In The Supreme Court of Bermuda

COMMERCIAL COURT

COMPANIES (WINDING UP)

Case 2021: Nos. 307 and 309

IN THE MATTER OF MARKEL CATCO REINSURANCE FUND LIMITED

AND IN THE MATTER OF CATCO REINSURANCE OPPORTUNITIES FUND LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF THE SEGREGATED ACCOUNTS COMPANIES ACT 2000

JUDGMENT

Date of Hearing: **7, 8 December 2021**
Date of Update Hearing: **16 February 2022**
Date of Judgment: **25 February 2022**

Appearances: **Daniel Bayfield QC, South Square, Gray's Inn, London and Kehinde George, ASW Law Limited, for the Companies**

Christian Luthi and Rhys Williams, Conyers, for the Joint Provisional Liquidators

Felicity Toube QC, South Square, Gray's Inn, London and David Kessaram, Cox Hallett Wilkinson, for Opposing Scheme Creditors, HWH Realty Holdings LLC and Partners Capital LLC

JUDGMENT of Mussenden J

Introduction

1. This matter came before me by a Summons dated 29 October 2021 in respect of each of the companies Markel CATCo Reinsurance Fund Limited (the "**Private Fund**") and CATCo Reinsurance Opportunities Fund Limited (the "**Public Fund**", together the "**Scheme Companies**"). The Scheme Companies are part of the CATCo Group (the "**Group**") which operates an Insurance Linked Securities fund business ("**Markel CATCo**") which was founded in 2011 and acquired by Markel Corporation ("**Markel Corporation**") in late 2015. The Group provided investment opportunities in retro and non-retro reinsurance products to its investors (the "**Investors**")[1]

2. The Scheme Companies each seek an order pursuant to section 99 of the Companies Act 1981 (the "**CA 1981**") convening meetings (the "**Scheme Meetings**") of the beneficial owners of their shares, in their capacity as creditors of the Scheme Companies (the "**Scheme Creditors**"), for the purpose of considering and, if thought fit, approving schemes of arrangement between each of the Scheme Companies and its Scheme Creditors (the "**Schemes**"). The applications were originally supported by the evidence filed by the Scheme Companies including:
    a. The third affidavit of Federico Alejandro Candiolo filed on behalf of the Scheme Companies dated 17 November 2021 ("**Candiolo 3**");

[1] The Investors are the beneficial owners of the shares in the Private Fund or the Public Fund (as applicable) in their capacity as creditors of the Private Fund or the Public Fund (as applicable). The Scheme Creditors will be the Investors (other than HWH, Partners and certain funds managed by Partners, as explained (and as those defined terms are set out) in paragraph 7 below) as at the date designated as the "Scheme Record Time", which will occur shortly before the date of the Scheme Meetings.

b. The first and second affidavits of Andrew Good of Skadden, Arps, Slate, Meagher & Flom ("**Skadden**") dated 16 November 2021 ("**Good 1**") and 1 December 2021 ("**Good 2**");

c. The first affidavit of Joe Cotterell of Sterling Financial Print dated 16 November 2021; and

d. The first affidavit of Eric Bertrand of Centaur Fund Services (Bermuda) Limited dated 15 November 2021.

3. Shortly before the original return date for this hearing on 10 November 2021, certain parties informed the Scheme Companies that they intended to oppose the Schemes. Those parties are Pension Insurance Corporation plc ("**PIC**") and HWH Realty Holdings LLC ("**HWH**"), both of which are Investors in the Private Fund, and Partners Capital LLC and certain of its clients ("**Partners**", and together with PIC and HWH, the "**Opposing Scheme Creditors**"), which is an investment manager and adviser to various Investors in the Private Fund. The Opposing Scheme Creditors had filed evidence from several people.

4. Shortly before the Convening Hearing on 7 December 2021, PIC withdrew its opposition to the Scheme proposed by the Private Fund, and signed a support undertaking. PIC were no longer part of the Opposing Scheme Creditors which consequently consisted of HWH and Partners.

5. On 7 and 8 December 2021, there was a full hearing when I heard submissions from counsel for the Scheme Companies and the Opposing Scheme Creditors. Counsel for the Scheme Companies provided full details of the proposed Schemes and counsel for the Opposing Scheme Creditors provided full details of their objections to the Schemes. At the end of the hearing, I reserved judgment.

6. On 28 January 2022, counsel for the Scheme Companies informed the Court by letter that the Scheme Companies and the remaining Opposing Scheme Creditors had agreed to an in principle settlement that would, if successfully concluded, result in the withdrawal of the objections to the proposed Schemes raised by those creditors. On that basis, modifications would be required to the proposed Schemes. In order for the proposed Schemes (as amended) to proceed, the Scheme Companies would still require Orders from the Court

summoning meetings of the Scheme Creditors, and the Court would still need to be satisfied that it had the necessary jurisdiction to make the Orders sought.

7. On 3 February 2022, counsel for the Scheme Companies informed the Court by letter that the Scheme Companies and the remaining Opposing Scheme Creditors (HWH and Partners) had entered into a settlement agreement (the "**Settlement Agreement**"). As a result of the Settlement Agreement, HWH, and Partners would no longer be Scheme Creditors and they no longer opposed the Private Fund Scheme. Thus, there would no longer be Opposing Scheme Creditors.

8. On 16 February 2022, there was a hearing in Court when counsel for the Scheme Companies provided an update on the proposed Schemes (the **"Update Hearing**"). They relied on the Third Affidavit of Peter Newman sworn on 15 February 2022 ("**Newman 3**") which provided an overview of the developments since the Convening Hearing. At the end of the hearing I made the Orders with reasons to follow, which I now provide.

9. As the Opposing Scheme Creditors withdrew their objections, I have for the majority of this Judgment referred only to the submissions of the Scheme Companies referring to the same as the "Scheme Companies" or "counsel for the Scheme Companies" or "counsel".

Background to the Scheme Applications – Prior to the Settlement Agreement

10. Counsel for the Scheme Companies submitted that in light of litigation brought and threatened against them, the directors of each Scheme Company consider that the risk of Scheme Creditors bringing claims against the Scheme Companies or persons who are indemnified by the Scheme Companies in relation to certain claims which might be made against them (referred to as "**Investor Claims**") is such that they cannot make further distributions to Scheme Creditors at present. This is because the Scheme Companies are likely to incur costs and expenses (including costs of defending such claims) if Investor Claims are brought and other liabilities if Investor Claims succeed or are settled.

11. The Schemes form part of a wider proposal (the "**Buy-Out Transaction**") pursuant to which the Scheme Creditors will receive 100% of the adjusted net asset value of the shares in which they are beneficially interested (the "**Closing NAV**") which includes the value of

a US$20 million contribution by Markel Corporation or its affiliates towards the expenses of the transaction and future run-off of the group (the "**Administrative Expenses Contribution**"),[2] plus their pro rata share of a further US$34 million which will be contributed by Markel Corporation or its affiliates (the "**Additional Consideration**"), while retaining the right to any future upside should the value of fund assets increase.

12. In exchange, the Scheme Creditors will provide releases (the "**Releases**") of any Investor Claims that they might hold against the Scheme Companies and certain third parties, including all those who are, directly or indirectly, entitled to an indemnity from the Scheme Companies, such as Markel Corporation (the "**Indemnified Parties**").

13. The Releases, which the Scheme Companies accept are broad, are a key feature of the Schemes. Markel Corporation is not willing to fund the Buy-Out Transaction if there remains any risk of litigation being brought by Scheme Creditors in relation to the Investor Claims. The funding is only available if Markel Corporation is confident that the Schemes will bring an end to the litigation threatened by a number of the Scheme Creditors, and which might be brought by other Scheme Creditors. The Schemes are designed to bring about finality and certainty and the breadth of the Releases reflects that and is necessary to achieve it.

14. On 1 October 2021, the Bermuda Court appointed joint provisional liquidators ("**JPLs**") in respect of the Scheme Companies and other entities in the Group for the purpose of overseeing the implementation of the Schemes and the Buy-Out Transaction (together, the "**Restructuring**"). The appointment of the JPLs brought into effect a moratorium on claims against the Scheme Companies which has subsequently been recognised in the U.S. under Chapter 15 of the U.S. Bankruptcy Code.

15. Absent the Schemes, the boards of directors of the Scheme Companies had determined that they would have no choice but to take steps to place the Scheme Companies into full liquidation proceedings. A report had been prepared by AlixPartners UK LLP (the

[2] Closing NAV is calculated as the higher of (i) the net asset value ("**NAV**") of the shares on the date on which the Restructuring completes or (ii) the NAV of the shares on 31 August 2021, in either case adjusted to allow for transaction costs, the Administrative Expenses Contribution, projected on-going management costs, and the release of certain litigation reserves.

"**AlixPartners Report**") which indicated that returns to Scheme Creditors in that scenario would be substantially lower than if the Schemes are implemented.

16. Thus, the Scheme Companies submit that in the interests of the Scheme Creditors that they be permitted to convene meetings of the Scheme Creditors, and, if the Schemes be approved at those meetings, for the Schemes to be sanctioned, allowing the Buy-Out Transaction to proceed.

17. All Private Fund Scheme Creditors will receive the same treatment under the Schemes, in that they will receive 100% of the Closing NAV of the shares in which they are beneficially interested, plus their pro rata share of the Additional Consideration.

18. Public Fund Scheme Creditors will effectively receive the same treatment, save that their share of the distributions will be made via the Public Fund through its receipts from the Private Fund.

19. The Scheme Companies propose that their Scheme Creditors should be divided into a number of classes for the purpose of voting on the Schemes:

    a. For the Private Fund Scheme, it is proposed that the Scheme Creditors who are beneficially interested in shares in the main fund of the Private Fund (the "**Master Fund**") will be divided into four classes depending on which policy year they invested in (each a "**Master SP Class**" for 2016, 2017, 2018 and 2019 respectively). The Scheme Creditors who are beneficially interested in a separate sub-fund of the Private Fund (the "**Aquilo Fund**") will vote in a further separate class (the "**Aquilo Class**").

    b. The Public Fund issued two series of shares, ordinary shares ("**Ordinary Shares**") and C shares ("**C Shares**"). Ordinary Shares correspond to investments in the Master Fund of the Private Fund made in policy years 2016, 2017, 2018 and 2019, whereas the C Shares correspond to investments made in policy years 2018 and 2019. It is therefore proposed for the Public Fund Scheme that the Scheme Creditors who are beneficially interested in the Ordinary Shares will vote in a separate class from those beneficially interested in the C Shares.

20. At the Convening Hearing in December 2021, the Court was informed that the Schemes had the support of over 82% of each class of Private Fund Scheme Creditors and over 95% of each class of Public Fund Scheme Creditors (in each case by value, as described below). As at 11.59pm on 9 November 2021[3]:

    a. 98.2% of the Public Fund Scheme Creditors interested in C Shares and 95.4% of Public Fund Scheme Creditors interested in Ordinary Shares had undertaken to support the Public Fund Scheme, in each case by value with value being calculated by reference to the NAV of the shares held by each Scheme Creditor.

    b. Private Fund Scheme Creditors had undertaken to support the Private Fund Scheme in the following percentages by value, with value again calculated by reference to the NAV of the shares held by each Scheme Creditor:

        i. 88.81% of the 2016 Master Fund SP Class;
        ii. 88.28% of the 2017 Master SP Class;
        iii. 82.24% of the 2018 Master SP Class;
        iv. 94.57% of the 2019 Master SP Class; and
        v. 100% of the Aquilo Class.

Background to the Group and Circumstances

21. The factual background to the applications was set out in Candiolo 3. Mr. Candiolo is the Assistant Secretary of the Manager.

Background to the Group

22. Mr. Candiolo provided a background to the Group. The Markel CATCo business was acquired by Markel Corporation in 2015. Since then it has been managed by Markel CATCo Investment Management Ltd (the "**Manager**"). Until 2019, the Group offered Investors the opportunity to acquire shares that would allow the Investors to participate in

[3] This was the original deadline for providing an undertaking to support the Schemes and be eligible to receive the Early Consent Fee per Candiolo 3 at [18].

the performance – either positive or negative – of portfolios of property and casualty reinsurance and retrocessional reinsurance contracts. Investors would invest for a set period, usually a year or three years, and the money they invested would be exposed to losses on any insured events occurring during the term of their investment. Investors would earn positive returns if the premium on the retrocessional reinsurance and/or reinsurance contracts in which they invested exceeded the sum of the losses on those contracts plus any fees paid to the Manager.

23. In 2017 and 2018, following six years of gains (by the Group and its predecessor prior to the acquisition by Markel Corporation), the catastrophic risk reinsurance market suffered its worst and fourth-worst years of losses, respectively. Following these events, the Group ceased offering new investment and has been in run-off since 2019. Since that time, the Group has returned approximately US$2.3 billion to Investors, but its ability to continue returning capital to Investors has now been impaired by certain claims asserted against the Group and related parties.

24. Mr. Candiolo explained how the investment schemes operated. Investors could invest in the Private Fund directly by purchasing shares in one of its segregated accounts (each a "**Fund**" or indirectly by purchasing shares in the Public Fund (which is itself an Investor in the Private Fund). He explained that the Private Fund is a mutual fund company under the CA 1981 and a segregated company under the Segregated Accounts Companies Act 2000 (the "**SAC Act**"). The Private Fund offered two separate investment strategies, through the Aquilo Fund and through the "**Retro Funds**". The interests of the Retro Funds are linked, because six of the Retro Funds[4] (each a "**Sub-Fund**") purchased shares in the Master Fund, which is the seventh Retro Fund. The Private Fund, the Public Fund and the Reinsurer were each managed by the Manager, pursuant to certain management agreements (the "**Management Agreements**"). The Manager also holds all the voting shares in the Private Fund and the Reinsurer. As set out below, the Management Agreements contain broad indemnities in favour of the Manager and certain of its related parties.

[4] Namely the Diversified Fund II, Limited Diversified Arbitrage Fund ("**LDAF**"), the Diversified Arbitrage Fund, the GTL Diversified Fund, the Markel Diversified Fund and the QIC Diversified Fund: Explanatory Statement, Part II, paragraph 29.

Investments in the Private Fund

25. Mr. Candiolo explained in detail about the structure of the investments in the Private Fund which were primarily raised on an annual basis and funded at the beginning of the calendar year after which they were invested in the Reinsurer. He explained about the disposition of the capital at the end of the year and about the creation of "side-pockets" which are distinct classes of shares issued by the Master Fund which give their holders an entitlement to share in a defined pool of assets. Thus the assets of the Master Fund are divided into four SPs, one for each policy year in 2016, 2017, 2018 and 2019 ((the "**Retro Fund SPs**") (referred to as the "**2016 Master Fund SP**", "**2017 Master Fund SP**", "**2018 Master Fund SP**" and "**2019 Master Fund SP**" respectively).

26. The effect of this structure is that while Investors who invested in any of the Retro Funds for a particular year remain holders of SP shares issued by that particular Retro Fund for that year, all Investors who invested in the Retro Funds within any policy year have identical (although proportional) economic interests in the Master Fund SP for that year. Investors that invested through a Sub-Fund hold that interest indirectly, while Investors that invested directly in the Master Fund hold their interest directly.

27. Accordingly, counsel for the Scheme Companies submitted that it is appropriate to divide investors in the Retro Funds according to which policy year they invested, rather than drawing a distinction between the Investors in the different Retro Funds.

28. The Aquilo Fund also has SPs, one for each calendar year from 2014 to 2020. Markel Corporation is the sole holder of shares in the 2020 Aquilo SP, because it bought out the interests of Investors in the remaining on-risk policies in the Aquilo Fund at the end of 2019. 100% of investors in the Aquilo Fund have undertaken to support the Schemes.

Share rights in the Public Fund

29. The Public Fund has two classes of shares, the Ordinary Shares and the C Shares, the proceeds of which were used to subscribe for shares in the Master Fund. The Ordinary

Shares are entitled to share in particular investments in policy years 2016, 2017, 2018 and 2019, whereas the C Shares are entitled to share in particular investments in policy years 2018 and 2019 per Candiolo 3, [54].

The Reinsurer and the Manager

30. Mr. Candiolo explained that Investors in the Group invested capital which was used by the Private Fund to subscribe for shares in Markel CATCo Re Ltd (the "**Reinsurer**"), which in turn used the capital to write fully collateralised catastrophic risk reinsurance contracts (as well as other insurance products) with cedants who paid the Reinsurer premiums under those contracts. He further explained that Investors' capital was held in cash and cash equivalent assets in trust accounts. (the "**Trust Accounts**") held in New York for the benefit of the relevant cedant.

31. Mr. Candiolo explained that the Manager is a Bermuda-based insurance and investment manager and an indirect wholly-owned subsidiary of Markel Corporation (an entity incorporated in the Commonwealth of Virginia, U.S.A.). As mentioned above, the Manager had entered into Management Agreements with the Private Fund, the Public Fund and the Reinsurer, and receives management fees for its services.

32. Under the Management Agreements (and certain other agreements, including the Bye-Laws) each of the Private Fund, Public Fund and Reinsurer have provided broad indemnities to the Manager, its affiliates and certain others in respect of (in summary) claims arising out of the performance by the Manager, and its officers, directors, employees and affiliates (together, the "**Indemnified Parties**") of their respective duties under the Management Agreements. The precise scope of each indemnity depends on the wording in each Management Agreement. Each Management Agreement contains certain carve-outs which make the indemnities unresponsive to certain types of claim such as claims based on negligence and/or wilful default and fraud or dishonesty. The scope of the indemnity varies between the agreements.

Consequences of Losses in 2017 and 2018

33. As a result of a large number of catastrophic events in 2017 and 2018, the Investors suffered material losses on their investments for those years. In 2019, the Manager ceased offering new investment in the Master Fund or the Aquilo Fund and at the end of the 2019 policy year, all remaining capital in the segregated accounts other than that trapped as collateral was returned to Investors. On 26 March 2019, the Public Fund voted to approve the run-off of its investments in the Master Fund. As of 31 August 2021, funds totalling US$2.3 billion had been released and returned to Investors, leaving the Private Fund with assets of US$735.8 million yet to be distributed. The run-off is expected to take until at least January 2023.

Investor Litigation

34. The claims asserted and brought by certain Investors prior to the Schemes being launched were explained in Good 1.

Partners' Correspondence in 2019

a) On 26 March 2019, Partners wrote to Markel Corporation setting out its concerns regarding certain representations made by the Manager or its employees that it claimed were misleading in various ways.

Eugenia Litigation

b) In October 2020, one of the Private Fund Scheme Creditors, Eugenia II Investment Holdings Ltd ("**Eugenia**"), brought proceedings against the former CEO of the Manager, Anthony Belisle, in the U.S. District Court for the Middle District of Florida. Eugenia alleged fraudulent and negligent misrepresentation for statements made in 2017 relating to Eugenia's investment for the 2018 policy year, and claimed US$7.5 million plus costs and punitive damages. Eugenia was represented by Sullivan (the law firm which represented HWH when it filed a claim against the Manager and Mr Belisle, and which now represents Partners, both of which were at the time of the Convening Hearing in December 2021 still Opposing Scheme

Creditors). In accordance with an indemnity applicable due to his previous employment, Mr. Belisle demanded that the Manager meet his costs of defending this claim and the amount of any judgment awarded. Eugenia's claim was settled with proceeds of the Group's D&O insurance policy without admission of liability

HWH Claim

c) Whilst the Eugenia litigation was ongoing, HWH raised a claim against Mr. Belisle, the Manager and the Private Fund and requested a payment of US$16 million. HWH was at that time represented by Sullivan, but is now represented by Quinn Emanuel. HWH indicated that its claim was based on a slide in an investor presentation and raised complaints similar to Partners and Eugenia. HWH also suggested that the Manager, the Reinsurer and the Private Fund operated as a scheme to defraud Investors by misleading them about the risk involved in an investment. On 3 December 2021, HWH filed a claim against Mr Belisle in the US District Court for the Middle District of Florida.

Partners' Litigation

d) On 2 December 2021 Partners filed a claim against Mr. Belisle in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida (the "**Partners Litigation**") seeking US$69 million against Mr. Belisle for fraudulent or negligent misrepresentation. The Scheme Companies were informed of this development on 3 December 2021. It is alleged that Mr. Belisle and persons under his direction made false representations to induce the funds managed by Partners to invest in the Private Fund in late 2017.

Future Investor Claims

e) In light of the matters set out above, the directors of the Scheme Companies are concerned that Scheme Creditors will seek to commence claims against the Manager, the Scheme Companies or the Reinsurer, or any of the other Indemnified Parties. The Scheme Companies say that they will defend any such legal proceedings (although if the Schemes are not implemented this would be a matter for liquidators in due course). However, at the material time, it was apparent that

the then Opposing Scheme Creditors considered (as other Scheme Creditors may do) that they did have valid Investor Claims which, if pursued, could result in adverse judgments being given against the Scheme Companies.

35. The Scheme Companies have extensive indemnification obligations under the Management Agreements. In addition, the bye-laws of the Manager, the Reinsurer and each Scheme Company (the "**Bye-Laws**") all contain similar indemnification provisions. If Investor Claims were to be brought against the Scheme Companies or any of the Indemnified Parties, the Scheme Companies and/or the Reinsurer would be required to pay the costs of defending the claims as well as satisfying any adverse judgments awarded. In the Eugenia Litigation, Mr. Belisle sought an indemnity from the Manager, and it seemed likely that he would also have done so for both the Partners Litigation and HWH claim in Florida.

<u>The Alternative to the Schemes</u>

<u>The Liquidation Scenario</u>

36. Counsel for the Scheme Companies submitted that the directors of the Private Fund consider that the prudent course is to make no further distributions until the possibility of future Investor Claims being asserted is resolved. If the Schemes are not approved, it is unlikely that any alternative transaction will be proposed by Markel Corporation or another third party, and the directors consider it likely that Scheme Creditors will pursue Investor Claims, which could deplete or exhaust the assets of the Scheme Companies. Moreover, section 15(2) of the SAC Act provides that distributions to holders of shares in segregated accounts, by redemption or dividend, may not be made if "*there are reasonable grounds for believing that the segregated account is not, or would after the payment not be, solvent.*".

37. Counsel submitted that the directors also consider that, given the Public Fund's close relationship with the Private Fund, it would be appropriate to place both companies into

liquidation notwithstanding that no claims have yet been asserted against the Public Fund directly.

38. Counsel also submitted that in the absence of the Buy-Out Transaction, the directors of the Scheme Companies, the Reinsurer and the Manager are likely to apply to convert the provisional liquidations into ordinary full liquidations. This is therefore the most likely alternative to the Schemes (the "**Liquidation Scenario**").

The AlixPartners Report

39. The Scheme Companies made reference to the AlixPartners Report which set out the likely returns to Scheme Creditors under the Liquidation Scenario in their capacity as members of the Scheme Companies. Simon Appell of AlixPartners was appointed by this Court as a joint provisional liquidator of the Scheme Companies. AlixPartners modelled two scenarios making various assumptions. In summary, the report indicated that the Schemes offer a better result for Scheme Creditors than the Liquidation Scenario assuming that individual Investors do not have unique Investor Claims which would entitle them to any proportionately different recovery from fund assets in a liquidation than any other Scheme Creditors. This information was provided in the draft Explanatory Statement exhibited to Candiolo 3.

Terms of the Restructuring – Prior to the Settlement Agreement

40. Counsel for the Scheme Companies submitted that the Buy-Out Transaction would result in the early return of all fund capital to the Scheme Creditors, together with their pro rata share of the Additional Consideration, conditional upon the Releases being granted.

41. The Scheme Companies set out the mechanics for implementing the Scheme. They also made detailed submissions about various circumstances including the Releases, the buy-distributions to the Scheme Creditors, the Closing NAV, the distribution of the Additional Consideration including of that to the Public Fund for further distribution to its creditors,

the management of the Group after the restructuring and distribution of any further capital released after the closing date of the Schemes ("**Closing Date**").

42. In respect of fees, they submitted the Schemes include two fees payable to Scheme Creditors, the payment of which is conditional upon the Schemes being sanctioned as follows:

    a. The "**Early Consent Fee"** will be paid to all Scheme Creditors who executed Undertakings prior to 9 November 2021 and who, consistent with their Undertakings, vote to approve the Schemes at the relevant Scheme Meetings. It will be calculated as 2% of the Current NAV of the shares in which those of each Scheme Creditors are beneficially interested and will be funded by an affiliate of Markel Corporation.

    b. The "**Work Fee**" will be paid to two Scheme Creditors, PKA A/S ("**PKA**") and Almitas Capital ("**Almitas**") in respect of the work that they have done in negotiating the terms of the Buy-Out Transaction. It will be calculated as 2% of the Current NAV of the shares in which those Scheme Creditors are beneficially interested and will be funded by Markel Corporation or one of its affiliates.

The Settlement Agreement

43. At the hearing on 16 February 2022 the Court was informed that in respect of the Settlement Agreement, some of the terms are as follows:

    a. HWH and Partners and their related parties will be excluded from the Private Fund Scheme. As they are no longer Private Fund Scheme Creditors, they will not be entitled to vote at any of the Private Fund Scheme Meetings.

    b. HWH and Partners will stay the proceedings commenced by each of them in Florida, USA (the "**Florida Litigation**") and, if the Restructuring is completed, will ensure that the Florida Litigation is dismissed.

c. On the date of the completion of the Restructuring, HWH and Partners will receive $20 million to be divided between them as they see fit plus a cash amount equal to the current Net Asset Value of the shares in which they are beneficially interested.

d. With effect from the Closing Date, HWH and Partners will grant releases, which mirror the releases Scheme Creditors will be required to provide under the Schemes.

Improved terms for remaining Scheme Creditors

44. The Court was also informed that as a result of the further negotiations, the Scheme Companies have agreed certain improvements to the Schemes for all Scheme Creditors including that: (a) the Additional Consideration to be provided by Markel Corporation has been increased from US$34 million to US$44 million; and (b) Markel Corporation has increased the Administrative Expense Contribution to an amount equal to all of the transaction costs in respect of the Schemes. This is estimated to comprise an increase of US$5 - US$10 million above the amounts previously described in the draft Explanatory Statement.

45. I accept that the terms of the Settlement Agreement will not in any way diminish the returns for Scheme Creditors under the Schemes as, on the contrary, the outcome for all Scheme Creditors has improved as a result of the further negotiations and agreements.

Undertakings

46. The Newman 3 evidence shows that it is clear that the Schemes are supported by an overwhelming majority of Scheme Creditors and well in excess of the statutory requirements as follows:

a. 98.2% of Public Fund Scheme Creditors beneficially interested in the C Shares and 95.4% of Public Fund Scheme Creditors beneficially interested in the Ordinary Shares.

b. Private Fund Scheme Creditors in the following percentages, in each case by value:

vi. 99.47% of the Retro Fund 2016 Class

vii. 99.11% of the Retro Fund 2017 Class

viii. 99.87% of the Retro Fund 2018 Class

ix. 99.60% of the Retro Fund 2019 Class and

x. 100% of the Aquilo Class

Impact of the Developments on the Scheme

47. Counsel for the Scheme Companies submitted that the exclusion of HWH and Partners from the Private Scheme does not present any obstacles to convening the Scheme Meetings or sanctioning the Schemes. I accept that their exclusion is a commercial decision taken by the Private Fund in order to facilitate the implementation of the Schemes.

The Convening Hearing

48. Counsel for the Scheme Companies made detailed submissions about the Convening Hearing as set out below.

49. Section 99(1) CA 1981 provides that:

> "*Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs*".

50. Section 99(1) CA 1981 provides that:

> "*Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 99 there shall—*
>
> *(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company whether as directors or as members or as creditors of the company or*

otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid."

51. Counsel submitted that these provisions mirror the corresponding provisions in the UK Companies Act 1948 and are substantially similar to the scheme provisions in the UK Companies Act 2006. Accordingly, when considering these provisions, the Bermuda Court mirrors the approach taken in England and other common law jurisdictions. The rationale for this approach was explained by Kawaley CJ in *Re Titan Petrochemicals Group Limited* [2014] Bda LR 90 at [12]:

> "*As Bell JA (Acting) more recently himself observed in Kader Holdings Company Limited-v-Desarrollo Inmobiliario Negocios Industriales de Alta Technologia de Hermosilio, S.A. de CV [2014] CA (BDA) 13 Civ (10 March 2014): "It seems to me sensible that the position in Bermuda should mirror that in England, as well as that in other common law jurisdictions…" (at paragraph 24). It is true that this observation was made in the context of determining the content of common law rules of private international law. However, the general desirability of a common approach is no less compelling when it comes to construing statutory provisions derived from the same legal roots and which often apply to companies whose operations and restructurings traverse multiple jurisdictional shores*."

52. Counsel submitted that the procedural aspects of the Convening Hearing are governed by Practice Direction No. 18 of 2007, Guidelines applicable to Schemes of Arrangement under Section 99 of the Companies Act 1981. Paragraphs 2 and 3 of the Practice Direction provide that:

    a. It is the responsibility of the applicant to determine the appropriate class composition for the scheme meetings, and to draw to the Court's attention any issue that may arise regarding the composition or conduct of the meetings.

    b. Unless there are good reasons for not doing so, the applicant should take all steps reasonably open to it to notify any person affected by the scheme that the scheme is being promoted, the purpose it is designed to achieve and the proposed class composition.

53. The function of the court at the convening hearing is "*emphatically not*" to consider the merits or fairness of the proposed scheme or plan, which will arise for consideration at the future sanction hearing if the scheme is approved by the statutory majority of creditors: see *Re Telewest Communications plc* [2004] BCC 342 at [14] per David Richards J.

Jurisdiction

Each Scheme Company is a "company"

54. Counsel for the Scheme Companies submitted that they are incorporated in Bermuda and are therefore clearly liable to be wound up in Bermuda and that they are already in provisional liquidation. Therefore, each Scheme Company is a "company" within section 99 CA 1981. I accept this submission.

The Scheme Creditors are creditors of the Scheme Companies

55. Counsel submitted that the starting point is that it is common for schemes of arrangement to be proposed with a large group of potential or contingent creditors, many of whom may not ultimately have a valid claim against the company. They argued that the present Schemes squarely fell into this category, as it was noted by Williams Trower QC (as he then was):

> "*In these types of case, the need for certainty is often the impetus behind the proposed scheme. In particular a company may be faced with a situation in which it knows or suspects that there are claims out there, but the extent of those claims is highly uncertain and the very fact of that uncertainty is acting as a break on the company's ability to plan for the future*." [5]

The meaning of "creditor" in section 99 CA 1981

[5] *Consumer Redress and the Scheme Jurisdiction*, Williams Trower QC, South Square Digest, August 2015, p7.

56. Counsel for the Scheme Companies made detailed submissions about the meaning of "creditor". They submitted that the meaning of "creditor" in section 99 of the CA 1981 was considered in detail by Kawaley CJ in *Re Titan Petrochemicals Group Limited*. In that case at [12] Kawaley CJ emphasised the "*general desirability of a common approach… when it comes to construing statutory provisions derived from the same legal roots and which often apply to companies whose operations and restructurings traverse multiple jurisdictional shores*". Following the approaches taken in England, Hong Kong and Singapore, he held that the beneficial owners of notes held via a trust structure can vote in schemes of arrangement as contingent creditors, provided that they are entitled to call for the issuance of definitive notes in certain circumstances under the term of the notes indenture.

57. The question of whether a contingent creditor can vote in a scheme of arrangement was considered in *Re Lehman Brothers International (Europe) (in administration)* [2009] EWCA Civ 1161 where Patten LJ stated at [29] that:

> "*There is no statutory definition of "creditor" or "arrangement" for the purposes of Part 26 and, in relation to "arrangement", the courts have been careful not to attempt to provide one beyond the limited criteria described in Re NFU Development Trust Ltd. But Mr Snowden contends that, in order to be a creditor of the company, it is necessary to be owed money either immediately or in the future pursuant to a present obligation* ***or to have a contingent claim for a sum against the company which depends upon the happening of a future event such as the successful outcome of some litigation****. Although a creditor for the purposes of Part 26 is not therefore limited to someone with an immediately provable debt in a liquidation, it does require that person to have a pecuniary claim against the company which (once payable) would be satisfied out of the assets as a debt due from the company*." (Emphasis added.)

58. In support of this conclusion, the Court of Appeal considered the decision of Lindley J in *Re Midland Coal, Coke & Iron Company* [1895] 1 Ch 267 and the comparatively recent decision of David Richards J in *Re T&N Ltd* [2005] EWHC 2870. In the former case, Lindley LJ held that a person with a contingent claim qualified as a creditor for the purpose of a scheme of arrangement under the Joint Stock Companies Arrangement Act 1870, stating at [277] that "*the word "creditor" is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless*."

59. In *Re T&N Ltd* [2005] EWHC 2870, having considered *Re Midland*, David Richards J concluded at [40] that persons with contingent claims for damages were also creditors for the purpose of a scheme of arrangement proposed under the English Companies Act 1985:

> "*In my judgment, 'creditors' in s 425 is not limited to those persons who would have a provable claim in the winding up of the company, although it clearly includes all those who would have such a claim. As was submitted by Mr Snowden and other counsel, one of the recognised purposes of s 425 is to encourage arrangements with creditors which avoid liquidation and facilitate the financial rehabilitation of the company: see, for example, Sea Assets Ltd v PT Garuda Indonesia [2001] EWCA Civ 1696 at para 2.* ***This suggests that as wide a meaning as possible should be given to "creditors" in the section.*** *Having said that, it is important to bear in mind that s 425 is designed as a mechanism whereby an arrangement may be imposed on dissenting or nonparticipating members of the class and such a power is not to be construed as extending so as to bind persons who cannot properly be described as 'creditors'."* (Emphasis added.)

The threshold for having a contingent claim

60. Counsel made various submissions about the threshold for having a contingent claim. They submitted that there was no suggestion in the authorities that the relevant contingency must have a real prospect of occurring, relying on *Re Noble Group Ltd* [2019] BCC 349 (where the scheme company was incorporated in Bermuda, and an inter-conditional Bermudian scheme of arrangement was promulgated on identical terms) where Snowden J noted in the convening judgment [at [162] that where relevant instruments provide that beneficial noteholders can acquire direct rights against an issuer in some (even remote) circumstance, underlying beneficial noteholders can properly be classified as "contingent creditors" of the company. It was submitted that this approach had been followed in numerous English cases, for example *Re Lecta Paper UK Limited* [2020] EWHC 382 (ChD) per Trower J at [18].

61. Counsel further relied on *Re Titan Petrochemicals Group Limited* where Kawaley CJ stated at [22] "*This analysis appears to me to follow a traditional approach to determining who qualifies as a contingent creditor, not discernibly different from the test applicable in the winding-up petition or proof of debt contexts. I found that it supported the submission that*

the Note Creditors ought properly to be accepted as entitled to vote on the proposed Scheme as contingent creditors."

62. In light of the above reasoning, Counsel submitted that the following principles should be followed:
    a. For the purpose of voting on a scheme of arrangement, a contingent creditor can include anybody who may in "*some (even remote) circumstance"* have a claim against the company proposing the scheme; and

    b. The Court should take a particularly broad approach when the proposed contingent creditors have a real economic interest in the scheme company.

Potential and/or contingent creditors in a scheme of arrangement

63. Counsel for the Scheme Companies submitted that it was well established that schemes of arrangement can be proposed with contingent or potential creditors, particularly in circumstances where the company "*knows or suspects that there are claims out there, but the extent of those claims is highly uncertain"* (see the quotation by William Trower QC cited above). One reason why schemes are particularly appropriate in this situation is because they can bind a wide group of persons, including parties who are subsequently held not to have a valid claim against the scheme company.

64. Counsel cited the case of *Re Card Protection Plan Limited* [2013] EWHC 3288 (Ch), where a scheme of arrangement was proposed with approximately 6.9 million policyholders who might have been mis-sold policies providing protection against the loss, theft or misuse of credit cards, or against misuse of the policyholders' identities. There, David Richards J held that the court did have jurisdiction to make a convening order stating at [6]-[7] *"It is, I think, clear that it is not necessary that only persons with established claims can be made the subject of a scheme of arrangement. The statutory provisions would to a considerable extent be unworkable if it were otherwise. It is, in my judgment, enough that they are persons who consider that they do or may have claims to be creditors…"*

65. Counsel also cited the case of *Re AI Scheme Ltd* [2015] EWHC 1233 (Ch), which concerned a similar scheme to that proposed in *Re Card Protection Plan*. The scheme creditors comprised approximately 1.991 million potential creditors in respect of the mis-selling of fraud insurance cover. The scheme was proposed as a mechanism for dealing with these claims, and scheme creditors were invited to submit their claims in a redress procedure set up by the Financial Conduct Authority. There is no suggestion in the convening or sanction judgments that all of the scheme creditors necessarily had claims against the scheme company. Norris J highlighted that there was potential for a mis-selling claim where purchasers may be able to seek redress. Thus there were 1.991 million potential claimants who might each have a claim. Norris J had accepted that the potential claimants were contingent creditors for the purpose of the scheme.

66. Counsel submitted that it is clear from *Lehman Brothers* at [29] that Patten LJ contemplated that a claim which "*depends upon the happening of a future event such as the successful outcome of some litigation"* falls within his definition of a contingent claim. Norris J was correct to characterise the claims in *Re AI Scheme* in this way, indeed, any creditors whose claims would need to be established through future litigation are properly characterised as contingent creditors. Further or alternatively, it appears that there is no relevant distinction between "potential creditors" and "contingent creditors" in this context. In both *Re Card Protection Plan* and *Re AI Scheme*, the scheme creditors consisted of a large number of parties, some of whom might have valid claims against the scheme company and others of whom might not.

67. Counsel submitted that in *Re Noble* the scheme included an adjudication mechanism that enabled creditors whose claims were disputed by the company to be determined within the scheme. It was apparent from the convening judgment that the company considered it "unlikely" or "highly unlikely" that the claims of the other scheme creditors other than one would succeed. Also, there was no suggestion in *Re Noble* that a scheme creditor who ultimately failed to establish a claim in the adjudication procedure would not be regarded as a scheme creditor, and therefore would not be bound by the wide third-party releases in that case. The same is true in *Re Card* and *Re AI Scheme*. The reason for this is obvious: it would be entirely pointless, and deprive the scheme jurisdiction of practical efficacy, if a

scheme designed to adjudicate on potential claims failed to bind any parties who tried, but failed, to establish a claim within the scheme.

Present case

68. Counsel submitted that a number of sophisticated Scheme Creditors had asserted claims in respect of the losses that they suffered through their investments in the Private Fund. As set out in the draft Explanatory Statement, the claims included assertions about defrauding investors and assertions that the Manager and/or its officers induced Scheme Creditors to invest in the Scheme Companies as a result of misrepresentations made to most if not all Scheme Creditors. In both cases, counsel submitted how Scheme Creditors could establish a claim against the Scheme Companies and as the claims are subject to the successful outcome of future litigation, they are properly characterized as contingent claims, in accordance with *Re AI Scheme* and *Re Lehman Brothers*. They stressed that regardless of whether the claims are described as contingent claims or potential claims, the Court can be satisfied that the Scheme Creditors are properly to be regarded as creditors of the Scheme Companies for the purposed of the scheme of arrangement jurisdiction.

69. Counsel submitted that the following principles apply:

    a. It is well established that the fact that a creditor's claim is contingent, disputed and/or has not yet been asserted does not prevent a creditor from being bound by a scheme of arrangement.
    b. The fact that the Scheme Companies do not consider that any Investor Claims would be likely to succeed does not prevent them from being "contingent claims" in accordance with *Re Lehman Brothers* and *Re Noble.*
        i. The scheme jurisdiction would be engaged based on some circumstance, no matter how remote, in which the Scheme Creditors could become creditors of the Scheme Companies (*Re Noble*);
        ii. Since the Scheme Creditors are all Investors in the Scheme Companies and in light of the potential ways in which Investors may bring claims against the Scheme Companies, the test is clearly satisfied.

iii. By voting on the Schemes, the Scheme creditors will confirm that they consider themselves to have a claim against the relevant Scheme Company.

c. It is important to adopt a broad approach towards contingent claims where proposed Scheme Creditors have a real economic interest in the Scheme Companies.

d. Any creditors voting on the Schemes will be required to confirm on their voting/proxy forms that they consider themselves to be a creditor of the relevant Scheme Company. Based on Undertakings[6], the Court can be satisfied that the overwhelming majority of Scheme Creditors will confirm that they consider themselves to be creditors of the Scheme Companies.

70. Counsel therefore submitted that the Scheme Creditors are clearly "creditors" for the purpose of section 99 CA 1981, such that the Court has jurisdiction to cover and sanction the proposed Schemes.

71. In light of the above submissions, I am satisfied that the Scheme Creditors are "creditors" for the purposes of section 99 CA1981.

The impact of the SAC Act

72. Counsel for the Scheme Companies submitted that no difficulty was caused by the fact that the Private Fund is a segregated accounts company under the SAC Act, where assets or liabilities are linked to particular segregated accounts or the company's general account. They relied on the case of *BNY AIS Nominees Limited and ors v New Stream Capital Fund Ltd* [2012] SC (Bda) 66 Civ where Kawaley J stated that the segregated account is wholly or substantially an extension of the company's own legal personality. As a result, a creditor of a segregated fund of the Private Fund is characterized as a creditor of the Private Fund and would have to start proceedings against the Private Fund, thus they are creditors of the Private Fund.

[6] As at the Convening Hearing, between 82.24% and 100% of each class of Private Fund Investors (including 100% of the Aquilo Fund) and between 95.4% and 98.2% of each class of Public Fund Investors have provided Undertakings.

73. In light of the above submissions I am satisfied that creditors of a segregated fund of the Private Fund are creditors of the Private Fund.

The Schemes are each a compromise or arrangement with the Scheme Creditors

74. Counsel for the Scheme Companies submitted that there can be no doubt that the proposed Schemes constitute a "*compromise or arrangement*" with the Scheme Creditors for various reasons. They relied on the case of *Re N.F.U. Development Trust Ltd* [1972] 1 W.LR. 1548 at p1555 where Brightman J noted that in order to be a compromise or arrangement, a scheme must involve a degree of "*give and take*", when it was necessary to look at the restructuring as a whole, and not just to the terms of the scheme in isolation. They cited the case of *Re Uniq plc* [2012] BCLC 783 where David Richards J stated that it would be artificial to confine the analysis to only the scheme when it actually formed a part of a restructuring which conferred substantial benefit on the members bound by the scheme.

75. Counsel submitted that in the present case there was: (a) "give" as Scheme Creditors will benefit from the Buy-Out Transaction as their shares in the Private Fund or Public Fund will be bought out in exchange for 100% of Closing NAV of relevant shares and they will also receive their pro rata share of the Additional Consideration; and (b) the "take" is that the Scheme Creditors will grant the Releases; that is, they will release any unsecured contingent claims they hold against the Scheme Companies and the other Released Parties.

76. In light of the above submissions, I am satisfied that the proposed Schemes constitute a compromise or arrangement with Scheme Creditors.

The Releases

77. Counsel for the Scheme Companies addressed the question of whether third-party releases can be included within a scheme of arrangement by citing several key cases from common law jurisdictions. They submitted that it was well established, both in England and elsewhere, that third-party releases that are necessary to avoid "ricochet" claims against

the scheme company, the existence of which could undermine the compromises affected by the scheme, are within the scheme jurisdiction. They relied on *Re Lehman Brothers (Europe) (No.2)* [2009] EWCA Civ 1161 per Patten LJ at 65 and several other cases and cited *Re APP China Group Ltd* [2003] Bda L.R. 50, pages 12-13 in which the approach had been adopted in Bermuda.

78. Counsel submitted that the authorities, for example, in *Re Far East Capital Ltd SA* [2017] EWHC 2878 (Ch) at [13]-[14] and *Re Noble Group Ltd* (sanction judgment), supported the release of creditor claims against those involved in the negotiation of the scheme. The justification is that a claim by a dissentient creditor against a person involved in the negotiation of the scheme would undermine the scheme. Further, following *Re Noble* and *Re Far East Capital*, the release of professional advisors is now a regular feature of English Schemes.

79. It was submitted that where the releases are an essential part of the deal and a third party whose funding or support is essential to the deal being consummated, the third party releases will be necessary in order to give effect to the arrangement proposed between the scheme, the company and its scheme creditors. They cited *Re Lehman Brothers (Europe) (No.2)* where Patten LJ expressed that an arrangement between a company and its creditors does not prevent the inclusion in the scheme of releases of contractual rights against related third parties necessary in order to give effect to the arrangement.

80. Counsel cited a line of cases underscoring a "sufficient nexus" approach. The Australian case of *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 at [55], provided that third party releases can be included in a scheme where there was a "sufficient nexus" between the relationship between the scheme creditor and the scheme company on one hand and the release on the other hand. The test in *Re Opes* was considered by the Singaporean Court of Appeal in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29 where Sundaresh Memon CJ stated that liabilities of a primary obligor can be properly released in a scheme even in the absence of a ricochet claim adding that there was a practical attraction in the "sufficient nexus" test in *Re Opes*. The *Pathfinder* approach

was approved by the Irish Court in *Re Nordic Aviation DAC* (Barniville J, 11 September 2020) at [88]-[103].

81. Counsel submitted that there is little practical difference between the "*necessity*" test adopted in England in Singapore and the "*sufficient nexus*" test adopted in Australia as the purpose of the jurisdiction to release third party claims is to ensure that the scheme works. They also submitted that the Singapore approach is relevant in light of the case *Re Contel Corporation Limited* [2011] Bda LR 12 of where Kawaley J held "*Singapore law provisions relating to schemes of arrangement are substantially similar to those under Bermuda law".*

Present case

82. Counsel for the Scheme Companies submitted that in the present case, the then Opposing Scheme Creditors' argument at the December 2021 hearing that the Releases go beyond what can be done pursuant to Part VII of the CA 1981 should be rejected. This was on the basis that the release of claims against third parties which would give rise to ricochet claims is entirely standard in the context of schemes of arrangements. All of the Releases fell into this category except two categories.

83. The first category was the release of professional advisors to the Scheme Companies, which, as set out above, have become a regular feature of schemes of arrangement.

84. The second category was the Releases in respect of claims which were excluded from the relevant indemnities (such as claims for fraud, dishonestly, wilful default and/or negligence) (the "**Carve-Out Claims**") and Releases of certain additional related parties of the Released Parties. The Scheme Companies submitted that the Releases are an integral part of the Buy-Out Transaction since Markel Corporation is not willing to provide funding for the Buy-Out Transaction unless the Releases are granted in the form proposed. This was because Markel was not willing to provide funding if there remains scope for litigation to be brought regarding whether an Investor Claim falls within a particular carve-out or not, or whether a particular connected party falls within the broad list of indemnified persons, particularly in the Private Fund Management Agreement. Additionally, without

the Release of the Carve-Out Claims, the compromise effected by the Schemes would be undermined in that Scheme Creditors would receive their distributions under the Scheme and then could seek to recover further monies from the Indemnified Parties via Investor Claims.

85. The Scheme Companies submitted that in light of these reasons:

    a. The Releases are necessary to give effect to the arrangement proposed between the Scheme Companies and the Scheme Creditors because the Buy-Out Transaction is not available in the absence of the Releases and the assertion of Carve-Out Claims could undermine the Buy-Out Transaction;
    b. Further or alternatively, the Releases are plainly necessary for the Schemes to achieve their purposes in accordance with the *Pathfinder* approach. This Court was urged to adopt this approach, particularly in light of Kawaley J's comments in *Re Contel Corporation* regarding similarities between Bermuda and Singapore schemes.
    c. Further or in the further alternative, the Releases fall within the "sufficient nexus" test set out in *Re Opes* and supported by the Singaporean Court of Appeal in *Re Pathfinder*. That "sufficient nexus" being because all of the Investor Claims arise out of the investments made by the Scheme Creditors in the Scheme Companies. Such claims are likely to arise out of the same or similar facts in that they are likely to relate to statements made prior to the relevant Scheme Creditor making an investment in the Group. This Court was urged to adopt this test given that there was little difference between "necessity" tests adopted in England and Singapore and the "sufficient nexus" test adopted in Australia.

86. In light of the above, the Scheme Companies submitted that on any view, the Releases fall within the jurisdiction of Part VII of the CA 1981.

87. In light of the above submissions, I am satisfied that: (a) the Releases are necessary in order to give effect to the proposed arrangement between the Scheme Companies and the Scheme Creditors; (b) the Releases are necessary for the Schemes to achieve their purposes; and

(c) there is a sufficient nexus between the relationship between the Scheme Creditor and the Scheme Company on the one hand, and the release of Investor Claims against all of the Released Parties on the other hand. Thus, I am satisfied that the Releases fall within the jurisdiction of Part VII of the CA 1981.

Class Composition

88. Counsel for the Scheme Companies submitted that the current position is that the Schemes have the support of overwhelming majorities of the Scheme Creditors, none of whom have raised any objection to the proposed class composition.

89. Counsel set out the basic principles of class composition stating that a class "*must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*": see *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 at 583 (Bowen LJ) and *Re UDL Holdings Ltd* [2002] 1 HKC 172 at [27] (Lord Millett NPJ).

90. Counsel also relied on the case of *Re APCOA Parking Holdings GmbH* [2015] Bus LR 374 at [52], where Hildyard J held that the test for class composition should be divided into two stages:

> "*The modern approach ... is to break the question into two parts, and ask first whether there is any difference between the creditors in point of strict legal right ... and if there is, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous motivation operating in the case of any particular creditor(s).*"

91. Counsel submitted that it is the legal rights of creditors or members, not their separate commercial or other interests, which determine whether they form a single class or separate class. Conflicting interests can be taken into account when considering whether, as a matter of discretion, to sanction the scheme or plan. They cited Lord Millett NPJ's judgment in *Re UDL* at 184-5:

> "*The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their own private interests not derived from their legal rights against the company is not a ground for calling separate meetings ... The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class*."

92. Counsel submitted that Hildyard J provided the following summary of the law in *Re Primacom Holding GmbH* [2013] BCC 201 at [44]-[45]:

> "*… The golden thread of these authorities, as I see it, is to emphasise time and again ... [that] in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing and the rights offered in the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.*
>
> *"I emphasise this point because it ... enables the court to take a far more robust view as to what the classes should be and to determine a far less fragmented structure than if interests were taken into account*."

The Private Fund

Rights absent the Scheme

93. Counsel submitted that if the Private Fund Scheme is not implemented, the Private Fund Scheme Creditors will all have the right to prove in the liquidation of the Private Fund as unsecured creditors and, if their claims are accepted, to receive distributions on a *pari passu* basis. They submitted that there would be no material difference in Private Fund Scheme Creditors' rights absent the Private Fund Scheme.

Rights under the Scheme

94. Counsel submitted that all Private Fund Scheme Creditors will release their Investor Claims, where if any had any merit, the claims would likely be common to all or most of the Private Fund Scheme Creditors. In return, the Private Fund Scheme Creditors will each

receive a distribution equal to 100% of the Closing NAV of the shares in which they are beneficially interested, as well as their pro rata share of the Additional Consideration. They also submitted that there would be no material difference in the Private Fund Scheme Creditors' rights under the Private Fund Scheme.

95. Counsel submitted that Mr. Candiolo had explained that the Private Fund has decided to propose that its Scheme Creditors vote in five separate classes for pragmatic and commercial reasons to ensure that as far as practicable:
    a. Scheme Creditors will vote in a class that only contains other Scheme Creditors who invested based on the same publicly disclosed information as they did;
    b. Scheme Creditors will vote in a class that only contains Scheme Creditors who are beneficially interested (directly or indirectly) in the same SP and therefore suffered substantially equivalent losses; and
    c. Scheme Creditors will vote in a class which only contains Scheme Creditors who will receive precisely the same level of distributions as them.

96. Counsel submitted that the Private Fund considers that if any Private Fund Scheme Creditors did have a valid Investor Claim, the other members of their class would be even more likely to have a substantially similar Investor Claim.

97. Therefore, the Private Fund considered that its Scheme Creditors should vote in five separate classes:
    a. Scheme Creditors beneficially interested in the 2016 Master Fund SP;
    b. Scheme Creditors beneficially interested in the 2017 Master Fund SP;
    c. Scheme Creditors beneficially interested in the 2018 Master Fund SP;
    d. Scheme Creditors beneficially interested in the 2019 Master Fund SP; and
    e. Scheme Creditors beneficially interested in the Aquilo Fund. These Scheme Creditors have all provided Undertakings to support the Private Fund Scheme.

98. I note that Counsel informed the Court in the Update Hearing that as a result of the Settlement Agreement, HWH and Partners will no longer be voting at the Scheme Meetings and no other Scheme Creditors have raised any objection to the proposed class composition or suggested they have claims of a sufficiently different quality to the other Private Fund Scheme Creditors to fracture the classes further.

99. In light of the above submissions, I am satisfied that the Scheme Creditors of the Private Fund should vote in the five separate classes as set out above.

The Public Fund

Rights absent the Scheme

100. Counsel submitted that if the Public Scheme is not implemented, the Public Fund Scheme Creditors will all have the right to prove in the liquidation of the Public Fund as unsecured creditors and if their claims are accepted, to receive distributions on a *pari passu* basis. They submitted that there would be no material difference in Public Fund Scheme Creditors' rights absent the Public Fund Scheme.

Rights under the Scheme

101. Counsel submitted that all Public Fund Scheme Creditors will release their Investor Claims in return for their proportionate share of the distribution received by the Public Fund (in its capacity as a Scheme Creditor of the Private Fund), as well as their pro rata share of the Additional Consideration, now increased from US$34 million to US$44 million. They also submitted that there would be no material difference in the Public Fund Scheme Creditors' rights under the Public Fund Scheme.

102. Counsel submitted that Mr. Candiolo had explained that the Public Fund has decided to propose that its Scheme Creditors vote in two separate classes to ensure that as far as practicable:

a. Scheme Creditors will vote in a class that only contains other Scheme Creditors who invested based on the same publicly disclosed information as they did;

b. Scheme Creditors will vote in a class that only contains Scheme Creditors who share an equivalent proportional beneficial interest in the underlying Master Fund SPs (and hence in any losses suffered in respect of such SPs); and

c. Scheme Creditors will vote in a class which only contains Scheme Creditors who will receive the same level of distributions as them. Scheme Creditors beneficially interested in Ordinary Shares will receive approximately US$0.32 per share and those beneficially interested in C Shares will receive approximately US$0.50 per share (in each case using the NAV as at 31 August 2021).

103. Counsel submitted that the Private Fund considers that if any Public Fund Scheme Creditors did have a valid Investor Claim, the other members of their class would be even more likely to have a substantially similar Investor Claim.

104. Therefore, the Public Fund considered that its Scheme Creditors should vote in two separate classes, reflecting the fact that the Ordinary Shares and C Shares are invested in different SPs:

a. Scheme Creditors beneficially interested in the Ordinary Shares; and

b. Scheme Creditors beneficially interested in the C Shares.

105. In light of the above submissions, I am satisfied that the Scheme Creditors of the Public Fund should vote in the two separate classes as set out above.

Impact of the Fees

106. Counsel submitted that the payment of the Early Consent Fee and the Work Fee to some but not all of the Scheme Creditors does not fracture the classes further.

Early Consent Fee

107. The Early Consent Fee will be paid in cash on the Closing Date. Counsel submitted that:

a. Where a consent fee is available to all creditors, it does not fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class. They cited the case of *Re Avangardco Investments Public Ltd* (convening hearing, 24 September 2015), Morgan J stated at [7]:

> *"I turn then to the question as to the appropriate class or classes of scheme creditors. I consider that there need only be one class. All scheme creditors enjoy the same rights under the present arrangements. All scheme creditors are offered the same rights under the intended scheme. All scheme creditors are being offered a fee if they commit to voting for the scheme in advance of the court meeting. I consider that that fact does not compel the conclusion that there needs to be more than one class of creditors, for example dividing creditors into those who have become entitled to the fee and those who have not become entitled to the fee. I say that principally because it seems to me that all scheme creditors are being treated in the same way so far as the offer made to them is concerned. Further, I have been shown a number of cases where further reasons have been given for the conclusion that the availability of a fee for early commitment does not compel or justify the court in creating different classes of creditors. Some of the cases go into the question of whether the amount of the fee is such that it is a sufficiently material difference, or creates a sufficiently material difference, between the various individual creditors. For myself, I prefer the analysis which concentrates on all creditors being offered the same terms, it being a matter for the creditor whether to take up the offer in question in relation to the fee."*

b. Where a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator and the value of the rights conferred by the Scheme), this provides a further or alternative reason for concluding that the fee does not fracture the class per Snowden J in *Re Noble Group Ltd* (convening judgment) at [150]-[151].

108. Counsel submitted that in the present case, the Early Consent Fee was available to all Scheme Creditors, the Court should be satisfied that all Scheme Creditors have had a realistic opportunity to qualify for the Early Consent Fee, the Early Consent Fee is not material when assessed in light of the predicted returns to all creditors under the Schemes and in the Liquidation Scenario, thus the Early Consent Fee is not likely to induce a Scheme Creditor to commit to vote in favour of the Schemes in circumstances where they might

otherwise reject it and it is being funded by an affiliate of Markel Corporation and therefore will not deplete funds available for Scheme Creditors not eligible to receive it.

109. In light of the above submissions, I am satisfied that the Early Consent Fee does not fracture the proposed class composition.

The Work Fee

110. A Work Fee will be paid in cash to PKA and Almitas on the Closing Date. Counsel submitted that the relevance of work fees to class composition has been considered in a number of English cases, including *Re Noble Group Ltd* and in no case has the existence of a work fee been considered to fracture a class. Thus, payment of a work fee will not fracture a class where it is a commercial reward for the time and effort expended in assisting to formulate the restructuring. Counsel also cited *Re NN2 Newco Limited* [2019] EWHC 1917 (Ch).

111. Counsel submitted that in the present case, the Work Fee is being paid to those Scheme Creditors who have been actively involved in negotiating the Buy-Out Transaction, each of which have undertaken significant work for the benefit of all Scheme Creditors. PKA has been involved since 20 July 2021 and engaged counsel to assist it with reviewing and negotiating the proposed transaction. Almitas has been involved since around 20 September 2021. Mr Candiolo considers that the input from PKA and Almitas was critical to the Buy-Out Transaction being proposed in its current form. Further, it is being funded by an affiliate of Markel Corporation and therefore will not deplete funds available for Scheme Creditors not eligible to receive it.

112. I note that Counsel informed the Court in the Update Hearing that as a result of the Settlement Agreement, HWH and Partners will no longer be voting at the Scheme Meetings and no other Scheme Creditors have raised any objection to the Work Fee. They submitted to the Court that it was relevant to note that the improvements to the Schemes negotiated by PKA in light of the Settlement Agreement further evidence the ongoing work that it has done for the benefit of all Scheme Creditors.

113. In light of the above submissions, I am satisfied that the Work Fee does not fracture the proposed class composition.

Notice, Timing and Conduct of the Scheme Meetings

114. Counsel for the Scheme Companies made detailed submissions about the notice, timing and conduct of the Scheme Meetings.

115. In light of those submissions I am satisfied that such matters are in accordance with the requirements.

Conclusion

116. In summary, I am satisfied of the following:

a. Each Scheme Company is a "company" within section 99 CA 1981.
b. The Scheme Creditors are "creditors" for the purposes of section 99 CA1981.
c. The creditors of a segregated fund of the Private Fund are creditors of the Private Fund.
d. The proposed Schemes constitute a compromise or arrangement with Scheme Creditors.
e. The Releases fall within the jurisdiction of Part VII of the CA 1981on the bases that:
    i. the Releases are necessary in order to give effect to the proposed arrangement between the Scheme Companies and the Scheme Creditors;
    ii. the Releases are necessary for the Schemes to achieve their purposes; and
    iii. there is a sufficient nexus between the relationship between the Scheme Creditor and the Scheme Company on the one hand, and the release of Investor Claims against all of the Released Parties on the other hand.
f. The Scheme Creditors of the Private Fund should vote in the five separate classes as set out above.

g. The Scheme Creditors of the Public Fund should vote in the two separate classes as set out above.
h. The Early Consent Fee does not fracture the proposed class composition.
i. The Work Fee does not fracture the proposed class composition.

117. In light of the above reasons, I was satisfied that I should make the convening orders sought by the Scheme Companies.

Dated 25 February 2022

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT