercive threat which the issuer invites the majority to levy against the minority, nothing more or less. Its only function is the intimidation of a potential minority, based upon the fear of any individual member of the class that, by rejecting the exchange and voting against the resolution, he (or it) will be left out in the cold.

85. This form of coercion is in my judgment entirely at variance with the purposes for which majorities in a class are given power to bind minorities, and it is no answer for them to say that it is the issuer which has required or invited them to do so. True it is that, at the moment when any individual member of the class is required (by the imposition of the pre-meeting deadline) to make up his mind, there is at that point in time no defined minority against which the exit consent is aimed. But it is inevitable that there will be a defined (if any) minority by the time when the exit consent is implemented by being voted upon, and its only purpose is to prey upon the apprehension of each member of the class (aggravated by his relative inability to find out the views of his fellow class members in advance) that he will, if he decides to vote against, be part of that expropriated minority if the scheme goes ahead.

86. Putting it as succinctly as I can, oppression of a minority is of the essence of exit consents of this kind, and it is precisely that at which the principles restraining the abusive exercise of powers to bind minorities are aimed.

<u>Conclusions</u>

87. The claimant therefore fails on the first limb of its case, but succeeds on the second and third. The claimant is therefore entitled to the substance of the declaration sought in paragraph 2 of the Claim Form. I will hear submissions, in the absence of agreement, as to the precise form which those declarations should take.