In The Supreme Court of Bermuda

COMPANIES (WINDING UP) JURISDICTION

COMMERICAL COURT

2024: No. 265

IN THE MATTER OF AFINITI LTD

(PROVISIONAL LIQUIDATORS APPOINTED FOR RESTRUCTURING PURPOSES)

AND

IN THE MATTER OF THE COMPANIES ACT 1981

RULING
(In Chambers)

Dates of Hearing: **6 and 7 November 2024**

Date of Ruling: **20 November 2024**

Appearances: *Adam Al-Attar KC* and *Stephen White* of Walkers (Bermuda) Limited for the Joint Provisional Liquidators
Tom Smith KC and *Conor Doyle* of Conyers Dill & Pearman Limited for the Company
Blair Leahy KC and *Lalita Vaswani* of Appleby (Bermuda) Limited for the Secured Lenders
Felicity Toube KC and *Sam Stevens* of Carey Olsen Bermuda for Mr. Chishti

RULING of Martin J

Introduction and summary of disposition

1. This is the Court's decision in respect on an application made by the Joint Provisional Liquidators (the "JPLs") for sanctions under sections 175 (1) (e) and 175 (2) (a) of the Bermuda Companies Act 1981 to enter into a restructuring transaction between Afiniti Ltd (Provisional Liquidators Appointed for Restructuring Purposes) (referred to as "the Company") and the Secured Lenders (defined below) that will have the effect of transferring the whole of the Company's undertaking (including its assets, a substantial proportion of its debts which are the subject of existing security and a number of specified unsecured liabilities and its intellectual property rights) to a new company, which will be followed by a number of consequential steps to reorganise the existing shareholding and debt structure.

2. The details of these steps will be set out in more detail below, but the overall effect of the transfer will be to reconstitute the business of the Company under a new ownership and debt structure. For ease of reference the combined effect of these steps is referred to as the "Transaction" even though it is a series of transactions which lead to the end result. However, the Court is only being asked to give its sanction to the first two stages of the Transaction, namely (i) the transfer of the Company's assets to a new wholly-owned subsidiary called Afiniti AI Holdings LLC (referred to as "Holdco") and (ii) a transfer of all the Company's shares in Holdco and all the Company's shares in its United States subsidiary Afiniti Inc. to a new owner called Afiniti Newco Holdings LLC (referred to as "Newco").

3. At the same time, the Credit Agreement dated 13 June 2019 between the Company and the lenders for the time being ("the Secured Lenders") will be amended to adjust the terms of the debt structure and the maturity dates, and this will be combined with a rights offering to certain eligible investors in Newco.

4. The JPLs seek the Court's sanction to enter into the Transaction both as a compromise under section 175 (1) (e) and as a sale under section 175 (2) (a) of the Companies Act 1981 (referred to as the "Sanctions" or the "Sanction Applications" as the context requires). The Court will also have regard to the subsequent steps that are intended to be taken in the transaction in deciding whether to exercise its power to grant its sanction, but the Court does not have any part to play in authorising those subsequent steps to be taken.

5. The Sanction Applications are supported by the Company and the Secured Lenders who have negotiated the terms of the Transaction, but they are opposed by Mr. Chishti. Mr. Chishti is an 8% direct shareholder[1] in the Company and holds shares in an intermediate holding company called The Resource Group International Ltd (referred to as "TRG-I"

[1] Mr. Chishti was the founder and a former director and officer of the Company.

in these proceedings) and he claims to be a contingent creditor[2] in respect of claims he has brought or intends to bring under the terms of an Indemnity Agreement dated 1 January 2020 (the "Indemnity Agreement") between himself and the Company.

6. Mr. Chishti seeks an adjournment of the Sanction Applications. The first ground on which he seeks an adjournment is that he wishes to challenge the commercial basis upon which the Transaction has been agreed.

7. To do this he says he needs the opportunity to consider the evidence that has been filed and obtain full disclosure of all the materials that were used to produce the valuation report relied upon by the JPLs. He has instructed an independent valuer who has identified what his counsel referred to as "flaws" which go to the fundamental assessment of the Company's value. Mr. Chishti says that if his expert is right, then the Company has been substantially undervalued, and that his interests as a shareholder and/or (more probably) as a contingent creditor are substantially prejudiced. Mr. Chishti therefore wishes to have a full-blown trial of the valuation issue on the basis that the sanction of the Transaction as a compromise under section 175 (1) (e) requires the Court to make its own valuation of the Company before granting a sanction to the JPLs (referred to as a "Type 1 sanction" and is defined below).

8. The second ground on which Mr. Chishti seeks an adjournment is that if the Court does not sanction the Transaction as a compromise but does so as a sale under section 175 (2) (a) the Court must still exercise its powers in a more limited way as to be satisfied that it is a transaction that is in the interests of the creditors as a whole and that in entering into the Transaction is not an unreasonable or "crazy" thing for the JPLs to do (referred to as a "Type 2 sanction" and is defined below). Mr Chishti says he still needs further information (albeit more limited in scope) in order to mount his opposition to the Transaction.

9. Mr. Chishti also seeks leave to commence proceedings for declaratory relief in respect of the Company's obligations under the Indemnity Agreement and so needs the Court to lift the automatic stay of proceedings against the Company, and wishes to pursue his claims for both reimbursement of his litigation expenses in relation to these proceedings as well as in relation to other litigation pending between himself and the Company and other members of the group as well as other parties. Mr. Chishti says he needs to obtain the advancement of those expenses in order to (i) be on a level footing with the Company in this application and (ii) to be able to meet the expenses he is incurring in those other proceedings. It is also part of his case in opposing the Transaction that its effect will be to "denude" him of his rights under the Indemnity Agreement which both affords him a complete defence in relation to other litigation pending between him and the Company and/or other members of the group, as well as his rights of reimbursement

[2] Mr. Chishti's status as a contingent creditor may be the subject of more detailed consideration at a future date in a different context, but for the purposes of these proceedings it is accepted that he has standing to oppose the application.

and advancement. Mr Chishti also seeks specific performance of the term of the Indemnity Agreement that he says requires the Company to "see to it" that another solvent company assumes its liabilities under the Indemnity Agreement. These points are mentioned because (a) some of them relate to Mr. Chishti's grounds of opposition to the Transaction on the grounds of unfairness and a lack of even-handedness on the part of the JPLs and (b) they relate to pending applications that were adjourned so that further directions could be made in relation to those applications following the determination of the Sanction Applications.

10. For the reasons more fully explained below, the Court has decided to grant the Sanction Applications under both heads of a compromise under section 175 (1) (e) and a sale under section 175 (2) (a) applying the Type 1 and Type 2 tests in each case. The Court has accordingly also decided to refuse Mr. Chishti's applications for an adjournment (either short or long) in order to challenge the valuation report that is relied upon by the JPLs.

11. The principal conclusions of the Court on the Sanction Applications are as follows:

    (1) The Court is not required to conduct its own valuation of the Company in order to decide whether or not to grant the sanction under section 175 (1) (e) to permit the JPLs to enter into a compromise or under section 175 (2) (a) to sanction a sale of the assets of the Company.

    (2) The Valuation Report of Teneo FA dated 3 September 2024 (the "Valuation Report") was not intended to provide a valuation that would assess the value of the Company as if it were going to be sold in a private market sale as a going concern in conditions of solvency. It was commissioned as part of the assessment of the terms upon which the Company and the Secured Lenders had negotiated the Transaction as a yardstick by which to measure the reasonableness of the terms agreed against the reality of the Company's profound condition of balance sheet insolvency and impending cash flow insolvency, and to consider and compare alternative outcomes.

    (3) The criticisms made against the approach taken by Teneo FA in its performance of the task do not show that the Valuation Report is fundamentally flawed nor do they undermine the reasonableness of the JPLs' reliance upon the Valuation Report in seeking the Court's sanction to enter into the Transaction on the terms agreed.

    (4) The terms of the Transaction are not unfair or otherwise objectionable in their effect upon Mr. Chishti (or the other unsecured creditors) and the Court does not find that there is any reason for the Court to withhold its sanction to the JPLs to enter into the Transaction on the grounds advanced by Mr. Chishti.

(5) The Court is satisfied that the JPLs have met the appropriate Type 1 test in seeking the sanction to enter into the Transaction as a compromise. The JPLs have also met the lower hurdle for the Type 2 test for the sanction of the Transaction as a sale. The Court has accordingly granted a sanction to the JPLs to enter into the Transaction under both section 175 (1) (e) and section 175 (2) (a), applying the relevant tests separately to each application.

(6) The Court has rejected the submission that the JPLs have acted in breach of their duties or otherwise in a manner which is unfair to Mr. Chishti or in less than an even-handed way, or that the JPLs should not be permitted to enter into the Transaction on the basis that to do so would offend ordinary notions of commercial morality or fairness.

(7) The Court will grant the JPLs the appropriate comfort in the Order that in deciding to enter into the Transaction, they have acted properly and in accordance with their duties to the Company and its creditors as a whole.

12. The Court has set out the consequential directions for the hearing of Mr. Chishti's application for leave to commence proceedings against the Company at paragraphs 192-195 below.

Background[3]

13. The Company is a Bermuda exempted company and serves as the ultimate holding company of a group of 32 companies which do business under the generic name 'Afiniti' which are collectively in the business of applied predictive artificial intelligence. The Afiniti group's product is a patented technology for use in customer service contact centres that pairs customers with contact centre agents based on machine learning algorithms seeking and predicting 'optimal' outcomes. This technology is used worldwide in healthcare, telecommunications, travel, hospitality, insurance and banking services.

14. The Afiniti group took on significant debt in 2020 to finance its growth strategy, at a time when market conditions enabled the Company to secure debt in 2020 and 2021 despite negative cash flow. The principal secured debt amounted to [redacted] by May 2021. The Company acts as guarantor of the indebtedness of the group and has little income generating activity of its own.

15. In November 2021 Mr. Chishti, who was the founder of the group, and had served as Chairman of the Company, resigned his position due to allegations of sexual

[3] The summary of background facts in paragraphs 13 to 35 is a digest of the material facts that are engaged in the application, taken principally from the first affidavit of Charles Thresh, the first affidavit of Mohammed Khaishgi, and the second affidavit of Michael Myshrall and the first affidavit of Brendan Renehan.

misconduct that had been made against him. This had a negative impact on the Company's reputation and customer relationships.

16. Market conditions changed in 2022, and interest rates increased, and debt markets were less ready to offer as attractive terms, and this put financial pressure on the Afiniti group's ability to service the debt, which by this time the principal borrowed had increased to [redacted] in secured debt.

17. At the end of 2022, the Afiniti group's customer base shifted to using generative artificial intelligence models which impacted the group's business model because its clients prioritized generative AI in preference to customer care centres. The Afiniti group's 'pay for performance' business model depended on a small number of high-value clients, and this led to high revenue volatility.

18. At the same time, the Company became involved in litigation with Mr. Chishti over an alleged misappropriation of the Company's trade secrets and competition with what the Company claims is an "unlawful competing enterprise" and is the subject of unresolved litigation. Mr Chishti also made claims for reimbursement and advancement of his expenses under the Indemnity Agreement in respect of this trade secrets claim and several other pieces of unrelated litigation.

19. In January 2023 the Company's board formed a transaction committee to assist the board in seeking solutions to the Company's weakening financial condition including During the course of 2023, the Company's management team decided that steps needed to be taken to address the group's weak financial position and in November 2023 engaged the investment bank Moelis & Co LLC ("Moelis") to investigate strategic transactions for the company.

20. Moelis conducted an extensive fund-raising process that explored a broad range of financing solutions. The process involved approaching 87 capital providers, of which 61 signed non-disclosure agreements and received access to the Company's due diligence materials. These lenders represented a cross section of market participants, ranging from direct lenders to very large asset management firms. Out of the 61 who viewed the materials, only one made a proposal to advance capital, and did so on a "super-senior" basis (i.e. requiring the existing secured creditors to subordinate their security to a priority in favour of the new lender). This was (unsurprisingly) not agreeable to the Secured Lenders.

21. In addition, the Company had sought equity investment to repay the earliest maturing tranche of the secured debt, but the declining revenue stream made this unattractive to investors.

22. In March 2024 the Company sought to engage in discussions with the Secured Lenders to renegotiate the terms of the debt particularly in light of the fact that the first two

tranches of secured debt (totalling [redacted]) was due to mature in June 2024. It had become clear to the Company's board that in order for the Company to be able to continue in business a complete recapitalization of the Company's debt and equity was necessary. In the absence of a forbearance, the Company would default on its principal debt obligation under the first two tranches, which would have accelerated the repayment obligations across the whole debt. This liquidity and leverage crisis led to the negotiation of the Transaction between the Company and the Secured Lenders, the details of which are explained below.

23. The Company's position continued to deteriorate throughout 2024. In May the Company lost its second largest customer and other customers who between them accounted for [redacted] of the group's total revenues. The Company's revenue forecasts were reduced from [redacted] million to [redacted] million to reflect the fact that the Company missed its first quarter revenue targets.

24. By July 2024 the group's indebtedness stood at [redacted] including unpaid interest which had been rolled up as "payments in kind". Unpaid unsecured debts and trade creditors totalled [redacted] million, bringing the total debts to [redacted] million of which approximately [redacted] million is secured.

25. The Company engaged Teneo Financial Advisory Limited ("Teneo FA") on 25 July 2024 to provide a valuation report on the business with a valuation date of 12 August 2024. The scope of the engagement referred to in the ultimate report[4] records:

> *"We understand that the Group is seeking to restructure its debt through a provisional liquidation and either the sale of the Group's assets sanctioned by the Bermuda court, or a scheme of arrangement ...In light of this [Teneo FA] was appointed to prepare:*
>
> *i. An independent valuation that comprises a debt free, cash free going concern Enterprise Value of the Group....on a pre-Proposed Transaction basis (ie an as-is valuation) as of an assumed valuation date of 12 August 2024 (the "Valuation Date");*
>
> *ii. A comparator analysis assessing the relevant alternatives (including, amongst others, a hypothetical distressed sale or liquidation) to the proposed restructuring...and the estimated value of the Group in those scenarios (collectively "the Analysis").*

The report also included the qualification that:

> *"The information contained in this document has been obtained from the Client (and its advisors acting on its behalf) as well as from publicly available sources.*

[4] Hearing Bundle 1 ("HB1") page 255 (document references hereafter will follow the pattern eg **HB1/255**).

Teneo has relied upon this information without independent verification or audit."

26. On the same day, the firm Teneo (Bermuda) Limited was engaged with a view to obtaining the services of Messrs. Michael Morrison and Charles Thresh as prospective provisional liquidators (the "JPLs"), and subsequently an application was made for their appointment on 19 September 2024. The Order provides (inter alia) that the JPLs are to review the financial position of the Company, to consult with the creditors in determining the most appropriate manner to realise value for the benefit of the creditors and to take such steps as they *"deem appropriate to sell, transfer, and/or with respect to the disposition of the assets of the Company"*. The Order appointing the JPLs left the management in place subject to the supervision of the JPLs, and during the next two weeks the details of the Transaction were made final.

27. The JPLs issued the application for the Court's sanction to enter into the Transaction on 2 October 2024. Mr. Thresh swore an affidavit[5] in support of the application exhibiting the relevant materials and sought an early hearing of the application due to the worsening financial condition of the Company.

28. In his affidavit Mr Thresh explains that Teneo FA had undertaken its Valuation Report at the request of the Company and that he and Mr. Morrison had no involvement in the preparation of the report and that Teneo (Bermuda) Limited is a separate legal entity. The JPLs had reviewed the Report and understood the valuation approach, assumptions and conclusions (which will be considered in more detail below). Based on the Teneo FA Valuation Report the JPLs concluded that the Enterprise Value of the group was in the range of between US$ [redacted] and US$ [redacted] as at the Valuation Date of 12 August 2024. The alternative to the Transaction under a hypothetical accelerated sale was estimated to result in a likely recovery of between [redacted] to [redacted]. A liquidation was estimated to produce between [redacted] and [redacted]. He said this would mean that the only available alternatives would produce a significantly worse result than the Transaction. It also meant that in any alternative to the Transaction, the unsecured creditors and the shareholders would not make any recovery at all, so their respective positions were not affected by the Transaction.

29. Mr. Thresh and Mr. Morrison's view is that apart from the Secured Lenders, the Transaction would benefit the ordinary course of trade creditors and certain of the Company's essential vendors, whose debts would be assumed by the new structure post restructuring, as well as the employees who would retain their jobs.

30. The essential conclusion of the JPLs' review was that the Transaction was in the best interests of the creditors as a whole because the proposed restructuring would minimise

[5] HB1/10/87-117 Thresh 1

the impact of the Company's financial distress on the Company's creditors (both secured and unsecured), certain vendors, the Company's employees and the ordinary course of business trade creditors. Mr Thresh considered that the Transaction has no negative impact on the Company's shareholders or general unsecured creditors because the Company's position is so profoundly insolvent that all the assets would be insufficient to meet the secured debt, leaving nothing for the unsecured creditors and shareholders on an insolvent liquidation. This therefore meant that the Transaction was the best alternative to a liquidation and sought the Court's sanction to enter into it.[6] Mr Thresh noted the urgency of proceeding because the Company was quickly running out of liquidity.

31. Since the summer of 2024, the Company's cash position weakened as a result of the lower revenue streams. By 22 October 2024[7] the Company's Chief Financial Officer, Mr. Michael Myshrall, set out the Company's cash position was on the brink of failure. He reported that the Company had [redacted] in unrestricted cash on hand. The group's unrestricted cash was [redacted], of which [redacted] was in foreign accounts that was not easily accessible, reducing the cash that was readily accessible. It was predicted that cash inflow would likely generate [redacted], although only [redacted] would be received by the Company directly.

32. Against those liquid assets, the Company faced operating payables of US$4 million, and the group faced payables of [redacted]. As a result of liquidity challenges experienced over the past period, the Company had deferred payment of payables and suspended purchasing services from some vendors. The Company's ageing accrual balance had grown to over US$19 million, including US$7 million past due.

33. In order to manage the Company's cash resources as effectively as possible, the Company ahs been factoring its receivables (i.e. selling them at a discount) to ensure the Company has enough liquidity to meet payroll expenses, rent and other essential services. Mr. Myshrall predicted that the Company will run out of cash resources to meet payroll and trade creditors by early December 2024[8].

34. Mr. Brendan Renehan[9] also filed evidence on behalf of the Secured Lenders confirming that the Secured Lenders supported the Transaction and explaining their reasons, namely that the Company was unable to meet the repayment of the first two tranches of debt, and that had the Secured Lenders not agreed to extend the repayment date and amend the loan financing agreements, the Company would have been in default and triggering liabilities in excess of [redacted], not including the [redacted] or more of trade creditor liabilities. This would result in a total collapse of the Company's

[6] HB1/89 and HB1/115-6 Thresh 1 para 8; 78-9; 81-2. The Court will consider the details of Mr. Thresh's affidavit below.
[7] This was obviously after the date of Mr. Thresh's first affidavit in support, but these are the clearest figures to show the actual position, and from which the cash position of the Company at the beginning of October can readily be inferred.
[8] Myshrall 1 HB1/181-3
[9] HB1/125-133 Renehan 1

business and an insolvent liquidation and enforcement of the security in these circumstances would drastically reduce the vale of the Company's assets and that the interests of all other stakeholders, including trade creditors, customers and employees would be harmed.

35. Mr. Renehan explained that the proposed restructuring would avoid that outcome. In particular, the Transaction would extend the repayment dates under an amended credit agreement as to [redacted] until the end of 2027 and between [redacted] and [redacted] would be payable by the end of 2031. In his view these amended repayment dates would be more likely to be sustainable in line with the Company's projected business performance.

Mr. Chishti's applications

36. Before the JPLs' Sanction Applications came on for hearing, Mr. Chishti issued his applications to adjourn the hearing of the JPLs' sanction application and to seek leave to issue his claims for declaratory relief, specific performance and advancement under the Indemnity Agreement, (referred to above).

37. In his first affidavit[10], Mr. Chishti sets out the history of the Indemnity Agreement, his ongoing litigation with the Company and related parties in the Afiniti group. The essential points that he raised were (i) that the JPLs had not reasonably exhausted the alternative to the Transaction because the JPLs had not approached him (ii) that the Teneo FA Valuation as wrong because he had obtained internal figures that showed the revenue target figures had been "depressed" in the Teneo FA Report (iii) Teneo FA fundamentally misunderstood the Company's business (iv) the Company's present financial position was as a result of mismanagement (v) the JPLs had not performed any independent review of the figures provided to Teneo FA by the Company's management (vi) Teneo FA had attracted millions of dollars in fees in the valuation project and because Teneo Bermuda Limited employs the JPLs there was an appearance of bias (vii) if he was given the opportunity he stood ready to attempt to arrange a refinancing that would keep the secured creditors whole and put new capital into the Company so that it would prosper.

38. Mr. Myshrall replied[11] to Mr. Chishti's allegation and denied that management had provided Teneo FA with figures that "depressed" the Company's actual forecasts. He said that (a) there was only one business plan and that was provided to Teneo FA. (b) that there were no other figures given to Teneo FA. Mr. Myshrall also responded to Mr. Chishti's arguments that the Company's financial condition was due to mismanagement.

[10] HB1/135 at 146-149 Chishti 1
[11] HB1/ 191-4 Myshrall 2

39. In response to Mr. Chishti's evidence, Mr. Renehan replied in his second affidavit[12] saying that the Secured Lender did not intend to make any further extensions to the maturity date and were unwilling to provide further funding before the closing of the transaction.

40. Mr Chishti also filed evidence from Mr. Steven Taylor of Interpath Advisory in respect of the deficiencies that Mr. Chishti alleges are fundamental flaws in Teneo FA's Valuation Report. By the time the hearing of the Sanction Applications, Teneo FA had replied to Mr. Taylor's evidence and Mr. Taylor responded to Teneo FA's reply (the details of which are explained fully below).

41. In addition, Mr Chishti adduced evidence from Ms Rachelle Frisby[13] of Interpath Advisory in Bermuda who deposed that in her experience in situations where a liquidity crisis threatened the collapse of the Company, the Secured Lenders would be likely to amend and extend and make further advances to prevent a liquidation and so an adjournment for the conduct of a full and exhaustive analysis of the Valuation Report should be possible. She said she had not seen any evidence that the Secured Lenders would not advance further lending or that they would actually take steps to enforce. If further time were granted, then Ms Frisby said she would look further at the possibility of an accelerated sale.

42. In response to Ms Frisby, Mr Renehan[14] further confirmed that the Secured Lenders would not enter into any amend and extend variation to the existing Credit Agreement and would take steps to enforce their security rights before the Company ran out of cash.

43. Mr. David Flannery[15] put in an affidavit in response to Mr. Chishti's averment[16] that he had made contact with a broader syndicate which was willing to provide capital to the Company on substantially better terms that those articulated in the Transaction. Mr. Flannery explained that he had met with Mr. Chishti in New York in early September 2024 in his capacity as President of Vista Credit Partners which is the entity that manages the loans under the Credit Agreement. At that meeting he says Mr. Chishti said that he would like to raise money to invest in the Company, but did not present a term sheet, did not introduce potential investors, and did not provide any detail of any proposal that could repay the debt under the Credit Agreement.

44. Mr. Thresh put in a further affidavit[17] to update the Court and to deal with the points that had been raised by Mr Chishti. These points will be considered in more detail below, so it is not useful to set them all out here. The important points in this affidavit

[12] HB1/186-7 Renehan 2
[13] HB1/15/174-80 Frisby 1
[14] HB1/200 Renehan 3
[15] HB1/20/204-6 Flannery 1
[16] HB1/13/135-153 Chishti 1
[17] HB1/21/207-226 Thresh 4

are that Mr. Thresh (i) asked the Company to respond to Mr Chishti's allegations and (ii) asked the Company and Teneo FA to give their responses to the comments made in Mr. Taylor's opinion and to respond to Ms Frisby's evidence. In particular, a copy of the Term Loan Agent's analysis was produced which was broadly consistent with Teneo FA's analysis.

45. Further evidence was put in by Mr Taylor[18] and Ms Frisby[19] addressing the valuation issues and restructuring alternatives respectively which will be considered below.

46. Mr Chishti put in a second affidavit[20] in which he again referred to his dealings with his contacts within the Company who had provided him with information which led him to believe that the figures relied upon by Teneo FA were wrong and that the figures as to the Company's projected revenues were much higher than represented by Teneo FA's report. He said that the Company's actual target figures have been "concealed" from Teneo FA by the Company's management team and the true projection was that the Company would earn [redacted] a month[21].

47. Mr. Chishti asserted that (based on his undisclosed sources within the Company) the Company's actual revenues would result in the Company meeting its [redacted] revenue target for the current financial year. He also made the assertion that (based on his sources), that the Company's core customers and revenues were largely stable, with the exception of the loss of one large customer[22].

48. On the eve of the hearing, a further affidavit was sent to the Court and the JPLs from Mr Haris Mustafa[23], an employee of Afiniti Software Solutions Pvt Ltd, a wholly owned subsidiary of the Company that operates in Pakistan. Mr. Mustafa works in the accounts payable section and has access to the Company's accounting system.

49. In his affidavit, Mr Mustafa says that (i) the Company is not at any immediate liquidity risk and said that as at 30 October 2024, the Company had [redacted] in unrestricted cash (ii) the accounts payable stood at [redacted] (iii) the Company's accounts receivable balance was [redacted] in June 2024 but had been reduced to [redacted] which he said showed an improvement in cash collection, (iv) the Company has raised [redacted] in financing against its receivables, asserted that applying "industry standard metrics" the Company could raise 80% on billed receivables and 40% of unbilled receivables which would (he said) enable to Company to raise [redacted] in additional cash through "enhanced factoring".

[18] HB1/23/ 237-249 Taylor 2
[19] HB1/24/250-3 Frisby 2
[20] HB1/22/237-249 Chishti 2
[21] HB1/22/230 paras 12 and 14
[22] HB1/22/231 para 20
[23] HB1/51/1864-1937 Mustafa 1

50. Mr. Mustafa also made a number of assertions about the projected operating performance of the Company. In particular he said the Company's annual target for the current year is [redacted]. Allowing for the revenues already earned, the projection for the rest of the financial year would produce an average of [redacted] a month. Taking that figure, assuming a linear growth in revenue from the first quarter revenues of [redacted], this would produce a "revenue run rate" of [redacted] per month. Assuming no growth in financial year 2026, he says that this would produce a total of [redacted] in revenue in that year. He deduces from this calculation that if revenues continue to rise in line with the rate he predicts for the rest of the current financial year, this would produce "record revenues" of [redacted].

51. Mr. Mustafa also suggests that if the legal and other expenses associated with the Transaction were eliminated, this would increase the Company's cash flow from between [redacted] and [redacted].

52. Finally, Mr. Mustafa asserts that it was disclosed to the operational managers within the global finance team that the Company was expecting to receive a tranche of more than [redacted] in financing from the Secured Lenders in December 2024.

53. Mr Mustafa attached printouts from the Company's internal accounting system that he said supported all the factual assertions he makes.

54. This was sent in to the Court *"in good faith for the benefit of the Company, and JPLs and ultimately for the benefit of the Bermuda Supreme Court ...so that the true circumstances of the Company are considered in the liquidation proceedings..."*.

55. Mr. Myshrall put in a third affidavit[24] to address the points made by Mr. Mustafa. Mr. Myshrall produced the Company's bank records and internal comparisons of what the actual records of the Company show. It appeared to Mr. Myshrall that some of the documents attached to Mr. Mustafa's affidavit appeared to have been manually altered. Further Mr Myshrall made a line-item comparison of the entries in Mr. Mustafa's attachments and commented on each of the main assertions made by Mr. Mustafa. His responses were to the effect that (i) many of Mr. Mustafa's figures are wrong (ii) the calculations as to future financial performance are misconceived and unrealistic (iii) past performance growth rates showed that the Company's growth declined in 2023-4 by [redacted]%.

The Transaction

56. Before turning to the analysis of the facts and the law, I will now briefly set out the main terms of the Transaction[25] to put the contentions of each side in context.

[24] HB3/1843
[25] Thresh 1 and Khaisghi 1

Step 1

57. The Company will transfer substantially all of its assets (which are all charged to secure the charges in favour of the Secured Lenders) other than the Company's interest in Afiniti Inc. and the Company's Bermuda subsidiaries to Afiniti AI Holdings LLC a company to be incorporated by the Company in Delaware for the purposes of the Transaction ("Holdco") pursuant to a Stock and Asset Transfer Agreement to be executed between the Company and the JPLs and Holdco.

Step 2

58. Then the Company will transfer all of its interests in Afiniti Inc and Holdco to Afiniti Newco Holdings LLC ("Newco") pursuant to a Securities Transfer Agreement.

Step 3

59. Newco Afiniti Inc, all the other subsidiary guarantors under the existing Credit Agreement, and the Secured Lenders will execute a further amendment to the Credit Agreement (the "Amended Credit Agreement").

Step 4

60. The Amended Credit Agreement will result in (i) a new senior first lien secured tranche of debt in the principal amount of (approximately) [redacted], subject to potential increases for accrued interest (the "New 1L Tranche") and (ii) a new junior secured convertible tranche of debt in the initial principal aggregate amount of [redacted], subject to potential increases from the rights offering described in Step 5 below and potential increases for accrued interest (the Convertible 2 L Tranche) where interest can be paid in kind to provide liquidity. The Amended Credit Agreement will be secured by substantially all of the assets of Newco, Holdco and each of the guarantors under the Credit Agreement (other than the Company) who will continue to be guarantors following the completion of the Transaction, on terms that better correspond to the current performance of the business.

Step 5

61. The Company's existing equity holders who are "Eligible Holders" (as defined) and who have not prosecuted any claims against the Afiniti group, will be entitled to participate on a voluntary basis in a rights offering pursuant to which existing equity holders may subscribe for [redacted] (including a [redacted] of the "Backstop" 2L Loans referred to below) of the Convertible 2L Tranche, subject to the terms of the Restructuring Support Agreement ("RSA") dated 17 September 2024 and Backstop Agreement. Those participating in the rights offering, amongst other things, will need to provide fresh capital for their subscription and provide releases to the Afiniti group companies, the Secured Lenders and certain other parties in order to participate in the rights offering.

Step 6

62. The Company's existing holders of preferred stock who are Eligible Holders[26] and who have not prosecuted claims against the Afiniti group companies will be provided certain shares of Class B Units and certain Warrant Units in Newco in consideration of releases provided to the Afiniti companies, the Secured Lenders and certain other parties subject to the terms of the Newco LLC agreement.

Step 7

63. Following the completion of Steps 1-6 the majority of the equity interests in Newco will be owned by the Secured Lenders.

64. It can be readily seen that the only steps that involve the JPLs are Steps 1 and 2. The JPLs have had regard to the steps that follow to consider whether they affect the interests of the creditors. The JPLs consider that the subsequent steps do not affect the interests of the unsecured creditors or the shareholders because the value represented the transfer falls well below the value of the secured debt owed to the Secured Lenders.

Mr Chishti's position

65. For reasons that are explained below, Mr. Chishti complains that all of these steps affect him adversely in his capacity as both shareholder and as a contingent unsecured creditor for the following reasons:

    (i) In respect of Steps 1 and 2 he says the value of the Company exceeds the value of the secured debt. Therefore, he says, his interests as a shareholder are adversely affected he says because a sale at the correct or true value would or could provide him with a dividend in the distribution of the proceeds of sale, or alternatively (at least) a dividend in the distribution of the assets to unsecured creditors in the insolvent liquidation of the Company because he says the value of the Company exceeds the value of the secured debt, and there will or should be a distribution to unsecured creditors. He also says he is a contingent unsecured creditor with a right to participate in any surplus after the realisation of the secured creditors'interests.

    (ii) In respect of Steps 5 and 6 he is being unfairly excluded from the rights and warrants being offered to existing equity holders;

[26] These are defined in the Restructuring and Support Agreement (the "RSA") dated 17 September 2024 (which sets out the basis on which the Secured Lenders are prepared to proceed to enter into the Transaction) as a holder of equity interests in the Company that is either (i) a qualified institutional buyer as defined in Rule 144A of the US Securities Act 1933 (ii) an institutional accredited investor under the Securities Act or (iii) a non-US person who is a regulation S holder located outside the US. HB1/28/457

(iii) Mr Chishti says that the Transaction makes no provision for the assumption or transfer of the Company's obligations to him under the Indemnity Agreement to another solvent company (here Newco), which thereby (a) removes his source of funding to bring and defend claims in relation to the Company and other members of the Afiniti group of companies and (b) removes a complete defence to actions brought against him by any of those companies.

(iv) The JPLs (he says) have not been even handed in their approach because he has been treated differently than the other creditors and shareholders.

(v) The JPLs (he says) are in breach of their duties under the rule in ***ex parte* James** because their conduct in supporting the Transaction that includes these terms offends ordinary notions of commercial morality.

The Sanction of the Court under section 175 of the Companies Act 1981: Type 1 and Type 2

66. In this case the JPLs have sought the Court's sanction under both these heads for two reasons. First, although the Transaction involves a sale or transfer of substantially all of the assets and undertaking of the Company, it also involves a compromise of the rights as between the Company and the Secured Lenders (and some of the unsecured creditors). Second, for purposes of recognition in the United States under Chapter 15 of the Bankruptcy Code, it is beneficial to have the Court's sanction of a compromise of rights. However, each type of sanction falls under a different statutory power under the Companies Act 1981 (the "Act").

67. The statutory framework provides two types of sanction that a liquidator may seek from the Court under section 175 of the Companies Act.

Section 175 (1) provides

"The liquidator in a winding up by the Court shall have power, with either the sanction of the Court or of the committee of inspection--
(e) to make any compromise or arrangement with creditors or persons claiming to be creditors..."

Section 175 (2) provides

"The liquidator in a winding -up by the Court shall have power—

(a) to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels;"

68. The analogy to 'category 1' and 'category 2' cases in **Public Trustee v Cooper**[27] has been made[28]. A liquidator, like a trustee, may apply to the court to exercise a power that he does (or may) not have, or for the blessing of the court to exercise a power that he or she does have, for example where the decision to exercise the power is a "momentous" one. Although a Liquidator is not a trustee, he or she is acting in the interests of the relevant stakeholders under what is sometimes called the 'statutory trust' that arises on insolvency.

Type 1

69. Where the liquidator seeks a sanction under section 175 (1) the Court is providing a sanction to the exercise of a power that the liquidator does not have unless a committee of inspection has been appointed, in which case the liquidator may exercise the power with the sanction of the committee, not the Court. Where there is no committee, the liquidator may not exercise the power unless the Court gives its sanction. The Court is not itself exercising the power, nor directing the liquidator to exercise the power, the Court is simply authorising the liquidator to do so[29].

70. One such power is the power to make a compromise with a creditor. A compromise must involve some 'give and take', but this expression is very widely interpreted[30]. Here the Transaction contains both the compromise of rights between the Company and the Secured Lenders, and certain of the creditors, as well as a sale or transfer.

71. In **Greenhaven Motors Limited (in liquidation)**[31] the English Court of Appeal approved the *dictum* of Lightman J in **Re Edennote Ltd (No 2)**[32] which explained the approach the Court will usually take in considering whether to grant a sanction to a liquidator to enter a Type 1 transaction as follows:

> *"Where a liquidator seeks the sanction of the court and takes the view that a compromise is in the best interests of the creditors, in any ordinary case, where (as in this case) there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so, or that for some reason or other his view is flawed."*

Later in his judgment, Chadwick LJ gave further guidance in indicating circumstances in which a judge would not grant a sanction.

> *"...The question for the court is whether a compromise which provides no discernible benefits, but which just might do some harm to the creditors and*

[27] [2001] WTLR 901, 922 (Hart J) and see **In re Nortel Networks (UK) Ltd** [2017] Bus LR 590 paras 49-50 per Snowden J.
[28] See Re **Sova Ltd (In Special Administration)** cited below at page 799f at para 172 per Miles J.
[29] See **US Holdings Limited** (2024) SC Bda 11 Civ (2 April 2024) per Subair Williams J
[30] **Re Savoy Hotel Ltd** [1981] Ch 351 at 359 per Nourse J.
[31] [1999] BCLC 635 at 643 a-c per Chadwick LJ
[32] [1997] 2 BCLC 89 at 92 h

contributories, should be sanctioned. I am satisfied that that question should be answered in the negative."

72. From this case the following elements can be derived. The liquidator must take the view be in the best interests of the creditors. I take this to mean the best interests of the creditors as a whole, not that it must be in the interests of every single creditor. The liquidators must act in good faith in arriving at that view (and must therefore have reasonable grounds for coming to that view). The liquidator must not act in a manner that is partisan. There must be no substantial reasons in the evidence why the Court should not grant the sanction. The liquidator's reasons must not be based upon a flawed reasoning or flawed understanding of the facts.

Type 2

73. Where the liquidator seeks a sanction under section 175 (2) the liquidator clearly has the power to enter into the transaction, but for some reason wishes to obtain the Court's blessing to exercise it. This may be where the transaction is "momentous" or there is a circumstance which the liquidator feels it is appropriate to do so.

74. In this case, the JPLs were appointed for the purpose of determining the best manner of realising value for the creditors. The Appointment Order[33] confers the power of sale on the JPLs. It is invariably the case the JPLs will seek the approval of the Court before proceeding with a transaction of this kind, particularly at an early stage of the liquidation and where the circumstances demand decisive action under pressure of time. Such an application is also in the nature of a report to the Court on the progress of the liquidator's actions in the liquidation.

75. In **Re Sova Ltd (In Special Administration)**[34] the English High Court considered the test to be applied when the court is asked to grant a sanction to the power of sale, which is a power which the liquidator undoubtedly has, but for the exercise of which the liquidator has asked the court's 'blessing'. The learned judge said:

> *"First, I consider that the [liquidator's] 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 not reason to read the power down to exclude such a transaction."*
>
> *"Second, as the JSAs submit, in exercising such power [a liquidator] is required to act reasonably to obtain the best price in the circumstances as they reasonably appear to the [liquidator]. This places an important constraint on the exercise of the power. It prevents a [liquidator] from simply transferring the assets to a particular creditor in return for the claim of the creditor where this*

[33] HB1/41
[34] [2023] Bus LR 779 at paras 249-50 per Miles J.

may be at the expense of the estate. It is only if the [liquidator] genuinely and rationally believes proper value is being obtained that the power is exercisable."

76. Similarly in **Nortel Networks UK Ltd**[35] the English High Court said of the grant of a sanction for the power of sale:

> *"In short, the court should be concerned to ensure that the proposed exercise is within the [liquidator's] power, that the [liquidator] 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 [liquidator] to put all relevant material before it, including a statement of 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."*

77. From these cases the following elements can be derived. The liquidator is required to obtain the best price he or she reasonably believes is possible in the circumstances. The liquidator must also genuinely believe that the sale is for the benefit of the company (and its creditors). The liquidator must have a rational basis for holding that view[36]. The liquidator must not have a conflict of interest. The liquidator must put all the relevant material before the court and explain the reasons why the liquidator considers that the sale is in the interests of the company (and its creditors).

78. I observe at this point that if the JPLs satisfy the Type 1 test for the sanction of the power to enter into the Transaction as a compromise, then they will also pass the Type 2 test for the sanction (or blessing) to exercise the power to enter into the Transaction as a sale, provided that they consider the price for the sale is the best that can reasonably be achieved in the circumstances.

The JPLs' applications

79. The JPLs seek the sanction of the Court under section 175 (1) (e) as a compromise and section 175 (2) (a) as a sale for two reasons. As can be seen from the *dictum* of Miles J above, a sale involving a waiver of rights (i.e. a compromise) can be achieved under the power of sale alone, without needing to get a sanction to compromise. Therefore,

[35] (See citation above in footnote 25) at paragraphs 49-50 per Snowden J.
[36] Mr. Al-Attar KC referred in this context to the everyday expression used by Lord Sumption JSC to describe it as not being a "crazy" decision.

the Court could grant a Type 2 sanction for the JPLs to proceed with the Transaction under this provision alone.

80. However, there is a potential concern that a sale of the whole of the assets as a going concern might be characterised differently, because it is an exercise of a power in ('light touch') provisional liquidation and does not involve a distributive process to creditors within the liquidation. Therefore, in order to put it beyond doubt, the Court is invited to grant its sanction to the exercise of the power of sale.

81. Furthermore, the transfer includes a compromise, so it can also be characterised as a compromise, and there are good practical reasons why the sanction of the Transaction as a compromise would aid recognition in the United States under Chapter 15 of the Bankruptcy Code, which has many practical benefits and protections.

82. Although I was invited by Ms Toube KC to apply the Type 1 test to both applications for sanction on the basis that the Transaction involves both a sale and a compromise so the two elements are inextricably linked and interdependent, I prefer to apply the relevant considerations to each type of Test to maintain the distinctions described in the cases and avoid the possible conflation of the separate concepts in future cases.

83. The basis of the JPLs' applications has been described above. In summary, the Company (and the group) is insolvent on a balance sheet basis and is shortly expected to become cash flow insolvent. In reality, the Company is already cash flow insolvent in that it is deferring payment of debts already due in an effort to stretch out its cash liquidity for as long as possible while these proceedings are being determined. If the Court's sanctions for the Transaction are not granted before the cash runs out, the Company will not be able to pay any of its debts as they fall due. Moreover, the Secured Lenders will not advance any further cash (a point which will be considered below) and will enforce their security rights under the charges given by the Company in support of the Credit Agreement.

84. The Company has attempted to obtain refinancing over the past 18 months and has made efforts to secure new inward investment to alleviate its liquidity, all of which efforts have been unsuccessful. Management believes that the Company's debt burden and deteriorating revenue flow has made it unattractive to investors because they cannot see any equity value or sufficient profitability to be able to meet existing or additional debt burden. Management considers that this strongly implies a market value of the Company as being below the value of the debt.

85. Therefore, the Company engaged in negotiations with the Secured Lenders in an effort to save the Company from an insolvent liquidation, and the Secured Lenders have been prepared to amend the Credit Agreement to restructure the debt so that it is more realistic that the Company will (or may) be able to trade its way back to a more profitable condition. This is not without substantial risk. In return for the assumption of

that risk, the Secured Lenders have negotiated the transfer of the Company's business enterprise, in accordance with the terms described above.

86. Teneo FA was commissioned to provide (i) an independent valuation that comprised a debt free, cash free going concern Enterprise Value of the group on a pre-Proposed Transaction basis (i.e. an "as-is" valuation) as at 12 August 2024 and (ii) a comparator analysis assessing the relevant alternatives (including a hypothetical distressed sale or liquidation) to the proposed Transaction and the estimated value of the group in those circumstances. The conclusions were (a) that the Enterprise value is likely to fall in the range between [redacted] to [redacted] (b) a distressed sale would likely realise between 30% and 50% of the Enterprise Value and (c) the liquidation value would likely between [redacted] and [redacted][37].

87. The JPLs have reviewed the Valuation Report and based on that report, their discussions with management, and the alternatives to the Transaction that are considered both in the Valuation Report and in the light of their experience, they consider that it is in the best interests of the Company and the creditors to enter into the Transaction on the terms proposed.

88. The Enterprise Value, according to the Valuation Report is very substantially below the secured debt, which means that in a liquidation, none of the unsecured creditors would be entitled to make any recovery and (obviously) the shareholders would not make any recovery of any surplus.

89. In addition, this view is based in part on the practical realities that there are no alternative proposals that could be explored or achieved in the period that remains before the Company runs out of cash, which is about to happen in the next four weeks or so. The result of that will mean that all the Company's employees will leave, customer relationships will be damaged (probably irretrievably), and the Enterprise Value will necessarily suffer so that the secured creditors, and the ordinary course of business creditors, will suffer substantial and irrecoverable losses. Accordingly, the Company will not be able to continue in business, and the component parts of the business will be sold off or realised by the Secured Lenders in some form of enforcement proceedings.

Mr. Chishti's opposition to the JPLs' applications

90. At the directions hearing on 24 October 2024 the Court decided that it would deal with the adjournment applications first and address Mr. Chishti's remaining applications in the light of the outcome of the adjournment applications.

91. Although there are a large number of issues that are disputed in the evidence, it is not necessary to address each one of them in turn for the purposes of determining the

[37] HB1/25/282

applications before me. I propose to deal with the substance of the submissions made on Mr. Chishti's behalf under four headings: (i) the adjournment applications (ii) the Valuation Report challenge (iii) the allegation of appearance of bias and (iv) Mr. Chishti's 'conspiracy' theory.

The Adjournment applications

92. Mr. Chishti has sought an adjournment of the JPLs' sanction applications on the grounds that he believes the Enterprise Value set out in the Teneo FA report is wrong, and that the true Enterprise Value of the Company exceeds the value of the Company's liabilities to the Secured Lenders. This means that he has an interest in the proceedings as a contingent creditor (at least) for the value of his claims under the Indemnity Agreement referred to above[38].

93. Ms Toube KC submitted that in the exercise of its discretion to grant a Type 1 sanction the Court must itself come to a valuation of the Company, and that Mr Taylor's evidence showed that there were very real issues as to the reliability of the Teneo FA report such that the Court could only come to a view on the valuation after a full trial. She submitted that the Company and the JPLs should provide a full disclosure of all documents relied upon by Teneo FA in arriving at its conclusions as well as a long list of documents categorised in a schedule annexed to her submissions. It was suggested that the disclosure should start immediately and continue on a rolling basis until the hearing. She also submitted that leave should be given to adduce further expert testimony so that a trial of the valuation issue could take place in February of next year.

94. Alternatively, if the Court proceeded on the basis of granting a Type 2 sanction, then a more limited discovery would be required, and a shorter period of adjournment for the resolution of the valuation issues before the Court granted a Type 2 sanction.

95. In the further alternative she submitted that if there was no time to achieve a trial of the valuation issue, the Court should simply refuse the sanction applications and allow the Secured Lenders and the Company to proceed with the Transaction without sanction, as she submitted they could do, or allow the JPLs to proceed by exercising the power of sale for which they did not need a sanction. In all events, she submitted that the JPLs should not receive any "comfort" from the Court that the JPLs were immune from any future challenge in the exercise of their power.

96. The premise upon which the adjournment application rests is that the Court must undertake its own valuation of the Company before it can grant a Type 1 sanction, and/ or it must consider further evidence in relation to value (presumably the reliability of the Valuation Report) before it can grant a Type 2 sanction. In my view this is wrong.

[38] The parties agreed that this is not the time or place for the Court to consider the merits of Mr. Chishti's claim that he has a valid contingent claim. This will be dealt with pursuant to the directions for the remainder of Mr. Chishti's applications referred to in paragraphs 192-5 below.

97. Ms Toube KC accepted and agreed that the grant or refusal of a sanction under either limb of section 175 (1) or (2) is ultimately a matter for the exercise of the Court's discretion, which I hold to be the correct view. It must follow that it is also a matter for the Court's discretion as to whether, in the circumstances of any given case, a full trial of the valuation issues is required in order for the Court to grant its sanction in any particular case. This will necessarily involve consideration of all the materials the Court has available and all the circumstances in which the applications are made.

98. Although it is theoretically possible that a Court *could* order such a trial on valuation issues, I would observe that it would be most unusual for the Court to consider it appropriate to do so. The essence of a compromise is a transaction at something less than full value, where there is 'give and take', and where the parties have exercised their own commercial judgement in reaching the terms of their agreement. Ms Toube KC was unable to point to a case in which such a thing has ever been done. On the contrary, a similar attempt to require a 'valuation' approach to be taken in relation to the sanction of a compromise was rejected by the English High Court in **Re Bluebrook Ltd**[39]. In that case it was submitted that the court had to be satisfied that the value of the asset being transferred had to be at least equal to the value of the asset being received. The learned judge said:

> *"The function of a court asked to sanction a compromise by a liquidator involves considering whether the interests of those interested in the assets of the company in liquidation are best served by letting the company enter into the compromise, or by not letting it enter into the compromise. This is not the same exercise as a court conducts when considering a scheme of arrangement..."*[40]

99. The case law dealing with the approach the Court is to take in evaluating applications for Type 1 sanctions does not refer or even hint at the Court taking on an appraisal exercise before granting a sanction. On the contrary, the case law says that in the absence of a fundamental flaw or impropriety, the Court will usually give great weight to the views of the liquidator, provided they are genuine, rational and based on reasonably credible grounds. I am satisfied that the Court is not required to reach its own view on valuation by conducting a trial of the issues prior to granting its sanction to the JPLs to enter into the Transaction as a compromise or as a sale.

100. The enormous additional cost that would likely be incurred in having a valuation trial would be entirely contrary to the notion of efficient and economic approval of a compromise in the context of an insolvent company. In this case, the reality is that there is insufficient time to conclude a further disputed valuation process before the Company's cash resources run out. There is not enough to pay ordinary expenses, let

[39] [2010] 1 BCLC 338 at paragraph 71 per Mann J.
[40] i.e. granting a sanction to a scheme that has been approved by the requisite majorities under section 99 of the Companies Act 1981. Under that provision, the Court does not conduct a valuation exercise but considers whether an honest reasonable and intelligent creditor might vote in favour of it.

alone to pay for a full-blown trial of valuation issues, or even a more limited "mini-trial" of the valuation issues for the purposes of reviewing the JPLs' application for a Type 2 sanction.

101. I should also mention the statements made by Ms. Frisby[41]that in her experience Secured Lenders will often choose not to enforce their strict legal rights because the effect on their recovery will usually be worse than not doing so. But that is not evidence that can be relied upon in the face of direct evidence that the Secured Lenders intend to act upon the Notice of Default that has been issued[42]. Mr. Renehan has made the clear and unequivocal statement that the Secured Lenders will not wait until the Company's cash runs out before exercising their rights under their security[43].

102. The Court will not engage in what amounts to brinksmanship or calling the Secured Lenders' bluff. Neither should the Court's officers do so where the obvious risk would be to collapse the Company altogether.

103. I have also taken into account the points raised by Mr. Chishti in support of his challenges to the Teneo FA Valuation Report and his other objections. There has not been a trial of these issues or cross examination of the witnesses, so my preliminary assessment is obviously not determinative. However, I have looked at the strengths and weaknesses of the points that have been made and have evaluated whether on the face of it they raise issues which should be investigated further before the Court should grant the Sanctions. I am of the view that the points made in opposition to Teneo FA's approach in the Valuation Report are not sufficiently cogent to justify further examination. I will explain my reasons for this in more detail below. The submission that the Court cannot consider the points properly unless there has been a fully litigated valuation proceeding is in reality a 'bootstrap' argument to justify the adjournment.

104. In my view it would be wholly inappropriate in the circumstances of this case for the Court to adjourn the JPLs' applications and I decline to do so on the grounds that (i) the Court is not required to undertake its own valuation exercise in the manner proposed by Ms Toube KC (ii) the cost and delay in doing so would not be justified (iii) it would be a pointless exercise because the Company will not survive long enough for it to reach the trial and (iv) the points raised as objections to the valuation do not hold sufficient water to justify further time and money being spent on examining them.

105. As a result, the two alternative adjournment applications urged by Ms Toube KC are entirely unrealistic in the circumstances of this case and are refused.

106. That does not dispose of the matter. It remains for me to consider whether the materials presented in support of the Transaction meet the requirements of the tests in Type 1

[41] HB1/24/251 para 9
[42] HB1/59/1980
[43] HB1/19/200 para 13 and reiterated by Ms Leahy KC on behalf of the Secured Lenders in the hearing.

and Type 2 cases or whether the issues raised by Mr. Chishti are sufficient to raise substantial questions as to whether the JPLs can reasonably rely on the Teneo FA' s Valuation Report in seeking the Court's sanctions, and whether on those grounds the Court should decline to grant the Sanctions.

The Valuation Report challenge

107. The main scope of analysis of the issues raised focuses on whether the Valuation Report relied upon by the JPLs is fundamentally "flawed" such that the JPLs (acting in accordance with their duties) could not or should not properly rely upon it.

108. Mr Chishti's expert Mr Taylor put forward several theories why he says the Teneo FA Report is wrong and cannot be relied upon. These are broadly (i) the valuation approach (ii) the selection of appropriate multiples (iii) over-reliance on management forecasts (iv) the indicative IP valuation and (v) the value of the Company implied by the issue of convertible preference shares and warrants to the eligible investors (referred to as the "new money" point for short).

109. I will address each of these points and explain the responses that Teneo FA has made to each category of criticisms as briefly as I can. There was a series of exchanges of correspondence and further affidavits which make it difficult to summarise how each of the issues evolved in the rapid exchanges between the parties. My summary attempts to put these points and responses in their final form, rather than to explain how each point evolved. I will then evaluate what the Court needs to "take away" from these points in determining whether to grant the Court's sanction. The essential point made by Ms Toube KC was that the Valuation Report is "flawed" in the language used by Lightman J in **Re Edennote (No 2)** quoted above, so that any reliance by the JPLs upon it would therefore also be flawed, and the Court would not be justified in granting grant its sanction to the Transaction either as a compromise or as a sale.

110. I should here note that the Secured Lenders also made responses to Mr. Taylor's affidavits independently from the Company, as they were entitled to do. Without any disrespect to the many points set out in the Secured Lenders' responses, I will not set them out in detail in this judgment. The main focus of the attack by Mr. Chishti was on the JPLs' reliance on Teneo FA's report, so the Court will base its assessment of the JPLs' reliance upon the Teneo FA report on the responses given by Teneo FA. I shall simply record that the Secured Lenders made many of the same points as Teneo FA and they also rejected Mr. Taylor's criticisms.

Valuation approach

111. Mr. Taylor argues that the discounted cash flow approach to valuation ("DCF") used by Teneo FA is not appropriate, but that the Company should be valued on a revenue basis, applying a multiple of income to derive value. Mr. Taylor says that artificial intelligence ("AI") and software-as-a-service ("SaaS") companies are valued on

enterprise value multiples on a revenue basis. He referred to the SaaS Capital Index model predictions as the basis for proposing that the appropriate multiple for the Company should be closer to 6.1 times its revenue (ie the average of the SaaS Capital Index) and not the [redacted] to [redacted] times that the Valuation Report suggests[44].

112. The JPLs put these points (along with the others which are considered below) to the Company. The Company relayed the points Mr. Taylor had raised to Teneo FA in correspondence to which Teneo FA responded in detail. The Secured Lenders also wrote to the Company separately expressing their views on the points raised by Mr. Taylor.

113. In relation to the valuation approach, Teneo FA maintained that the DCF approach to valuation is considered to be the most relevant method of valuing a business which has volatile earnings and is in operational or financial distress because it integrates the growth prospects, anticipated profitability, and the rate of return required by debt and equity investors. In addition, Teneo FA had corroborated the DCF or income approach using a market approach with reference to market multiples from identified comparable companies. Teneo FA put limited reliance on the market approach because there few companies which had a directly comparable profile[45].

Comparable companies

114. Mr. Taylor criticised Teneo FA for not using comparable companies to analyse the Company's enterprise value. He says Teneo FA should not have used Contact-centre-as-a -service ("CcaS") companies as comparators because the Company has a small proportion of revenue from CcaS operations and offers his views on companies that he says are more appropriate models, which he says justifies a much higher Enterprise Value than the range suggested by Teneo FA[46]. Mr. Taylor also suggested that the previous financing attempts in 2018 reflected a market value of [redacted] to [redacted][47].

115. Teneo FA responded to this point by saying that the market approach depends on the ability to compare companies that have an identical or highly comparable business profile or performance model. Teneo FA pointed out that the companies Mr. Taylor had identified as possible comparators were entirely dissimilar and were of a different scale and business model. Teneo FA explained the basis on which it had selected the 12 comparators they used to conduct their corroboration of their primary valuation method, which included 8 AI businesses and 4 that could be so classed because they offer AI-enabled business-to business products intended to enhance business functions, and also have significant IP assets[48].

[44] HB1/4/157 paras 20-30
[45] HB/26/322 paras 1.2-1.4
[46] HB1/4/160 paras 34-6
[47] HB1/14/160 at para 36
[48] HB1/26/326-7 at paras 3.7-3.14

116. Teneo FA also suggested that Mr. Taylor's suggested comparators were much more highly diversified businesses, operating across different classes of business and did not have a high concentration of contact centre services. These comparators did not (in Teneo FA's view) have similar historic revenue growth patterns or the future anticipated growth to be useful in assessing the Company's market value, even assuming that this was an appropriate approach to take[49].

117. In relation to Mr. Taylor's point that the previous financing rounds implied a market value of [redacted], Teneo FA said that these were not based on valuations but projections and were highly generalised based on predictions of growth, not track record, and so nothing could be implied as to current market value from historic pitch documents[50]. Teneo FA referred to the actual attempts to refinance the debt in 2023 and early 2024 through Moelis LLC which were entirely unsuccessful[51].

118. In his second affidavit, Mr Taylor made various responsive points about the comparators and made an additional argument based upon the 2023 Pepperdine Report (an independent study of cost of capital for private market participants produced by Pepperdine University) to the effect that Teneo FA had miscalculated the WAAC, and that the Pepperdine Report suggested that the market value of the Company could be as much as [redacted]. However, Mr. Taylor said was using this to show that the methodology adopted by Teneo FA was wrong, not because he agreed that the value was [redacted][52].

Over-reliance on management forecasts

119. Mr. Taylor criticises Teneo FA for over-reliance on management's forecasting and says Teneo FA should have challenged the management's business plan forecasts as if it were a third-party sale and not in isolation of third parties[53].

120. Mr. Taylor says that Teneo FA has "double-counted" the risk factors (the 'alpha' factors) generating a much steeper discount on value (13%)[54] which in turn distorted the calculation of the weighted average cost of capital calculation ("WAAC")[55]. Mr. Taylor says that if the correct approach had been taken, this might support a valuation of as much as [redacted] (although he does not say that this is the correct value, he just says that it shows that the Teneo FA valuation is wrong).

121. Teneo FA rejected these criticisms. It was pointed out that Teneo FA had held extensive management meetings with the executive management team and did a through analysis

[49] HB1/26/331-3 para 3.18-3.22
[50] HB1/26/334-6 paras 4.1-4.5
[51] HB1/26/336 para 4.5 The obvious implication of this was (it was later submitted) that the market considered the Company's value to be well below the value of the secured debt.
[52] HB1/23/244-5 paras 32, 39, 42 and 53. This would obviously also be below the value of the secured debt.
[53] HB1/4/161-2 paras 43 and 50
[54] HB1/4/163 paras 55-6
[55] HB1/4/164-5 paras 58-60

of the business plan and income forecasts and identified and validated the exposure to volatile income and customer concentration, as well as the narrow focus of the new "pipeline" business. Since the date of the report, Teneo FA noted that management had reduced the forecast to reflect the deterioration in income and performance to the budget forecast[56]. Teneo FA pointed out some mistakes in Mr. Taylor's WAAC calculation, but the main point was that his approach materially overstates the valuation because Mr. Taylor relies on the wrong comparative data[57].

122. As to the discount rate in the 'alpha' factors, Teneo FA made the point that the comparators used by Mr. Taylor are inappropriate and do not reflect a like for like comparison[58]. As to the 2% assumed growth rate, Teneo FA said that this was appropriate where the Company had an established history, and it was not appropriate to assume a continuing growth pattern[59].

IP Valuation

123. Mr. Taylor says that the Company's value is closely tied to the valuation of its Intellectual Property ("IP"). Mr Taylor says that a full valuation of the IP must be undertaken to establish the appropriate range. He says that the Company had been historically valued at [redacted] to [redacted], and an IP value that is derived from a royalty rate of [redacted] to [redacted] risks significantly undervaluing the inherent value of the IP[60].

124. Teneo FA addressed this point by saying that it had not relied upon the IP valuation of the Company, but as a benchmark comparison for the alternatives to the restructuring[61]. Teneo FA noted that a comparison with similar IP licences of other comparable companies suggested that a range of 5% to 10% would seem realistic and suggested that a fire-sale value in an alternative realisation would be likely to realise less than [redacted] based on that view[62].

New Money

125. This point was made as a 'Parthian shot' at the end of Mr. Taylor's first affidavit[63]. However, it became a central point in the debate, and a considerable amount of reliance on it was placed on it in argument.

126. Mr. Taylor says in his third affidavit that when valuing an asset, the amount a third party is willing to pay for it is usually the best guide to its market value. He says the

[56] HB1/26/339-40 paras 5.10-5.12
[57] HB1/26/347 para 6.10-6.11
[58] HB1/26/343-4 para 6.2-6.5
[59] HB1/26/340-1 paras 5.13-5.15
[60] HB1/4/166-7 paras 67 to 71
[61] HB1/26/348 para 7.4
[62] HB1/26/348-9 paras 7.5-7.7
[63] HB1/4/167 paras 72-3

same is true when an investment is made in a company whether through debt or equity[64].

127. Mr. Taylor deduces from the fact that TRG-I (who fall within the group of Eligible Holders of shares in the Company referred to in Step 6) are willing to invest at least [redacted], but potentially up to [redacted], to purchase junior convertible debt must mean that the value of the assets that are to be sold in the Transaction is greater than the value of the senior and the junior debt.

128. Mr. Taylor concludes that this also must mean that the Enterprise Value (or the true value) of the assets must exceed the total of the secured debt and the unsecured debt. From this it is said that Valuation Report is "flawed", and that only a full valuation exercise after a trial after full disclosure of the evidence that underlies the Valuation Report can determine whether the JPLs should proceed with the Transaction on the current terms, or to determine if there is reason to pursue an accelerated alternative merger or acquisition (referred to as an "AMA") instead[65].

129. Mr. Taylor prayed in aid the fact that Mr. Renehan had referred[66] to the possibility of other investors being potentially interested in making investments in this class of junior debt if TRG-I is unable to do so as showing that this was a true third-party investment analysis, which supported his implied valuation theory.

130. Teneo FA responded to this line of argument by pointing out that the Valuation Report was based on a valuation date of 12 August 2024, and so it was not appropriate to attempt to compare the post restructuring position of the Company, after the debt had been restructured on new terms and liquidity had been eased[67].

131. TRG-I put in correspondence to explain that its motive in making the investment in the Backstop was to salvage some potential value from its investment in the Company by investing in the prospective success of the new entity[68]. Mr. Taylor responded[69] by suggesting that on his analysis, even if the investment performed as well as it was hoped after 7 years, the performance would not justify the exercise of the conversion right because the equity value is negative.

What should the Court "take away" from these points?

132. The starting point is that this is not an appraisal action, and the Court is not here engaged in the valuation process. There has been no trial and no cross-examination of the witnesses. As I have held at paragraph 99 above, the Court is not required to arrive

[64] HB1/48/1824 paras 12-15
[65] HB1/48/1824-5 paras 20-25
[66] HB1/12/133 Renehan 1 at para 47
[67] HB1/26/350 para 8.2
[68] HB1/56/1973
[69] HB1/58/1978-9

at a valuation before deciding whether or not to grant its sanction to the JPLs to enter into the Transaction either as a compromise or as a sale. The Court is here engaged in assessing whether to authorise the JPLs to enter into the Transaction against the submission that the Valuation Report is "flawed" such that the JPLs cannot properly rely upon it.

Valuation approach

133. The Court cannot definitively decide at this stage of the proceedings which of the two valuation methods identified by the experts is the "correct" one. However, I can make observations as to whether the approach taken by Teneo FA is flawed. It seems to me that the reasons that Teneo FA has given for choosing the DCF/income approach are appropriate to a company in distress for the reasons they have given. The approach reflects the reality of the situation of extreme financial distress and attempts to factor into the valuation the prospects of growth, profitability and the rates of return that an investor or lender will need to evaluate. In a different factual situation, it may be that other approaches could be taken, but I am of the view that Teneo FA's approach in the present circumstances of this case is obviously not "flawed".

Comparable companies

134. It also seems to me that Teneo FA have gone to a lot of trouble to seek meaningful comparators to draw appropriate inferences for the valuation of the Company. In contrast, Mr. Taylor's alternatives are not compelling, indeed they appear to me to be somewhat unrealistic comparisons for the reasons given by Teneo FA. Again, I find that Teneo FA's approach is not flawed.

Over-reliance on management forecasts

135. It also seems to me that Teneo FA has examined the information provided to it by management carefully and has done what it reasonably can to assess it objectively and critically, as well as test it against available market information and publicly available sources. It is not an audit process. The process described by Mr. Taylor[70] seems unrealistic in the circumstances of the case, to the extent that any actual alternative process is articulated.

136. In my view, Teneo FA's approach is not flawed on this ground particularly because the whole exercise is to assess what the existing management believes is achievable with the current staff and customer base and pipeline business. Contrary to Ms Toube KC's submission, Teneo FA's reliance on management's forecasts, with the validation for such external sources as are available is certainly not akin to the situation in **Brewer v Iqbal** [71]. In that case the office-holder did not receive a valuation for the assets until

[70] HB1/14/162 para 49 *"If I were appointed, I would perform a deeper dive into understanding how the forecast was prepared…rather than relying on a single forecast, I would likely utilize a scenario analysis, explicitly modelling the impact of various risks to the business across several forecasted scenarios."* In my view this is not meaningful criticism.
[71] [2019] BCC 746

after the assets had been sold, had relied exclusively on the prospective purchasers for the valuation figures, and had relied upon the directors for their estimate of the value of the assets he sold. Chief ICC Judge Briggs held[72] that

> *"Mr. Iqbal was entitled to rely upon the directors to appraise him of the company's finances, its assets and liabilities. He was entitled to rely upon them to provide an account for the reasons of the company's insolvent position. His reliance on them crossed the permissible line. He placed too much reliance on the directors to provide: (i) a value on the EPGs (ii) approval for the marketing (through advertising) of the EPGs on the Edward Symmons website and (iii) the timing or dictate the timing on the sale of the EPGs."*

137. In this case, the JPLs have not relied upon the directors for the valuation of the assets. The whole point of the Teneo FA report is to consider whether the terms of the Transaction are in line with the probable range of values of the Company as a going concern, measured against the likely range of values if the Company proceeds to a with an (imaginary) accelerated sale under distress, or a liquidation.

138. Again, the reliance on management to provide figures as to the Company's finances, assets and liabilities as well as its expected revenues and prospective income is entirely within the permissible range of reliance indicated by Chief Judge Briggs' statement quoted above. Therefore, in my judgment, neither Teneo FA's nor the JPLs' reliance on the management forecasts represents a flawed approach.

IP Valuation

139. Teneo FA did not rely upon the IP valuation to assess value, rather they used the IP valuation to test the valuation analysis, and I do not see that there is anything to this criticism. Again, in my view, it does not represent a flawed approach.

New Money

140. This argument (as it seems to me) stretches the boundaries of reality to breaking point. The idea behind this theory is that an actual present-day value can be implied from a future value derived from the new debt and liquidity structure, based upon the notion that lender/investors would not advance money unless it has an equivalent present-day value at par, so that this must imply the present value must equal or exceed the total value of the secured and unsecured debt.

141. In my view this is "pie in the sky". Whatever investment theory may (or may not)[73] hold, the present-day reality is that this Company is profoundly insolvent. But for the refinancing (i.e. the restatement of the credit terms and the restructuring of the business), this business will not last more than a few weeks. The fact that TRG-I is

[72] At page 767 para 81
[73] Mr Taylor does not cite established valuation principles that support his theory.

prepared to lend more money to give the restructuring a greater prospect of success, and in the hope of being able to recoup some of its lost investment in the future if the new company propers, does not imply any actual present-day value in the existing Company, and certainly not a value that exceeds the total of the secured and unsecured debt of over [redacted].

142. It follows that the Valuation Report is not, in my view, flawed on these grounds either.

The Appearance of bias

143. This argument was put on several grounds at the beginning of the hearing and included allegations of the JPLs not acting in an even-handed manner[74]. By the end of the hearing, however, Ms Toube KC put the case on the appearance of bias on the argument that (i) Teneo FA had been appointed alongside the JPLs who are employed by Teneo (Bermuda) Limited and (ii) the JPLs were defending Teneo FA's Valuation Report so that it gave the appearance that the JPLs were not bringing an independent and impartial mind to Mr Chishti's arguments and Mr. Taylor's criticisms of the Valuation Report.

144. It is accepted that the JPLs played no part in preparing the Valuation Report itself. It is also accepted that Teneo FA and Teneo (Bermuda) Limited are independent entities. There is no allegation of actual bias.

145. In my view it is clear that far from not bringing an independent mind to the arguments advanced by Mr. Chishti, the JPLs have gone to great lengths to (i) consider the arguments raised by Mr. Chishti (ii) to seek independent legal advice about them (iii) to seek responses from the Company and the Secured Lenders and (iv) to seek detailed responses to the various points that Mr. Taylor has raised.

146. The affidavits of Mr. Thresh set out the JPLs' analysis and the reasons why they do not regard Mr. Taylor's criticisms as being ones that cause them to re-evaluate their assessment of what is in the best interests of the creditors and the Company.

147. This Court has also analysed the materials and arguments put forward in support of Mr. Chishti's case and does not find any validity in the claim that he has been treated in anything less than an even-handed way by the JPLs, nor that they have exhibited any bias against him. The fact that the JPLs have (after careful analysis) concluded that the analysis in the Valuation Report is sound does not in my view give rise to an 'appearance' of bias. The Court has reached the same view as the JPLs.

148. It was also said that the JPLs had a duty to act fairly, and this included not to agree to support a Transaction which offended normal notions of commercial fairness, and

[74] See Ms Toube KC's skeleton at paragraphs 82-86.

reliance was placed on the well-known rule in ***ex parte* James**[75]. This aspect of Mr. Chishti's case is dealt with under the next heading under which Mr. Chishti's allegations of bad faith are examined.

Mr. Chishti's conspiracy theory

149. Ms Toube KC opened her address to the Court by saying that the Transaction was designed to "denude" Mr Chishti of his both his contractual rights under the Indemnity Agreement and "strip out the assets" of the Company, take from him his rights as a shareholder and treat him differently than all the other creditors[76]. It was said that this was the "whole purpose" of the Transaction.

150. It was submitted that the Company had the obligation to make sure that his rights under the Indemnity Agreement were preserved by requiring those obligations to be assumed by another solvent company, and this was not contemplated by the Transaction. This was alleged to be for the purpose of frustrating Mr. Chishti's absolute defence to claims brought against him by the Company and/or other members of the group. It was also said that the intention was to remove his ability to defend himself by depriving him of his rights of advancement of legal expenses under the Indemnity Agreement.

151. It was said that Mr. Chishti's rights as a shareholder were being removed because the Valuation Report was wrong, and if the true value were established it would show that the Company's value exceeds the value of the totality of the debt.

152. It was also said that his rights as a contingent creditor in respect of his advancement and reimbursement claims were being affected because (i) the true value of the Company was greater than the unsecured debt and that he had a valid claim in the liquidation and (ii) he had a liquidation priority claim that ranks ahead of ordinary unsecured claims.

153. In his first affidavit[77] Mr. Chishti alleged that the Company's management had (i) provided the wrong forecast and that as a result the figures in Teneo FA's Valuation Report had been "depressed" and (ii) the true forecast figures were significantly higher. The implication is that this was done in order to enable the Transaction to proceed on the terms agreed between the Company and the Secured Lenders and not at the true value. Mr. Chishti said that this information came from insiders within the Company whom he did not wish to name to prevent them being the subject of "retaliation".

154. Mr. Chishti also alleged that had he been approached by the JPLs, he would have made it clear that he (in conjunction with a broader syndicate) would have been willing to

[75] ***ex parte* James In re Condon** (1874) LR 9 Ch App 609 and recently quoted in **Lehman Brothers Australia Ltd (in liquidation) v MacNamara [**2021] Ch 1.
[76] Ms Toube KC's skeleton paras 4, and 46-54 and her oral submissions.
[77] HB1/13/147 at para 34

provide capital to the Company on substantially better terms than those being offered under the Transaction[78].

155. In his second affidavit, Mr Chishti alleged that the Company's true revenue targets had been "concealed" from Teneo FA and that the figures had been misrepresented by Mr Myshrall. He alleged that he had been told by Company insiders that the true target was to increase revenue by [redacted] per month[79]. He also made other allegations to the effect that the current customer base was largely stable[80], and he attributed the declining performance of the Company to mismanagement by the present management team.

156. On the Friday before the hearing, an affidavit was received by the JPLs from Mr. Haris Mustafa, described in paragraph 48 above. Allegations were made that the information being provided to the Court was false and that the true position was that the Company had more free cash than it was telling the Court, and that the forecasts had been understated. Mr. Chishti denied (through counsel) having had any hand in the preparation of Mr. Mustafa's affidavit. Ms Toube KC did not rely upon Mr. Mustafa's evidence.

157. In the course of the hearing, Mr Chishti said that he was prepared to factor some of the Company's receivables to give the Company liquidity. The suggestion was that his offer had not been taken seriously by the JPLs.

158. The tenor of these allegations is that the Company has engaged in a course of conduct to dishonestly misrepresent its true financial position to Teneo FA in order to depress the Company's value. It is also implied that the Valuation Report is flawed because it failed to detect these misrepresentations by not making a thorough independent review and relying too heavily on what management had represented.

Bad faith

159. These are very serious allegations. The Court is required to examine them closely and consider the evidence on which they are based.

160. First, it is immediately apparent that the allegations made by Mr. Chishti in his affidavits concerning what he has been told by Company insiders is entirely inadmissible. It is unattributed and unsupported. Moreover, the evidence that has been presented by the Company and the Valuation Report is supported by the Company's financial records, which Mr. Myshrall attests as being true and correct, and Teneo FA attests that it has reviewed. The Court therefore rejects Mr. Chishti's allegations about the "depression" of figures and the "concealment" of the true facts on the basis that

[78] HB1/13/149 at para 41-2
[79] HB1/22/230 at para 12
[80] HB1/22/231 para 20

they are inadmissible as evidence. The Court observes that the particular allegations of dishonesty made by Mr. Chishti are inherently improbable because they involve senior management falsifying records in a centralised accounting system which would be easily discovered.

161. Second, the affidavit sent in by Mr. Mustafa contains many material inaccuracies. In particular, the references to the bank balances at the end of October 2024 are inconsistent with the Company's bank statements. The internal review that was conducted to recreate the information produced by Mr. Mustafa from the Company's accounting system could not be replicated. This means that Mr. Mustafa's evidence as a whole must be treated with extreme caution, and the Court is not prepared to accept it as being reliable and therefore rejects it. The Court is not required to speculate as to the motives behind Mr. Mustafa's unilateral submission of his affidavit, but the Court is highly sceptical that it was done for the purposes Mr. Mustafa professes[81]. For the sake of completeness, I accept the evidence given by Mr. Myshrall in response to Mr. Mustafa's affidavit[82].

162. Third, the allegation that Mr. Chishti offered to provide financing on terms that were more favourable to the Company is flatly contradicted by Mr. Flannery's evidence[83]. It is self evident that Mr. Chishti has not made any such proposal or offer.

163. Fourth, the allegations made by Mr. Chishti about Company mismanagement are wholly unparticularised and are not related to any specific action or omission to justify them. The suggestion that the Company's financial distress has been caused by mismanagement is rejected. These assertions amount to no more than scurrilous accusations. In the absence of any direct evidence, those allegations are rejected, and the evidence given by Mr. Myshrall responding to those accusations is accepted[84].

164. In the light of these findings, I reject the allegations made by Mr. Chishti to the effect that the Company and/or the Secured Lenders and/or the JPLs have acted in any improper or collusive manner. Nor have the JPLs acted in a manner that is less than even-handed or fair to Mr. Chishti. There is nothing in the assertions Mr. Chishti has made which undermines the confidence in the conduct of the JPLs or the Company or the Secured Lenders or that would justify the Court's refusal to grant the Sanctions sought.

[81] I have noted that Ms Toube KC did not rely upon this evidence. Curiously, Mr. Stevens sought to object to the criticisms of Mr. Mustafa's evidence on the basis that he was not before the Court to defend himself against the Company's response that the materials he had produced appeared to have been manually altered (i.e. falsified). I note that in relation to that allegation, there was *prima facie* evidence that (i) the information he exhibited and attested that he had produced from the Company's system had been generated outside the Company's operating system and (ii) it was directly contradicted by the external third-party evidence in the Company's bank statements. See HB1/51/1950-8

[82] HB1/18/191 para 8 and HB1/51/1847-61 paras 15-18

[83] HB1/20/205 para 6

[84] HB1/18/192-3 paras 13-15

165. The Court expresses its concern about this aspect of the case. Serious allegations of dishonesty or bad faith should not be made or pursued unless there is clear *prima facie* evidence which supports them. There is no evidence that justifies the allegations of dishonesty and bad faith that Mr. Chishti has made in this case.

Mr. Chishti's offer to factor receivables to generate short-term cash liquidity for the Company

166. It was suggested in the course of the hearing that Mr. Chishti's offer of factoring was not taken seriously.

167. Just before the hearing Mr. Chishti made a proposal that he (and some unnamed associates) could make available up to US$10 million in cash (in three instalments) to ease the Compnay's liquidity issues (and thereby allow the Company to survive while the valuation exercise was completed) by purchasing at a discount (factoring) some of the Company's receivables. The proposal did not include any details other than an outline proposal and no information was given as to the source of the funding or its terms.

168. The factoring proposal required the Company to obtain the approval of the Secured Lenders, which was not given because it involved the use of receivables which are subject to the Secured Lenders' existing charges over the Company's assets. This was not an unreasonable objection, given that any sale of those assets at a discount represents a loss of future revenue to the Company.

Share rights

169. Mr. Chishti complains that he has been unfairly treated because his share rights will be lost. This is the normal consequence of an insolvency which does not produce a surplus available for distribution to shareholders or unsecured creditors. For the reasons I have given above, there is no evidence to support the argument that the Company's Enterprise Value exceeds the total amount of its liabilities. There is nothing wrong or unfair in this to Mr. Chishti.

170. Mr. Chishti also complains that he has been singled out for unequal treatment because he is not being offered the opportunity to participate in the rights offered in Steps 5 and 6. The Secured Lenders submit that this is in effect a 'gift' and not an entitlement, and that in any event, the requirement that in order to be eligible the participant must not be in litigation with the Company is not an unreasonable limitation, and it is certainly not offensive to ordinary notions of commercial morality such that the JPLs should not support the Transaction. I agree.

171. It is worth noting in this context that Mr. Chishti will in fact participate indirectly in the rights offered under Step 5 because he has an ownership interest in TRG-I.

The Indemnity Agreement

172. Turning to the submission that the terms of the Transaction that are said to have the effect of "removing" Mr. Chishti's rights of indemnity, this is plainly an inaccurate statement. Mr. Chishti's rights of indemnity under the Indemnity Agreement remain unaffected by the Transaction. His rights remain, albeit that the Company is insolvent and will be unable to fulfil those obligations except to the extent to which it has assets available in the liquidation to admit his proof of debt as a contingent claim, value it and declare a dividend to the unsecured creditors.

173. Mr. Chishti says that Newco or some affiliate should be required to carry over the indemnity obligations of the Company under the Indemnity Agreement. There is no obligation on the Secured Lenders to do so, and it is apparent that they do not wish to assume additional obligations on top of the secured debt that is owed to them already, in addition to the debts owed to the creditors whose services are essential to the continuation of the business[85]. There is nothing unusual in this and it does not represent a term which is offensive to ordinary notions of commercial morality such that the JPLs should not support the Transaction.

174. The claim that the Company has an obligation to "see to it" that the obligations under the Indemnity Agreement are assumed by a solvent third party will be addressed in a separate application, subject to the directions given in paragraphs 192-195 below.

175. On analysis, having considered Mr. Chishti's various objections, it is clear to the Court that the terms of the Transaction are designed to restructure the debt in a manner that seems most likely to the Company and the Secured Lenders to achieve a successful repayment of the Company's debts, and to secure the future of the Company's business enterprise. The Transaction is not "designed" to "denude" Mr Chishti of any rights or treat him unfairly, nor is it designed "to strip the assets out of the Company" improperly.

176. Accordingly, to the extent that Mr. Chishti relies upon these arguments to suggest that the JPLs should not support the Transaction, or that the Court should not give its sanction to the JPLs to enter into it on the basis of the rule in ***ex parte* James** (or otherwise), those submissions are rejected.

Is this a "momentous" decision justifying the Court's sanction as a sale?

177. It was submitted that the Court should not grant a sanction to the JPLs under section 175 (2) as a sale because the JPLs have to make the decision for themselves, and they have the power to do so under the section. Thus, it is said they do not need to come to the Court for a sanction at all (in what Ms Toube KC called an unjustified "bomb-

[85] The Secured Lenders submitted that they do not wish to be burdened with ongoing litigation costs associated with Mr. Chishti's litigation claims, with which they have nothing to do.

shelter" application). This was based in part on the statements made in **Re Sova Ltd (In Special Administration)** referred to above, where Miles J said that while there are analogies to be drawn between trustees and liquidators, generally liquidators and administrators have to make hard commercial decisions as part of their job and cannot expect to rely on the approval of the court[86].

178. I do not disagree that in the course of conducting the liquidation of a company the liquidator does not usually need to seek a sanction for a routine sale. There are two features that distinguish this application from the routine exercise of the power of sale which in my view justify the JPLs seeking the sanction of the court.

179. The first and most important of these is that the JPLs were appointed for the purpose of trying to assist the Company to reach a restructuring. They are not permanent liquidators appointed after a winding up order has been made and the creditors have met to appoint them to office, after which their appointment has been confirmed by the court. For this reason, JPLs appointed for the purposes of a restructuring (whether on a so-called "light touch" or other basis) normally report to the court prior to committing to a restructuring plan and will invariably seek the approval of the court to proceed with a restructuring plan.

180. The second reason is that this is not a routine sale of an asset, but it is part of a package of terms that dispose of the whole of the Company' s business undertaking and there will be little if anything left to liquidate after the Transaction has been concluded. It is therefore (in my view) entirely appropriate for the JPLs to seek the validation of the exercise of the power of sale in these circumstances.

Overall conclusions

181. In the light of the foregoing findings and determinations, the Court now turns to apply the respective tests to each of the Sanctions Applications.

The sanction to enter into the Transaction as a compromise under section 175 (1) (e) of the Companies Act 1981

182. The elements required to satisfy the test for a Type 1 sanction are set out in paragraphs 71-2 above.

183. I find that (a) the JPLs have put all the relevant materials before the Court, they have explained their reasons for coming to their conclusions, and have taken into account the concerns, criticisms and objections made by Mr. Chishti and Mr. Taylor in their evidence[87] (b) the JPLs have the genuine view that it is in the best interests of the creditors and the Company, including its employees, taken as a whole to enter into the

[86] At paras 182-4 (para 184 (a))
[87] Thresh affidavits 1, 4 and 5.

Transaction as a compromise on the terms proposed and that they have reasonable grounds for taking that view[88] (c) in reaching their view, the JPLs have not acted in a manner that is irrational or in a way that no reasonable liquidator would act[89] (d) the JPLs have not acted in a partisan manner, they do not have an actual conflict of interest, nor is there an appearance of bias in the way that they have arrived at their decision[90] (e) there is no other substantial reason why the Court should not grant its sanction to the JPLs to enter into the Transaction as a compromise (f) the JPLs' reasoning and their reliance upon the Valuation Report (and the Report itself) is not based on flawed reasoning nor on a flawed understanding of the facts[91] and (g) the Transaction has obvious and discernible benefits to both the Company and its creditors[92].

184. The Court therefore grants its sanction to the JPLs to enter into the Transaction as a compromise.

The sanction to enter into the Transaction as a sale under section 175 (2) (a) of the Companies Act 1981

185. The elements required to satisfy the test for a Type 2 sanction are set out in paragraphs 75-7 above.

186. I find[93] that (a) the JPLs have put all the relevant materials before the Court, they have explained their reasons for coming to their conclusions, and have taken into account the concerns, criticisms and objections made by Mr. Chishti and Mr. Taylor in their evidence (b) the JPLs have the genuine view that the Transaction obtains the best price they reasonably believe is possible in the circumstances and that it is in the best interests of the creditors and the Company, including its employees, taken as a whole to enter into the Transaction as a sale on the terms proposed, and that they have reasonable grounds for taking that view (c) in reaching their view, the JPLs have not acted in a manner that is irrational or in a way that no reasonable liquidator would act (d) the JPLs have not acted in a partisan manner, they do not have an actual conflict of interest, nor is there an appearance of bias in the way that they have arrived at their decision (e) there is no other substantial reason why the Court should not grant its sanction to the JPLs to enter into the Transaction as a sale (f) the JPLs' reasoning and their reliance upon the Valuation Report (and the Report itself) is not based on flawed reasoning nor on a flawed understanding of the facts and (g) the Transaction has obvious and discernible benefits to both the Company and its creditors.

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[88] Thresh 1 paras 8, 81 and 84. Thresh 4 paras 43-64.
[89] The conclusions of the JPLs are rational, coherent and based on proper grounds including the Valuation Report, the background circumstances of the Company, its current financial condition and its illiquidity.
[90] For the reasons I have given above and Thresh 4 paras 67-8 and Thresh 5 which examines in close detail all of the allegations raised by Mr. Mustafa.
[91] Thresh 1 and 4 and the Valuation Report.
[92] Although the requirement under (g) seems to be required only by the test for a compromise, it seems appropriate to include it as a finding in relation to the sale as well. These benefits include the continuation of the business which benefits the secured creditors and the essential creditors and the Company's employees. There is no discernible disadvantage to the shareholders and unsecured creditors because they will not make any recovery in a liquidation.
[93] I repeat the cross references to the evidence set out in footnotes 87-91 above to each of the respective headings.

187. The Court therefore grants its sanction to the the JPLs to enter into the Transaction as a sale.

The comfort in the recitals to the Order

188. Ms Toube KC also said that even if the Court were minded to grant the Sanctions, the Court should not offer any comfort to the JPLs in the recitals to the Order. I disagree. The Court has found that (i) the Transaction is one which is one that the JPLs can properly enter into as a compromise or as a sale if they consider it is in the best interests of the Company and its creditors to do so and (ii) there is no flaw or other vitiating factor that requires the Court to withhold its sanction(s) to the JPLs to proceed to enter into the Transaction if they are minded to do so. There is no reason therefore to withhold the normal comfort that records those matters on the face of the Order. I also repeat the point made above regarding the JPLs' role as provisional liquidators appointed for the purposes of restructuring.

189. There was some discussion about the form the wording should take. In my view, the recitals to the Order should record that the Court is satisfied that in deciding to take the necessary steps to give effect to the Transaction the JPLs have acted properly and in accordance with their duties to do what in their view is in the best interests of the Company and its creditors as a whole.

The Order granting the sanctions

190. The Court therefore grants the Order in the terms in the draft submitted to the Court, subject to the amendment of recitals as expressed in paragraph 189 above, and the revised Order can be submitted to the Registry for signature in the normal way.

Costs of the Sanction Applications

191. The draft Order provides that the JPLs' and the Company's costs of the Sanction Applications to be paid out of the assets of the Company as fees and expenses properly incurred in preserving, realising or getting in the assets of the Company under rule 140 of the Winding-Up Rules 1982, which the Court hereby approves. The costs of the Sanction Applications were necessarily substantially increased by the adjournment application made by Mr. Chishti. I will hear the parties upon application as to whether and how the Court should deal with this aspect of the costs Order (if at all).

Further directions for the determination of Mr. Chishti's other applications

192. Mr. Chishti has an outstanding application for leave to commence proceedings against the Company for (a) declaratory relief as to the meaning and effect of the Indemnity Agreement (b) interim relief in respect of his advancement of expenses claims and (c) specific performance of the obligation to "see to it" that the Company's obligations to him under Indemnity Agreement are assumed or transferred to another solvent party. This application was adjourned to follow the decision in relation the Sanction

Applications. I appreciate that Mr. Chishti also wishes to bring on an immediate application for interim relief in respect of his advancement of expenses claim under the Indemnity Agreement, but it seems to me that that application can only be made after the Court has determined his application for leave to lift the automatic stay.

193. The Court directs that the leave application alone should be relisted for an *inter partes* hearing as soon as possible, after the parties have agreed suitable dates between counsel. Once that application has been determined, further directions can be given in respect of the conduct of Mr. Chishti's claims, when or if leave is given.

194. The Court also directs that Mr. Chishti should put in an affidavit in support of the leave application together with any materials he wishes the Court to consider in support of it by way of evidence. That affidavit must exhibit a draft of the full Points of Claim setting out the basis of the underlying claim which he wishes to bring so that the JPLs have a proper opportunity to consider it and respond if they wish to do so. Mr. Chishti's affidavit should also provide evidence to support the factual grounds on which the Court is to be invited to exercise its discretion to give leave to commence the proceedings.

195. Mr. Chishti is to serve his affidavit by 31 December 2024. The JPLs are to have 21 days in which to respond to any evidence put in by Mr. Chishti, and Mr. Chishti is to have 14 days in which to reply to the JPLs' evidence (if any). The leave application can then be set down for hearing thereafter.

196. In the event that these directions need to be adjusted, liberty to apply is also given to the parties (if agreement cannot be reached).

20 November 2024

THE HON. ANDREW MARTIN

PUISNE JUDGE