American Bankruptcy Institute

New York City Bankruptcy Conference

Restructuring Abroad vs. Plenary Chapter 11

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CONCURRENT SESSION

2024

ABI Conference
Restructuring Abroad vs. Chapter 11

Moderator: Madlyn Gleich Primoff (Freshfields, NY)

Judge: Lisa Beckerman (United States Bankruptcy Court for the Southern District of New York)

Panelists:

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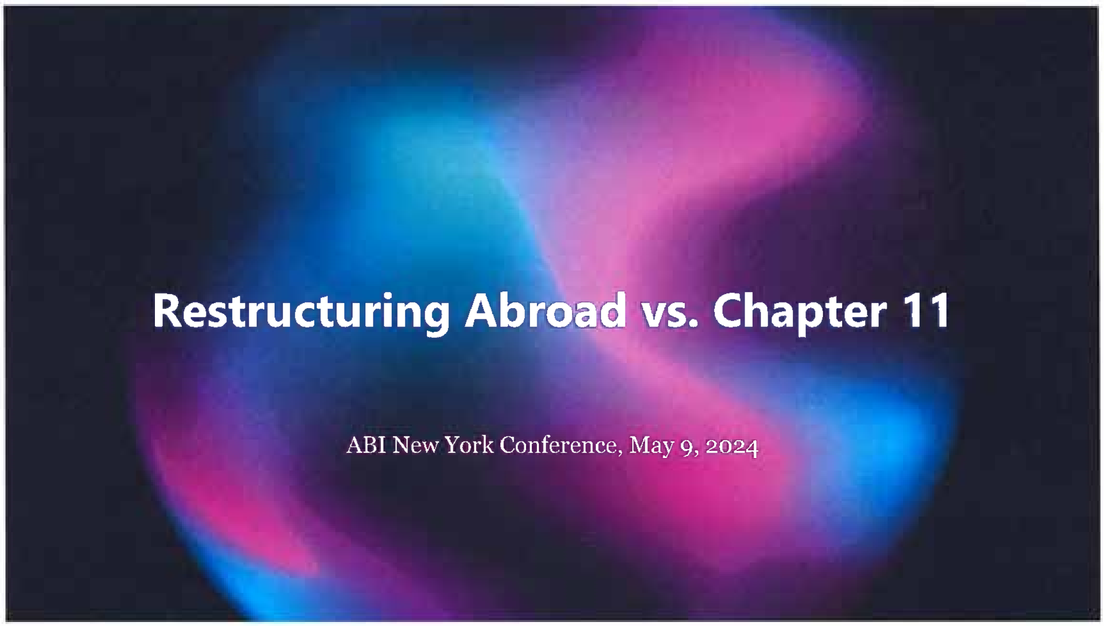

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1. Introduction

A rapidly evolving restructuring landscape

1

Prompted by the EU Restructuring Directive and accelerated by the pandemic, jurisdictions across Europe have completely transformed their restructuring regimes in recent years

2

This is part of a global trend towards more debtor-friendly rescue-orientated restructuring regimes, inspired by Chapter 11

3

This means that in large cross-border situations, there will increasingly be a choice of forum for debtors: the key cross-border hubs (US, UK) will always be on the table; the newer cross-border hubs (Ireland, Netherlands) increasingly so; and the 'home jurisdiction' may also have available tools

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This presentation aims to provide an overview of the fundamentals underpinning all these regimes, whilst also providing a comparative analysis of some key distinguishing features that will be relevant in considering choice of forum

2. The Fundamentals
Core process – the restructuring plan

They are called different things (German StaRUG, Dutch WHOA, French Sauvegard) but the central tool at the heart of every regime is some form of restructuring plan

The essential components of a restructuring plan are as follows:

- A compromise or arrangement with creditors and/or members, which changes the rights creditors/members have against the company
- To be implemented, the plan must be approved by a requisite majority of creditors/members and be sanctioned by the court
- Creditors/members are organised into classes for the purpose of voting, based on similarity of rights against the company
- If a requisite majority of a particular class votes in favour of the plan, it is an assenting class; if the threshold is not met, it is a dissenting class
- Subject to certain conditions and court approval, the plan can be 'crammed down' on dissenting classes

There are now a lot of different variations of this essential construct, with each jurisdiction's regime having its own distinguishing features

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Key concepts

Restructuring plan
An 'arrangement' or 'compromise' between the company and its creditors and/or shareholders.

Cross-class cram down
The confirmation by a judicial authority of a restructuring plan despite the dissent of one or more affected creditor classes.

Best interest/'no worse off' test
No dissenting party is worse off as a result of the plan than it would be in the specified alternative(s).

Absolute priority rule
Rule requiring the claims of a dissenting class of creditors to be paid in full before any class of creditors junior to such dissenting class may receive or retain any property in satisfaction of their claims.

Relative alternative
Can be stipulated to be liquidation break up value – but could be a more flexible concept (eg a trading administration).

Sufficient connection v COMI
Some proceedings require a company to be incorporated in a jurisdiction or have its centre of main interest there. Other proceedings have a softer threshold such as 'sufficient connection' with the jurisdiction (which could be assets in the country or debt documents governed by the relevant law).

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Key distinguishing features of the UK RP

Which companies can use it?

- Company encountering/likely to encounter financial difficulties affecting its ability to carry on the business as a going concern.
- Available to domestic companies and non-UK companies with 'sufficient connection'. English court is open to artificial structuring to establish sufficient connection if it is 'good forum shopping' – but need to check local recognition. No COMI test.

Voting thresholds

- A class approves by 75 per cent in value of those voting in that class (no headcount or connected person test).
- Classes with no genuine economic interest can be excluded from the vote altogether, but still bound by the plan.

Conditions to cross-class cram down

- At least one class with a 'genuine economic interest' has assented.
- Dissenting classes are 'no worse off' than under the relevant alternative.
- The Court considers it an appropriate exercise of its discretion. In forming a view, the Court may consider if there is a fair allocation of the 'restructuring surplus'.

Other

- Sits under company law rather than insolvency law – although the jury is still out on whether it is an insolvency process.
- No moratorium.
- No formal DIP financing, although this can be done in the context of an RP by amending existing finance documents.
- Third party releases possible (so a plan of the primary debtor can be used to release all obligors).

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Key distinguishing features of the German StaRUG

Which companies can use it?

- Company registered in or with COMI in Germany.
- Company encountering **financial difficulties** (imminent illiquidity; forecast period 24 months).

Voting thresholds

- Creditors and shareholders divided into classes with similar legal rights and economic interests.
- A class approves by **75 per cent of overall value** in that class (no numerosity requirement).

Conditions to cross-class cram down

- Classes voting against the plan can be bound, provided that:
  - the majority of classes approve the plan;
  - no creditor is worse off than if the plan didn't take effect; and
  - the plan provides for adequate participation in distributed value (esp **absolute priority rule** with certain exceptions applicable on a case by case basis).

Other

- Court-appointed **restructuring expert** (mandatory only if certain conditions are met) will assist the company with the structure, negotiation and filing of the plan – may also be granted supervisory duties.
- **General or selective stay** on enforcement for three months (can be extended up to eight months provided certain conditions are met).
- **Plan-based new money** generally protected against insolvency claw-back and lender liability. No priority/priming.

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Key distinguishing features of the French process (sauveguard and reorganisation)

Which companies can use it?

- All corporate entities (regardless of size). Must meet the following conditions:
  - financial statements certified by an auditor or drawn up by a certified chartered accountant;
  - subject to ongoing conciliation proceedings; and
  - must not have been insolvent for more than 45 days when it applied for the opening of conciliation proceedings.

Voting thresholds

- Classes of affected parties apply. Classes based on criteria of sufficient common economic interest test and requirement for separation of secured/unsecured creditors and holders of equity securities.
- Each class must vote in favour of the plan by a 2/3 majority of the amount of the claims held by the members voting.

Conditions to cross-class cram down

- A majority of classes (including one that is senior to the unsecured class) or at least one 'in the money' class supports the plan
- Absolute priority rule is respected
- Where shareholders are affected: no forced transfers of shares; no cramdown of an 'in the money' shareholder; shareholder has priority right to subscribe to the share capital increase

Other

- Out of court followed by court-administered proceedings which culminate in the adoption of a restructuring plan.
- Automatic stay of payments and enforcement actions during the accelerated safeguard.
- New money financing may receive super priority status ('post money' privilege).

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Key distinguishing features of the Dutch WHOA

Which companies can use it?

- All companies, irrespective of legal form (excluding banks and insurers).
- Dutch companies or foreign companies with COMI in the Netherlands or foreign companies with sufficient nexus to the Dutch jurisdiction.
- Groups of companies.

Voting thresholds

- All creditors and shareholders whose rights are affected may vote.
- Two-thirds in value of creditors or shareholders that voted (no head count test).

Conditions to cross-class cram down

- **General grounds**: At least one 'in the money' class votes in favour of the plan, formal/procedural requirements, feasibility-test, class composition, interests of the joint creditors.
- **Additional grounds**: No creditor worse off than if the plan were not effected, priority rule, cash-out for non-professional lenders, 20% minimum pay-out for trade creditor SMEs.
- Individual rights vs class rights.

Other

- Total of 8 month moratorium if granted by the court (not automatically).
- Debtor can offer the plan. Creditors, shareholders, works council or trade union can request the court to appoint a **restructuring expert** who prepares and offers the plan.
- Emergency funding is protected (no priming).
- Public version vs undisclosed version.
- Debtor in possession.

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Key distinguishing features of the Spanish RP

Which companies can use it?

- All companies (excluding banks, insurers and collective investments).
- Companies registered in or with COMI in Spain.
- Available for groups of companies.

Voting thresholds

- Class approval majorities:
  - minimum of 2/3 of the liabilities of each class;
  - secured creditors: minimum of 3/4 of the liabilities of the secured creditors class.
- No numerosity test.

Conditions to cross-class cram down

- Cross-class cram down permitted if the plan has been approved by (i) a simple majority of classes if at least one class ranked as privileged claims; or (ii) at least one in-the-money class (in this case, a report from the restructuring expert is required).
- Court sanction is required.
- 'Best interest of creditors test'.
- 'Priority rule'.
- Proportionality: The reduction in value of the debt cannot be manifestly greater than what is necessary to ensure the viability of the company.

Other

- The debtor/creditors representing more than 50/35% of the affected liabilities may appoint a **restructuring expert** to assist in the negotiations.
- Pre-insolvency filing (existing/imminent negotiations with creditors):
  - moratorium up to six months.
  - suspension of directors' obligation to wind up if negative equity.
  - suspension of the enforcement over assets/rights necessary for the debtor's business activity (3 months).
  - no admission of creditors' insolvency applications.
- Court sanction required to bind equity holders, terminate contracts and protect interim/new financing.

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Key distinguishing features of the Italian Restructuring Plan*

Which companies can use it?

All companies (other than the Italian State / public entities, banks and insurers):

- Exceeding specific size thresholds;
- Having their COMI (or an establishment) in Italy; and
- Being in a crisis or insolvency situation.

Conditions to cross-class cram down

- **General rule**: cross-class cram down in case of homologation subject to applicable voting majorities.
- **Cram down of tax and social security liabilities**: if the favourable vote of tax and social security authorities is necessary to reach the applicable majority, the Court may homologate the restructuring plan if, on the basis of the independent professional's appraisal, the "no worse off" test is satisfied (i.e. satisfaction of such creditors is deemed **convenient or not detrimental** compared to a judicial liquidation proceeding).

Majorities - within each class:

- General rule: 50%+1 of the claims of the class; and
- Exception (if general rule is not met): provided that at least 50%+1 of the claims have voted, favourable vote of 2/3 of the votes

Majorities – across classes

- **General rule**: favourable vote of <u>each</u> class
- **Exceptions providing for cross class cram down:**
  - Where there is no favourable vote of each class: favourable vote of the <u>majority of the classes</u>, provided that at least one assenting class is composed of secured claims; and
  - Where there is no favourable vote in the majority of the classes: favourable vote of <u>at least one class</u> composed by claims being envisaged to be satisfied (in whole or in part) by applying the going-concern value.

Other

- Absolute priority rule applies to the distribution of the liquidation value;
- Relative priority rule applies to the distribution of the going-concern value;
- Protective and provisional measures automatically applicable upon debtor's request;
- No admission of creditors' insolvency applications; and
- Availability of DIP financing (subject to certain conditions)

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*__Note__: this refers to composition plans homologated in the context of compositions with creditors with business continuation («*concordato preventivo in continuità*»)

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Key distinguishing features of the US framework

Which companies can use it?

- All companies, irrespective of legal form
- If the company has a connection such as a place of business or property in the US (even money in a bank account for the purposes of filing for Chapter 11), then it will qualify as a 'debtor' under Chapter 11 and be able to the file.

Voting thresholds

- Only creditors and shareholders who are 'impaired' are entitled to vote whether to accept or reject a plan of reorganisation.
- The vote is binding on all members of the class if the class votes to 'accept' the plan.
- 'Acceptance' requires the vote of more than fifty per cent (50%) in number and more than two-thirds (2/3) in amount of those creditors that vote.

Conditions to cross-class cram down

- Debtor can pursue a 'cram down' plan over the objection of certain classes of creditors so long as it has the support of at **least one impaired class**
- Cram down of secured creditors (sometimes referred to as a cram up): (i) one class of non-insider impaired creditors must vote in favour of the plan; (ii) plan provides for an instrument which has total cash payments having a present value, as of the plan effective date, equal to the value of the collateral; (iii) disputes will centre around collateral value, discount rate, feasibility and payment terms.
- Cram down of unsecured creditors: based on the absolute priority rule, the plan must provide that unsecured creditors obtain a distribution equal to their allowed claims prior to any junior class (ie equity) obtaining any recovery.

Other

- Many substantial Chapter 11 cases filed in the US over the last several years have been pre-negotiated
  - pre-packaged, ie votes are solicited in advance of the commencement of the case; or
  - prearranged, ie parties enter into a restructuring support agreement and commence the case with the terms of the plan of reorganization fully negotiated and agreed.
- The time to consummate these plans can be anywhere from several days in the case of a 'rocket' pre-packaged plan to 4-6 months for a pre-arranged plan.
- All plans require the filing of a comprehensive Disclosure Statement.

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Comparing restructuring tools across jurisdictions

	Stay	DIP Finance	Exclusive Right to Propose Plan	Class Voting	Can Insiders Vote on Plans	Cross-Class Cram down	Absolute Priority Rule	Jurisdictional Threshold	Terminate/ Reject Contracts	Binding on All Parties
France	Yes, automatic	No, but new money may have priority with court approval	Company (sauvegarde); others in reorganisation	Yes 2/3 in amount No numerosity	Yes, if impaired	Yes	Yes	High (COMI criterion)	Yes	Yes
Germany	Up to 8 months, with court approval	No , but new money is protected from clawback and lender liability	Yes for company	Yes 75% of nominal amount No numerosity	Yes, if impaired*	Yes	Yes	High (COMI/registration)	No	Yes
Netherlands	Up to 8 months, with court approval	Yes, no priming	Yes for company and restructuring expert who may be approved upon request by creditors	Yes 2/3 in amount No numerosity	Yes, if impaired	Yes	Yes	Low (COMI or sufficient connection)	Yes, with court approval	Yes
Spain	Up to 7 months, notice to the court of the opening of negotiations with its creditors	Yes	No	Yes 2/3 in amount No numerosity	Yes, in some cases*	Yes	Yes	High (COMI criterion)	Yes, with court approval	Yes
United Kingdom**	No, unless separate processes are commenced in parallel	No, but plan can accommodate new financing	No	Yes 75% in amount No numerosity	Yes, if impaired	Yes	No	Low (sufficient connection)	No	Yes
United States	Yes, automatic	Yes	Yes for Company up to 18 months	Yes 2/3 in amount 50% in number	Yes, but need one other approving class w/o insider votes	Yes	Yes	Low	Yes, with court approval	Yes

*Insider debt claims will be subordinated and will have an impact on class structures

**Comments on this slide relate to restructuring plans, not schemes of arrangement in the UK or amicable proceedings in France

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Comparing restructuring tools across jurisdictions

	Stay	DIP Finance	Exclusive Right to Propose Plan	Applicable majority	Can Insiders Vote on Plans	Cross-Class Cram down	Absolute Priority Rule	Jurisdictional Threshold	Terminate/ Reject Contracts	Binding on All Parties
Italy	Upon debtor's request	Yes, subject to certain conditions	Debtor and, with respect to competing proposals, creditors representing at least 10% of the claims (or shareholders holding at least 10% of the corporate capital)	General rule: all classes must approve	Yes, unless they are satisfied in cash in full within 180 days from the homologation and the relevant security interest continues until the sale of the relevant asset	Yes	Yes with respect to liquidation value (relative priority rule with respect to going-concern value)	High (COMI or establishment)	No, but certain exceptions*	Yes, with respect to creditors whose claims arose before the opening of the restructuring procedure

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4.

What are the drivers in different jurisdictions?

England

1 — Rescue is key: and courts are commercial

Various tools to rescue a business: from CVA, to scheme, restructuring plan and pre-pack administration – where applicable, implemented with commercial and fast court process.

Generally good track record – trusted courts and substantial body of jurisprudence.

2 — Duty to take creditors into account

Directors have a duty to take into account creditors at certain points and balance them against shareholder interests.

The more parlous the financial status of the company the more the interest of creditors becomes paramount.

3 — Cultural bias in favour of creditor recovery

Flexible and commercial approach to creditor recovery – not many restructuring plans fail.

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Germany

1 Mandatory filing obligations with civil and criminal liability

Obligation to file for insolvency without undue delay and, in any event, at the latest within 3 weeks of the date on which the company has become illiquid or within 8 weeks of the date on which the company has become over-indebted (balance sheet insolvent).

2 No shift of duties to creditors

No shift of directors' duties to the creditors until application for insolvency or within a StaRUG process.

3 Balanced restructuring regime

Overall, balanced restructuring regimes taking into account shareholder/debtor and creditor interests. Shareholder controls initiation of out-of-court process but within out-of-court and in-court process creditors are afforded with high level of protection.

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France

1 Continuation of economic activity and employment is key

The French legal system aims, as a matter of priority, at preserving the continuation of economic activity and maintaining employment.

Although "settling liabilities" (*apurement du passif*) is also an objective, the recovery by creditors of their claims is not a priority.

2 No shift of duties to creditors

The debtor's governance bodies must act "in the corporate interest" of the company – no "shift" of duties of governance bodies towards creditors at any point in the process.

3 Cultural bias in favour of debtors and shareholders

Constitutional rights protect share ownership.

Debtor/officeholder-driven process with limited ability for creditors to influence the development of the plan.

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The Netherlands

1
Intended as option of last resort

Tool to strengthen the restructuring capacity and facilitate a consensual restructuring: "carrot and stick approach"

Can be used not only for a 'going concern' restructuring, but also for a controlled winding-up of the business as an alternative to bankruptcy.

2
Economic approach

The 'hold-out' position of an 'out of the money' creditor OR shareholder can be disregarded.

3
Fair distribution of reorganisation value among stakeholders

In principle: (i) each creditor will receive at least its claim to the liquidation value and therefore may not be worse off as a result of the plan and (ii) the 'upside' must also be distributed in accordance with the statutory or contractual of creditor or shareholder.

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Spain

1
Continuation of economic activity and extract the highest value of assets

With respect to viable companies facing financial difficulties, the aim is to facilitate debt restructurings that respect the rights of creditors and ensure the continuity of the company.

With respect to non-viable companies, the goal is to extract the highest value from the company's assets to satisfy creditors following a defined ranking of claims.

2
A flexible and agile restructuring procedure

The Spanish restructuring plan is a very flexible tool both in terms of its possible content and the possibility of cross-class cram down.

Equity holders' co-operation is not always necessary, which restricts their ability to frustrate the plan and avoids unnecessary delays.

3
No shift of duties to creditors

The debtor's governance bodies must act "in the corporate interest" of the company – no "shift" of duties of governance bodies towards creditors at any point in the process.

However, at a minimum, directors must proceed with extreme caution and take steps to minimise losses and the impact of insolvency.

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Italy

1 **Business continuation and preservation of workplaces**

Business continuation is an option applicable to all Italian crisis and insolvency regulation tools and is prioritized by a number of provisions granting favourable effects to restructuring plans providing for business continuation (*e.g.*, claims arising in the context of business continuation automatically qualify as "super senior" (*prededucibili*")).

2 **Maximization of creditors' satisfaction (also compared to liquidation alternatives)**

The "no worse-off" rule cuts across the various Italian crisis and insolvency regulation tools providing for each creditor to be satisfied at least "as much as" (and, in specific cases, "more than") it would be in the context of a judicial liquidation proceeding.

3 **Flexible and agile restructuring tool**

Negotiations with creditors are managed out of court allowing the debtor and its creditors to find the most suitable restructuring solution.

Court involvement comes at a later stage (i.e., the homologation of the composition with creditors / restructuring agreement) and, save for specific circumstances, does not concern the merit of the agreement (provided all relevant majorities are met)

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USA

1 **Automatic Stay**

2 **DIP Financing With or Without Priming Liens**

3 **Speedy Pre-pack or pre-arranged cases**

4 **Operational restructuring – Facilitated by Rejections and Contracts Leases**

5 **Cross-Class Cramdown plus Absolute Priority Rule**

6 **Feasibility and Best Interests of Creditors' Tests**

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5. Choosing Forum
(Some) factors to take into account...

Voting	Recognition	Third party releases	Process and costs	DIP finance	Moratorium	Impact on operations
• Do you need the lowest majority thresholds? • Which conditions to cross-class cram down are achievable, eg best interests, absolute priority?	• Are you compromising English law debt? (If so, an English process is required – rule in *Gibbs*) • Do you need access to automatic recognitions across the EU?	• Do you need third party releases (e.g. of guarantors)? • Is there a desire to avoid filing multiple companies?	• Factor in the likelihood and cost of litigation • What language is the court process conducted in? • Are the courts' decisions predictable?	• Is interim financing required? • Is there existing super senior debt capacity?	• Are creditors likely to take adverse action? • Can you get a consensual standstill? • Do you need a statutory stay?	• Do you need protection from counterparty termination of contract? • Do you need the ability to reject contracts/leases?

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6. Appendix

1. In the Matter of Project Lietzenburger Straße HOLDCO S.Á.R.L. and In The Matter of the Companies Act 2006
2. In the Matter of AGPS Bondco PLC: Between Strategic Value Capital Solutions Master Fund LP and others and AGPS Bondco PLC
3. Plusholding Modified Scheme Sanctioned, Aggregate and Adler raised at hearing

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Neutral Citation Number: [2024] EWHC 468 (Ch)

Case No: CR-2023-006021

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

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 4 March 2024

Before:

MR JUSTICE RICHARDS

IN THE MATTER OF
PROJECT LIETZENBURGER STRAßE HOLDCO S.À.R.L.

- and -

IN THE MATTER OF THE COMPANIES ACT 2006

Tom Smith KC, Ryan Perkins and **Edoardo Lupi** (instructed by **DLA Piper UK LLP**) for **Project Lietzenburger Straße Holdco S.À.R.L.**
Charlotte Cooke and **Madeleine Jones** (instructed by **Macfarlanes LLP**) for **Bank J. Safra Sarasin**
Adam Al-Attar (instructed by **Freshfields Bruckhaus Deringer LLP**) for **Chapelgate Credit Opportunity Master Fund Limited**
Daniel Bayfield KC and Georgina Peters (instructed by **Sullivan & Cromwell LLP and Greenberg Traurig, LLP**) for **Nofe Investment S.À.R.L** and **AXA Real Estate Investment Managers SGP**

Hearing dates: 2nd 5th, 6th and 7th February 2024

Approved Judgment

This judgment was handed down remotely at 11am on 4th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE RICHARDS:

1. This is my judgment on the application of Project Lietzenburger Straße Holdco S.à.r.L (the "Plan Company") for an order sanctioning a restructuring plan (the "Plan") between the Plan Company and three classes of its creditors (the "Plan Creditors") under Part 26A of the Companies Act 2006 (the "CA 2006").

INTRODUCTION AND OVERVIEW

Background

2. The Plan Company is incorporated in Luxembourg and has its registered office in Luxembourg. It is part of a wider sub-group of companies (the "Group") held under Aggregate Holdings 4 S.à.r.L ("AH4"). One of the companies within the Group, Project Lietzenburger Straße PropCo S.à.r.L. ("PropCo"), owns a development site on the "Ku'Damm", a well-known shopping boulevard in Berlin (the "Development"). The Development is the key asset of the Group and is one of the largest uncompleted commercial real estate projects in Germany.

3. The Group is a sub-group of a wider group (the "Aggregate Group") headed by Aggregate Holdings SA ("Aggregate Holdings"), whose ultimate beneficial owners are two Austrian businessmen, Mr Günther Walcher (as to 80%) and Mr Cevdet Caner (as to 20%).

4. The Group has three basic tranches of secured debt, ranking in the following order: the "Senior Debt" (€775 million); (ii) the "Tier 2 Debt" (€150 million); and (iii) the "Junior Debt" (€95 million). The Senior Debt and the Tier 2 Debt are primary obligations of PropCo; the Junior Debt is a primary obligation of AH4. I refer to the Tier 2 Debt and the Junior Debt together as the "Subordinated Debt", to distinguish it from the Senior Debt.

5. The total secured debt exceeds €1 billion. All relevant secured debt documents are governed by German or Luxembourg law. The Plan Company has at all material times been a guarantor of the secured debt. By a Deed of Contribution governed by English law and dated 15 October 2023, the Plan Company has assumed obligations to the holders of the various classes of debt (the "Senior Creditors", the "Tier 2 Creditors" and the "Junior Creditors" respectively).

6. The Development has suffered from substantial cost overruns. Construction was substantially halted in January 2023 and came to a complete stop in May 2023. In addition, the Group's cash of some €102 million is held in an "Investment Reserve Account" that is currently blocked and over which the Senior Creditors have a security interest. The Senior Creditors have made available unsecured interim facilities ("Interim Facilities"), funded by "recycling" sums received following partial enforcement of their security over the Investment Reserve Account, to enable professional fees and expenses to be paid and also to ensure that necessary work can be done to keep the partly completed Development secure and in a suitable condition for construction work to resume. The Interim Facilities are governed by English law.

7. Pursuant to a Restructuring Support and Lock-up Agreement dated 15 October 2023 (the "RSA"), a "Senior Creditors' Committee" agreed to support the Plan and, as a consequence, refrain from taking action to enforce their Senior Debt for a period of time. Initially that Senior Creditors' Committee consisted of two entities ("AXA" and "Fidera") that either held, or were acting on behalf of Senior Creditors who held, in excess of two thirds of the Senior Debt. Since then, the number of Senior Creditors who,

together with the Senior Creditors' Committee agreed to support the Plan, has expanded. By the time of the plan meetings referred to below, the Senior Creditors who support the Plan together with the Senior Creditors' Committee consisted of holders of some 97.3% by value of the Senior Debt, all of whom have become party to the RSA.

8. All three tranches of the Group's secured debt fell due for repayment on 28 November 2023. The Group failed to pay and has nowhere near enough cash to do so.

9. While the Group has €102 million of cash in the Investment Reserve Account, it cannot access that sum. It lacks the cash needed to redeem its debts and, even taking into account the €102 million, has insufficient cash to complete the Development. All parties are agreed that an ideal outcome would include, but not be limited to, PropCo obtaining additional funding necessary to complete the Development and an extension to the maturity of the Senior Debt so that it can be repaid out of either a sale or refinancing of the Development once it is completed.

10. The purposes of the Plan are disputed, as is the extent of the court's jurisdiction to sanction it. At this stage, I simply note that the Plan Company's position is that the purpose of the Plan is to restore the Group to solvency by: (i) restructuring the Group's secured debt; and (ii) enabling the provision of a substantial amount of new money to allow the completion of the Development. It argues that the court should exercise its power to sanction the Plan because the Plan Company has moved its centre of main interests ("COMI") to England and Wales (the "COMI Shift", an expression I use recognising that there is a dispute as to whether there has been a shift in the Plan Company's COMI).

11. On 1 November 2023 Miles J made an order giving the Plan Company liberty to convene three separate class meetings (the "Plan Meetings") of the Senior Creditors, the Tier 2 Creditors and the Junior Creditors (together the "Plan Creditors") to consider and, if thought fit, approve the Plan (the "Convening Order"). Miles J also gave a judgment in which he explained his reasons for making the Convening Order reported at [2023] EWHC 2849 (Ch).

12. In accordance with the Convening Order, the Plan Meetings took place on 27 November 2023. The Plan was approved by 97.3% of those voting at the meeting of the Senior Creditors and by 93.75% of those voting at the meeting of the Tier 2 Creditors. The Plan was not approved by any of the Junior Creditors.

13. These voting figures do not, however, give the full picture. There is objection to the Plan which is being led by Bank J. Safra Sarasin ("Safra") who says that it represents 711 Tier 2 Creditors who hold some €86 million of the total Tier 2 Debt of €150 million. Ony 10.67% of the Tier 2 Debt was represented at the class meeting of the Tier 2 Debt. Accordingly, despite apparently opposing the Plan, Safra's clients appear not to have registered their objection by voting against it. I do not need to consider why they acted in this way since the Plan Company accepts that there was not fair representation of the Tier 2 Creditors at their Plan Meeting and that the Tier 2 Creditors should be treated as a dissenting class despite their apparent vote in favour.

The Plan as originally proposed (and voted on)

14. The Convening Order was made, and the Plan Meetings held, before the Court of Appeal gave judgment in *Re AGPS Bondco Plc* [2024] EWCA Civ 24 ("*Re AGPS Bondco*"). As will be seen, the Plan as proposed, and voted upon, contains a provision under which the Subordinated Debt is cancelled for no consideration. That gives rise to the issue, addressed below, as to whether the Plan in this form constitutes a "compromise or arrangement" with Subordinated Creditors such as to engage this court's jurisdiction to sanction it. This section summarises the Plan on which Plan Creditors have voted and so does not take into account amendments that the Plan Company proposes (which are intended to ensure that the Plan does embody a "compromise or arrangement" with Subordinated Creditors to the extent it does not already).

<u>The Deed of Contribution</u>

15. The Plan seeks to make significant changes to the terms of the Senior Debt and a complete release of the Subordinated Debt. However, as I have noted in paragraph 4 above, all of the debt to be restructured by the Plan is governed by German law and is owed by PropCo and AH4, which are both companies incorporated in Luxembourg. It might, therefore, be wondered how a restructuring of this debt is to be achieved by a Plan under Part 26A, which takes effect under a UK statute and which is proposed to be sanctioned by an English court. The answer to this starts with the Deed of Contribution and also involves the COMI Shift.

16. The Plan Company has at all material times been a guarantor of both the Senior Debt and the Subordinated Debt. It has, therefore, at all such times owed obligations to Plan Creditors. By the Deed of Contribution, the Plan Company agreed that, if PropCo or AH4 make any payment on the debt, then those companies will have rights of contribution against the Plan Company in the same way as if the Plan Company had been a joint principal obligor.

17. Entering into the Deed of Contribution therefore created a risk of "ricochet" claims against the Plan Company if Plan Creditors make claims against PropCo and AH4. The Plan Company argues that the Plan can undoubtedly operate to release claims against the Plan Company in its capacity as guarantor of debt. Moreover, since the Plan Company is potentially liable in relation to "ricochet" claims, the Plan can properly result in claims of Plan Creditors against PropCo and AH4 being varied or released on the basis that those claims are closely related to claims against the Plan Company which are to be varied or released under the Plan. Reliance is placed on the judgment of Zacaroli J in *Re Gategroup Guarantee Ltd* [2021] EWHC 775 (Ch).

18. My jurisdiction to make an order that has the effect of varying or releasing the debt obligations of PropCo and AH4 is not challenged. Nor has any party suggested that the mechanism that the Plan employs to effect that variation or release is deficient as a matter of English law. By Clause 5.1 of the Plan, Plan Creditors appoint the Plan Company as its agent to execute documents giving effect to the variations and releases of the PropCo and AH4 liabilities, thus dealing with the points that Zacaroli J identified at [36] to [40] *of Re Gategroup Guarantee Ltd*.

19. However, the parties are far from agreed on whether I should exercise my discretion to sanction a Plan that results in the German law liabilities of the Plan Company, PropCo

and AH4 being amended or released. As will be seen, Safra argues that the German and Luxembourg courts would be unlikely to recognise any order of an English court that has that result. The Plan Company argues that they would do so on the basis that, as a result of the COMI Shift, they would accept that the English courts have jurisdiction in what it asserts are "insolvency proceedings".

New money

20. Pursuant to the Plan, all of the Senior Creditors will be entitled (but not obliged) to participate in a new tranche of super senior financing (the "Super Senior Financing") with a principal amount of €190 million. The function of the Super Senior Financing, when put together with the balance of the Investment Reserve Account which will become unblocked pursuant to the Plan, is to provide the Group with the funds necessary to complete the Development. The Super Senior Financing will also be used to repay the Interim Facilities and any transaction costs that are not paid by the Interim Facilities. The Super Senior Financing will rank in priority to the Senior Debt.

21. The Senior Creditors are entitled to participate in the Super Senior Financing pro rata to their existing holdings of Senior Debt. The deadline for agreeing to participate in the Super Senior Financing was 8 December 2023, and 97.3% of the Senior Creditors (by value) agreed to participate.

22. There is an "elevation" incentive for the 97.3% by value of Senior Creditors who agreed to participate in the Super Senior Financing. The Plan proposes that those Senior Creditors will be given an enhanced priority position in the post-restructuring waterfall for a portion of their debt. Senior Creditors who do not participate in the Super Senior Financing will not benefit from this elevation but the Plan Company asserts that they will be "no worse off" than in the relevant alternative.

23. The Senior Debt will be restated into four tranches. Those four tranches can be summarised as follows (in descending order of priority):

i) The "Elevated Senior Financing". This tranche will be allocated to Senior Creditors who participate in the Super Senior Financing. For every €1 of new money provided by a creditor under the Super Senior Financing or Interim Facilities, €2 of the existing Senior Debt held by that creditor will be restated as fully-drawn commitments under the Elevated Senior Financing. The balance of Senior Debt held by such creditors will be restated as Tranche A Stub Senior Financing (see below).

ii) The "NWO (No Worse Off) Senior Financing". This tranche will be allocated to Senior Creditors who do not participate in the Super Senior Financing. Each non-participating Senior Creditor will receive fully-drawn commitments under the NWO Senior Financing in an amount that is said to leave them no worse off than they would have been under the relevant alternative to the Plan. The balance of Senior Debt held by such creditors will be restated as Tranche B Stub Senior Financing (see below).

iii) The "Tranche A Stub Senior Financing". This tranche will be allocated to Senior Creditors who participate in the Super Senior Financing. It will represent the balance ("stub") of the Senior Debt held by participating Senior Creditors in excess of the amount restated as Elevated Senior Financing.

iv) The "Tranche B Stub Senior Financing". This tranche will be allocated to Senior Creditors who do not participate in the Super Senior Financing. It will represent the balance ("stub") of the Senior Debt held by non-participating Senior Creditors in excess of the amount restated as NWO Senior Financing.

24. All four of the new tranches of Senior Debt will in practice become repayable on 28 November 2025 (although technically the Super Senior Financing is repayable on 28 November 2024 with a provision for automatic extension if not repaid by then). There is then an option for the Plan Company to extend all tranches until 28 November 2026 with the consent of two-thirds of the Senior Creditors.

Release of Tier 2 Debt and Junior Debt

25. Under the Plan as proposed and voted on, Tier 2 Creditors and Junior Creditors would release entirely their rights under the Tier 2 Debt and the Junior Debt. To the extent that the Subordinated Creditors have any claims against PropCo or AH4, those claims will likewise be released. That position is modified by the amendments to the Plan discussed below which envisage that Tier 2 Creditors would receive an aggregate consideration of €150,000 for the release of their rights with the Junior Creditors receiving an aggregate consideration of €50,000.

Fees and compensation for the holders of Senior Debt and others

26. Holders of the Senior Debt will receive the following benefits in connection with the Plan:

i) Their Elevated Senior Financing enjoys the enhanced priority described in paragraph 23.i).

ii) The interest rate payable on the Elevated Senior Financing is 9.5% as compared with the 3.5% currently payable on the Senior Debt. That said, the 9.5% interest is payable not periodically in cash, but only on maturity of the Elevated Senior Financing.

iii) An Exit Fee of 5.00% (i.e. €9,975,000) will be payable to providers of the Super Senior Financing of €190 million upon certain defined "exit events".

iv) A Backstop Fee of €8,550,000, representing 4.5% of the €190 million Super Senior Financing is payable on maturity of that financing. This fee is paid in consideration for underwriting services provided by various Senior Creditors.

v) A Consent Fee of 1.00% will be paid on the Senior Debt held by the Senior Creditors voting in favour of the Plan. That falls due when the relevant restated Senior Debt is repaid. The Consent Fee is expected to amount to approximately €7,439,000.

vi) An Extension Fee of 5.00% is payable if the Super Senior Financing is extended beyond its initial maturity date of 28 November 2024. If it becomes payable, it is added to the principal of the new money and incurs interest. The initial value of the fee, if it is incurred on 28 November 2024, will be €9,500,000.

vii) A Structuring Fee of €6,650,000 is payable to the Senior Creditors' Committee in return for their work done in developing and structuring the Plan. It is not conditional on the sanction of the Plan.

27. It is also envisaged that, following implementation of the Plan, an affiliate of Aggregate Holdings will enter into an agreement (the "Consultancy Agreement") under which it is appointed as consultant to the Development for a fee of €300,000 per month.

Group Restructuring

28. In parallel with the Plan it is proposed that there be a corporate reorganisation of the Group. That reorganisation does not require the sanction of the Plan by the court in order to proceed.

THE STRUCTURE OF THIS JUDGMENT

29. I will order this judgment as follows:

i) In Part A, I give reasons for concluding that (a) I will not sanction the Plan as it has been proposed and voted upon and (b) I will not make amendments to the Plan that the Plan Company seeks and sanction it in its amended form.

ii) In Part B I make findings of fact based on the evidence that I have received.

iii) Those findings of fact will enable me in Part C to decide whether, if I were wrong in my conclusion in Part A, I would have sanctioned the Plan in its amended form.

iv) Part D explains the orders I propose to make for the convening of further Plan Meetings to consider the amended Plan.

PART A – THE PLAN AND THE PROPOSED AMENDMENTS TO IT

Statutory provisions

30. Section 901A provides that:

> ***901A Application of this Part***
>
> *(1) The provisions of this Part apply where conditions A and B are met in relation to a company.*
>
> *(2) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.*
>
> *(3) Condition B is that—*
>
> *(a) a compromise or arrangement is proposed between the company and—*

(i) its creditors, or any class of them, or

(ii) its members, or any class of them, and

(b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2).

31. It is common ground that Condition A in s901A(3) is satisfied. However, the parties are not agreed on Condition B. Safra and other objecting creditors argue that the Plan as voted on does not constitute the requisite "compromise or arrangement" with Subordinated Creditors.

32. Section 901C provides so far as material as follows:

901C Court order for holding of meeting

(1) The court may, on an application under this subsection, 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.

(2) An application under subsection (1) may be made by—

(a) the company,

(b) any creditor or member of the company,

(c) if the company is being wound up, the liquidator, or

(d) if the company is in administration, the administrator.

(3) Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned under subsection (1).

(4) But subsection (3) does not apply in relation to a class of creditors or members of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company.

(5) An application under subsection (4) is to be made by the person who made the application under subsection (1) in respect of the compromise or arrangement.

33. Section 901F deals with the situation (which is not the case with the present Plan) where all classes of creditor or member approve a Part 26A plan by the requisite majority. In that case, the court is given a discretion to approve the Plan in the following terms so far as material:

901F Court sanction for compromise or arrangement

(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting

summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

34. However, a Part 26A Plan can be sanctioned even if some classes of creditor or member failed to approve it by the requisite majority. Section 901G permits the court to effect what is commonly known as a "cross-class cramdown" as follows:

> ***901G Sanction for compromise or arrangement where one or more classes dissent***
>
> *(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.*
>
> *(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.*
>
> *(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).*
>
> *(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.*
>
> *(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.*

Reasons why I will not sanction the Plan as voted upon

35. Part 26A is relatively new legislation. However, it bears a number of similarities with Part 26 of CA 2006 which consolidates and re-enacts legislation on "schemes of arrangement" between companies and its creditors or shareholders that has been in existence for over 100 years.

36. There have been some inconsistent decisions at first instance on the meaning of "compromise or arrangement" for the purposes of s901A(3). In *Re Prezzo Investco Ltd* [2023] EWHC 1679 (Ch) Richard Smith J concluded that, for the purposes of Part 26A, a plan proposed under Part 26A could constitute a "compromise or arrangement" involving an "out of the money" class of creditors even if that plan proposed their debts be released for no consideration.

37. However, the approach of Richard Smith J was arguably incompatible with authorities on the meaning of "compromise arrangement" in Part 26 that stressed the need for an element of "give and take" with the result that a proposal to expropriate the rights of a creditor without any compensating advantage could fall outside the scope of the definition (see, for example *Re NFU Development Trust Ltd* [1972] 1 WLR 1548).

38. Snowden LJ considered the matter at [258] to [277] of *Re AGPS Bondco.* Noting that he was expressing a "provisional view", that the point had been argued less fully than other grounds of appeal before him, and that the question was not strictly necessary to determine the appeal, he expressed the following conclusions:

i) A "compromise or arrangement" in Part 26 does not include a confiscation or expropriation of rights without compensating advantage (see [265]).

ii) By using the same concept of a "compromise or arrangement" in Part 26A, Parliament intended that a court should have no jurisdiction to sanction a confiscation or expropriation of rights for no compensation under Part 26A just as it would have no jurisdiction under Part 26 (see [258] and [270]).

iii) That conclusion is not altered by the fact that Parliament gave the court powers under s901C(4) to decline to summon a meeting of shareholders or creditors with no "genuine economic interest", or under s901G, to effect a cross-class cramdown. The court's powers under those sections were designed to remove the possibility that an out of the money class of creditors or members could exercise a right of veto over a restructuring. They were not intended to make creditors or shareholders liable to confiscation of their rights or property for no consideration.

39. The Plan Company formally invited me not to follow this approach on the basis that the judgment in *Re AGPS Bondco* in this regard is *obiter* and wrong. I will not accept that invitation. While I agree that the passages in question are *obiter*, I respectfully consider that they are correct and will, therefore, follow them. It follows that I have no power to sanction the Plan as it has been voted upon (see [270] of *Re AGPS Bondco*) and I will not do so.

Reasons why I will not sanction an amended Plan

40. On the day the Court of Appeal handed down judgment in *Re AGPS Bondco.* and after the Plan Meetings had taken place, the Plan Company notified Plan Creditors that it would seek an amendment to the Plan at the sanction hearing. Pursuant to the Plan as amended (the "Amended Plan"), Tier 2 Creditors would receive an aggregate sum of €150,000 in return for the cancellation of their Tier 2 Debt. Junior Creditors would receive an aggregate sum of €50,000 for the cancellation of their Junior Debt. The €200,000 would be paid by some of the Senior Creditors and would not be funded out of the assets of the Plan Company. The Plan Company asks me to sanction the Plan with those amendments and notes that no Senior Creditor objects to that proposal.

41. Both Safra and Chapelgate Credit Opportunity Master Fund Limited ("Chapelgate"), a Junior Creditor objecting to the Plan, argue that I simply have no power to make an order of this nature. They advance that argument in two ways:

i) Miles J lacked jurisdiction to make the Convening Order since it involved convening plan meetings to vote on something that was not a "compromise or arrangement" with the Subordinated Creditors. It follows that there is no plan properly before the court which can be sanctioned whether with, or without, amendments.

ii) Even if Miles J had jurisdiction to make the Convening Order, it is still necessary to consider the separate question of whether the court has jurisdiction to sanction the Plan or the Amended Plan. Section 901A(1) makes it clear that Part 26A applies only where both Condition A and Condition B are met. Here, Condition B is not met as there is no "compromise or arrangement" with the Subordinated Creditors. That means that the court has no jurisdiction under Part 26A and correspondingly no jurisdiction to approve amendments to the Plan and then sanction the Amended Plan.

42. The Plan Company disputes that analysis and reasons as follows:

i) The Convening Order remains valid despite the *obiter* comments in *Re AGPS Bondco*.

ii) The judgment of the Court of Appeal in *Re Hawk Insurance Co Ltd* [2002] BCC 300 establishes that where a Part 26A plan is proposed with multiple classes of creditor, there is a separate compromise or arrangement between the company and each affected class. Since, on any view, the Plan included a "compromise or arrangement" with the Senior Creditors, the requirement of Condition B in s901A is met by reference to that compromise or arrangement.

iii) Section 901C(3) requires only that creditors who are "affected by" the compromise or arrangement have the opportunity to participate in a plan meeting. It does not require them actually to be parties to the "compromise or arrangement" (see *Re Hurricane Energy plc* [2021] EWHC 1418 (Ch)). Accordingly, no difficulty arises from the fact that the business before the meeting of Subordinated Creditors did not include a vote on a "compromise or arrangement" as defined.

iv) Nor does it matter, for the purposes of Condition B in s901G that there was no "compromise or arrangement" with Subordinated Creditors. Following *Re Hawk*, Condition B is satisfied by reference to the affirmative vote in favour of the "compromise or arrangement" with Senior Creditors only.

v) Accordingly, the court does have jurisdiction under Part 26A to sanction the Plan. When exercising that power, it has an inherent jurisdiction to make amendments to the Plan or impose conditions before sanctioning it. The proper exercise of that inherent jurisdiction can be informed by the fact that Clause 8.5 of the Plan (as voted upon) contains a provision permitting the Plan Company to consent on behalf of all Plan Creditors to any modification of, or addition to, the Plan that the court may think fit to approve or impose.

43. I accept the Plan Company's argument set out in paragraph 42.i). The answer is not to be found in any "invalidity" of the Convening Order. That order has not been reversed or set aside. The most that can be said is that there are doubts whether the Convening Order should have been made in the terms it was in the light of subsequent *obiter* comments in

Re AGPS Bondco. That is insufficient to deprive the Convening Order of any effect. As Lord Dyson said in *Rochdale Metropolitan Borough Council v KW (No 2)* [2016] 1 WLR 198 at [22]:

> *An order of any court is binding until it is set aside or varied. This is consistent with principles of finality and certainty which are necessary for the administration of justice. ... Such an order would still be binding even if there were doubt as to the court's jurisdiction to make the order....*

44. However, the Convening Order's validity does not dispose of the point. I still need to be satisfied, at the sanction stage, that I have jurisdiction to amend the Plan and to sanction it in its amended form. I agree with Safra and Chapelgate that my focus should be on whether, looking at matters afresh at the sanction stage, Condition B in s901A(3) is met in relation to the Plan that has been "proposed" (see s901A(3)(a)). If it is not, then s901A(1) does not apply and the court's jurisdiction under Part 26A to act in relation to the Plan as proposed, whether by sanctioning it, or amending it, is not engaged.

45. Without the benefit of the Court of Appeal's judgment in *Re Hawk*, it might be thought that Condition B is postulating a single "compromise or arrangement", albeit one that may be proposed between a company and multiple classes of creditor or member. Some support for that reading can be found in s901A(3)(b) which asks a question about the "purpose of the compromise or arrangement". That, perhaps, points against the proposition that Condition B envisages separate "compromises or arrangements" with each separate class of creditor or member since the statute does not expressly deal with what is to happen if one "compromise arrangement" has the requisite purpose but others do not.

46. *Re Hawk* was a case about class composition. It was not disputed that the company had put forward a "compromise or arrangement". The question was whether it was a single "compromise or arrangement" on which its creditors should vote as a single class. In analysing that question, Chadwick LJ noted at [15] that a Part 26 scheme involving two distinct classes might give rise to separate compromises or arrangements with the two classes concerned.

47. With the benefit of Chadwick LJ's analysis in *Re Hawk*, I can accept that Condition B does not require there to be a single overarching "compromise or arrangement". However, *Re Hawk* does not answer the question whether, if a company makes separate proposals to different classes of creditor or member, all of those proposals need to involve a "compromise or arrangement" in order to satisfy Condition B.

48. I accept that, read purely literally, the Plan Company could be said to have proposed a compromise or arrangement with "its creditors, or any class of them" for the purposes of s901A(3)(a)(i) by proposing the Plan which constituted a "compromise or arrangement" with the Senior Creditors but not with the Subordinated Creditors. However, in my judgment, that is not the correct reading when the statutory provisions are approached as a whole.

49. Part 26A follows the same three-stage architecture as that applicable to Part 26, which Chadwick LJ summarised at [11] of *Re Hawk*. At stage 1, the company makes a "proposal" to its creditors, members or any class of them and seeks an order under s901C

for plan meetings to take place of the relevant classes of creditors or members. At stage 2, the creditors and members vote at the plan meetings. At stage 3, if the proposal has been passed by the requisite majorities at plan meetings, or if the court exercises its power to effect a cross-class cramdown, the court will consider whether it should exercise its jurisdiction to sanction a plan.

50. In my judgment, it follows from the scheme of the legislation at each of those three stages, that the proposal that is put forward must constitute a "compromise or arrangement" for <u>every</u> class of creditor or member to whom it is directed.

51. The first indication in favour of that interpretation is found in Condition B itself. The whole focus of Condition B is on whether the company has put forward a "compromise or arrangement" to address financial difficulties. The concept of a compromise or arrangement is wide, embracing almost everything with some element of "give and take". It might well be wondered why Parliament would regard Condition B as satisfied if a company made proposals to particular classes of creditors or members that fall outside the wide concept of a "compromise or arrangement".

52. That conclusion is reinforced by considering what is to happen at the second stage. The creditors or members to whom a company makes proposals are, by s901C summoned to vote. Section 901F(1) and s901G(1) ask whether the requisite majority at a plan meeting has agreed a "compromise or arrangement". The implication is that at the second stage, each class of creditor or member has been asked to vote on a compromise or arrangement. That could not be achieved if the proposal made to some classes of creditor or member at the first stage involved a "compromise or arrangement", but the proposal made to other classes did not.

53. I consider the Plan Company's reliance on *Re Hurricane Energy Plc* to be misplaced. All that authority demonstrates is that if a company proposes a compromise or arrangement with some classes of stakeholder (for example creditors), the court has power under s901C(3), to order that another class of stakeholder (for example shareholders) which is affected by the compromise or arrangement should have the opportunity to participate in a plan meeting and vote on the compromise or arrangement. Any such additional meeting ordered on the court's initiative has the same status as any other plan meeting of creditors or shareholders (as demonstrated by the fact that the ultimate outcome in *Re Hurricane Energy Plc* was that the shareholders voted against the proposal at the meeting the court required and the plan was ultimately not approved). I agree with Safra and Chapelgate that *Re Hurricane Energy Plc* does not answer the point made in paragraph 52. The proposal made to creditors in *Re Hurricane Energy plc* clearly answered to the statutory definition of "compromise or arrangement". Even though the shareholders in *Re Hurricane Energy Plc* were not parties to it, they were still asked to vote on something that constituted a "compromise or arrangement".

54. On the Plan Company's analysis, a company could legitimately make a proposal to a class of creditor or member that is not a "compromise or arrangement". That class of creditor could then be called to a meeting to vote on it. However, the vote would be of no effect since s901F(5) envisages that a court can only sanction a "compromise or arrangement" and so could not sanction the proposal as involving that class. I recognise that the practical answer to this is that the court would be unlikely to exercise discretion to call the meeting in the first place. However, the fact that the Plan Company's interpretation admits the possibility is a pointer against that interpretation being correct

and a pointer in favour of what I consider to be the most natural interpretation, namely that Condition B in s901A requires that, if a company chooses to make a "proposal" to classes of creditor or member, that proposal must constitute a "compromise or arrangement" for all classes involved.

55. I have not found the point straightforward, but conclude, in agreement with both Safra and Chapelgate, that Condition B is not satisfied by reference to the Plan.

56. It follows that I have before me a plan which does not satisfy Condition B in s901A with the result that Part 26A does not apply to it. A particular consequence of that is that the court's jurisdiction to sanction the Plan is not engaged. In those circumstances, I would need a clear basis on which I could properly "amend" the Plan, thereby conferring jurisdiction on myself and, having done so, sanction the Amended Plan.

57. The Plan Company rightly does not argue that Clause 8.5 of the unamended Plan gives me the necessary power. Clause 8.5, being part of the Plan, comes into effect only if the court makes an order sanctioning it which is then delivered to the Registrar of Companies. Until then, by s901F(6), no aspect of the Plan, including Clause 8.5, has effect. As Hildyard J put it in *Re Co-operative Bank Plc* [2013] EWHC 4074 (Ch) at [30], until then the Plan is "writ in water".

58. I acknowledge that the court has some inherent power to effect amendments to a Part 26A plan after the second stage, at which it has been voted upon, but before the third stage at which it is sanctioned. There is no need for me in this judgment to seek to delineate the precise parameters of that power. However, the power to effect amendments cannot be divorced from the statutory context of Part 26A. In *Re Kempe Ambassador Insurance Co* [1998] 1 BCLC 234, Lord Hoffmann, sitting in the Privy Council made the following statement in connection with a scheme of arrangement under legislation in Bermuda that is similar to what is now Part 26 of CA 2006:

> *It is true that the sanction of the court is necessary for the Scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the Registrar. But this is not enough to enable one to say that the court (rather than the liquidators who proposed the scheme or the creditors who agreed to it) has bias order made the scheme. It is rather like saying that because Royal Assent is required for an Act of Parliament, a statute is an expression of the Royal will. Under section 99 [the relevant legislation in Bermuda] it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the court to sanction it. It is the statute which gives binding force of the Scheme when there has been a combination of these three acts just as the rules of the constitution give validity to act duly passed by the Queen in Parliament.*

59. All of the authorities I was shown touching on my power to amend the Plan were in a context where the court had power to sanction the Part 26 scheme or Part 26A plan in its unamended form. Here, as I have concluded, I have no such power. I consider that if I exercise, or purported to exercise, an inherent jurisdiction to amend the Plan I would be turning it from something that the court has no power to sanction into something that the court can sanction. I consider that to be a material amendment that either falls outside the scope of my power or would be an improper exercise of it.

60. I will not, therefore, make the amendments to the Plan that the Plan Company seeks. Nor will I, as the Plan Company invited me to, make an order under s901C(4) retrospectively disenfranchising the Tier 2 Creditors and the Junior Creditors and, having done so, sanction the unamended Plan pursuant to s901F. I make no determination as to whether an order under s901C(4) can now be made in relation to meetings that have already taken place. However, since I consider Part 26A does not apply to the Plan in its unamended form for the reasons given above, I consider I lack jurisdiction, at the sanction stage, to make an order under s901C(4) in relation to that Plan for the same reason that I lack jurisdiction to sanction the Plan.

PART B – FINDINGS OF FACT

The witnesses who gave evidence and my impressions of them

61. For the Plan Company and the Senior Creditors, I had witness evidence from the following:

    i) Mr Paul Cattermole of GLAS Specialist Services Limited ("GLAS"), which acts as "Information Agent" for the Plan Company, provided two witness statements dealing with administrative matters such as the posting of the "Practice Statement Letter" and compliance with the Convening Order. He was not-cross examined.

    ii) Mr Ryan Beckwith, who has since 12 October 2023 been the sole manager (the Luxembourg equivalent of a director) of the Plan Company provided two witness statements on factual matters. He was cross-examined.

    iii) Mr Christopher Howard, a partner at Sullivan & Cromwell LLP, who act for Nofe Investment S.à.r.L ("Nofe"), a beneficial owner of Senior Debt, provided a witness statement that broadly confirmed Nofe's support for the Plan. He was not cross-examined.

    iv) Mr John Houghton, a solicitor at Greenberg Traurig LLP, representing AXA Real Estate Investment Managers SGP gave similar evidence confirming the views of other holders of Senior Debt. He was not cross-examined.

    v) Mr Benjamin Vogt, a Senior Portfolio Manager of Fidera Vecta Limited ("Fidera"), gave evidence about the process of negotiations between Senior Creditors and Safra and of the perspective of Senior Creditors whom he advises, which include Nofe. He was cross-examined.

    vi) Mr Christoph Gerlinger gave expert evidence on the matters going to the valuation of the Development. He was cross-examined.

    vii) Ms Lisa Rickelton, a Senior Managing Director of FTI Consulting LLP ("FTI") gave expert evidence on various financial matters relating to the Plan and the alternatives to it. She was cross-examined.

    viii) Professor Dr Christoph Thole, a professor of law at the University of Cologne, gave expert evidence on matters of German law. He was cross-examined.

ix) Professor Dr André Prüm, Professor of Law at the University of Luxembourg, gave expert evidence on matters of Luxembourg law. He was cross-examined.

x) Mr Wolf Waschkuhn, an insolvency practitioner and founder of the "One Square" real estate consultancy, gave expert evidence on the level of "insolvency discount" that would apply if the Development were sold as part of a liquidation of the Group. He was not cross-examined.

62. For Safra and the Tier 2 Creditors that it represents, I had witness evidence from the following:

i) Ms Hella Alashkar, a Managing Director of Safra and Head of its Direct Private Investments platform, gave evidence on matters of fact. Ms Alashkar has been leading the opposition of Tier 2 Creditors to the Plan and she was cross-examined.

ii) Professor Dr Dominik Skauradszun, a Professor of civil law, civil procedure and company law at Fulda University of Applied Sciences in Germany, and a Judge of appeal at the Higher Regional Court of Frankfurt, gave expert evidence on matters of German law. He was cross-examined.

iii) Professor Dr Gilles Cuniberti , a Professor of Private International Law and Comparative Law at the University of Luxembourg, gave expert evidence on the matters of Luxembourg law. He was cross-examined.

63. I regarded the expert evidence of all experts who were cross-examined as first-rate. All experts clearly had expertise in their respective fields and no-one suggested otherwise. All experts were conscious of their duties to the court and gave their opinion evidence dispassionately.

64. I have examined disputed questions of Luxembourg law in some detail as I consider that they were important not just to the question of whether any order sanctioning the Plan would be recognised in Luxembourg, but also to some other issues. On some of those questions, I have by a slender margin preferred the opinion of Professor Prüm. However, I have reached those conclusions on the balance of probabilities by reference to brief cross-examination on what I accept are difficult questions of Luxembourg law. In reaching my conclusions, I should not be taken as doubting the quality of Professor Cuniberti's analysis for which I was most grateful.

65. Mr Beckwith and Mr Vogt were both impressive witnesses. I considered that they were both reliable and truthful and I have accepted their evidence.

66. The Plan Company has invited me to conclude that Ms Alashkar did not give her evidence in a straightforward and frank manner. It also submitted that in places her evidence was untruthful. I will not make that finding. Ms Alashkar clearly believes that the Plan treats Tier 2 Creditors unfairly. She has spent a long time and a lot of effort in opposing the Plan. As a consequence, her answers to questions in cross-examination were sometimes long and sometimes argumentative. She did not always directly answer questions put to her. However, while sometimes witnesses adopt this strategy as a means of avoiding difficult questions, I am quite satisfied that Ms Alashkar did not. Rather, I concluded simply that she is strongly invested in the Tier 2 Creditors' opposition to the Plan, there

was a lot she wished to say and she was concerned that, if she did not do so, important matters might escape the court's attention.

67. The Plan Company also criticised Ms Alashkar's witness statement for being misleading in its accounts of links between the Aggregate Group, the Plan Creditors and London. I do not accept that. I conclude that Ms Alashkar did not think these links important as the focus of the COMI issue was on the Plan Company's links to England and Wales. At the beginning of her evidence, she disclosed, without being in any way prompted, that one of the Tier 2 Creditors has an address in England.

68. I am satisfied that Ms Alashkar gave her evidence truthfully.

Findings of fact on the COMI Shift

69. It is common ground between the parties that the location of the Plan Company's COMI, as defined in Article 3(1) of Regulation (EU) 2015/848 on insolvency proceedings (as recast) (the "Insolvency Regulation Recast"), at various times is of significance.

70. For reasons that are explained below, my factual conclusion is that the Plan Company's COMI was located in Luxembourg until 16 October 2023, the date of the notice to Plan Creditors referred to in paragraph 71.iii). From the giving of that notice, the Plan Company's COMI was located in England.

COMI – primary facts

71. It is not disputed that the Plan Company has taken the following steps with a view to moving its COMI to England:

i) On 6 October 2023, the Plan Company's managers resolved that it was in the Plan Company's best interests to transfer its COMI to the UK.

ii) On 9 October 2023, the Plan Company entered into a Services Agreement with IWG plc, which uses the brand name "Spaces", giving it the right to occupy office premises, as licensee rather than lessee, in Moorgate, London (the "Moorgate Office"). That agreement was renewable monthly and required the Plan Company to pay a licence fee of £3,325 plus VAT per month.

iii) On 16 October 2023, all Plan Creditors were given notice that the business and management activities of the Plan Company had been relocated to the UK. On the same date, the Plan Company sent a "Practice Statement Letter" informing Plan Creditors of its intention to propose the Plan. That letter gave the Plan Company's business office address as the Moorgate Office.

iv) Since 12 October 2023, Mr Beckwith has been the Plan Company's sole manager. Mr Beckwith lives in London.

v) On 19 October 2023, the Plan Company applied to Companies House in the United Kingdom to register as a foreign company with a UK establishment. It was duly registered as such 23 November 2023.

vi) The Plan Company has notified HM Revenue & Customs ("HMRC") that, in light of its central management and control being exercised in the United Kingdom, it regards itself as tax resident in the United Kingdom.

vii) Mr Beckwith has provided a summary of meetings and calls in which he participated between 11 October 2023 and 30 October 2023 that involved the business of the Plan Company. In this period, there were two in-person meetings with DLA, the Plan Company's English solicitors that took place at the Moorgate Office. There were also 20 conference calls that took place between Mr Beckwith (on behalf of the Plan Company) and the Plan Company's creditors on the one hand and DLA on the other. Mr Beckwith was physically present at the Moorgate Office while these conference calls took place.

viii) Since 21 December 2023, the Plan Company has ceased to use the Moorgate Office and has used an office at Copthall House in London. It occupies Copthall House as lessee rather than licensee paying a rent of £17,950 per month plus VAT. The Plan Company sent a letter to Plan Creditors notifying them of the change of address.

ix) Until 12 December 2023, Mr Beckwith was the Plan Company's sole employee. On 12 December 2023, three further employees were hired, all on a full-time basis: a Head of Finance, a Head of Operations and an Executive Team Assistant. All three employees live in the UK. Since 8 January 2024, all three employees have tended to work from Copthall House, where there are sufficient IT and other facilities for them to perform their duties, around two days a week in accordance with flexible working arrangements. The remainder of the time they work from home in the UK.

x) Mr Beckwith's unchallenged evidence is that, with the exception of a two-day period between 9 and 10 October 2023, when he was travelling on business to Berlin, he was physically present at either the Moorgate Office or at Copthall House for all calls and meetings that he has held with Senior Creditors. In addition, his unchallenged evidence was that between 31 October 2023 and the date on which the Plan Company ceased to use the Moorgate Office, he was present at the Moorgate Office for 30 out of 35 working days.

xi) The Plan Company has, since around the beginning of February had a website. That website contains no information on the Plan Company's business but does list, under the heading "Our Team", the names of Mr Beckwith and the three employees referred to above. It also provides the Copthall House address and a UK telephone number as a means of contacting the Plan Company. When the Plan Company moved to Copthall House, Mr Beckwith attended Copthall House for 10 out of 19 working days between 21 December 2023 and 18 January 2024. His absence during the other nine working days in this period was attributable to him being on holiday in Australia.

xii) The Plan Company has sought to open a bank account in its own name with a UK bank. However, applications to date have been refused. The Plan Company has access to a bank account with Barclays bank through an arrangement with GLAS.

Ascertaining COMI – the principles

72. Various provisions of the Insolvency (Amendment) (EU Exit) Regulations 2019 (the "2019 Regulations") ensure the continued significance of the concept of "COMI" as defined in Regulation 3(1) of the Insolvency Regulation Recast. The applicable definition of "COMI" is as follows:

> *the place where the [Plan Company] conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*

73. The following principles to be followed when determining a company's COMI, which were largely drawn from Trower J's summary at [15] of *Re Swissport Holding International SARL* [2020] EWHC 3556 (Ch), were common ground:

i) There is a rebuttable presumption that the Plan Company's COMI is located at the place of its registered office, in Luxembourg (see Regulation 3(1) of the Insolvency Regulation Recast).

ii) The Plan Company's COMI will be located where it conducts the administration of its interests on a regular basis. The court must identify that place after making a comprehensive assessment of all the relevant factors.

iii) The location of the COMI must be objectively ascertainable by third parties.

iv) Since the location of the Plan Company's COMI has a direct bearing on where it is likely to be wound up, special consideration should be given to the position of creditors and their perception as to where the Plan Company conducts the administration of its interests. That is because creditors would be particularly affected by a winding up of the Plan Company and therefore need to be in a position to calculate the legal risks that would arise on an insolvency (Recital 28 to the Insolvency Regulation Recast and [122] of the judgment of the CJEU in *Re Eurofood IFSC Ltd* [2006] Ch 508).

v) There is no principle of immutability. The Plan Company is free to choose where it carries on the administration of its interests, and so is free to move its COMI to England for the sole purpose of promulgating a restructuring under Part 26A. The question is where, viewed objectively, the COMI is located and not why, viewed subjectively, the Plan Company seeks to establish its COMI in a particular jurisdiction.

vi) That said, where, as here, the Plan Company asserts that it has moved its COMI for what might be described as a "self-serving purpose", it is quite appropriate for the court to scrutinise that claim to ensure that the change is based on "substance and not an illusion and that the change has the necessary element of permanence" (see *Shierson v Vlieland-Boddy* [2005] BCC 949 at [55(5)].

Application of those principles to the primary facts

74. The Plan Company's business, being that of a holding company, consists of reasonably circumscribed activities. As Trower J observed at [22] *of Re Swissport Holding International SARL*, it is likely to be more straightforward to move the COMI of a

company carrying on such a business than it would be to move the COMI of an operating company.

75. In my judgment, the primary facts set out in paragraph 71 provide a strong basis for rebutting the presumption that the Plan Company's COMI remained in Luxembourg. Those primary facts indicate that the Plan Company conducts the administration of its interests on a regular basis from England and that its creditors are well aware of that fact, having been specifically notified. Indeed the Senior Creditors constitute a significant majority by value of the Plan Company's total creditors and Senior Creditors have positively assented to the movement of the Plan Company's COMI to England pursuant to the RSA. The presence of full-time employees in England, who perform their duties at physical premises that the Plan Company occupies in England, together with the notification of a changed tax residence to HMRC, and the registration as an overseas company with Companies House, provide a clear indication that the shift of administrative function is permanent.

76. Safra nevertheless invites me to look behind the apparently strong case. It argues that there has been substantial window-dressing that seeks to obscure the true position, namely that creditors would actually perceive relatively little permanent conduct of the Plan Company's administration in England.

77. Safra points out that the initial licence of the Moorgate Office was taken out on a short-term basis which committed the Plan Company only for one month at a time. Safra notes that this very flexibility was a selling point that IWG plc stressed on its website. However, I see little force in that objection. The Plan Company resolved on 6 October 2023 to move its COMI. It needed office space in England to do that. There was nothing wrong in principle with the Plan Company acting quicky and taking a short-term licence of office space on 9 October 2023. What matters to the Plan Company's COMI is not whether it was entitled to terminate the licence agreement of the Moorgate Office on short notice or not but whether, viewed as a whole, the transfer of administration to London was permanent or not. The Plan Company's act of taking a 36-month lease of dedicated office space at Copthall House provides a clear indication that it did not require office space on a temporary basis only.

78. I also see little force in Safra's arguments that the Plan Company engaged in window-dressing by taking on three employees that it did not really need and by taking a lease of Copthall House which provided accommodation considerably in excess of its true needs. Mr Beckwith spoke convincingly in his oral evidence about how difficult it was for him to have to do everything before the employees were appointed. I accept that the Plan Company had a genuine need for an employee to deal with finance-related matters given that, as matters stand, much of the Plan Company's activity has involved dealing with its creditors. Nor do I see any sign of window-dressing in the Plan Company's appointment of an employee to deal with "operations". After all, the Plan Company is a holding company of entities whose main asset is a partially completed development in Berlin. It was reasonable for the Plan Company to appoint an employee to help look after that underlying asset. I can quite understand that the Plan Company considered that some additional administrative support was needed in the form of an office administrator.

79. The Copthall House office may well be larger than offices used by other businesses with four employees (including Mr Beckwith), but that does not detract from the conclusion that it represents accommodation genuinely used by the Plan Company in London.

80. I acknowledge that the Plan Company has an incentive to present the facts in as attractive a way as possible since it wishes to rely on the COMI Shift in the face of opposition from Subordinated Creditors. However, in my judgment the allegation of window-dressing is not made out, partly because of the points made in paragraph 78, and partly because I do not consider that there is an alternative "true" picture that any window-dressing is designed to obscure. Rather, the true position is that the Plan Company has, since 16 October 2023, when it gave notice of the fact to its creditors, carried on the administration of its interests in London.

81. Safra argues that the move of the Plan Company's COMI to England would have been insufficiently visible to creditors because (i) the Plan Company held very few face-to-face meetings with creditors in London, (ii) such meetings as there were with creditors took place by means of a call or video meeting and (iii) it does not really matter where Mr Beckwith was physically located when he participated in remote meetings since those meetings could function perfectly well whether he was physically present in London or not.

82. I do not accept that argument. The Plan Company can only administer the business interests that it has. Its creditors are based largely, but not exclusively, outside the UK. It is inevitable that, in the modern business environment, discussions with those creditors are largely going to take place at remote meetings, rather than face-to-face. I accept Mr Beckwith's oral evidence that during remote meetings, the fact that he was physically present in the UK was occasionally remarked on. In any event, Safra's argument overlooks the significance of the express notification to creditors that the Plan Company would, from 16 October 2023, be administering its business interests from London.

83. Relatedly, Safra argues that since creditors continued to send documentation to the Plan Company at its Luxembourg registered office, they cannot have been sufficiently aware of the asserted transfer of the Plan Company's COMI to London. Mr Beckwith has produced a schedule of correspondence received in a hardcopy at the Plan Company's registered office in Luxembourg. Some of that was received from Luxembourg authorities, such as its revenue authorities and its Chamber of Commerce. It is not obvious to me that those entities are "creditors" and, in any event, they could be expected to correspond using a known address in Luxembourg. Some correspondence came from creditors, but I accept the Plan Company's point that Subordinated Creditors have a clear self-interest in sending correspondence to a Luxembourg address to bolster their arguments that COMI has not shifted. I regard the weight of this indication as slender.

84. I attach little significance to Safra's other objections based on the continued presence of certain documents in Luxembourg and the engagement of a Luxembourg corporate services provider. Despite the shift of its COMI to London, the Plan Company remains a Luxembourg incorporated company. It therefore has legal obligations that it must comply with under Luxembourg law. The fact that it takes steps to comply with those obligations, by keeping documents in Luxembourg as required, and engaging a provider of corporate services to ensure compliance with Luxembourg legal obligations, says little if anything about the location from which it administers its business interests. In a similar vein, I attach little significance to the fact that the Plan Company is party to legal proceedings in Luxembourg. Those proceedings relate to the Subordinated Creditors' attempts to wind up the company under Luxembourg law and therefore necessarily have to be brought in Luxembourg.

85. Finally, Safra notes that, if the Plan is sanctioned, the Plan Company will have much less of a continued role in the group structure. Ms Cooke suggested in the Plan Company's closing submissions that it might be reduced to holding just 5% of the shares in PropCo following a reorganisation of the Group that is proceeding in parallel with the Plan. However, that is simply a statement that the Plan Company's business may reduce in scale. It does not suggest that the place where the Plan Company administers its business interests, (whether those business interests reduce in the future or not) is somewhere other than England. I am not satisfied that the move of the COMI to England is "temporary" in the sense that, if the Plan is sanctioned, the Plan Company proposes to relocate its administration of that business back to Luxembourg.

Findings of fact as to Luxembourg law

Whether the COMI Shift was in breach of the Plan Company's Articles

86. I have reached the following conclusions which I will explain in the remainder of this section:

    i) The COMI Shift did not involve the Plan Company acting in breach of Article 2 of its Articles of Association.

    ii) To the extent that the Plan Company held meetings of its managers outside Luxembourg between 6 October 2023 and 16 October 2023, it would have acted in breach of paragraph 16 of Article 11 of its Articles of Association. However, any such breach would not vitiate the COMI Shift as a matter of Luxembourg law.

87. Article 2 contains four paragraphs. The first paragraph provides for the Plan Company's registered office to be in the municipality of Luxembourg. The managers are entitled to move the registered office to another address in the municipality of Luxembourg. The second paragraph provides that a resolution of shareholders is needed to approve the move of registered office to any other place outside the municipality but still in the Grand Duchy of Luxembourg.

88. The third paragraph permits the registered office of the Plan Company to be transferred outside the Grand Duchy of Luxembourg on a temporary basis if a threshold condition is satisfied namely that "military, political, economic or social reasons ... might prevent normal performance of the activities of the [Plan Company] at its registered office [in the Grand Duchy of Luxembourg]". Such a transfer of registered office can be temporary only "until such time as the situation is normalised".

89. Professor Prüm based his opinion on what he considered to be the natural reading of Article 2 as dealing only with the registered office of the Plan Company and imposing no restriction on the location of its administrative functions. That seemed to me to accord with the ordinary meaning of the words used and the overall purpose of Article 2: while shareholders' approval would be needed to move the registered office within the Grand Duchy of Luxembourg, exceptional circumstances could permit the managers to approve a temporary transfer outside Luxembourg without the need for shareholder approval.

90. Professor Cuniberti's contrary opinion was based on the statement in Article 2 that a temporary transfer of registered office "will not have any effect on the [Plan Company's] nationality which notwithstanding said temporary transfer of registered office will remain

a Luxembourg company". Professor Cuniberti's point was that this wording indicated that Article 2 is concerned with an examination of the nationality of the Plan Company. Since the COMI Shift would result in a change of nationality, his opinion was that Article 2, when read together with other provisions of the Articles of Association, did indicate that any transfer of administrative function could similarly take place only on a temporary basis.

91. However, I preferred Professor Prüm's opinion. The wording on which Professor Cuniberti relies, in my judgment, explains the consequences of a temporary transfer of registered office rather than imposing any restriction on the transfer of administrative functions.

92. The conclusion set out in paragraph 86.ii) was largely common ground between the experts. Until amendment on 16 October 2023, Article 11 of the Articles of Association of the Plan Company precluded a majority of managers from attending a board meeting while being located in the same jurisdiction outside Luxembourg. An amendment to the Articles on 16 October 2023 removed this restriction. The Plan Company resolved to move its COMI on 6 October 2023, while the "old" Articles remained in force. Therefore, there was scope for a breach of the Articles between 6 October 2023 and 16 October 2023. Both Professor Prüm and Professor Cuniberti agreed that the location of the Plan Company's COMI was a question of fact. Accordingly, any breach of Article 11 could not, as a matter of Luxembourg law, vitiate the COMI Shift.

The Luxembourg Restructuring Law

93. I have reached the following conclusions which I explain in the remainder of this section:

i) The Luxembourg law of 7 August 2023 (the "Luxembourg Restructuring Law") came into force on 1 November 2023. It provides a framework for the restructuring of debt obligations of Luxembourg companies ("Luxembourg Plans"), including suspension of payment. The Luxembourg Restructuring Law applies differently to certain secured "extraordinary creditors" ("*créanciers sursitaires extraordinaires*") as distinct from unsecured creditors ("*créanciers sursitaires*") affected by a proposal for the suspension of payment. Since both the Senior Debt and the Subordinated Debt is secured, holders of such debt would constitute "extraordinary creditors" for the purposes of the Luxembourg Restructuring Law.

ii) Article 45 of the Luxembourg Restructuring Law permits payment obligations owed to extraordinary creditors to be deferred for a period of up to 36 months. However, absent consent, a Luxembourg Plan "may not include any other measure affecting the rights of extraordinary deferred creditors".

iii) It is simply not clear as a matter of Luxembourg law whether the restriction in Article 45 applies only to the extent that an extraordinary creditor is "in the money" in the sense that the debt exceeds the value of the associated security. There is a respectable school of thought to the effect that, if an extraordinary creditor is owed a debt of €100 but the value of the security for that debt is only €50, a Luxembourg Plan can seek without consent to extinguish €50 of the creditor's debt. There is equally a respectable school of thought that in this example none of the creditor's debt could be extinguished under a Luxembourg Plan without consent.

94. The propositions that I have set out in paragraphs 93.i) and 93.ii) above were common ground between Professor Prüm and Professor Cuniberti.

95. Professor Prüm's opinion was that "one could reasonably expect" that Article 45 protects rights of extraordinary creditors only to the extent that they are "in the money" although he acknowledged that the point was unclear. He supported his opinion by reference to academic commentary on the Belgian law on which the Luxembourg Restructuring Law had been based. That Belgian law had been amended expressly to provide that rights of secured creditors could be varied without consent to the extent that the debt was "out of the money". Professor Prüm's conclusion was that academic commentary in Belgium supported the conclusion that this amendment merely clarified what had been intended all along and he considered that a Luxembourg court would apply a similar approach.

96. Professor Cuniberti's opinion was that the Luxembourg Restructuring Law was so new that it is very difficult to express an opinion. He acknowledged the possibility of a "liberal" approach under which the Luxembourg court would interpret Article 45 as permitting some extinguishment of "out of the money" debt held by extraordinary creditors. He thought that the likelihood of the liberal approach being applied would be affected by the amount of the extinguishment so that a 10% extinguishment might be acceptable but complete expropriation might not be. Against that, he acknowledged the possibility of a "conservative position" under which Article 45 is interpreted as precluding any extinguishment of secured debt without consent.

97. I reach the conclusion in paragraph 93.iii) because both Professor Prüm and Professor Cuniberti both accepted that the position was unclear and both experts' analyses struck me as entirely plausible.

Article 20(4) of the Luxembourg Law on Collateral Arrangements

98. I have concluded that the Plan would not infringe the Luxembourg law of 5 August 2005 on Financial Collateral Arrangements (the "Luxembourg Collateral Law") by providing for the release of Subordinated Debt that benefits from a share pledge under Luxembourg law.

99. Article 20(4) provides for both Luxembourg and non-Luxembourg provisions governing reorganisation measures not to apply to "financial collateral arrangements" and not to constitute an obstacle to the enforcement and performance of the parties' obligations, particularly their obligation of re-transfer or repurchase. It is common ground that both the Senior Debt and the Subordinated Debt are secured by a share pledge under Luxembourg law that constitutes a "financial collateral arrangement" for the purposes of Article 20(4).

100. Professor Prüm's opinion is that this provision is dealing only with the "financial collateral arrangement" in question in order to make it "unassailable" including in circumstances where a Luxembourg company is subjected to insolvency proceedings in a different country. He explained that, in his view, Article 20(4) was intended specifically to interact with the predecessor to the Insolvency Regulation Recast. Under that regulation, it was typically the law of the country in which the winding up takes place that determines whether security can be set aside in that winding up. However, the regulation permitted an exception where the law of the territory under which the security was granted prevented the security from being set aside. In Professor Prüm's opinion,

Article 20(4) was intended to enact just such an exception. He supported that articulation of purpose by reference to a judgment of the Luxembourg Court of Appeal in Case CAL-2020-00840.

101. Professor Cuniberti's contrary opinion was that Article 20(4) prevents the Plan from releasing any part of the underlying debt obligations owed to creditors who benefit from a share pledge under Luxembourg law. However, I concluded that this contrary opinion did not accord with the natural meaning of Article 20(4) and did not provide a clear rationale why the Luxembourg legislature should wish to protect debt obligations from release in a provision which was ostensibly dealing with the continued validity of security. Overall, I concluded that Professor Cuniberti's analysis did not explain clearly what was wrong in Professor Prüm's opinion. I accordingly prefer the analysis of Professor Prüm.

The previous insolvency proceedings in Luxembourg

102. Subordinated Creditors have initiated the following insolvency proceedings against members of the Group in Luxembourg:

i) On 24 July 2023, Safra brought bankruptcy proceedings ("July Proceedings") against the Plan Company. Those proceedings were dismissed on the basis that Safra, as distinct from the creditors it represents, had no standing to petition for bankruptcy. There has been no appeal against that ruling.

ii) In September 2023, Chapelgate brought bankruptcy proceedings ("September Proceedings") against AH4, the Plan Company, PropCo and Ionview Holdings S.à.r.L ("Ionview"), a member of the Group and a guarantor of the Senior Debt and the Subordinated Debt. The applications as relating to the Plan Company, PropCo and Ionview have been stayed pending determination of the appeals referred to in paragraph iii) below. The application as relating to AH4 was dismissed on the basis that there was insufficient certainty that AH4 was insolvent (applying similar reasoning to that set out in paragraph (iii) below).

iii) On 2 November 2023, Mr Aintabi and Daventry Development SA ("Daventry") served proceedings (the "Aintabi Proceedings") in Luxembourg against Ionview, the Plan Company and PropCo. Mr Aintabi owns some Tier 2 Debt and is the ultimate beneficial owner of a property developer and investor known as "Jesta" and also of Daventry. In July 2023, Daventry had made an offer to acquire the Development which had not been accepted. The Aintabi Proceedings sought the appointment of a trustee for the purposes of organising a competitive sale process of all or part of the assets of companies in the Group to Daventry pursuant to Article 55 of the Luxembourg Restructuring Law. The Luxembourg court dismissed the proceedings insofar as relating to Ionview on the basis that Article 55 does not apply to it. It dismissed the proceedings against PropCo for two reasons. First, it concluded that the applicants lacked standing. Second, it concluded that there was uncertainty as to how the subordination provisions of the Tier 2 Debt operated as a matter of German law and, as a result, uncertainty as to whether PropCo had defaulted on payment obligations under the Tier 2 Debt on which the allegation of insolvency in the Aintabi Proceedings was based. It stayed the proceedings as relating to the Plan Company pending the outcome of the Plan. The appeals were heard in January 2024. At the time of the hearing before me, judgment was expected on 27 February 2024.

Whether the Luxembourg courts would consider that they have exclusive jurisdiction

103. I conclude that the Luxembourg courts would not decline to recognise an English judgment sanctioning the Plan on the basis that the Luxembourg courts have exclusive jurisdiction in relation to a winding up of the Plan Company or a restructuring of its debt.

104. Professor Cuniberti's opinion was that the Luxembourg courts would consider that both the July Proceedings and the September Proceedings conferred on it exclusive jurisdiction to open *faillite* in Luxembourg. *Faillite* is a Luxembourg insolvency proceeding that falls within Annex A of the Insolvency Regulation Recast ("Annex A"). Proceedings of this kind survive enactment of the Luxembourg Restructuring Law. Professor Cuniberti based his conclusion on judgments of the Court of Justice of the European Union (the "CJEU") made in the context of moves of COMI between member states of the EU. Concluding that case law of the CJEU (including Case C-723/20 *Galapagos BidCo Sarl*) indicates that Luxembourg would retain exclusive jurisdiction if the Plan Company had moved its COMI to another member state after the applications in Luxembourg, Professor Cuniberti concludes that there would be still greater reason for the Luxembourg courts to assert exclusive jurisdiction in the context of a shift of COMI outside the EU.

105. Professor Prüm bases his opinion squarely on the assumption that the Plan Company's COMI is in England at the time of any order sanctioning the Plan. On that assumption, Professor Prüm concludes that a central consideration is the fact that the Luxembourg courts have not yet made any decision to open insolvency proceedings in relation to the Plan Company. The July Proceedings were dismissed and the September Proceedings stayed. If the English court sanctions the Plan, Professor Prüm's opinion is that the Luxembourg courts would not regard that as trespassing on their exclusive jurisdiction. He disputes Professor Cuniberti's analysis as based on EU law, concluding that this has no application where the shift of COMI is to a country outside the EU. He considers that the Luxembourg courts would be more likely to adopt the approach of the French *Cour de Cassation* in a judgment dated 30 September 2009. In that case, the French court was first seised of an application, but a foreign court ruled first. The French court concluded that the proceedings in France had become irrelevant once the foreign judgment was given.

106. Both of these opinions were tested in cross-examination. Both held up to scrutiny and, therefore, I concluded that both opinions had a realistic chance of being accepted by a Luxembourg court. Professor Prüm's opinion was based, at least to an extent, on reasoning by analogy to the CJEU's judgment in *Galapagos*. He concluded that since, in that case, the CJEU held that the jurisdiction of the German court was not affected by the existence of pending insolvency proceedings in England after the end of the Brexit withdrawal period, the converse was likely to be true namely that pending insolvency proceedings in Luxembourg should not cause the Luxembourg courts to conclude that the English courts lack jurisdiction. I saw the logic of that, but it remained an argument based on reasoning by analogy. I also saw force in Professor Cuniberti's point that, since Luxembourg would retain exclusive jurisdiction if the COMI Shift had been to an EU member state, the Luxembourg courts might be reluctant to conclude that they lost exclusive jurisdiction when the COMI Shift was to a non-EU member state.

107. If the matter had rested there, I would have concluded that the opinions of Professor Prüm and Professor Cuniberti were both eminently respectable points of view, but neither should necessarily be preferred to the other. There are two factors that tip the balance and lead me to prefer the opinion of Professor Prüm.

108. The first is Professor Prüm's conclusion that the Luxembourg courts would only consider that they have exclusive jurisdiction given the existing insolvency proceedings if the Plan Company, AH4 and PropCo have been shown to have defaulted on payment obligations that are due. The Luxembourg courts have already, in the September Proceedings and the Aintabi Proceedings, concluded that PropCo and AH4 have not been shown to have defaulted on the obligations under the Junior Debt or Tier 2 Debt on which those proceedings relied. Accordingly, Professor Prüm considers that the Plan Company would similarly not be considered to have defaulted in relation to its obligations in respect of the Junior Debt or Tier 2 Debt.

109. Professor Cuniberti clearly disagreed with the reasoning of the Luxembourg court as regards the insolvency proceedings against PropCo and AH4. However, as matters stand, those are the decisions of the Luxembourg Court and Professor Cuniberti accepted that there is a prospect that the same decision would be made in relation to the Plan Company by the same Luxembourg first instance court.

110. The second factor is that Professor Cuniberti's opinion was that the July Proceedings established the exclusive jurisdiction of the Luxembourg courts, even though they had been dismissed on the basis that Safra lacked standing to bring them with that dismissal not under appeal. I did not obtain from Professor Cuniberti's evidence a clear explanation of this apparently anomalous result.

111. Therefore, albeit by a slender margin, I conclude that Professor Prüm's opinion on the question of the exclusive jurisdiction of the Luxembourg courts is to be preferred.

Whether a judgment sanctioning the Plan would be recognised in Luxembourg

112. The parties agree that a relevant question is whether, if the Plan is sanctioned, there is a reasonable prospect that it will be recognised and given effect to in the relevant overseas jurisdictions, being Luxembourg and Germany in this case. Certainty as to the position under overseas law is not needed. (See [27(iii)] and [27(iv)] of the judgment of Sir Alastair Norris in *Re DTEK Energy BV and another (No 2)* [2021] EWHC 1551 (Ch)). I am satisfied that there is such a reasonable prospect in relation to Luxembourg.

113. Professor Prüm and Professor Cuniberti agree that the Luxembourg court would recognise and enforce any order of an English court that gives effect to the Plan provided all of the following conditions are satisfied:

i) The Luxembourg court should not have exclusive jurisdiction over the matter decided by the English court. In addition, there must be some actual connection between the dispute and England.

ii) The initiation of the English proceedings should not be aimed at evading either (i) the application of Luxembourg law (*fraude à la loi*) or (ii) a potential Luxembourg judgment (*fraude au jugement*).

iii) Any order sanctioning the Plan must comply with Luxembourg international public policy.

iv) There must not be a decision of the Luxembourg courts that is irreconcilable with an English order sanctioning the Plan.

114. I have already in paragraph 103 explained why I prefer Professor Prüm's opinion that the Luxembourg courts would not regard themselves as having exclusive jurisdiction. Both Professor Prüm and Professor Cuniberti agree that the question whether there is an actual connection between the dispute and England is determined in a flexible and liberal manner. Nevertheless, Professor Cuniberti thought that there would be difficulties in satisfying this test since he considers the better view is that the test of "actual connection" should be determined at the time insolvency proceedings were first brought in Luxembourg. At that time, the Plan Company had no connection with England.

115. Notwithstanding this difference of opinion on the question of "actual connection", I conclude that there are at least reasonable prospects that the Luxembourg courts would consider that test to be satisfied. Put another way, I do not consider it clear that, if the Luxembourg courts were satisfied that they did not have exclusive jurisdiction they would apply a test of actual connection, which is intended to be "flexible and liberal", by reference only to circumstances existing in July or September 2023 and so before the date of the very English court order whose recognition they would be considering.

116. The question raised in paragraph 113.ii) was the subject of a clear difference of opinion between Professor Prüm and Professor Cuniberti. Professor Cuniberti's analysis of *fraude à la loi* drew on his opinion, which I have not accepted, that the COMI Shift involved a breach of the Plan Company's articles. It also drew support from the proposition that the Plan Company is insolvent in Luxembourg terms and so the effect of the COMI Shift is to result in Luxembourg insolvency law being sidestepped. However, the force of that objection is diminished by rulings to date which, as I have explained, suggest that the Luxembourg courts would conclude that the Plan Company has not been shown to be in default on obligations in relation to the Tier 2 Debt on which the September Proceedings rely.

117. Professor Cuniberti also considered that the Plan Company's clear acceptance that the COMI Shift is being effected solely to enable it to propose the Plan under UK law made it clear that the Plan Company was engaged in a *fraude à la loi* or a *fraude au jugement* since it emphasised that the Plan Company was seeking to obtain a foreign judgment applying foreign insolvency law instead of a Luxembourg judgment applying Luxembourg insolvency law.

118. Professor Prüm drew precisely the opposite conclusion noting that, at the time of the COMI Shift, the Luxembourg Restructuring Law was not in force and so there was simply no mechanism available in Luxembourg that permitted the Plan Company to achieve the outcome it sought. He did not consider that accessing a foreign law to achieve a result that, while not possible, was not positively prohibited by Luxembourg law, amounted to a *fraude à la loi.* He drew an analogy with a judgment of the Luxembourg court to the effect that there was no *fraude à la loi* where a Luxembourg couple sought recognition from a US court of parenting rights over a child who was born under arrangements with a surrogate mother in circumstances where Luxembourg law had no legislation relating to surrogate motherhood.

119. If it were necessary to choose between these opinions, I would prefer the opinion of Professor Prüm. Professor Cuniberti's contrary opinion was based on propositions that I considered insecure (see paragraphs 116 and 117). It also leads to the conclusion that, despite EU law recognising that a company can validly move its COMI, any move of COMI to a jurisdiction that has a different insolvency law from Luxembourg could be regarded as a *fraude à la loi.* That struck me as a surprising outcome and I preferred Professor Prüm's reasoning that provided a coherent explanation of why that is not the correct interpretation. At the very least, I conclude that there is a reasonable prospect that the requirement of paragraph 113.ii) is met.

120. Significantly in my judgment, Professor Cuniberti accepted at paragraph [82] of his expert report that there would be no violation of Luxembourg public policy simply on the basis that the Plan achieves a result that cannot be achieved under the Luxembourg Restructuring Law. Rather, his opinion that the condition in paragraph 113.iii) is not met was based on the proposition that the Plan results in a breach of the Luxembourg Collateral Law and a breach of Article 45 of the Luxembourg Restructuring Law.

121. I have not accepted Professor Cuniberti's opinion on the Luxembourg Collateral Law (see paragraph 98 above). I therefore do not accept that this aspect of the Plan involves a breach of Luxembourg public policy. I have found (see paragraph 93.iii) above) that Professor Cuniberti may be correct in his conclusion that Article 45 would not allow Subordinated Creditors to have their debt extinguished even though they are completely "out of the money" by reference to the security for that debt. However, I prefer Professor Prüm's opinion that this aspect of the Plan does not involve a breach of public policy either. Since the interpretation of Article 45 is not settled, it is difficult to see how that Article can set out a clear expression of public policy that is breached by the Plan.

122. Both Professor Prüm and Professor Cuniberti agree that to date there is no conflicting decision of a Luxembourg court with the result that there is no difficulty with the requirement of paragraph 113.iv).

Whether the Plan would be recognised and given effect to in Germany

Background principles of German Law

123. The principles of German law set out in this section were common ground between Professor Thole and Professor Skauradszun.

124. Section 343 of the German Insolvency Code (*Insolvenzordnung*) (the "InsO") provides for the opening of non-German "insolvency proceedings", and judgments implementing "insolvency proceedings" to be recognised in Germany. There is an exception if the courts in which the proceedings were opened, or judgment given, would lack jurisdiction applying German law principles or where recognition leads to a result which is manifestly incompatible with major principles of German law.

125. Both experts agree that an English judgment sanctioning the Plan would be recognised in Germany only if the Plan Company's COMI is in England at the time of any order sanctioning the Plan. Without that, the German courts would not accept that the English courts have jurisdiction for the purposes of s343 of the InsO.

126. Neither Professor Thole nor Professor Skauradszun suggested that the Plan is manifestly incompatible with major principles of German law.

127. The central question that divides the experts is whether the English proceedings seeking sanction of the Plan are "insolvency proceedings" for the purposes of s343 of the InsO. If not, there might still be a route to recognition of the Plan under s328 of the Civil Procedure Code (*Zivilprozessordnung*) ("ZPO"). However, the ZPO is most obviously applicable to bilateral civil judgments and so provides a less attractive basis for recognition than the InsO.

128. Section 1(1) of the InsO provides some insight as to the meaning of the term "insolvency proceedings" as follows:

> *The purpose of insolvency proceedings is to jointly satisfy a debtor's creditors by exploiting the debtor's assets and distributing the proceeds or by making a different provision in an insolvency plan, in particular to preserve the company. The honest debtor is given the opportunity to free himself from his remaining liabilities.*

129. In order to constitute "insolvency proceedings" for the purposes of the InsO, it is necessary for those proceedings to deal with obligations of creditors collectively. Professor Thole and Professor Skauradszun are not agreed on whether this means that the claims of all creditors are dealt with in the proceedings. However, they are agreed that provided the Plan satisfies the requirement of "collectivity", it will be treated as a form of "insolvency proceedings". Put another way, there are no other obstacles standing in the way of the Plan qualifying as "insolvency proceedings".

130. Germany has implemented into domestic law the provisions of the EU Directive 2019/1023 on Preventive Restructurings (the "Restructuring Directive"). The implementing legislation is the Stabilisation and Restructuring Framework for Businesses Act (the "StaRUG Act"). The StaRUG Act permits "preventive restructuring proceedings" ("StaRUGs") to take effect in German law which include features that are provided for in Part 26A, including the facility to implement a "cross-class cramdown".

131. The StaRUG Act contains provisions for the recognition in Germany of preventive restructuring frameworks that take effect in other EU member states to the extent they fall within the scope of the Insolvency Regulation Recast. However, these provisions of the StaRUG Act do not apply to the Plan since the UK is no longer an EU member state.

132. The StaRUG Act appears in the list of provisions contained in Annex A. Accordingly, a StaRUG must be recognised and given effect in EU member states in accordance with the Insolvency Regulation Recast.

Conclusion

133. For reasons that follow, I am satisfied that there is a reasonable prospect that any order sanctioning the Plan would be recognised and given effect to in Germany.

134. Professor Thole's reasons for concluding that the Plan would be recognised and given effect to in Germany can be summarised as follows:

i) The Plan is similar in nature to a StaRUG. StaRUGs fall within the list of "insolvency proceedings" set out in Annex A.

ii) Proceedings set out in Annex A are "insolvency proceedings" for the purposes of the InsO. In official commentaries on German domestic legislation, the German legislature has stated that, in deciding whether non-EU proceedings constitute "insolvency proceedings", it is helpful to consider their similarities with proceedings listed in Annex A.

iii) Since the Plan is similar to a StaRUG, which falls within Annex A, a German court would likely conclude that an order sanctioning the Plan would be an order in "insolvency proceedings" for the purposes of the InsO.

iv) That conclusion is not altered by the accepted fact that the Plan does not deal with all the Plan Company's creditors (such as professional advisers). The requirement for "collective proceedings" is present by virtue of the fact that the Plan deals with the rights of the Plan Company's financial creditors. That conclusion is supported by a comparison with StaRUGs which likewise do not need to deal with the claims of all creditors.

v) Accordingly, the Plan would be enforced and recognised under the terms of the InsO.

135. Professor Skauradszun's reasons for reaching a contrary conclusion can be summarised as follows:

i) German legal literature categorises plans under Part 26A as "preventive restructuring frameworks" which are the province of the StaRUG Act rather than the InsO. Accordingly, a German court would consider that the question whether the Plan should be recognised and enforced in Germany should be answered by reference to the StaRUG Act, rather than by reference to the InsO.

ii) The StaRUG Act does not provide for preventive restructuring frameworks of a non-EU member state to be recognised or enforced in Germany. There is, therefore a "gap" in German domestic legislation which means that non-EU "preventive restructuring frameworks" are inherently incapable of being recognised in Germany. Since Germany has a civil law tradition, the courts would not seek to fill that gap by adopting a strained interpretation of the concept of "insolvency proceedings" so as to enable the Plan to be recognised under the InsO. Rather, a German court would look to the legislature to fill the gap if it saw fit.

iii) The Plan falls outside the definition of "insolvency proceedings" in the InsO applying orthodox principles of interpretation which are not affected by any wish to fill a perceived gap in the legislation. That is because the Plan lacks the requisite element of "collectivity" to satisfy the definition.

iv) The fact that the Plan is similar to procedures (such as a StaRUG) listed in Annex A is not relevant. While German legislation does indeed take into account similarities with EU insolvency proceedings, the InsO only requires a comparison to be made with proceedings listed in the EU Insolvency Regulation <u>prior</u> to it being recast in 2015. The German court would not apply an "always speaking" doctrine of statutory interpretation to "update" those references to include Annex A of the Insolvency Regulation Recast.

136. When considering the debate between the experts on Luxembourg law, I have, in particular instances said that I preferred the conclusion of one expert over the other. I did so because propositions of Luxembourg law potentially affect other factual determinations I must make including the viability of the Safra Proposal. However, the question of German law that is before me is more limited. I simply need to decide whether there is a "reasonable prospect" that an order sanctioning the Plan would be recognised and given effect to in Germany.

137. Both experts' opinions set out a coherent and reasonable view. Moreover, the experts approached the question from different standpoints. Professor Thole is an academic and so understandably adopted an academic and scholarly approach in reasoning how a German court might determine a controversial point. By contrast, Professor Skauradszun is both an expert and a practising judge. He acknowledged that a logical argument could be made along the lines that Professor Thole proposes but, based on his experience as a judge, thought that a German court would adopt a less academic approach.

138. I have concluded that, while each expert's opinion is tenable and reasonable, neither is clearly to be preferred to the other. Nevertheless, the very fact that Professor Thole was able to articulate a clear and cogent reason why an order sanctioning the Plan would be recognised and given effect to in Germany leads me to conclude that there is a reasonable prospect of the Plan being so recognised in accordance with s343 of the InsO. Having reached that conclusion, I do not consider it necessary to address the experts' competing positions under s328 of the ZPO.

Findings of fact as to alternatives to the Plan

Overall conclusion

139. My overall conclusion, which I explain in the sections that follow is that, if the Plan is not sanctioned the most likely alternative outcome is that the Company would be placed into liquidation under the laws of England and Wales and PropCo and AH4 would be placed into liquidation under Luxembourg law. In that scenario, neither the Safra Proposal (described below) nor any variant on it would be implemented.

140. In that hypothetical liquidation, the Senior Creditors would secure repayment of around 45% of amounts due to them. Subordinated Creditors would receive nothing.

141. Safra invited me to make findings as to how recoveries under the Safra Proposal compare with recoveries under the Plan. I will not make any such findings since, having concluded that the Safra Proposal or variants to it would not be implemented, the Safra Proposal would not produce any recoveries.

The detail of the Safra Proposal

142. Safra has proposed an alternative to the Plan (the "Safra Proposal"). The Safra Proposal suggests, while stressing that it is a matter for the Group to decide, a change of sponsor of the Development, away from the Aggregate Group, which Safra considers is tainted by its association with Mr Caner. Safra recommends the Group moves to Jesta as sponsor.

143. Safra intends that the Safra Proposal would be implemented under Article 13 of the Luxembourg Restructuring Law. It contains the following ingredients:

i) A new money facility of €105 million, ranking pari passu with the Senior Debt in which all creditors (and not just Senior Creditors) may participate (the "Cost Overrun Funding Facility") with the option to extend that by a further €45 million. The Cost Overrun Funding Facility would be on similar terms as the existing Senior Debt, including as to interest. However, it would be issued at a discount so as to produce a return to its holders of 8.75% per annum.

ii) The creation of two categories of equity instruments in the Plan Company that provide for payments to be made out of the residual value of the Development after the Senior Debt is repaid. The first such category (the "Preferred A Profit Rights") provide for an interest-like return of 5.5% of their principal amount, payable on redemption, and with no other rights to share in the residual value of the Development. The second such category (the "Preferred B Profit Rights") which would rank behind the Preferred A Profit Rights, but ahead of the ordinary equity in the Plan Company, would carry no right to an interest-like return but would entitle the holders to share in any residual value in the Development after payment of sums due to Senior Creditors and holders of Preferred A Profit Rights.

iii) Jesta will commit to fund at least 51% of the Cost Overrun Funding Facility. In return for that underwriting commitment, Jesta and any other lead underwriters will receive 50% of the Preferred B Profit Rights.

iv) The funds from the Investment Reserve Account will be released to fund the costs and expenses relating to the Development.

v) The term of the Senior Debt will be extended to 28 November 2025. Senior Creditors will be offered the option to increase their compensation under the Senior Debt from the 3.5% per annum that is currently paid in cash to an interest rate of 6.25%, albeit with interest only being paid on redemption of the Senior Debt. Holders who exercise that option will be rewarded with an allocation of Preferred A Profit Rights.

vi) The Tier 2 Debt will be exchanged for

a) €100 million notional value of Preferred A Profit Rights; and

b) 25% of the Preferred B Profit Rights;

vii) The Junior Debt will be exchanged for 25% of the Preferred B Profit Rights.

viii) Unsecured debts will be cancelled in return for "appropriate consideration".

The Safra Proposal would not be implemented because of a lack of support among Senior Creditors

144. The Safra Proposal takes the form of a restructuring plan under the Luxembourg Restructuring Law. It is common ground that, for such a plan to be implemented under Luxembourg law, it must be approved by 50% by value and a majority by number of creditors of each relevant class. It is not clear whether the Senior Creditors and the

Subordinated Creditors would vote as a single class, or as separate classes, if the Safra Proposal were put forward. However, that does not matter greatly for the following reasons:

i) Even if all creditors voted as a single class, the Senior Creditors represent over 75% by value of the relevant debt and therefore, if Senior Creditors representing just two thirds by value of the Senior Debt voted against the Safra Proposal it could not be implemented.

ii) By contrast, if the Senior Debt and Subordinated Debt voted as a separate class then the Safra Proposal could be blocked even if just 50% by value of the Senior Debt voted against.

145. In fact, the position is even more stark than the figures set out in paragraph 144 might suggest. The Safra Proposal involves the Cost Overrun Funding Facility being advanced on terms that it ranks pari passu with the existing Senior Debt and shares in the existing security package that is available to the Senior Debt. By Article 45 of the Luxembourg Restructuring Law, any measure "affecting the rights of" the Senior Creditors, other than a postponement of payments due to them for a period of up to 36 months, cannot be implemented without the consent of each Senior Creditor. In my judgment, a requirement to share the benefit of existing security with the providers of the Cost Overrun Funding Facility clearly does "affect the rights of" the existing Senior Creditors. Professor Cuniberti accepted as much in cross-examination.

146. During her cross-examination, Ms Alashkar suggested otherwise. She reasoned that, since the Cost Overrun Funding Facility would result in PropCo receiving new money that it could use to complete the Development, it would necessarily result in the value of the security being enhanced. Therefore, she argued, although the Senior Creditors would have to share their security with others ranking pari passu with them, an apparent disbenefit, they would achieve a countervailing benefit consisting of an increase in value of that security.

147. I do not accept that analysis. It relies on the proposition that, as soon as the Cost Overrun Funding Facility is advanced, there would be an immediate increase in the value of the Senior Creditors' security. That strikes me as both uncertain and unlikely. After all, the principal amount of the Cost Overrun Funding Facility will not remain as an asset of PropCo, but will be spent. There must, at the very least, be some delay between the spending of money on contractors and a euro for euro increase in the value of the Development. Moreover, there must be some risk that spending money on contractors will not lead to such a euro for euro increase in value. The whole point of the Senior Creditors' security package is to insulate them from a degree of risk. I conclude that the admission of a class of creditor ranking pari passu with the Senior Creditors and sharing in their security "affects the rights" of the Senior Creditors.

148. That conclusion of itself means that the Safra Proposal would, on a balance of probabilities, not be approved since any single Senior Creditor could veto it. In circumstances where 97.3% by value of Senior Creditors have confirmed their opposition to the Safra Proposal (see paragraph 150.ii) below), I conclude that at least one of them would veto.

149. However, in case I am wrong in my conclusion that a single Senior Creditor could veto the Safra Proposal, I will go on to consider the level of support that the Safra Proposal could expect from Senior Creditors generally.

150. The Plan Company attaches significance to what it submits are at least three documents that demonstrate Senior Creditors' opposition to the Safra Proposal:

i) A letter dated 27 October 2023 from Senior Creditors supporting the Plan (who at that time held in excess of two thirds by value of the Senior Debt), addressed to the Plan Company and to PropCo stating that, if the Plan is not approved, they would take action to enforce payments due to them on their Senior Debt.

ii) A letter sent to the Plan Company in December 2023 on behalf of Senior Creditors supporting the Plan explaining why they consider the Safra Proposal was not workable (the "Rejection Letter").

iii) A "Conditional Enforcement Notice" sent to both the Plan Company and to PropCo on behalf of Senior Creditors supporting the Plan giving notice of enforcement of their rights under the Senior Debt conditional only on this court refusing to sanction the Plan.

151. The documents referred to in paragraphs150.i) to 150.iii) clearly envisage that if the Plan is not approved, the Senior Creditors who are signatories, will take steps to demand repayment of their Senior Debt and will enforce their security over the Investment Reserve Account and other assets. That is clearly incompatible with the signatories supporting the Safra Proposal.

152. Safra does not deny that there is an apparent incompatibility. However, it invites me to conclude that the Senior Creditors are party to those documents only because they currently hope that the Plan will be sanctioned and that, if that hope is dashed, they will reappraise the situation. Safra points out that on the projections set out in Ms Rickelton's evidence (see paragraph 180 below) Senior Creditors could expect to recover only some 45% of amounts due to them if they were to take enforcement action that led to a liquidation. Since the Safra Proposal offers at the very least the prospect of a much better recovery than this, Safra argues that the only rational choice available to the Senior Creditors if the Plan is not sanctioned, is to support the Safra Proposal or a variant of it.

153. It is right that I consider the possibility that the documents referred to in paragraph 150.i) to 150.iii) seek, consciously or otherwise, to advance the Senior Creditors' case without necessarily providing a definitive guide as to how they would act if the Plan is not sanctioned. That is not to say that these documents might be calculated to mislead. Rather, it is simply to acknowledge the reality namely that, having put a lot of effort into agreeing the Plan between themselves and with the prospect of earning significant reward and fees should it proceed, the Senior Creditors have an obvious self-interest in presenting the Plan as the only realistic proposal.

154. During his oral evidence, Mr Vogt referred on several occasions to the fiduciary obligations that Fidera owes to others to whom Fidera provides investment advice and assistance. Since Mr Vogt clearly takes Fidera's fiduciary obligations seriously, I conclude that Fidera was prepared to look at the Safra Proposal with an open mind. If that proposal appeared to offer the advantages that Safra claimed, in the form of a lower

debt burden and reduced fees, Fidera would have concluded that its fiduciary obligations required it to give the Safra Proposal proper consideration. Since Fidera speaks for over 45% by value of the Senior Debt, Fidera's attitude to the Safra Proposal would carry significant weight in discussions with other Senior Creditors.

155. Similarly, Mr Beckwith is a lawyer and former partner at Freshfields. I concluded from his evidence that he, as a manager of a company that might well be on the brink of insolvency, is acutely aware of his own obligations to deal fairly with the interests of all of the Plan Company's creditors. Accordingly, if the Safra Proposal offered, or appeared to offer, advantages over the Plan, Mr Beckwith would have considered the Safra Proposal seriously.

156. Therefore, there were reasons why both Senior Creditors and the Plan Company would consider the Safra Proposal seriously. Even though it took just a few days from Safra's communication of the proposal to the Rejection Letter, I accept the evidence of Mr Vogt and Mr Beckwith that during those few days the Senior Creditors spent a lot of time considering that proposal and did so with an open mind.

157. Accordingly, the Senior Creditors' rejection of the Safra Proposal came after it was given serious thought. That itself points against Safra's suggestion that holders of the Senior Debt were "bluffing" when they rejected the Safra Proposal and pointed out flaws with it. I agree with Safra that the Senior Creditors cannot have meant the Conditional Enforcement Notice to be absolutely irrevocable in any circumstance. I doubt, for example, that my refusal to sanction the Plan as proposed will cause them to initiate a liquidation. Instead, I consider they will seek sanction of the Amended Plan as foreshadowed by the Plan Company's applications considered in Part D of this judgment. However, that does not mean that Senior Creditors would respond to a refusal of sanction simply by engaging in negotiations with Safra since, as discussed in paragraphs 161 to 179 below, a number of the flaws that the Senior Creditors identify in the Rejection Letter are, in my judgment, indeed present in the Safra Proposal.

158. I also reject Safra's broader submission that since May 2023 at the latest, the Plan Company and the Senior Creditors had a fixed mindset that they would pursue a plan under Part 26A and so refused to countenance any alternative, including Jesta's offer to purchase the Development or proposals that Safra made in negotiations. I was shown some evidence of the state of negotiations in May 2023.

159. First, Jesta never provided evidence satisfactory to the Plan Company and its advisers that it had sufficient funds to complete a purchase of the Development. It was not unreasonable for the Plan Company to require some certainty as to Jesta's funding position before engaging in negotiations with them. After all, the stakes were high. If time and money was spent negotiating with Jesta only to find that Jesta was in no position to complete, the Development risk to being put in an even worse position and while failed negotiations with Jesta were ongoing, the opportunity to look at alternatives would have been lost.

160. Turning to negotiations between the Senior Creditors and Safra, there was a meeting on or around 17 May 2023. It clearly was not constructive. However, following that meeting, Fidera, through its lawyers articulated a proposal that would involve the Tier 2 Creditors having their debt converted into some equity thereby, on the face of it, offering the Tier 2 Creditors some interest in the residual value of the Project. I make no finding as to

whether Safra should, or should not, have accepted that offer, but it points against the existence of the fixed mindset that Safra alleges. I also accept Mr Vogt's evidence that Safra's institution of the July Proceedings made further negotiations difficult since Safra's apparent parallel pursuit of a value-destructive liquidation caused Senior Creditors to lack confidence that any negotiations would be in earnest. Again, I express no view as to whether Mr Vogt was correct in that assessment, but it was a reasonable concern to have and also points against the allegation of a fixed mindset.

The Safra Proposal does not produce sufficient funding to complete the Development

161. The Safra Proposal envisages a Cost Overrun Funding Facility of €105 million with a provision for a further extension of €45 million "if required". Even assuming that the uncertainties referred to below were resolved, that would still produce a maximum amount of new funding of €150 million.

162. Ms Rickelton has expressed her professional opinion that, even assuming that the full amount of the Investment Reserve Account is available on implementation of the Safra Proposal (as to which see paragraph 163 below), additional funding of €150 million would be insufficient to enable the Development to be completed. She bases that conclusion on her opinion that the Safra Proposal underestimates the costs of completing the Development. I recognise that there is inherent uncertainty in any exercise that involves an estimate of future costs. However, Ms Rickelton prepared her estimate following discussions with Dunman Capital, a real estate adviser to PropCo, in which Dunman Capital gave their detailed projections of future costs. By contrast, as Ms Alashkar accepted in cross-examination, the projection of future costs which underpins the Safra Proposal is based on Safra's understanding of a methodology set out in a "point of view" given by Trockland, a German real estate adviser to Jesta of which Safra has never been shown the underlying supporting calculations. In those circumstances, I regard Ms Rickelton's projections as more reliable than those of Safra.

163. The Safra Proposal assumes that the balance standing to the credit of the Investment Reserve Account will be made available to fund part of the costs of completing the Development. However, that assumption is not justified. If the Plan is not sanctioned, then the Senior Creditors' obligations under the RSA fall away so that each Senior Creditor is entitled to enforce its security over the Investment Reserve Account. The clear risk is that the Investment Reserve Account will be depleted so that still further funding from external sources would be needed to complete the Development.

There is uncertainty as to whether the Safra Proposal would produce the maximum €150 million that it claims

164. Ms Alashkar said in her witness statement that Jesta had committed to underwrite "at least 51%" of the Cost Overrun Funding Facility. That statement emphasises the lack of certainty as to where the other 49% is to come from. Safra suggests that the uncertainty is resolved by an undated letter (apparently sent by hard copy post to the Plan Company's registered office in Luxembourg) from Daventry, an affiliate of Jesta. In that letter, Jesta wrote:

> *We reaffirm our willingness and ability to enter into the Proposed Transaction. This includes acting as lead underwriter for the cost overrun funding facility to provide further funding for the Company as*

*part of the Luxembourg Reorganisation Plan (the "**Cost Overrun Funding Facility**").*

165. However, this letter does not say precisely how much further funding Daventry or Jesta is prepared to underwrite. Safra argues that since the letter contains an express cross reference to the Explanatory Memorandum in which Safra set out the Safra Proposal, it is clear that the offer is to underwrite €150 million since that is the figure that appears in the Explanatory Memorandum.

166. I do not agree. In "Table 2" of that Explanatory Memorandum, the Cost Overrun Funding Facility is described as having a notional exposure of €105 million "+ €45m Extension if required". Annex I of the Explanatory Statement similarly uses the term "Cost Overrun Funding Facility Extension" to distinguish the additional €45 million from the main "Funding Gap" of €105 million. Since the Explanatory Memorandum uses different terminology to distinguish between the €45 million extension and the main facility of €105 million, it is quite possible to read the reference in Daventry's letter to a willingness to underwrite the "Cost Overrun Funding Facility" as referring to just €105 million. Less legalistically, if Daventry had wished to reassure Senior Creditors that it was underwriting the full €150 million, it could have said so in terms and when it did not, Senior Creditors were entitled to conclude that it leaves the amount of committed funding uncertain.

<u>The Safra Proposal does not explain in sufficient detail how Senior Creditors are to be repaid</u>

167. In addition, the Safra Proposal is lacking in detail as to how precisely Senior Creditors would be repaid on the extended maturity date of 28 November 2025. Ms Alashkar was pressed on this in cross-examination. Her position was that, once the Development has a strong and credible sponsor, such as Jesta, it would be in a position to inject sufficient equity into companies associated with the Development to enable the Senior Debt to be refinanced once the Development is completed. I understand that as a general proposition, but I consider that it suffers from the same lack of detail and certainty as does the proposal to raise a maximum of €150 million of new funding that I have discussed above. The Safra Proposal does not explain how much additional equity is proposed or how Senior Creditors can have confidence that it will be provided. The letter from Daventry is silent on this matter.

<u>Senior Creditors would be unwilling to provide further money under the Interim Facilities</u>

168. Ms Alashkar was right to emphasise in her evidence that a liquidation will result in the Senior Creditors crystallising a significant loss of some 55% of their investment. However, I do not accept the conclusion that she draws from this fact, namely that it is economically rational for Senior Creditors to support the Safra Proposal simply on the basis that it offers a prospect of a better outcome. Senior Creditors would need a high degree of assurance that the Safra Proposal could be implemented (i) successfully and (ii) in a reasonably short period of time in order to support it.

169. As matters stand, Senior Creditors are currently entitled to enforce their claims against some €102 million sitting in the Investment Reserve Account as well as against other assets of the Development. Continued delay will diminish the balance of the Investment Reserve Account. Ms Rickelton says in her expert reports that it is necessary to spend €3.7 million per month both to keep the site secure and to ensure that construction can

restart when necessary. So, for example it is necessary to keep cranes on the site, continue to retain contractors and perform limited capital expenditure on deteriorating assets. Ms Alashkar said that the true figure is just €300,000 per month on the basis that much of Ms Rickelton's higher figure consists of professional fees associated with the Plan. Beyond making that general challenge to Ms Rickelton's estimate, Safra has not put forward any evidence of its own as to the true amount of the necessary costs.

170. Ms Rickelton's report makes it clear that her figure was derived following discussions with Dunman, construction and real estate advisers, who were asked to estimate the costs that would be needed if construction stopped for 16 months between January 2024 and April 2025 during a Luxembourg bankruptcy. Dunman estimated total costs over the 16-month period of €59 million (an average monthly cost of €3.7 million). I do not accept that this estimate was unduly skewed by professional fees associated with the Plan since it was prepared by a firm of construction advisers and referenced costs incurred after January 2024 when, no doubt, much of the professional costs associated with the Plan would already have been incurred. I accept Ms Rickelton's figure as broadly accurate.

171. The Safra Proposal recognises that, even if it had the necessary support of Senior Creditors, it would take some four months to obtain the approval of the court in Luxembourg as required by the Luxembourg Restructuring Law. During that time, continued funding of some €14.8m, on the basis of Ms Rickelton's figures, is likely to be necessary to keep the Development secure and in a position where construction can restart. The Safra Proposal simply assumes that Senior Creditors would continue to provide funding on an unsecured basis with that funding ultimately being written off. Safra argues that it would be economically rational for the Senior Creditors to provide that further unsecured funding. However, it is all too easy to express opinions on how others should spend their money. Given the significant questions that exist over whether the Safra Proposal truly is viable, the Safra Proposal requires the Senior Creditors to provide bridge finance (i) without knowing the date to which that finance is bridging and (ii) on terms that the finance would not be repaid. I accept Mr Vogt's evidence that Senior Creditors would regard this as an exercise in "throwing good money after bad".

172. I conclude from Mr Vogt's evidence that, if the Plan is not sanctioned, the Senior Creditors would have a difficult balance to strike. On the one hand, they must consider the prospect of the Safra Proposal actually delivering them a better outcome than a liquidation. On the other, they must measure the risk that the Safra Proposal turns out to be unworkable and that the time spent trying to resolve difficulties associated with it simply leads to a reduction in Senior Creditors' receipts in a delayed liquidation. In my judgment, Senior Creditors would conclude that the uncertainties associated with the Safra Proposal that I have outlined tip the balance in favour of not supporting that proposal and making the best of what would be a low, but at least certain, recovery in a liquidation. I am, therefore, satisfied, that the Senior Creditors' statements of intention that I have referred to in paragraph 150 would survive any judgment that brings to an end the prospect of the Plan, or the Amended Plan, being sanctioned.

The Senior Creditors would prefer a liquidation to an uncertain negotiation that seeks to remedy deficiencies in the Safra Proposal

173. Much of my reasoning in this regard follows from the conclusions I have expressed in the section above.

174. In cross-examination, Ms Alashkar accepted that there were aspects of the Safra Proposal that could benefit from refinement. She said, however, that if the Plan is not sanctioned, it would be in the economic interests of the Senior Creditors to engage with Safra to iron out any difficulties. Therefore, she said that, even if the Senior Creditors were unwilling to accept the Safra Proposal wholesale they would, after a reasonably short period of negotiation, accept some variant on it.

175. I am quite unable to accept that. While I accept that there are aspects of the Safra Proposal that could be made more palatable for the Senior Creditors with some relatively small changes (for example the addition of a structure to address the risk of German real estate transfer tax ("RETT") which is currently absent from the Safra Proposal), the deficiencies that I have identified in the Safra Proposal are fundamental and not susceptible to an easy fix. Senior Creditors have genuine and legitimate concerns as to whether the Safra Proposal provides sufficient new funding, whether it is sufficiently certain that even the new funding that it envisages will be forthcoming and whether it provides a secure basis for them to conclude that a good part of their Senior Debt will be repaid on the extended maturity date. Moreover, the Safra Proposal exposes them to incremental risk associated with the requirement that they share their security package with providers of the Cost Overrun Funding Facility who rank pari passu with them.

176. Ms Alashkar and Mr Beckwith agree that, in principle with motivation on both sides, deals to restructure complicated debt can be completed "over a weekend". However, I consider that much more time than this would be needed to address the defects in the Safra Proposal. Even if a lot of time were invested and the Senior Creditors and Safra were able to put aside some of the bitterness that has characterised their negotiations to date, I am not satisfied that even the investment of a significant amount of time would lead to a proposal that the Senior Creditors could support.

177. Moreover, the same dynamic that I have explained in paragraph 171 would militate against the Senior Creditors engaging in further negotiations with Safra that would be unlikely to produce a satisfactory outcome in a short timescale. In my judgment, the Senior Creditors would view the prospect of such negotiations as simply leading to a delayed liquidation with even less available to satisfy their claims. They would conclude that their best option if the Plan is not sanctioned is to demand repayment under the Senior Debt and enforce their rights under the security and cross-guarantees. If they took that action, Mr Beckwith as the Plan Company's sole manager would have no choice but to institute a liquidation process in England and Wales. For the same reasons, PropCo and AH4 would be obliged to file for bankruptcy in Luxembourg.

The letter of 5 February 2024

178. During the hearing, Safra handed up a letter dated 5 February 2024 that it had written to the Plan Company. That letter explained that an unnamed client of an affiliate of Safra had indicated that it was prepared to provide a facility of up to €200,000,000 to the Plan Company to enable the Safra Proposal to proceed. The letter indicated that there would need to be a negotiation as to the precise terms of that facility, with the identity of Safra's client to be kept confidential until "a later stage of the negotiations". However, the letter indicated that the financing to be provided was anticipated to rank senior to the Senior Debt.

179. In my judgment, this letter does not address the problems with the Safra Proposal that I have identified in the sections above. The fact that it is made by an anonymous financier and the expressed need for further negotiation on its terms does not address the Senior Creditors' need for certainty and quick implementation. The proposal that the new facility would rank senior to the Senior Debt would, in my judgment be completely unacceptable to the Senior Creditors. Moreover, there could be little doubt that it affected their existing rights with the result that the Luxembourg Restructuring Law would require it to be approved unanimously by Senior Creditors.

The amount of recovery in a liquidation

180. I accept as accurate the approach that Ms Rickelton followed when calculating her estimate of the likely recoveries if the Plan Company, PropCo and other group companies entered liquidation following failure of the Plan to achieve sanction. That approach can be summarised as follows:

i) Ms Rickelton started with an estimate of the "as is" value of the Development (that is its value in its current partially completed state) of €392 million.

ii) She then adjusted that figure to reflect additional relevant factors that would arise in a liquidation scenario.

iii) She applied a 25% "insolvency discount" to reflect the fact that a sale of the Development would not be an orderly sale but would be a forced sale taking place as part of a liquidation process.

iv) She took into account other assets available (chiefly the amount of the Investment Reserve Account).

v) She assumed that the total net assets available following a sale of the Development would be distributed among creditors with regard to their respective priorities. Her estimate was that this would result in holders of the Senior Debt achieving a total recovery of €342,585,000 out of a total amount due to them of €819,348,000 (a figure that includes accrued but unpaid interest). That is a recovery of 44.5% or, put another way a shortfall of €454,738,140.

vi) Since the Senior Creditors would not be paid in full, she concluded that the Subordinated Creditors would receive nothing.

181. Safra argues that the 25% insolvency discount is too high. However, in circumstances where it has provided no expert evidence to contradict that of Mr Waschkuhn, the Plan Company's expert on this matter, and chose not to cross-examine Mr Waschkuhn, I reject that argument.

182. Safra challenges Ms Rickelton's estimates as to the "as is" value of the Development. A challenge on this basis faced formidable difficulties because, whereas the Plan Company has expert evidence on matters of valuation from Mr Gerlinger, Safra has put forward no valuation evidence at all. Accordingly, Safra's case in this regard largely consisted of it inviting Mr Gerlinger in cross-examination to accept that the value of the Development might be higher than he had estimated.

183. Mr Gerlinger's calculation of the "as is" value started with what he termed the Gross Development Value ("GDV") of the Development when completed. The GDV was calculated as at September 2023. The calculation of GDV did not involve a consideration of the value of comparable developments or the value that a willing buyer might pay for the Development at any particular time. Rather, Mr Gerlinger approached the question by considering what annual rent the Development might achieve if it were complete in September 2023 and multiplying that figure by what he concluded to be an appropriate multiplier. That produced a GDV in Mr Gerlinger's opinion of €909 million.

184. To calculate the "as is" value, Mr Gerlinger reduced the GDV by construction and other development costs that have not yet been incurred and so are not reflected in the current condition of the Development. He also stripped out letting income which cannot be received since the Development is not complete. This process, together with other adjustments led him to the residual value of €392,000,000.

185. In the absence of any evidence as to an alternative approach of calculating the "as is" value I accept as valid the approach that Mr Gerlinger has followed.

186. In cross-examination, Mr Gerlinger accepted that the GDV, being something of an arithmetic construct, cannot be taken as a cast-iron guarantee of the exact value of the completed Development at any particular date. He accepted that he would be surprised if the value of the Development was the exact figure that he had calculated as the GDV. However, he was adamant, and I accept, that GDV provided a good estimate of the value of the Development if it was complete as at September 2023 because it synthesised all the realistically possible values into the most likely outcome of marketing a completed Development at that time. It follows that I accept that, as at September 2023, on a balance of probabilities, the completed Development would have been worth €909 million.

187. It was not directly suggested to Mr Gerlinger that a sale of the Development "as is" in the course of a liquidation process would produce a figure higher than his estimate. The focus of his cross-examination was on the likely value of the Development in November 2025 or June 2026 as part of an evaluation of the Safra Proposal. It was, however, suggested to him that his estimate of rents achievable on a completed Development was too conservative. He rejected that suggestion and I accept his expert evidence not least since I have no competing opinion that challenges it.

188. I do not accept Safra's submission in closing that the Development has suffered a temporary "dip" in value and may well recover. I accept, of course, that property prices might rise in the future. However, they could also fall and I accept Mr Gerlinger's expert opinion that is not contradicted by other expert evidence that, despite evidence of refinancing costs falling in Q4 2023, he would not expect property prices in Berlin to rise.

189. The evidence I have seen demonstrates that the Development ran out of funding because of inflationary pressures that caused costs to rise. It is therefore only partially completed and can only be expected to rise in value once it is completed. The Plan Company's valuations indicate that, even once completed, the Development will have a value sufficient only to repay some 86.6% of the Senior Debt. While I accept Safra's general point that a valuation is not a guarantee, and the value could turn out to be higher (or lower) than predicted, I have no competing valuation evidence from Safra that suggests a higher value.

190. In its skeleton argument and closing submissions, Safra suggested that Ms Rickelton had ignored other valuable assets that would be available to companies in the Group in a liquidation. It pointed to FTI's Restructuring Opinion which indicates that PropCo has assets of €814 million. It pointed to inter-company receivables on PropCo's balance sheet which it submitted an office holder would seek to realise in a liquidation. However, I am not satisfied that PropCo's balance sheet provides a reliable guide as to the actual market value that PropCo could expect to realise from its assets if placed into insolvency. Moreover, Ms Rickelton, in calculating the likely recovery of creditors in a liquidation, has had regard to all assets available to the Group I do not consider that she has overlooked assets having material value in reaching that conclusion.

191. Safra has alluded to other potentially valuable assets. It suggests that the Group could obtain some €70 million by enforcing a "Costs Overrun Guarantee". However, that benefits Senior Creditors rather than any company in the Group. It was suggested that the Group might have claims against directors and others who allowed it to get into a position where despite taking out funding of some €1 billion, it now holds a partially completed development that is apparently worth less than a third of that. However, the precise nature of these claims, and their value, has not been explained in the evidence. The Group would need to discover over €450 million of additional assets for the Subordinated Creditors to receive a single cent in a liquidation. While I can accept that there might be possible claims against directors or others, I do not consider that there is any realistic prospect of it obtaining sufficiently large sums from those claims.

PART C – WHETHER I WOULD SANCTION THE PLAN IF WRONG IN MY CONCLUSIONS IN PART A

192. As I have noted, the Amended Plan involves a payment of €150,000 being paid to Tier 2 Creditors, and a payment of €50,000 being paid to Junior Creditors in return for the complete extinguishment of their debt. I consider that sufficient to make the Plan, insofar as relating to the Tier 2 Creditors and the Junior Creditors, a "compromise or arrangement". Payment of those sums means that Subordinated Creditors' debt is not being expropriated for no consideration. I acknowledge that the sums payable are small in relation to the principal amount of their debt. However, at [277] of *Re AGPS Bondco*, Snowden LJ commented that payment of a "modest amount" by way of compensation for the extinction of debt could make all the difference in deciding whether a proposal involves a "compromise or arrangement". I consider that the sums payable to Tier 2 Creditors and Junior Creditors under the Amended Plan are indeed modest, but are not so small that they can be ignored altogether. After all, the question whether the Amended Plan involves a "compromise or arrangement" goes to jurisdiction and is not an open-textured question of fairness. In any event, I do not regard the sum payable to the Subordinated Creditors as unfair in the light of my findings earlier in this judgment as to the extent to which their debt is "out of the money".

193. Accordingly, in this section, I proceed on the basis that the Amended Plan embodies a "compromise or arrangement" with both the Senior Creditors and the Subordinated Creditors and so is properly before the court and capable of sanction.

Approach to applications to sanction Part 26A plans

194. The principles that apply when a court is asked to exercise its discretion to sanction a scheme under Part 26 of CA 2006 are well known. They are summarised in what David

Richards J described, in *Telewest Communications (No. 2)* [2004] EWHC 1466, as the "classic formulation" of applicable principles in the judgment of Plowman J in *Re National Bank Limited* [1966] 1 WLR 819 by reference to a passage in *Buckley on the Companies Acts* (13th edition, 1957). Since there was no dispute between the parties on the applicable principles in the context of Part 26 schemes (as distinct from Part 26A plans), I will not set out the passage in full, but I have it firmly in my mind.

195. In *Re AGPS Bondco*, the Court of Appeal gave guidance on how the proper approach to the sanction of a Part 26 scheme should be modified in the context of a Part 26A plan. Again, since there was no dispute between the parties on the proper approach apart from in the single respect described below, I will not set out quotations from authorities but will summarise the key principles.

196. Where, as here, a court is invited to sanction a plan under Part 26A that involves a "cross-class cramdown", the court must apply the following approach:

i) It must consider whether the provisions of the statute have been complied with. That will include questions of class composition, whether the statutory majorities were obtained and whether an adequate explanatory statement was distributed to creditors. It will also involve a consideration of whether "Condition A" and "Condition B" set out in s901G are met since those are statutory preconditions to the exercise of the "cross-class cramdown".

ii) The court must look at the vote in favour among the assenting class or classes (here the Senior Creditors). It must look at whether each assenting class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent. This exercise will be particularly important as regards any class whose affirmative vote in favour is relied upon to satisfy Condition B in s901G.

iii) The court must also apply established principles applicable to Part 26 schemes to decide whether, focusing on the affirmative vote of assenting classes, the plan is a fair plan which members of those assenting classes could reasonably approve. That does not involve the court imposing its own view of the commercial merits of the plan, but involves asking a more limited question, namely whether the compromise or arrangement that is the subject of a positive vote of an assenting class one that an "intelligent and honest man, a member of the class concerned, and acting in respect of his interest, might reasonably approve" (in the words of Plowman J in *Re National Bank Limited*). This approach of performing a "rationality check" is based on the proposition that the majority of that class can usually be presumed to be the best judges of the interests of that class.

iv) However, merely performing a "rationality check" of the votes of assenting classes is insufficient where a cross-class cramdown is proposed since dissenting classes (here the Subordinated Creditors) have not, by definition voted in favour of the Plan by the healthy majority CA 2006 usually requires. In addition, their interests will typically be different from, and often adverse to, those of the assenting classes. Therefore, while the court will not generally ask if there is a "better scheme" or a "fairer scheme" when considering a Part 26 scheme (since in such a case, it is performing a rationality check), where a Part 26A plan involves a cross-class cramdown, it is appropriate for the court to consider whether there has been a fair distribution of the benefits of the restructuring. That will involve asking whether the Plan provides for differences in treatment of the different classes of creditors between themselves and, if so, whether those differences can be justified. The obvious reference point for this exercise is the position of creditors in the relevant alternative.

v) The enquiry summarised in (iv) above may involve:

a) a "vertical comparison" under which the court compares the position of the dissenting classes with the position they would be in under the relevant alternative (here a liquidation); and

b) a "horizontal comparison" which compares the position of the class in question with the position of other creditors or classes of creditors if the restructuring goes ahead.

vi) The "vertical comparison" overlaps with similar considerations that arise when Condition A is being tested. However, there is no presumption that, if Condition A or Condition B is satisfied, the Plan will be sanctioned.

vii) The court must consider whether there is any "blot" or defect in the plan that would make it unlawful or in any other way inoperable.

197. I understood the need to consider the matters set out in paragraphs196.i), 196.ii), 196.iii) and 196.vii) to be common ground. However, the Plan Company and Safra were not agreed on whether Subordinated Creditors who, on my findings as to the "relevant alternative" are significantly out of the money, could complain of an unfair allocation of the benefits of the restructuring (the matters set out in paragraphs 196.iv) to 196.vi)). I took this to be a dispute, not as to the applicable principles, since the points summarised in paragraphs 196.iv) to 196.vi) are indeed made in *Re AGPS Bondco*, but rather as to how those principles should be applied to creditors who would be out of the money in the relevant alternative. I address this dispute, therefore, in paragraphs 209 to 215 below in which I apply the relevant principles.

The statutory requirements

198. The Plan Company has already encountered financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. That is demonstrated by the fact that unless the Plan is sanctioned, the Plan Company is likely to have to go into an insolvent liquidation. Condition A in s901A of CA2006 is met. As I have explained in paragraph 193, I proceed on the basis that the Amended Plan embodies the requisite "compromise or arrangement". The purpose of that compromise or arrangement is to eliminate or reduce the financial difficulties to which I have referred by removing the imminent likelihood of the Plan Company going into insolvent liquidation. Condition B in s901A of CA2006 is met.

199. An explanatory statement was provided to Plan Creditors. Neither Safra nor the 2.7% by value of Senior Creditors who voted against the Plan have made any criticisms of that explanatory statement. I am satisfied that it met the requirements of s901D. More generally, I am satisfied that it gave Plan Creditors sufficient information to enable them to decide how to exercise their votes at the Plan Meetings.

200. Mr Cattermole's unchallenged second witness statement satisfies me that that the requirements of the Convening Order were met.

201. The Senior Creditors have approved the compromise or arrangement by the requisite majority with that approval satisfying Condition B in s901G. The Tier 2 Creditors and the Junior Creditors are both "dissenting classes" who have not agreed the compromise or arrangement.

202. Condition A in s901G requires an analysis of whether the Subordinated Creditors would be no worse off under the "relevant alternative" than they would be under the Plan. For these purposes, the "relevant alternative" is whatever the court considers would be most likely to occur if the Plan were not sanctioned. That does not require the court to be satisfied that any particular alternative outcome would definitely occur. Instead it requires the court to consider which of the possible alternatives is most likely to occur (see *Re Virgin Active* [2021] EWHC 1246 (Ch) at [107]).

203. Based on my factual findings above, I have concluded that the "relevant alternative" is a liquidation of the Plan Company, PropCo and AH4 under which the Subordinated Creditors would receive precisely nil. Under the Amended Plan the Tier 2 Creditors and the Junior Creditors will receive, in aggregate €150,000 and €50,000 between them. They will not, therefore, be any worse off than in the relevant alternative of a liquidation.

204. In arguing against that conclusion Safra submitted that, in a liquidation, Subordinated Creditors would at least have a prospect of obtaining some realisation, whereas under the Plan they will achieve just €200,000 between them. However, given the extent to which the Subordinated Creditors are out of the money, I consider that the prospect of such realisations is fanciful and does not amount to any genuine economic interest. The only realistic outcome is that Subordinated Creditors would receive nil in a liquidation.

205. I am satisfied that all statutory requirements, including those necessary to effect a cross-class cramdown are satisfied.

Fair representation at the meeting of Senior Creditors and the rationality of the Senior Creditors' affirmative vote

206. Some 97.3% by value of the Senior Creditors voted in favour of the Plan at their meeting. The minority was, therefore, very small indeed and no member of the minority has made any representations suggesting that I should decline to sanction the Plan.

207. I see no suggestion that the majority coerced the minority. I see no evidence suggesting that the majority who voted in favour were doing anything other than seeking the best outcome for themselves in their capacities as Senior Creditors. I see no evidence that the majority voting in favour had any "special interest" different from their rights as Senior Creditors, for doing so.

208. I am quite satisfied that an intelligent and honest person, acting in respect of their interests, might reasonably approve the Plan at the class meeting of the Senior Creditors.

Fair allocation of the benefits of the Plan

209. The parties' submissions on this issue proceeded largely at cross-purposes. At [137] to [152] of its skeleton argument, Safra made detailed submissions as to why the Plan failed fairly to allocate the benefits of the restructuring. In essence, Safra's complaint was that the Plan allocated all those benefits to the Senior Creditors and to Mr Caner by, among other means, "expensive" Super Senior Financing in which only Senior Creditors can participate, the elevation of that Super Senior Financing and some existing Senior Debt above existing indebtedness of the Group, the various fees payable to the Senior Creditors that I have summarised in paragraph 26 and the Consultancy Agreement.

210. While the Plan Company did not accept Safra's complaints, it did not in its closing arguments, engage with the detail of them by seeking to explain why the allocation of benefits was "fair". Rather, the Plan Company argues that, since the Subordinated Creditors would be out of the money on the relevant alternative, they had no entitlement to share in the benefits of the restructuring, with the result that it was none of their concern how the Senior Creditors chose to share those benefits among themselves or with others.

211. I have concluded that the Plan Company's submissions are to be preferred. Accordingly, I do not consider that any "unfairness" in the allocation of the benefits of the Plan provides a reason why I should exercise discretion not to sanction it. Since I have no submissions from the Plan Company defending the "fairness" of that allocation, I will base my conclusion in this regard solely on the proposition that the Subordinated Creditors, being out of the money on the relevant alternative, have no entitlement to share in the benefits of the Plan. In my judgment, that conclusion follows both from the scheme of Part 26A and from authority.

212. Pursuant to s901C(4) of CA 2006, the court has power to order that creditors without a "genuine economic interest" in a company are not to be represented at a meeting summoned to consider a plan. Section 901C(4) does not, by contrast with s901G(5), explicitly link the question of whether there is a "genuine economic interest" to what would happen in the event of the "relevant alternative". The wording of s901C(4) and s901G(5) are different in that regard. Nevertheless, it is common ground between the parties that the concept of a "genuine economic interest" in s901C(4) is similar to that in s901G(5) and invites an analysis of whether there would be a genuine economic interest in the relevant alternative. Support for that common position can be found in the judgment of Snowden J in *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) at [247]-[249] the judgment of Miles J in *Re Smile Telecoms Ltd* [2022] 2 BCLC 626 at [76]-[77]. It is also supported by [251] of the judgment of Snowden LJ in *Re AGPS Bondco*.

213. Accordingly, it is common ground that if, as I have found, the Subordinated Creditors would obtain nothing in the event of a liquidation, which constitutes the "relevant alternative", they have no "genuine economic interest" for the purposes of s901C(4). Since an order under s901C(4) could have been made, which would have obviated any need to consult Subordinated Creditors about the Plan, limited weight should be attached to their views on whether the Plan fairly allocates the benefits of the restructuring.

214. The conclusion set out in paragraph 211 is also supported by authority. In *Re Virgin Active Holdings Ltd* [2022] 2 BCLC 62, Snowden J considered the point in detail. He

concluded at [249] that the views of an out of the money class (the Subordinated Creditors) on how the benefits of the restructuring should be shared among in the money classes (the Senior Creditors) were of little weight. Moreover, if the Senior Creditors decide that it is in their commercial interests for some of the benefits of the restructuring to be shared with holders of equity (who rank junior to the Subordinated Creditors), the views of the out of the money Subordinated Creditors as to the fairness or otherwise of that course will similarly count for little. It is clear from [249] of *Re Virgin Active Holdings* that the test of whether a creditor is "out of the money" or "in the money" is to be performed by reference to the relevant alternative, in this case a liquidation.

215. Safra acknowledges these points but submits that there is a difference between ascribing "no weight" to the views of an out of the money class and ascribing "little weight". I accept that as a general proposition, but I do not consider it advances the debate greatly. The Subordinated Creditors are so far out of the money that the Senior Creditors' views on how the benefits of the restructuring should be shared are, in this case at least, to be followed.

Other matters going to discretion

"Sufficient connection"

216. In its skeleton argument, Safra made a number of points in support of its proposition that "the Plan Company lacks a sufficient connection to the jurisdiction". That is a convenient way of grouping a number of points that relate to the Plan Company's ties to England. However, before dealing with these I note the following propositions of law which were common ground between the parties:

i) The Plan does not involve a reconstruction or amalgamation of the kind envisaged by s901J of CA 2006. Accordingly, this court in principle has jurisdiction to sanction the Plan provided that the Plan Company is a "company liable to be wound up under the Insolvency Act 1986". Section 220 and s221(5) of the Insolvency Act 1986 between them give this court power to order a winding-up of the Plan Company as an "unregistered company". The fact that the Plan Company is incorporated in Luxembourg is not an obstacle to its being wound up in England & Wales.

ii) Therefore, there is no need for the Plan Company to have any particular level of connection with England in order for this court to have jurisdiction to sanction the Plan.

iii) However, the extent of the Plan Company's links to England is a factor to which the court can legitimately have regard in deciding whether to exercise its discretion to sanction the Plan (see for example [57] of the judgment of Snowden J in *Re ColourOz Investment 2 LLC* [2020] BCC 926).

217. The reason it is appropriate for the court to enquire as to the "sufficiency" of the Plan Company's connection with England is explained at [21] to [23] of the judgment of David Richards J (as he then was) in *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch). The issue is closely related to the question whether the Plan, if approved, will have a substantial effect. So, for example, if a foreign company proposing a plan under Part 26A had assets within the jurisdiction, the court might conclude that an order to sanction the

Plan would have effect by preventing execution by creditors against those assets save in connection with the plan. Similarly, if the foreign company concerned had a number of creditors in England subject to the personal jurisdiction of the court, the court would attach significance to the fact that those creditors would be bound to act in accordance with the Plan if sanctioned.

218. Once the reasons for looking at the "sufficiency" of the Plan Company's connections with England are appreciated, it becomes clear that the court is not looking for a "bright line" between a connection that can, at a high level of generality described as "sufficient", and an "insufficient" connection. Rather, the enquiry is closely related to the question whether the Plan will, if sanctioned, have a substantial effect.

219. In my judgment, if the Plan is sanctioned it is likely that it would have a substantial effect. In accordance with its terms, it has a significant impact on the rights of holders of both the Senior Debt and the Subordinated Debt. I have concluded that there is a reasonable prospect that it will be recognised and given effect to in both Germany (whose law governs the debt) and in Luxembourg (where the Plan Company, PropCo and AH4 are incorporated). Moreover, on any view the Plan seeks to effect a significant alteration to the rights of Senior Creditors, 97.3% of whom by value have submitted to the jurisdiction of the English courts for purposes connected with the Plan pursuant to the RSA.

220. Safra argues that the Plan Company's links with England arise only following the COMI Shift. It submits that there is no decided case in which the court has found a "sufficient connection" on the basis of COMI alone without some additional "supporting factor" such as the plan or scheme in question having the overwhelming support of creditors, there being no alternative restructuring process available elsewhere, the debt being released being governed by English law or the presence of a good number of creditors within the jurisdiction of England and Wales. Reference was made to the facts of *Re Magyar Telecom BV*, *Re Zlomrex International Finance SA* [2014] BCC 440, Re DTEK Energy BV [2021] EWHC 1551, *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) and other cases.

221. However, in my judgment this argument misunderstands the nature of the enquiry as to "sufficient connection" which I have explained above. The fact that the Plan Company has its COMI in England is crucial to the opinions of Professor Thole and Professor Prüm that the Plan that would be recognised and given effect to in Germany and Luxembourg. Without the COMI Shift, therefore, the Plan would be unlikely to have a substantial effect because the courts of Luxembourg and Germany would be unlikely to recognise it. The COMI Shift does not, therefore, need "support" in order to satisfy an English court that the Plan will have substantial effect since the COMI Shift is a central part of the court's confidence that the Plan will have such an effect. I am reassured to note that David Richards J reached a similar conclusion at [23] of *Re Magyar Telecom BV* saying:

> *in the present case, the significance of moving the COMI of the company to England again lies not so much in the establishment and the abstract of a connection between the company and England but, on the basis that any insolvency process for the company would be taken under English law in England, providing a solid basis in background for a scheme under English law which alters contractual rights governed by a foreign law.*

222. In any event, the assertion that the Plan Company has no connection with England other than its COMI is wide of the mark. I attach relatively little significance to the Plan Company's argument that certain individuals and employees of AXA and Fidera might be based in London. Since AXA and Fidera are incorporated outside the UK, I do not consider that it matters that they have chosen to locate some of their employees in the UK. However, holders of the Senior Debt have submitted to the jurisdiction of England in connection with the Plan and the Interim Facilities which are affected by the Plan are governed by English law. In addition, as Ms Alashkar fairly noted in corrections to her witness statement, one of the holders of Tier 2 Debt that Safra represents has an address in England.

223. Finally in this regard, Safra submits that, purposes of the "sufficient connection test", the Plan Company's COMI should be ascertained as at the date of the Convening Order, rather than when the court is considering whether to sanction the Plan. I consider that this submission also misunderstands the relevance of COMI in these proceedings. There is no "test" that requires the English court to assess the Plan Company's COMI at any particular time. Rather, in the circumstances of this case, the location of the Plan Company's COMI is significant in underpinning the conclusion that the there is a reasonable prospect that the courts of Luxembourg and of Germany will recognise and give effect to the Plan. As I have explained in paragraphs 105 and 125 above, the opinions of Professor Thole and Professor Prüm in this regard depend on COMI being present in England at the time of an order sanctioning the Plan.

224. I conclude that the Plan and the Plan Company have a sufficient connection with the UK.

Forum Shopping

225. Safra also raises "forum shopping" concerns in support of its contention that there is an insufficient connection between the Plan Company and England. It refers to the accepted fact that the COMI Shift was effected for the sole purpose of enabling the Plan Company to propose the Plan pursuant to the provisions of CA 2006. It characterises the COMI Shift as having been effected with unseemly haste in parallel with the Part 26A proceedings. More generally, it argues that having failed to secure agreement of the Subordinated Creditors pursuant to the consent solicitation provisions of the German law debt, and being unable to secure the result they seek under the Luxembourg Restructuring Law, the Senior Creditors have procured the Plan Company to engage in wholly artificial forum shopping to achieve that result under Part 26A.

226. I attach relatively little significance to the perceived "artificiality" of the COMI Shift on its own. As I have explained, in paragraph 73.v), in principle the Plan Company is free to choose where it carries on the administration of its business in a jurisdiction of its choosing, including for reasons that might be characterised as "self-serving". I have rejected the argument that the COMI Shift involved a breach of the Plan Company's Articles of Association. I have concluded that the Plan Company's COMI is in England and I do not consider that the question of why that is the case to be, on its own, much of a guide to the exercise of my discretion to sanction the Plan.

227. In any event, I have already addressed the perceived "artificiality" of the COMI Shift in considering whether it amounts to a *fraude à la loi* for the purposes of Luxembourg law (see paragraph 116 above). Despite that artificiality, I have concluded that there is a reasonable prospect that an order sanctioning the Plan would be recognised and given

effect to in Luxembourg, the applicable threshold requirement (see paragraph 112 above). Since the question of artificiality has entered the balance in reaching that conclusion, I do not consider that it would be appropriate for it to enter the balance again, this time as a dispositive factor, so as to prevent me from exercising discretion to sanction the Plan.

228. That said, the COMI Shift could conceptually indicate that the Plan is being put forward for illegitimate and abusive reasons. As Newey J said at [18] of *Re Codere Limited* [2015] EWHC 2015:

> *In a sense ... what is sought to be achieved in the present case is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.*

229. In *Re Gategroup Guarantee Limited*, Zacaroli J also made observations on the question of forum shopping. For example, at [14] he said:

> *I also noted at [174] of the convening judgment, however, that "it is possible to envisage a case where the artificial structure is the only solution to enable a restructuring to be effected, all other possible alternatives having been explored and rejected for one or other reason of law or practicability; where the alternative is a value-destructive liquidation; and where the terms of the restructuring demonstrate the benefits the affected creditors. In such a case, there would be a powerful argument that the artificiality of the structure should not prevent the company and its creditors being able to take advantage of the English scheme or plan jurisdiction."*

230. He continued at [22]:

> *... To the extent that it may be seen as forum shopping, for the first five reasons already given, this case undoubtedly falls into that class of "good forum shopping" cases as identified by Newey J in Re Codere Finance UK Lt [2015] EWHC 3778 (Ch) at [18]-[19]: the co-obligor structure is being used here, not to enable a debtor to exploit it for its own advantage, and at the expense of a creditor class, the insolvency laws of a particular jurisdiction, but with a view to achieving the best possible outcome for all.*

231. Perhaps unsurprisingly, the Plan Company sought to highlight aspects of the circumstances that it submitted constitute "good forum shopping" such as the risk of a value-destructive liquidation if the Plan is not sanctioned. Safra emphasises its view that

the Plan benefits the Senior Creditors only and achieves a result that could not be achieved under Luxembourg law in support of its argument that the Plan Company has engaged in "bad" forum shopping.

232. I do not, however, consider that either *Re Codere Limited* or *Re Gategroup Guarantee Ltd* should be read as formulating a test of what constitutes "good", as distinct from "bad" forum shopping. Still less do those judgments formulate necessary and sufficient conditions for a case of forum shopping to fall into either category. Rather, in my judgment, the question of forum shopping is related to the question of "sufficient connection" which in itself is relevant to the court's exercise of discretion. The question I must address, therefore, is whether despite the fact that I have jurisdiction to sanction the Plan I should exercise my discretion and decline to do so on the basis of Safra's arguments based on "forum shopping".

233. I have dealt at some length with the legal position in Luxembourg because I consider that to be significant. I accept that the result that the Plan Company seeks under the Plan could, on Professor Cuniberti's interpretation of Article 45 of the Luxembourg Restructuring Law, not be achieved under Luxembourg law. However, I do not consider the result to be at odds with fundamental matters of public policy in Luxembourg (see paragraphs 120 and 121 above). Similarly, I acknowledge that the act of the Plan Company moving its COMI with a view to promulgating the Plan after bankruptcy proceedings had been initiated in Luxembourg by reference to the Plan Company's COMI there, raises questions of forum shopping and comity. However, I consider that the better view is that the Luxembourg courts would accept that the COMI Shift properly confers jurisdiction of the English courts to sanction the Plan (see paragraph 111 above).

234. In short, therefore, I consider that there are sufficient prospects of the Plan being recognised in Luxembourg, not being contrary to principles of comity as applicable to the Luxembourg courts, and not being contrary to public policy in Luxembourg, that it is appropriate for me to sanction it. I recognise that there is room for doubt on these matters and the Luxembourg courts will have the final say on any doubt that remains since they can ultimately decide not to recognise my order. However, I do not consider it would be right to decline to sanction the Plan simply because of the possibility of doubt. That would be to remove all prospect of the Plan taking effect in circumstances where it offers clear benefits to the Senior Creditors who, on my findings are the only in the money class.

235. The issues of comity and public policy are less significant in relation to Germany since there are no existing insolvency proceedings involving the Plan Company, PropCo or AH4 there. However, my conclusion in paragraph 234 applies similarly to Germany given my conclusion in paragraph 133 that there are reasonable prospects of the Plan being recognised and given effect to in Germany.

236. Turning to Zacaroli J's observations in *Re Gategroup Guarantee Ltd*, I quite accept that the parties have different perceptions on whether the Plan is in the interests of the creditors as a whole. However, given my factual conclusion that the "relevant alternative" is a liquidation of the Plan Company, PropCo and AH4 in which the Subordinated Creditors would obtain a nil return, I do not consider that there is any fundamental unfairness in the Subordinated Creditors obtaining just €200,000 on sanction of the Plan. The matter can be tested by considering the results that would apply if I were to exercise discretion to refuse to sanction the Plan. In that case, the Senior Creditors would be forced into a value-destructive liquidation as a consequence of opposition from the Subordinated

Creditors who on my findings would obtain no return in that liquidation. I do not consider that it would be right to exercise my discretion so as to achieve that outcome.

237. I will not decline to sanction the Plan on "forum shopping" grounds.

"Blots"

238. In its skeleton argument, Safra argue there were a number of "blots" on the Plan. Most of those points overlapped with its argument that the Plan does not achieve a fair restructuring of the benefits of the restructuring, which I have rejected.

239. Also in its skeleton argument, but not in oral closing submissions, Safra argued that the Plan involved a breach of the pari passu principle on the basis that Mr Caner obtained benefits, under the Consultancy Agreement, for example even though he is a holder of equity and so ranks junior to the Subordinated Debt which is to be discharged in return for just €200,000. I do not accept that. First, Mr Caner is not himself a holder of "equity" in the Plan Company, AH4 or PropCo, which are liable in relation to the Subordinated Debt. The fact that he holds shares in companies higher up the corporate structure in the Aggregate Group does not alter that conclusion. More fundamentally, as I have explained, the Senior Creditors are the only creditors with a genuine economic interest in the Group. If they choose to share some of the benefits of the restructuring with Mr Caner, that is their prerogative and does not involve any breach of the pari passu principle.

240. I conclude that there are no "blots" that should cause me to withhold sanction.

Conclusions

241. For all the reasons set out above if, contrary to my conclusions in Part A, I have the power to sanction the Amended Plan, by effecting a cross-class cramdown, I would do so.

PART D – THE ORDERS I WILL NOW MAKE

242. The hearing before me, therefore, started as a sanction hearing but, with my refusal to sanction the Plan as proposed and voted upon, has become a convening hearing. The Plan Company asks me to convene a further Plan Meeting to consider the Amended Plan. It asks me to make an order under s901C(4) that Tier 2 Creditors and Junior Creditors be disenfranchised from participation in any such meeting on the basis that they have no genuine economic interest in the Plan Company. Since the new Plan Meetings will involve Senior Creditors only, of whom 97.3% by value supported the original Plan and have indicated that they will continue to support the Amended Plan, the Plan Company asks for an order that the meeting be convened on just three business days' notice.

243. I have not heard detailed argument on all the matters that might normally be aired at a convening hearing. However, I am prepared to make the order under s901C(4). As I have explained in paragraph 213, in the light of my findings on the Subordinated Creditors' entitlement on the "relevant alternative", it is common ground that they have no "genuine economic interest" in the Plan Company for the purposes of s901C(4). In those circumstances, I see no reason why they should be entitled to vote on the Amended Plan. I proceed on the basis that, if the Senior Creditors approve the Amended Plan, then that can be sanctioned under s901F without any need for a cross-class cramdown and, on

delivery to the Registrar of Companies will become binding on all creditors, including the Subordinated Creditors. That, however, will be a matter for the judge at any future sanction hearing.

244. I am content to order that the further meeting of Senior Creditors takes place on just three business days' notice in the light of the Plan Company's assurance that 97.3% by value continue to support the Amended Plan. In making this order, of course, I am not tying the hands of the judge who comes to consider sanction of the Amended Plan (if approved), if turnout at the meeting is low.

245. I have no draft further convening order before me. However, I am prepared to make an order along the lines of the Convening Order with the modifications set out above. The Plan Company should provide a draft of the order they seek with any further deviations from the Convening Order explained and justified by reference to written submissions from counsel.

Neutral Citation Number: [2024] EWCA Civ 24

Case No: CA-2023-000914

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
Mr. Justice Leech
[2023] EWHC 916 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 23 January 2024

Before :

LORD JUSTICE NUGEE
LORD JUSTICE SNOWDEN
and
SIR NICHOLAS PATTEN

- -

IN THE MATTER OF AGPS BONDCO PLC

Between :

STRATEGIC VALUE CAPITAL SOLUTIONS MASTER FUND LP and others	**Appellants**
- and –	
AGPS BONDCO PLC	**Respondent**

- -

Tom Smith KC and Adam Al-Attar (instructed by **Akin Gump LLP**) for the **Appellants**
Daniel Bayfield KC, Ryan Perkins and Annabelle Wang (instructed by **White & Case LLP**) for the **Respondent**

Hearing dates: 23-25 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10 a.m. on Tuesday 23 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lord Justice Snowden:

1. This is an appeal against the order of Leech J (the "Judge") dated 12 April 2023 sanctioning a restructuring plan (the "Plan") pursuant to Part 26A of the Companies Act 2006 ("Part 26A" and the "2006 Act"). The Plan was between the Respondent company (the "Plan Company") and its creditors (the "Plan Creditors" or the "Noteholders") under six classes of senior unsecured notes (the "SUNs" or the "Notes"). The Judge's reasons for sanctioning the Plan were set out in a detailed judgment of 21 April 2023: see [2023] EWHC 916 (Ch) (the "Judgment").

2. This is the first appeal to this Court in relation to a restructuring plan under Part 26A. It raises some important questions concerning the approach which the court should take to the exercise of its discretion to sanction a restructuring plan notwithstanding that not all of the classes of plan creditors have approved the plan. The exercise of that power is generally referred to as a "cross-class cram down". The Appellants each hold Notes in the relevant class of Noteholders that did not vote by the required 75% majority to approve the Plan, they voted against the Plan, and they contend that the exercise of discretion by the Judge to impose the Plan upon them was vitiated by a number of errors of law and approach.

Parts 26 and 26A of the 2006 Act in outline

3. Part 26A was inserted into the 2006 Act during the COVID-19 pandemic by Schedule 9 to the Corporate Insolvency and Governance Act 2020. Part 26A was intended to provide a new restructuring tool to supplement the existing regimes for schemes of arrangement under Part 26 of the 2006 Act.

4. There are very considerable similarities between a scheme of arrangement under Part 26 and a restructuring plan under Part 26A. Both types of procedure apply where a "compromise or arrangement" is proposed between a company and its creditors (or any class of them) or its members (or any class of them): see sections 895(1) and 901A(3) of the 2006 Act.

5. Both procedures also involve a three-stage process consisting of, (i) a convening hearing at which the court considers (among other things) the appropriate composition of the classes of creditors that are to be invited to meetings to vote on the proposed scheme or plan and to receive a statement explaining its effect; (ii) the holding of those class meetings; and (iii) a sanction hearing at which the court has a discretion whether to sanction the scheme or plan: see sections 896 - 899 and 901C-901F of the 2006 Act.

6. There are, however, a number of important differences in the express provisions of Part 26 and Part 26A.

7. First, a company that wishes to propose a restructuring plan under Part 26A must satisfy two threshold conditions in section 901A which restrict the use of Part 26A plans to companies which have encountered or are likely to encounter financial difficulties affecting their ability to carry on business as a going concern. There is no such requirement in Part 26, which can also be used by solvent companies to promote schemes of arrangement to implement takeovers and other changes to their capital structures.

8. Secondly, unlike Part 26, under which all members or creditors whose rights against the company are to be affected by a scheme of arrangement must be summoned to a meeting or class meeting to vote upon the scheme, section 901C(4) in Part 26A gives the court power to exclude any class of plan creditors or members from being summoned to a meeting if the court is satisfied that none of the creditors or members in that class has a genuine economic interest in the company.

9. Thirdly, the court may sanction a restructuring plan under section 901F(1) in Part 26A if it is approved by 75% in value of those present and voting (either in person or by proxy) at the class meeting or meetings. Unlike schemes of arrangement under section 899(1) in Part 26, there is no additional requirement to obtain a majority in number of those present and voting at each class meeting.

10. Fourthly, and most significantly for present purposes, a scheme of arrangement under Part 26 can only be sanctioned by the court if each of the classes of creditors or members have voted in favour of the scheme by the required majorities at their respective class meetings. That gives any class a potential right of veto over the scheme. By virtue of section 901G in Part 26A, however, the court's discretion to sanction a restructuring plan under section 901F may be exercisable notwithstanding that the plan has not received the requisite approval of one or more classes of creditors or members.

11. Section 901G provides,

> "901G *Sanction for compromise or arrangement where one or more classes dissent*
>
> (1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of

> creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

12. It can be seen that section 901G specifies that before the cross-class cram down power can be exercised, two pre-conditions must be satisfied. The first ("Condition A") is that if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative. This is colloquially referred to as the "no worse off" test. The second ("Condition B") is that the compromise or arrangement has been approved at a class meeting by a class who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative. It will thus be appreciated that "the relevant alternative", as defined in section 901(G)(4), is a central statutory concept in relation to the exercise of the cross-class cram down power.

The Facts in outline

13. The Judgment contains a full account of the factual background to the Plan and its contents. For present purposes a shorter summary drawn from the Judgment and supplemented by an agreed chronology provided by the parties will suffice.

14. Adler Group SA (the "Parent Company") is a company incorporated in Luxembourg. The Parent Company and its subsidiaries (including Adler Real Estate AG ("Adler Re") form the "Group". The Group's business consists of the purchase, management and development of income-producing, multi-family residential real estate in Germany. It is likely that the centre of main interests (COMI) of the companies in the Group is in Germany and hence that any formal insolvency proceedings in relation to the Group companies would take place there.

15. Prior to the Plan, the external debt of the Group amounted to approximately €6.1 billion. Included within that debt were the Notes with a combined principal value of €3.2 billion. The six series of Notes had different maturity dates and interest rates. The first series was payable on 26 July 2024 (the "2024 Notes") and had a face value of €400 million. The second series was payable in August 2025 (the "2025 Notes") and also had a face value of €400 million. The third, fourth and fifth series of notes were payable in early and late 2026 and 2027 and had a combined face value of €1.6 billion. The final series of notes was payable on 14 January 2029 (the "2029 Notes") and had the largest single face value of any of the series of €800 million.

16. It was common ground between the parties, and is a central feature of this case that, absent the Plan, in the event of a formal insolvency of the issuer, the obligations under the Notes would all rank equally as unsecured debts.

17. The external debt of the Group also included €165 million of convertible notes issued by the Parent Company which were due on 23 November 2023; €500 million of unsecured notes issued by Adler Re which were due on 27 April 2023 (the "2023 Adler Re notes"); and €300 million of unsecured notes issued by Adler Re which were due on 6 February 2024 (the "2024 Adler Re notes").

18. From October 2021 the Group was the subject of a number of allegations from an entity known as Viceroy Research LLC to the effect that it had artificially inflated the value of its real estate assets and had entered into a number of undisclosed related party transactions. Following publication of a forensic special audit report by KPMG in April 2022, KPMG disclaimed its opinion on the Group's 2021 accounts and informed the Parent Company that it would not act as auditor for the 2022 accounts.

19. Domestic and global economic problems in 2022, and decreased business confidence caused a sharp downturn in the demand for residential and commercial real estate in Germany. This had a significant adverse impact on the Group's business. The Group pursued a number of measures aimed at improving its liquidity position in 2022, including selling in excess of €2 billion of assets. However, in early September 2022 the Group commenced restructuring discussions with the advisors to a number of Noteholders. The Group delivered its first restructuring proposal to those advisors in early October 2022 and negotiations continued during that month. At the start of November 2022, six entities holding about 45% of the total value of all Notes (the so-called "SteerCo") entered into non-disclosure agreements with the Parent Company and commenced detailed restructuring negotiations. The Appellants, who held about 34% by value of the 2029 Notes, were not members of SteerCo and did not take part in those negotiations.

20. On 25 November 2022 the Parent Company announced that it had entered into a "Lockup Agreement" with the members of the SteerCo, pursuant to which, in return for a lockup fee of 0.25% of the face value of their locked-up Notes, the members of the SteerCo agreed to support a restructuring of the Group.

21. Importantly, the purpose of the proposed restructuring was not to achieve the long-term survival of the Group. The proposal was for a controlled wind down of the business and a more beneficial realisation of the assets of the Group than in an immediate formal insolvency. To that end the restructuring offered the Group some new short-term liquidity to repay the 2023 and 2024 Adler Re notes, the capitalisation of interest on the Notes for two years in return for an increase in the coupon, the postponement of the maturity of the 2024 Notes for a year, and the modification of the Group's reporting covenants. It was thought that this would allow the management of the Group time to implement a phased programme of asset disposals during 2025 and 2026, in what was hoped would be a recovering property market, leading to the distribution of enhanced realisations to creditors and the liquidation of the Group companies in 2027.

22. The liquidity was to be provided by a special purpose company formed by the SteerCo under which up to €937.5 million of new term loans carrying interest at 12.5% per annum and maturing in June 2025 would be made to the Group (the "New Money"). The members of the SteerCo entered into commitment letters promising to provide €880 million of the New Money, which amount would be reduced to the extent that other Noteholders elected to participate.

23. €800 million of the New Money was to be used to repay the 2023 Adler Re notes and the 2024 Adler Re notes. A further €57.5 million was to be used to pay a variety of fees to the lenders in connection with the New Money (the "New Money Fees"). These included so-called "Backstop Fees" of 3% of the SteerCo's €880 million initial commitment; "Ticking Fees" of 5% on any undrawn commitment; "Early Bird Fees" of 1% of any sums committed by Noteholders before a specified deadline, and "Original

Issue Discount Fees" of 1% to any Noteholder who participated in the New Money. In addition, each provider of New Money would be allocated, pro rata, ordinary shares in the Parent Company amounting in total to 22.5% of the fully diluted share capital. It was further provided that claims for these New Money Fees would rank as unsecured debts in any insolvency.

24. The proposed amendments to the terms and conditions of the Notes included a suspension of the obligation to pay interest for two years, with the interest being capitalised and subject to an increase in the coupon by 2.75% over that period; and the insertion of a covenant by the Group to maintain a specified loan to value ("LTV") ratio of its assets.

25. Critically for present purposes, the proposed restructuring and the amendments to the terms and conditions of the Notes also included two features that would apply differently to the 2024 Notes and the other series of Notes. First, the maturity date of the 2024 Notes was to be extended by a year from 26 July 2024 to 31 July 2025. The maturity dates of all the other Notes were left unchanged. Secondly, it was proposed to modify the negative pledge clauses in the Notes to permit the grant of new security by the Group in respect of the New Money and the Notes. Under this new security (the "Transaction Security"), and according to an intercreditor agreement (the "Intercreditor Agreement"), the proceeds of enforcement of the security would be applied in accordance with a waterfall under which, after payment of certain costs and expenses, the New Money would rank first in priority, followed by the 2024 Notes, and then the five other series of Notes which would rank equally as between themselves.

26. The commitment of the members of the SteerCo to provide the New Money was conditional upon the alteration of the terms and conditions of the Notes, and their agreement to support the restructuring was expressed to expire on 12 April 2023.

The Consent Solicitation

27. The Group and the SteerCo envisaged that the proposed alteration of the terms and conditions of the Notes would be implemented by a so-called "consent solicitation" to obtain the agreement of the Noteholders. Under the terms and conditions of the Notes, this required a majority of 75% in value and 50% in number of the holders of each series of Notes.

28. The consent solicitation process commenced on 2 December 2022. On 8 December 2022 the Appellants notified the Group that they intended to vote against the consent solicitation. On 20 December 2022 the Group announced that although the requisite 75% majority by value had been obtained in five series of Notes, the consent solicitation had failed to achieve the required 75% majority in relation to the 2029 Notes, of which only about 55% in value had voted in favour.

The Issuer Substitution

29. After the failure of the consent solicitation, the Group announced its intention to implement the proposed restructuring by an alternative route. This was to propose a restructuring plan under Part 26A and to ask the English court to exercise its cram down power to overcome the objections of the Appellants. To that end, the Plan Company

was incorporated in England and Wales as a subsidiary of the Parent Company on 23 December 2022.

30. On 10 January 2023, the Appellants put forward an alternative restructuring proposal to the Group. That elicited no immediate response, but on 19 January 2023 the SteerCo informed the Company that the Appellants' proposal was not acceptable.

31. On 11 January 2023 the Plan Company was substituted for the Parent Company as the issuer of the Notes, ostensibly pursuant to the substitution procedure under the Notes (the "Issuer Substitution"). In connection with that substitution, the Parent Company guaranteed the Plan Company's obligations under the Notes, and the Parent Company issued back-to-back loan notes to the Plan Company on the same terms as the Notes.

32. It is self-evident, and the Plan Company accepted before the Judge, that the Issuer Substitution was carried out for the sole purpose of introducing an English company into the Group structure in order to persuade the English court to exercise its jurisdiction under Part 26A. Absent the Issuer Substitution, a proposal for the compromise of foreign law debts owed by a foreign company with no relevant connection with England would not have been entertained by the English court.

33. The technique of inserting a newly incorporated English company as a substitute obligor or co-obligor of debt owed by a foreign company in order to engage the jurisdiction of the English court under Part 26 or Part 26A has been used in a number of schemes and plans that have been sanctioned at first instance over the last few years: see e.g. Codere Finance (UK) Limited [2015] EWHC 3778 (Ch) and Gategroup Guarantee Limited [2021] EWHC 775 (Ch) at [12]-[23]. Mr. Bayfield KC told the Judge that it was "an established technique". It has, however, not been the subject of consideration at an appellate level.

34. The Appellants did not oppose the Plan before the Judge on the basis that the Issuer Substitution was an artificial device that could not justify the exercise of discretion to sanction the Plan. The point did not, therefore, arise for consideration on this appeal. For the avoidance of doubt, and without expressing a view one way or the other, I would wish to make it clear that the fact that this judgment does not deal with this issue should not be taken as an endorsement of the technique for future cases.

35. The Appellants did, however, challenge the legality of the Issuer Substitution as a matter of German law, both before the Judge, and by proceedings in Germany itself. The Judge heard expert evidence and was satisfied that it complied with German law. The Appellants also indicated that irrespective of our decision on this point, they reserved the right to continue their challenge to the Issuer Substitution in Germany.

The Plan

36. The Plan essentially sought to make the same changes to the terms and conditions of each series of Notes for which agreement had been sought in the consent solicitation as set out above. The Plan provided that the Notes were to be directly amended to take the form set out in an Appendix, and that the Plan Company was also authorised by the Plan to execute on behalf of all the Plan Creditors an agreement in accordance with German law providing that the Notes were to take that amended form. In particular, the amendments to the Notes included provisions as to the postponement of the maturity

date for the 2024 Notes and the variation to the negative pledge clauses to permit the grant of the new Transaction Security.

The convening hearing

37. On 26 January 2023, the Plan Company issued a letter to the Plan Creditors pursuant to the Practice Statement (Companies: Schemes of Arrangement) [2020] 1 WLR 4493 (the "Practice Statement"), informing them of the intention to promote the Plan. The letter indicated that there would be a convening hearing in respect of the Plan on 24 February 2023.

38. The convening hearing took place before Sir Anthony Mann. In his judgment, [2023] EWHC 415 (Ch), Sir Anthony found that the threshold jurisdictional requirements of Part 26A had been satisfied. He also accepted the submission of the Plan Company that there should be a separate class meeting of the holders of each series of Notes (the "Plan Meetings").

39. In the expectation that the Appellants would vote against the Plan and the 2029 Notes would be a dissenting class, Sir Anthony Mann also considered how it might be possible for the parties and the court to have sufficient time to deal with the numerous legal and valuation issues that would arise when the Plan Company asked the court to exercise its cross-class cram down power and give a decision on sanction before 12 April 2023. The result was that the convening order provided for the explanatory statement in respect of the Plan to be made available to Plan Creditors on 27 February 2023, for the Plan Meetings to take place on 16 March 2023, and for evidence to be prepared and exchanged under a very compressed timetable prior to a sanction hearing commencing on 30 or 31 March 2023.

The BCG Report

40. One of the important documents annexed to the explanatory statement was a report dated 20 February 2023 prepared by The Boston Consulting Group UK LLP ("BCG") which had been engaged by the Plan Company pursuant to a letter dated 10 February 2023. That report compared the projected outcome for Plan Creditors under the Plan and in the relevant alternative to the Plan.

41. The projected outcome under the Plan was based upon a business plan developed by the management of the Group (the "Management Case"). As indicated above, this was a "wind down" plan that envisaged a phased sale of the Group's yielding and development assets until the end of 2026, and a similarly phased reduction in the Group's personnel and organisation leading to a liquidation of the Group companies in 2027. BCG made it clear that they had relied upon the underlying assumptions made by the management of the Group, and that although they had conducted "plausibility checks" of that data, they had not performed a full examination or any audit of it. The values attributed by BCG to the Group's yielding and development assets were those which had been given in the last regular valuations for the Group in September 2022 by CBRE GmbH ("CBRE") (for the yielding assets) and in June 2022 by Apollo Valuation and Research GmbH ("NAI Apollo") (for the development assets).

42. BCG's projected outcome for Plan Creditors in the relevant alternative was based on a conclusion that if the Plan was not implemented, it was most likely that each of the

main companies in the Group would commence formal insolvency proceedings in April 2023. Those proceedings would be in England for the Plan Company, and in Germany for the Parent Company and the remainder of the Group. In that event, the claims of Noteholders would all rank equally as unsecured claims for payment of distributions in the insolvency proceedings. In addition, the New Money Fees would also rank as unsecured debts. These conclusions formed the basis of "the relevant alternative" under section 901G(4) by reference to which the Judge considered whether to exercise the cross-class cram down power (the "Relevant Alternative").

43. In a "Comparator Analysis", the BCG report expressed the opinion that provided that asset disposals were executed in accordance with the Management Case, the Plan would result in net proceeds (after payment of bank debt, interest and tax) of €4.1 billion which would be applied to repay the total of €3.684 billion (including interest) due on the Notes in full, starting with the 2024 Notes and the 2025 Notes and moving through the 2026, 2027 and 2029 Notes in chronological sequence. On the basis that the Management Case envisaged disposals being concluded by the end of 2026, it was said that this would permit payment of the 2027 and 2029 Notes prior to their scheduled maturity dates.

44. The Comparator Analysis in the BCG report assumed that in the Relevant Alternative there would be two phases of disposals of the assets of the Group companies at values that would be significantly discounted because the sales were being conducted in a formal insolvency. BCG opined that there would be two distributions in the first quarter of 2026 and 2028, together amounting to a payment of 57% of the amounts owing under the Notes.

45. On 15 March 2023, the day before the date fixed for the Plan Meetings, the Plan Company made available a revised explanatory statement. This contained an updated report from BCG (the "BCG Report") which revised the projection for the return to Plan Creditors in the Relevant Alternative to 63% rather than 57%.

The Plan Meetings

46. The Plan Meetings were commenced and then adjourned on 16 March 2023 to enable the updated BCG Report to be considered. They were reconvened on 21 March 2023. The attendance at each class meeting represented a very high proportion of the total Notes in issue. The chairman of the meetings subsequently reported to the court that the Plan had been approved by majorities in excess of 90% of those voting at the class meetings for the 2024, 2025 and 2026 Notes, and by a majority of about 80% of those voting at the class meeting for the 2027 Notes. However, at the meeting of the 2029 Notes, the Plan was approved by only 62.28% of those voting and so failed to achieve the required 75% majority.

The sanction hearing

47. The sanction hearing commenced before the Judge on 3 April 2023 and lasted for three extended court days, sitting from 9.30 am to 5 pm. The hearing was conducted on the footing that the terms of the SteerCo's funding commitment required a decision to be made by, at the latest, 12 April 2023.

48. At the hearing, the Judge was faced with the explanatory statement and BCG Report, together with factual evidence from a director of the Plan Company (Mr. Trozzi) as to the financial state of the Group, the state of its diverse property portfolio, and the manner in which the management of the Group intended to implement the Management Case and wind down its business and affairs if the Plan were sanctioned.

49. In relation to the comparative estimated outcomes for Plan Creditors under the Plan and in the Relevant Alternative, the Judge had written evidence supporting the valuations used in the BCG Report from CBRE and NAI Apollo, together with evidence from BCG (Mr. Wolf) and a restructuring expert (Mr. Gunther) on behalf of the Plan Company. He also had written evidence from a rival restructuring expert (Ms. Rickelton) and a report (the "Knight Frank Report") from an expert in German property valuation (Mr. Gerlinger of Knight Frank Valuation and Advisory GmbH) instructed by the Appellants.

50. In addition to the matters outlined in the revised explanatory statement and in the BCG Report, the evidence in reply filed on behalf of the Plan Company shortly prior to the sanction hearing included a response to the Appellants' contentions that the values of the Group's properties were as stated in the Knight Frank Report rather than the values given by CBRE and NAI Apollo. The Plan Company contended that if that were to be the case, and the Management Case could not be successfully implemented, the LTV covenant inserted into the Notes under the Plan would be breached at the end of 2024. The Plan Company contended that the likely result would be that the holders of the 2029 Notes would serve acceleration notices, leading to an enforcement process and a distribution of assets in accordance with the Transaction Security and Intercreditor Agreement. This was referred to in the Judgment as the Plan Company's "Alternative Case".

51. In addition to the experts on restructuring and valuation, there were also rival expert reports on German law dealing with the validity (or otherwise) of the Issuer Substitution and various aspects of the enforcement process that the Plan Company contended would follow a breach of the LTV covenant under the Plan Company's Alternative Case.

52. At the hearing, the Judge heard cross-examination of a total of seven witnesses and heard submissions from leading counsel for the Plan Company, the SteerCo and the Appellants. As he had been requested to do, the Judge announced his decision within a week on 12 April 2023. He decided to sanction the Plan and made an order to that effect on the same day (the "Order").

53. Although the Appellants immediately indicated an intention to seek permission to appeal, they did not seek a stay of the Order or any direction that the Plan not be made effective. Instead, the Judge made an order that a copy of the Order be delivered to the Registrar of Companies by the Plan Company "as soon as reasonably practicable". That was done the same day, whereupon the Plan became effective pursuant to section 901F(6) of the 2006 Act.

54. The Judge adjourned all consequential matters including the question of permission to appeal to a further hearing to take place after he had provided his written Judgment to the parties. His reserved Judgment was handed down on 21 April 2023. The further hearing took place on 25 April 2023. The Judge gave a short judgment refusing permission to appeal: see [2023] EWHC 987 (Ch).

Timing issues

55. Before summarising the Judgment, I wish to pay tribute to the Judge's conspicuous diligence and ability in assimilating a very large amount of detailed valuation and expert evidence, in conducting a complex hearing under intense time pressure, and in reaching a decision and producing a detailed and careful judgment with remarkable expedition. The Judge clearly went above and beyond the call of duty.

56. The compressed timetable for the process and the hearing was, however, criticised by Mr. Smith KC, who blamed the Plan Company and suggested that the pressure which was placed upon the Judge to give a decision within five business days of the end of the hearing may have contributed to the errors that he contended the Judge had made. Mr. Bayfield KC disputed that the Judge had made any errors and sought to deflect responsibility for the compressed timetable onto the Noteholder factions. However, he fairly accepted that the sanction exercise had been done to a timetable that was, for all concerned and especially the Judge, inadequate.

57. These are not new issues. Some five years ago in Noble Group Limited [2018] EWHC 2911 (Ch) ("Noble Group"), a case under Part 26, I commented, at [178]-[179],

> "178. ... As has been demonstrated on many occasions, flexibility and the ability to move swiftly when a genuine need arises is a particularly attractive and useful feature of the process for schemes of arrangement. The Companies Court will also always do what it can to accommodate the business needs of its users. However, it has been made crystal clear on numerous occasions that the Court is not a "rubber-stamp" for schemes of this (or any other) type. It is important that the Court is not taken for granted and its willingness to assist must not be abused.
>
> 179. That means that the Judge hearing a scheme case needs to be given adequate time for pre-reading and for the hearing, including time to consider what decision to make and to prepare a judgment. The parties involved in restructuring discussions must understand that they cannot run things down to the wire for their own benefit and without due regard for the proper process of the Court. Negotiations must be finalised in good time. The position should not be reached in which the Court is presented with a metaphorical "gun to the head" and the Judge is in effect told that if he does not comply with the company's application immediately, he will be responsible for the collapse of the company because other creditors ... will be unwilling to extend their deadlines."

58. These comments were made in relation to Part 26 schemes in which it was very rare for any valuation disputes to arise. The introduction of cross-class cram down in Part 26A has only served to accentuate these potential problems. That is because of the statutory requirement to demonstrate that dissenting classes of creditors will be no worse off under the plan than in the relevant alternative, coupled with the question of whether the treatment of assenting and dissenting classes justifies the court in exercising its cross-class cram down power under section 901G. As occurred in the instant case, it is

apparent that these additional requirements are increasingly leading to complex valuation disputes which the court is called upon to resolve under considerable time pressure.

59. In some cases, the time pressure is driven by external factors which are largely outside the control of the parties. An early example was Virgin Active Holdings Limited [2021] EWHC 1246 (Ch) ("Virgin Active"), a case of a viable company in the leisure industry suffering from the effects of the COVID-19 pandemic and seeking to reduce its debt burden to survive. But in other cases, especially where the deadlines result from the entirely foreseeable scheduled maturities of financial instruments, the time pressures on the court process appear to be the result of the parties, either by oversight or design, running matters down to the wire.

60. In such cases, in addition to the pressures upon the court that I identified in Noble Group, leaving things to the last minute can have other undesirable consequences. For example, if time is short, creditors may not be given adequate notice of the convening hearing and may also have little time to obtain, and even less time to get to grips with, the detailed financial information that underlies the plan company's valuation evidence.

61. Some of those problems were evident in Virgin Active and were also present in the instant case. So, for example, as the Judge observed at [94]-[95], although Mr. Gerlinger had assembled as much information as he could in the time available, and had produced a report that was impressive in the circumstances, in reality he had very little to go on, because he had essentially been asked to value all of the Group's assets within a matter of days or weeks. There was also no time for the experts to meet and to seek to narrow the issues for decision by the court at the sanction hearing.

62. Similarly, if time is unduly shortened, there may be a temptation to invite the judge at the convening hearing to postpone to the sanction stage consideration of issues that should be determined at the convening hearing. This will only serve to increase the pressure on the judge at the sanction hearing. In that respect I entirely agree with the recent observations of Miles J in Re Project Lietzenburger Strasse Holdco SÀRL [2023] EWHC 2849 (Ch) at [31], that if such a practice is developing, it is to be deprecated.

63. It is clear that to be of real value, the cross-class cram down power should be capable of being deployed swiftly and decisively when a genuine need arises. However, just as schemes under Part 26 have long been regarded as exercising "a most formidable compulsion upon dissentient, or would be dissentient creditors" (*per* Bowen LJ in Sovereign Life Assurance Co. v Dodd [1892] 2 QB 573 at 583) so it must be appreciated that plans under Part 26A, which offer the possibility of cross-class cram down, are capable of exerting an even more formidable compulsion and potential injustice upon dissenting creditors.

64. These considerations suggest that to prevent undue delay and expense, a plan company must (subject to the giving of any necessary confidentiality undertakings) make available in a timely manner the relevant material that underlies the valuations upon which it relies. The parties and their advisers and experts must also cooperate to focus and narrow the issues for decision so that sanction hearings are confined to manageable proportions. If sensible agreement is not forthcoming, the court should exercise its power to order specific disclosure of key information and its other case management powers robustly.

65. It must also be reiterated that the court's willingness to decide cases quickly to assist companies in genuine and urgent financial difficulties must not be taken for granted or abused. In particular, where a restructuring is designed to deal with the foreseeable maturity of financial instruments, and a division of the anticipated benefits of the restructuring is being negotiated between sophisticated investors, sufficient time for the proper conduct of a contested Part 26A process must be factored into the timetable. This will include complying fully with the Practice Statement, giving interested parties sufficient time to prepare for hearings, giving the court appropriate time to hear the case and to deliver a reasoned decision, and permitting time for the determination of any application for permission to appeal. If this is not done, the parties can have no complaint if the court decides to adjourn hearings and to take whatever time it requires to give its decision.

The Judgment

The law

66. In his Judgment, after setting out the facts, the Judge considered the law. For present purposes, the most relevant parts of his Judgment are those which dealt with the court's approach to the exercise of the discretion to impose a plan on a dissenting class in circumstances where section 901G applies.

67. The Judge first held, at [65], that satisfaction of Conditions A and B in section 901G is a jurisdictional requirement and does not give rise to a presumption in favour of sanction.

68. The Judge then dealt with a number of points under specific headings. Under the heading "Overall Support", at [66]-[67], the Judge accepted the arguments of the Plan Company that in deciding whether to exercise the power of cross-class cram down, he could take into account both the overall level of support for the Plan across all voting classes, and the 62.28% vote in favour of the Plan in the dissenting class of 2029 Noteholders. He said,

> "66. Mr Bayfield submitted that the creditors are normally the best judges of their own interests and that the overall support for the restructuring plan is a relevant factor. In answer, Mr Smith submitted that the normal principle that overall support is a relevant factor is weaker in the case of a cross-class cram down where, by definition, the restructuring plan has not been approved by the requisite majority in each class of creditors. I accept both submissions. In particular, I approach the question of discretion on the basis that overall support is a relevant but not [an] important or decisive factor.
>
> 67. In ED&F Man Holdings Trower J placed reliance on the fact that the plan enjoyed strong support across all classes of creditors: see [50]. In that case the vote in favour of the plan across all of the classes was 84% and the present case involves similar support. In relation to the dissenting class itself, Trower J considered that it remained relevant that a significant majority by value – in that case 69% – had voted in favour of the plan

> (although it fell short of the statutory majority): see [55]. In the present case, the majority was 62.28%. The fact that a majority of the 2029 Plan Creditors voted in favour of the Plan is also a relevant factor which I may take into account in the exercise of the Court's discretion."

69. In a later part of his legal analysis, under the heading "Holdings" the Judge also observed, at [84],

> "Many of the Plan Creditors who voted in support of the Plan are members of SteerCo. Others hold interests across all classes of the SUNs and so it is possible that they may have voted all of their rights under the SUNs in favour of an outcome which was more favourable to holders with earlier dated notes rather than later dated notes. Mr Bayfield submitted (and I accept) that it was relevant, therefore, to consider the extent to which the Plan is supported by "pure" 2029 Plan Creditors, who do not have "cross-holdings" in other classes of SUNs …."

70. Under the heading "Fair Distribution of Benefits" the Judge accepted at [71] that the principle of *pari passu* distribution is a fundamental principle of corporate insolvency law, and that it is important in the exercise of the cross-class cram down power under Part 26A for the court to take account of the "horizontal comparison" – i.e. the relative treatment of the classes of creditors *inter se*. In this respect, the Judge reached an important conclusion at [74],

> "74. … The Court should take into account the horizontal comparator and will normally approve a plan if there is equal treatment between all creditors. Moreover, equal treatment will normally mean adherence to the *pari passu* principle. However, even if there are differences in the treatment of individual creditors or classes of creditors, the Court may still approve or sanction the scheme provided that there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment."

The Judge's recognition of the importance of the principle of *pari passu* distribution and the need to take into account the horizontal comparison was, for reasons that I shall explain, entirely correct and not challenged on appeal. The parties did, however, disagree as to whether the Judge had correctly applied these principles in the instant case.

71. Under the same heading of "Fair Distribution of Benefits", at [75]-[77], the Judge accepted a further submission on behalf of the Plan Company that it was not the role of the court under Part 26A to consider whether a better or fairer plan might have been available than the one that had been presented to the court. In this respect, the Judge relied upon dicta of Sir Alastair Norris in Re Amicus Finance plc [2022] Bus LR 86 ("Amicus Finance") at [45] and rejected the Appellants' contention that the approach should be similar to that explained by Zacaroli J when considering a challenge to a company voluntary arrangement ("CVA") in Lazari Properties 2 Ltd v New Look Retailers Ltd [2022] 1 BCLC 557 ("New Look") at [191]-[196].

The Issuer Substitution

72. After his summary of the legal principles, the Judge dealt with the German law evidence as to the Issuer Substitution. He found that the Issuer Substitution was valid and that he had jurisdiction to sanction the Plan.

"*No worse off*"

73. The Judge then turned to consider the "no worse off test" under section 901G on the facts. The Appellants contended that the Plan Company was wrong to suggest that all of the Notes would be likely to be paid in full under the Plan, and to compare this with a likely return of 63% to all Noteholders in the Relevant Alternative. The Appellants contended that based upon Mr. Gerlinger's evidence and the reduced valuations as set out in the Knight Frank Report, because the 2029 Noteholders would be paid out last under the Plan, they would be likely to receive only about 10.6% of their debt. The Appellants contended that this was much worse than the 56.1% return that they predicted would be likely to be paid to them in the Relevant Alternative.

74. In addition to disputing Mr. Gerlinger's evidence and the valuations in the Knight Frank Report, the Plan Company relied upon its Alternative Case to suggest that even if the Knight Frank valuations were correct, the 2029 Noteholders would be able to accelerate their Notes, leading to an enforcement scenario in which they would be likely to recover a greater amount than in the Relevant Alternative.

75. The Judge first considered the outcome for Plan Creditors in the Relevant Alternative. He stated, at [176],

> "176. It is common ground that the Relevant Alternative to the Plan is that the Plan Company and the other Group companies go into a formal insolvency process. In the case of the Plan Company, this is an insolvency process in England (either administration or liquidation). In the case of the Parent Company, this is an insolvency process in Germany. It is also common ground that in both sets of proceedings the claims of the Plan Creditors would rank for payment *pari passu*. Indeed, Mr. Smith stated in closing submissions that it was part of the [Appellants'] case that the Relevant Alternative was an insolvency process in which all of the Plan Creditors were treated equally."

76. The Judge then considered the rival expert evidence as to the "Insolvency Discount" that would reduce the realisations from sale of the yielding assets and development assets in a formal insolvency. He concluded, at [184],

> "184. I accept Mr. Gunther's evidence [for the Plan Company] that the Insolvency Discounts applied by BCG are reasonable and I find on a balance of probabilities that if the Group went into liquidation the most likely of the two alternatives presented to the Court by the parties is that the Group's assets would be realised with Insolvency Discounts of 25% and 23% for the Yielding Assets and the Development Assets respectively."

77. This conclusion led to the Judge accepting the conclusion in the BCG Report that if the Plan was not sanctioned, the most likely outcome in the Relevant Alternative would be that €2.023 billion would be distributed to the Plan Creditors in 2026 and 2028, amounting to a return of 63.25% on all series of Notes.

78. The Judge then turned to the rival contentions as to the likely outcome under the Plan. After considering the evidence in some detail, the Judge reached his conclusion on the Plan Company's primary case at [217],

> "217. I prefer the evidence of Mr. Wolf [of BCG] to the evidence of Mr. Gerlinger [of Knight Frank] in relation to the proceeds of the future sales of the Group's assets and I find on a balance of probabilities that if the Plan is implemented the Group is more likely to realise the sums forecast in the BCG Report than the sums forecast in the Knight Frank Report and that it is likely the 2029 SUNs will be repaid in full."

79. On the Alternative Case, the Judge examined a complex series of events that might occur if the Plan was sanctioned, but the valuations in the Knight Frank Report turned out to be correct rather than those in the BCG Report. His conclusion was at [281],

> "281. I find, therefore, that if the future valuations set out in the Knight Frank Report turn out to be accurate, then the Plan Company and the Parent Company will be in breach of the LTV Covenant in the 2029 Notes and the 2029 [Noteholders] will be entitled to serve notice ... declaring that their debts are immediately due and payable. I also find that if this occurs, then the likely outcome is that all of the Plan Creditors will serve notice ... and will form an Instructing Group to instruct the Security Agent to enforce the Transaction Security under the Intercreditor [Agreement] by accepting a Credit Bid from a [Noteholder] Bidco resulting in an orderly wind down and sale of the Group's assets. Finally, I find that in that event the likely outcome is that the net proceeds will be distributed rateably and on a *pari passu* basis to all the Plan Creditors."

80. The Judge's basis for his conclusion in the last sentence of [281] that in the Alternative Case the net proceeds of enforcement of the Transaction Security would be distributed rateably and on a *pari passu* basis to all the Plan Creditors was set out in the immediately preceding paragraphs [278]-[280],

> "278. I turn next to consider whether the proceeds of the Group's property sales will be distributed under the security enforcement waterfall. This issue arose right at the end of closing submissions and, again, I would be hesitant to express a final view about the scope of the Intercreditor Agreement. Nevertheless, I am not persuaded that the Transaction Security will not include most of the Group's assets (as Mr. Smith submitted). A large number of the Group's subsidiaries will be parties to the Intercreditor Agreement for the purpose of

> providing guarantees and securities and their shares will also be pledged as Transaction Security.
>
> 279. Furthermore, section 7 of the Explanatory Statement summarises the Transaction Security which the Group intends to provide under the Intercreditor Agreement. It expressly states that: "Any asset which can be provided as security will be provided as transaction security, subject to the restrictions set forth in this section." There is no suggestion that the Group intends to exclude from the Transaction Security any of the Group's assets unless it is unable to do so, and this was not put to Mr. Trozzi.
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> 280. But even if most of the Group's assets will not form part of the Transaction Security, I accept Mr Bayfield's submission that if Group assets are sold after the acceleration of each series of Notes, then the Group would be required to distribute the proceeds of sale in the same order of priority as the security enforcement waterfall. Once the secured creditors are paid off, the Group would have to distribute the proceeds of sale between the Plan Creditors rateably."

81. The Judge then considered whether the "no worse off" test (Condition A) was satisfied on the facts. He held, at [291]-[292],

> "291. I accept Mr Smith's submission that future forecasts of property prices are inherently uncertain especially when based on macro-economic data. I also agree with him that it is perfectly possible for two highly experienced and competent property professionals to reach very different views about the value of property assets (especially where they are carrying out residual valuations). Finally, I accept that it will be ambitious for the Plan Company to pay off the 2029 [Noteholders] in full.
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> 292. Nevertheless, it is important to have in mind the statutory test which the Court must apply. I have to be satisfied that the 2029 [Noteholders] will be no worse off than they would be in the relevant alternative. It is not necessary, therefore, for the Court to be satisfied that the most likely outcome is that the 2029 [Noteholders] will be paid in full, only that the most likely outcome is that they will be better off. I am fully satisfied that this is the most likely outcome because even if the Group fails to achieve the sales prices forecast by BCG in the BCG Report and is only able to recover the sums forecast in the Knight Frank Report, I am still satisfied that the 2029 [Noteholders] will be better off. This is the consequence of my finding on the Plan Company's Alternative Case."

Discretion

82. The Judge considered the exercise of his discretion under sections 901F and 901G under a number of headings, reflecting the arguments made by the Appellants. Of these, the most relevant ones for the purposes of the appeal were (i) the retention of different maturity dates for the different series of Notes, (ii) the prior ranking security given to the 2024 Notes in comparison to the other series of Notes, and (iii) the retention of equity by the existing shareholders of the Parent Company.

Maturity Dates

83. The Appellants objected that the preservation of different maturity dates for the different series of Notes was a departure from the fundamental principle of *pari passu* distribution that would apply in a formal insolvency of the Plan Company, and that there was no justification for this departure. The Judge rejected this argument. He held, at [298]-[299],

> "298. In my judgment, the Plan does not involve a departure from the *pari passu* principle because it will preserve the existing maturity dates of the SUNs (apart from the 2024 Notes). I have found that if the Plan is implemented, it is likely that the Plan Creditors will be paid in full. There is, therefore, a significant difference between the restructuring plan in this case and the plans in many other Part 26A cases and the CVA cases where it is accepted on all sides that the creditors will not be paid in full. I might well have been prepared to accept that the Plan involved a departure from the *pari passu* principle if I had accepted the [Appellants'] evidence and found that the most likely outcome was a significant shortfall even if the Plan was fully implemented. I might also have found that this was unfair and a fundamental objection to the Plan. But I did not accept that evidence.
>
> 299. Equally importantly, I am not satisfied that the Plan involves a departure from the *pari passu* principle even if the Group fails to achieve the forecasts in the BCG Report. If the Group falls significantly short of those forecasts, then in my judgment the most likely outcome is that this will trigger an acceleration of all of the SUNs, enforcement of the Transaction Security and distribution in accordance with the *pari passu* principle subject to repayment of the Secured Parties (whom I consider separately below). Again, if I could have been satisfied that the *pari passu* principle would not apply if the Plan Company went into default, I might well have found that this was unfair. But, again, I accepted the Plan Company's evidence in relation to this issue."

84. The Judge then gave further consideration to the Appellants' arguments, accepting that the Plan involved a greater risk for the 2029 Noteholders than the holders of the earlier-dated Notes. He said, at [300]-[302],

> "300. I readily accept that the exercise in which all of the valuation and financial experts were engaged was inherently uncertain and that the three alternatives which the parties presented to the Court did not involve clear alternatives but more of a spectrum. I also accept that I do not have a crystal ball and that I cannot be certain that the 2029 [Noteholders] will be paid in full or even that they will recover on a *pari passu* basis if the Plan Company defaults … Whilst I was satisfied that this was a likely outcome, it remains far from certain.
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> 301. I must accept, therefore, that the Plan involves a greater risk for the 2029 [Noteholders] than it does for the Plan Creditors holding earlier-dated notes and it is possible (although, in my judgment, unlikely) that they might be worse off if they have to wait for the Plan to be implemented than if the Group was put into an insolvency process now. I put this point to Mr. Smith and he went as far as to submit that because the *pari passu* principle is a fundamental principle, I had to be satisfied that the 2029 [Noteholders] would be paid in full before I could exercise my discretion to depart from it and to sanction the Plan...
>
> 302. I have considered this submission carefully and although it was powerfully made, I cannot accept it. In my judgment, it is not unfair to require the 2029 [Noteholders] to accept a greater level of risk than the other Plan Creditors and I am prepared to sanction the Plan even though it may have that effect."

85. The Judge gave a series of reasons for reaching the critical conclusion in [302] that he would be prepared to sanction the Plan even though it might have the effect of imposing a greater level of risk on the 2029 Noteholders than the other Plan Creditors. Of these, the most significant were the following,

> "(1) The Plan preserves the existing maturity dates of the SUNs (apart from the 2024 Notes). This reflects the commercial risks which the 2029 [Noteholders] assumed when they purchased them. I am not satisfied that the Plan involves a significant change to the balance of those risks.
>
> (2) I consider it most likely that they will be paid in full but if the Plan's primary purpose fails, I also consider it likely that the maturity dates will be accelerated and that the 2029 [Noteholders] will recover more than if the Group goes into insolvency measures. Equally importantly, I am satisfied that it is likely that they will not be treated differentially and that the *pari passu* principle will be respected.
>
> (3) But even if the Group achieves neither of these outcomes, I am satisfied that the Group will not miss the Relevant Alternative by very much. Mr Bayfield submitted, and I accept, that the Group would have to realise at least £0.5 billion

less than BCG has forecasted before it is in danger of producing a worse outcome than it would if it went into insolvency now....

(4) The power of [the Appellants'] case on unfairness really rests on ... the comparison between the treatment of the near-dated SUNs (who all recover their claims in full) and the 2029 Plan Creditors (who recover only 10.6% of their claims). But I consider it to be unrealistic that the 2029 Plan Creditors will be unable to exercise their legal rights under the Plan to accelerate the 2029 Notes and even less realistic to assume that they will not attempt to do so.

(5) A majority of the 2029 [Noteholders] clearly take the same view and in my judgment their view of their own interests is a relevant factor to which I may (and do) attach weight. I also attach greater weight to their views than I would otherwise have done because, as Mr. Bayfield pointed out, a number of 2029 [Noteholders] do not have holdings in the 2024 Notes."

86. The Judge then considered a number of other factors,

"(6) I accept Mr Bayfield's submission that as a matter of law I do not have to be satisfied that the Plan is the best plan available or that it could not be fairer. I also accept that the Plan involved detailed and lengthy negotiations and that it was ultimately the only restructuring plan which commanded a significant measure of agreement between the Group and the Plan Creditors.

(7) Nevertheless, I consider this to be a weak reason for sanctioning the Plan (as Zacaroli J did in Houst) and I do not attribute much weight to it. Despite the volume of evidence filed by the parties, I was not given a compelling reason why the Plan Creditors wished to preserve the maturity dates and not to agree to harmonise them at the outset. If they had agreed to this, a great deal time and intellectual effort might have been saved in demonstrating to the Court why a default would result in a *pari passu* distribution.

(8) Again, I accept that the avoidance of a "debt wall" is a good reason for preserving the maturity dates. But in my judgment, this would not by itself justify the Court in sanctioning a scheme which was otherwise unfair. Moreover, Mr. Bayfield's reliance on this point was undercut by Mr. Trozzi's acceptance that the Plan itself involves a debt wall of sorts in 2025. It is clear, therefore, that this was not the most important reason for preserving the existing maturity dates and I also give it limited weight."

87. The Judge concluded his reasons in [302(9)] by saying,

> "(9) Ultimately, I am persuaded by Mr. Bayfield's very final oral submission at the end of the hearing. If the Plan works, he submitted, everyone is better off and the best judges of this are the Plan Creditors themselves, who voted by the requisite majority in every class for the Plan and by 62% in the dissenting class. Given the balance of risk, the right exercise of discretion is to give the management of the Group the opportunity to implement it."

The prior ranking security given to the 2024 Notes under the Plan

88. The Judge identified the issue and the rival submissions of the parties in this respect as follows,

> "303. The Intercreditor Agreement provides for the 2024 Notes to rank after the New Money in priority to the other SUNs. The justification for this change in priority is that they represent the only series of Notes which is subject to an extension of its maturity date. Mr. Trozzi told the Court in cross-examination that this was the sole reason for them to be given priority ...
>
> 304. Mr. Smith submitted that the extension of their maturity date was a bad reason to advance the priority of the 2024 Notes because the *pari passu* principle would apply in insolvency proceedings...
>
> 305. Mr. Bayfield accepted that this was an "imperfect compromise" but submitted that the Court should approach this issue on the basis that Condition A is satisfied and that the 2029 [Noteholders] will be no worse off under the Plan even though the 2024 Notes have been advanced in priority..."

89. At [306], the Judge indicated that the test that he was applying was that framed by Mr. Bayfield KC, namely whether the priority given to the 2024 Notes meant that the Plan was so flawed that the court should not sanction it. The Judge concluded that the Plan was not so flawed, giving the following main reasons,

> "(1) There is no issue between the parties that the Court may sanction a scheme which has the effect of altering the priority of different classes of creditors .... Rather, the issue for the Court in this case is whether it would be unfair to the 2029 [Noteholders] to approve the Plan on the basis that it involves an alteration to the priority of the 2024 Notes. I accept Mr. Bayfield's submission that the Court should approach this question on the basis that Condition A has been satisfied.
>
> (2) The Plan involves an extension to the maturity date of the 2024 Notes but not to any other series of the [Notes]. The *quid pro quo* for the agreement of the 2024 Noteholders to this

> extension is to give the 2024 Notes priority over the other [Notes]. The holders of the 2024 Notes have temporal priority over the other holders of [Notes] and they were being asked to agree both to an additional element of risk and to lock up their funds for another year and to compensate them they are to be given priority. In my judgment, this is a good reason why an honest intelligent person might approve the Plan on these terms.
>
> (3) Mr. Smith's primary submission was that this was unfair because it involved a departure from the *pari passu* principle. But for the reasons that I have given I do not consider the Plan to involve a departure from the *pari passu* principle…"

The Judge also found on the facts that there was no evidence to support a finding that, by reason of their cross-holdings, the SteerCo had been motivated by a desire to prefer the interests of the 2024 Noteholders over the interests of the other classes of Plan Creditors.

The retention of equity by the shareholders in the Parent Company

90. As indicated above, the restructuring provided that the SteerCo and any other Noteholders who chose to participate in the New Money would be issued with 22.5% of the enlarged equity share capital of the Parent Company. It also provided for the existing shareholders in the Parent Company to be entitled to retain the remaining 77.5% of the equity.

91. The Appellants contended that the retention of their shares in the Parent Company by the existing shareholders was unfair because the Group was insolvent. They contended that "the creditors owned the company" and since they alone were making the restructuring possible, they should therefore be entitled to take full ownership of the Parent Company, so that if there was any surplus value arising from the restructuring over and above the amount required to pay creditors in full, they would benefit from that surplus.

92. The Judge was plainly troubled by this point. He said, at [324],

> "324. This is the point on which I have had the greatest concern about approving the Plan. I can see no obvious reason why the shareholders who have provided no support for the Plan and no additional funding should get the upside if the Plan succeeds. The Plan Creditors rather than the Shareholders take the risk that the Plan will fail. I, therefore, accept Mr. Smith's submission that there is no compelling logic in Mr. Bayfield's position that if the Plan Creditors are paid in full, the shareholders should retain their equity."

93. However, the Judge concluded that he should not refuse to sanction the Plan on this basis. He gave a number of reasons for this at [326], of which the following were most significant,

> "(1) The parties who are most affected by the retention of equity in the present case are the [SteerCo who committed to providing the New Money]. They negotiated a 22.5% stake in the Group in return for providing the New Money and it is not suggested that they took anything other than a commercially rational approach …
>
> (2) The [SteerCo] might have attempted to negotiate a deal for 100% of the equity in the Group on the basis that the shareholders no longer had any economic interest in the Group. But if they had, there was no evidence that this would have affected the [Appellants'] attitude to the Plan or that they would have taken the opportunity to subscribe for New Money. They called no factual evidence at all.
>
> (3) Indeed, the [Appellants'] position throughout the hearing was that insolvency proceedings were the best alternative outcome for the Group and the shares had no value … on [the Appellants'] own case, the shares had (and have) no economic value at all.
>
> (4) Moreover, if the Plan Company had negotiated a better deal in which it agreed to issue equity to the [SteerCo] which gave them a much higher equity share in the Group, it is highly likely that the [Appellants] would have strongly objected on the basis that this was an improper incentive."

The Judge's conclusion

94. The Judge then dealt with a number of other points that are not the subject of the appeal. He also held that he did not need to decide whether some of the SUNs had been accelerated as a matter of German law, as contended by the Appellants, because this could be resolved by the German courts and would not make the Plan ineffective.

95. At the end of the Judgment the Judge concluded, at [344],

> "344. For all of these reasons I am satisfied that it was appropriate to sanction the Plan and to give effect to the votes cast by the majority of the Plan Creditors in all classes including the 2029 Notes."

The Appeal

96. On 16 May 2023, almost a month after the Plan had been made effective, the Appellants issued an application for permission to appeal, together with a somewhat belated request that the appeal be expedited. I granted permission to appeal but refused the application for expedition.

97. On the appeal, it was not suggested by the Plan Company that merely because the Plan had been made effective and the New Money had been drawn down and utilised, the appeal was moot or that it should for these reasons alone be dismissed. Instead, the

Plan Company submitted that the fact that the Plan had been implemented should lead to this Court being slower to interfere with the Judge's exercise of discretion. Ultimately, however, Mr. Bayfield KC accepted that if we concluded that the Judge had been wrong in his approach to the exercise of discretion, his decision to sanction the Plan could not stand, and the appeal should be allowed. In that event, at least so far as English law is concerned, the alterations to the terms and conditions of the Notes effected by and under the Plan would be ineffective, and the parties would have to consider their respective positions in light of our judgment. We were content to hear the appeal on that basis.

98. I would, however, observe that it is surprising that when the Judge announced his decision on 12 April 2023, counsel did not raise with him the issues that might arise if the Plan were to be made effective before he could give reasons for his decision or could consider an application for permission to appeal. No application was made for a stay, or more conventionally, for the Judge to direct that the Order not be delivered to the Registrar of Companies until after he had given reasons for his decision and determined any application for permission to appeal. This may be yet a further example of the difficult issues that can arise when complex cases such as this are heard at the last minute under significant pressures of time. If similar circumstances arise in the future, such matters should be raised by the parties with the judge.

The arguments on appeal

99. There were eight grounds of appeal, some of which overlapped, and which I shall address in what I consider to be the most logical order.

100. Grounds 3 and 4 contended that the Judge wrongly failed to appreciate that the Plan materially departed from the principle of *pari passu* distribution of assets that would apply in the Relevant Alternative, thereby placing a materially greater risk of non-payment upon the 2029 Noteholders than the other Notes; and that no good reason had been shown for this differential treatment.

101. Grounds 1 and 2 contended that in assessing the fairness of the Plan as between the assenting and dissenting classes, the Judge wrongly applied the "rationality test" derived from scheme cases under Part 26, and wrongly held that he did not need to investigate whether the Plan could have been made better or improved.

102. Grounds 5 and 6 contended that in exercising his cross-class cram down discretion, the Judge wrongly attached significant weight to the fact that the Plan had been approved by the other classes of Noteholders and by a simple majority of the 2029 Noteholders. They also contended that the Judge wrongly treated his finding that the no worse off test was satisfied as a factor supporting the exercise of discretion, rather than simply a necessary precondition to the exercise of the cross-class cram down power.

103. Ground 7 contended that the Judge had been wrong on the facts to accept the Plan Company's Alternative Case. Ground 8 contended that the Judge had been wrong not to accept the argument that some of the SUNs had been accelerated. It was argued that the commencement of proceedings under Part 26A amounted, under German law, to an "insolvency proceeding" which was an event of default under the Notes. It was said that the Judge should have found that this was a fundamental defect which was not addressed in the Plan and which prevented it from having substantial effect.

104. On behalf of the Plan Company, Mr. Bayfield KC essentially contended that the Judge was right to sanction the Plan for the reasons that he gave. He also reminded us that the Judge's decision to exercise his discretion to sanction the Plan was a complex evaluative exercise. He submitted, correctly, that this Court should not interfere with such a decision unless we were satisfied that the Judge applied incorrect legal principles, took into account irrelevant factors or omitted to take into account relevant factors, or came to a conclusion on the facts that no reasonable judge could reach.

The law

105. As indicated at the start of this judgment, section 901G enables the court to exercise its discretion under section 901F to sanction a restructuring plan, notwithstanding that there is a dissenting class or classes of plan creditors. It is apparent, however, that Part 26A contains no express statutory guidance to the court as to (i) how to define a "class" of creditors, (ii) how to exercise the discretion under section 901F in a case in which section 901G is not engaged, or (iii) how to exercise the discretion under section 901F in a case in which section 901G is engaged.

106. Instead, when introducing Part 26A, Parliament clearly envisaged that subject to the possibility of subsequent amendment of section 901G by regulations promulgated under section 901G(6), it would be for the courts to develop appropriate principles in these three areas, in much the same way as the courts have done for many years in relation to schemes of arrangement under Part 26. That is apparent from the explanatory notes prepared by the Department for Business, Energy and Industrial Strategy to accompany the introduction of Part 26A (the "Explanatory Notes"), which relevantly provided,

> "Arrangements and reconstructions for companies in financial difficulty
>
> 9. These provisions will allow struggling companies, or their creditors or members, to propose a new restructuring plan between the company and creditors and members. The measures will introduce a "cross-class cram down" feature that will allow dissenting classes of creditors or members to be bound to a restructuring plan. This means that classes of creditors or members who vote against a proposal, but who would be no worse off under the restructuring plan than they would be in the most likely outcome were the restructuring plan not to be agreed cannot prevent it from proceeding.
>
> ...
>
> 13. The scheme of arrangement framework is highly regarded and has proved a flexible tool in recent years...
>
> 14. In schemes of arrangement creditors (and sometimes members) are divided into classes (based on the similarity of their rights, which may vary significantly across a company's creditor base) and each class must vote on the proposed scheme. If all classes vote in favour of the scheme (requiring 75% by

> value and a majority by number of each class), the court must then decide whether to sanction it…
>
> 15. The new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement (approval by creditors and sanction by the court), but it will additionally include the ability for the applicant to bind classes of creditors … to a restructuring plan, even where not all classes have voted in favour of it (known as cross-class cram down). Cross-class cram down must be sanctioned by the court and will be subject to meeting certain conditions. As is the case with Part 26 schemes, the court will always have absolute discretion over whether to sanction a restructuring plan. For example, even if the conditions of cross-class cram down are met, the court may refuse to sanction a restructuring plan on the basis it is not just and equitable….
>
> 16. While there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."

107. Although paragraph 15 of the Explanatory Notes described the court's discretion under section 901F as "absolute", that plainly was not an invitation to a judge hearing a particular case to act capriciously, arbitrarily or on his own individualised view of the merits, untethered to legal principle. Nor were matters taken any further by the reference at the end of the same paragraph to the possibility that, even if Conditions A and B in sections 901G(3) and (5) were satisfied, the court might still refuse to sanction a plan if it thought that the plan was not "just and equitable". As I pointed out in Virgin Active at [291], those words do not appear anywhere in Part 26 or 26A, and they were not part of the established jurisprudence under Part 26. Moreover, like the related concept of "fairness", memorably discussed by Lord Hoffmann in O'Neill v Philips [1999] 1 WLR 1092 at 1098D-F, such general expressions are incapable of consistent judicial application without a frame of reference or rational principles to guide judges.

108. I therefore turn to summarise the principles that have been established in relation to class composition and the exercise of discretion under Part 26 and to consider how they should apply to restructuring plans under Part 26A.

Class composition

109. The basic principle in relation to class composition under Part 26 is 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 *per* Bowen LJ. As David Richards J indicated in his convening judgment in Telewest Communications plc (No.1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752 at [37], the application of this test requires an exercise of judgment on the facts of each case. The authorities show that a broad

approach is taken, and that the differences in rights may be material, certainly more than *de minimis*, without leading to separate classes.

110. In the Court of Appeal in Hawk Insurance Co Ltd [2001] EWCA Civ 241, [2001] 2 BCLC 480 ("Hawk") at [30] and [34], Chadwick LJ explained how the dissimilarity of rights test is to be applied,

> "In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."

111. It is also clear that where a scheme of arrangement is proposed as an alternative to a formal insolvency procedure, the application of the first limb of the "similarity of rights" test requires the court to identify the rights that the creditors would have in that insolvency proceeding, rather than the rights that they would have if the company were to carry on its business in the ordinary course. That appears clearly from the decision in Hawk, in which Chadwick LJ explained, at [42],

> "It is, to my mind, essential to have regard to the fact that the scheme is proposed as an alternative to a winding-up. There is no doubt that the company is insolvent. It has presented a petition for winding up and the court has appointed provisional liquidators. The right approach in those circumstances, as it seems to me, is to consider the position on the basis that the relevant rights are those which creditors would have in a winding up."

112. In his convening judgment in Virgin Atlantic Airways Limited [2020] EWHC 2191 (Ch) at [41]-[48], Trower J explained why the same principles of class composition that apply to schemes under Part 26 should apply to restructuring plans under Part 26A. Zacaroli J agreed with that conclusion in the convening judgment in Gategroup Guarantee Limited [2021] EWHC 304 (Ch) ("Gategroup") at [181]-[182], and I took a similar approach in the convening judgment in Virgin Active Holdings Limited [2021] EWHC 814 (Ch) at [61]-[69].

113. Neither party to this appeal suggested that this approach was wrong or that any different principles from those developed under Part 26 should be applied in relation to class composition under Part 26A. Nor did they suggest that any different principles were, or should have been, applied by Sir Anthony Mann when he accepted the Plan Company's proposal for the composition of the voting classes of Plan Creditors in the instant case.

114. I therefore proceed on the basis that the same underlying concepts of class composition developed in relation to scheme cases should apply to cases under Part 26A. That is an important starting point for an understanding of the statutory process under Part 26A and for the remainder of the analysis in this case.

Discretion to sanction where there is no cross-class cram down

115. The established principles that guide a court in the exercise of discretion to sanction a scheme of arrangement under Part 26 were summarised by David Richards J in his sanction judgment in Telewest Communications plc (No.2) [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 ("Telewest") at [20]-[22],

> "20. The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Limited [1966] 1 WLR 819 at 829 by reference to a passage in *Buckley on the Companies Acts* (13th ed., 1957) page 409, which has been approved and applied by the courts on many subsequent occasions:
>
> > "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
> >
> > The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."
>
> 21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under section 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve". That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> 22. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court "will be slow to differ from the meeting"."

116. I paraphrased those principles in Noble Group at [17],

> "(i) At the first stage, the Court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.
>
> (ii) At the second stage, the Court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.
>
> (iii) At the third stage, the Court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the Court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme.
>
> (iv) At the fourth stage the Court must consider whether there is any "blot" or defect in the scheme that would, for example, make it unlawful or in any other way inoperable."

117. These statements of principle were made in relation to a Part 26 scheme in circumstances in which all classes of creditors had voted in favour of the scheme. In a case where a restructuring plan under Part 26A has been approved by the required majority in each class meeting, so that there is no need to rely upon the provisions of section 901G to cram down a dissenting class, the same principles should be applied: see e.g. the sanction judgment in Virgin Atlantic Airways Limited [2020] EWHC 2376 (Ch) at [45]-[46].

Discretion to sanction: cross-class cram down

118. However, where a dissenting class has voted against a restructuring plan or has failed to vote in favour by the required 75% majority, and the plan company seeks to rely upon section 901G to persuade the court to impose the plan upon the dissenting class, the approach under Part 26 requires modification.

119. In general terms, the principles set out in the first and fourth stages of my summary in Noble Group will continue to apply. The court must confirm that the classes have been correctly constituted, that the explanatory statement is adequate, and that there is no defect in the plan making it unlawful or otherwise inoperable.

120. The court will also need to consider the matters set out in the second stage of the summary in Noble Group as regards each assenting class. Thus the court will need to be satisfied that those who attended and voted in favour at the meeting were a true reflection of the class as a whole (which might not be the case, for example, where the turnout was very low), and that the majority in each class had not voted in favour in order to promote interests adverse to the class of which they formed part. These factors will be particularly important as regards any class whose affirmative vote in favour of a plan is relied upon to satisfy Condition B under section 901G.

The rationality test, overall support and cross-class cram down

121. It is the third stage of the test outlined in the first paragraph of the extract from *Buckley* and in my summary in Noble Group that requires the greatest modification in its application to cross-class cram down under Part 26A.

122. As David Richards J explained in Telewest at [21], under Part 26 the question of whether it is "fair" to impose a scheme upon the dissenting minority within a class is answered by applying a limited rationality test to the majority vote within that class. The court does not impose its own view of the commercial merits of the scheme, but asks a more limited question in relation to each class of whether the compromise or arrangement embodied in the scheme is one that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve".

123. Almost invariably, under Part 26 this question is answered by the very fact of the vote in favour at each class meeting. The confidence that the court reposes in the decision of each class meeting in such circumstances is reinforced by the fact that the decision in favour of the scheme is the decision of an enhanced majority of 75% in value, rather than just a simple majority, of those who voted at the class meeting. Moreover, the greater the majority in favour at the class meeting, the greater confidence that the court can have that the scheme is in the interests of the class in question.

124. It is important to recognise, however, that this entire approach is dependent upon a number of fundamental assumptions.

125. The first, and most important for present purposes, is that it applies within a class of creditors that has been properly constituted, so that the majority and the minority in the class have a commonality of commercial interests based upon a sufficient similarity of their rights. The court's view that it would be fair to impose the scheme upon the dissenting members of the class, based only upon a rationality check on the commercial judgment of the majority, presupposes that the majority and minority have sufficiently similar commercial interests based upon their rights. If there is no such sufficient commonality of interests, then there can be no assumption that it is fair to impose the views of the majority upon a minority that is in a materially different commercial position.

126. The same logic also underpins the second assumption, which David Richards J expressly identified in Telewest at [22] by reference to the second paragraph of the extract from *Buckley*. If the majority in a class can be seen to have voted in favour of a scheme to promote some extraneous interest adverse to the interests of the class, then the court would not be justified in relying upon their commercial judgment to impose the scheme upon the dissenting minority in the class. One of the most obvious examples of this type of situation would be if creditors in the majority in one class (A) also had cross-holdings in another class (B), and it appeared that they had voted in favour in class A, not because of the merits of the proposed scheme for that class, but because of their desire to benefit from a more favourable commercial deal offered to class B.

127. The third assumption, again expressly identified in the extract from *Buckley* and by David Richards J in Telewest at [22] is that the class should have been "properly consulted". The court could have no confidence that the majority were the best judges

of the commercial interests of the class if, for example, they had been acting on inadequate or misleading information in the explanatory statement, or had not had enough time to consider the proposals fully: see in that respect Sunbird Business Services Limited [2020] EWHC 2493 (Ch) at [53]-[58], and ALL Scheme Limited [2021] EWHC 1401(Ch) at [102(ii), (xiii) and (ix)] and [134]-[141].

128. I see no reason why these principles that have been developed in relation to schemes should not be applied under Part 26A within an assenting class as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class.

129. However, in my judgment, when considering whether to exercise the court's discretion to impose a plan on a dissenting class under Part 26A, the court cannot simply apply the same rationality test, either (i) as regards the voting within the dissenting class, or (ii) as regards the overall voting across the different classes.

130. On the first point, where there is a dissenting class as defined by section 901G, *ex hypothesi* the court will not have the assurance of an enhanced 75% majority required by section 901F(1) voting in favour of the plan. One possibility (as in the instant case) is that the votes in favour within the dissenting class will constitute a simple majority, but will not have reached the 75% in value required by the statute. Simply applying a rationality test in such a case based on a lesser majority would undermine the importance that Parliament has plainly attached to obtaining the 75% threshold. Alternatively, the dissenting class may actually have voted against the plan. Simply applying a rationality test to that vote would result in the court refusing to sanction the plan. That would also defeat the legislative intention inherent in section 901G that the court should be able to impose a plan on a dissenting class in appropriate circumstances.

131. It is important to appreciate that I am not saying that a judge cannot pay some regard to the fact that a majority, short of the 75% required, voted in favour of a plan in the dissenting class. But the court cannot simply defer to the (inadequate) majority and apply a rationality test. If the court is going to place any weight on this factor, what would be required is an examination, not only of the same issues that are a pre-condition to the application of the rationality test (such as whether those voting in favour were representative of the class, were properly consulted and were not advancing interests extraneous to those of the class), but also of the commercial reasons why the plan might be thought to be in the interests of the dissenting class.

132. The court's approach to the overall levels of voting across the assenting class(es) and the dissenting class(es) must, however, be very different. For the reasons that I have explained, there can be no assumption that the assenting classes that have voted in favour of a plan have any commonality of commercial interests with the dissenting class. Rather, the entire premise for the Part 26A process is that creditors will have been summoned to different class meetings precisely because the differences in their existing and proposed rights under the plan meant that they had insufficient commonality of commercial interests to consider the merits of the plan together. To adapt David Richards J's memorable phrase from Telewest Communications plc (No.1) [2005] BCLC 752 at [40], the creditors will have been placed into separate classes because there is more about the plan that divides than unites them.

133. Given that dissimilarity of interests, the mere fact that one or more classes of creditors may have acted in their own separate interests in voting in favour of the plan says

nothing about the commercial merits of the plan for a dissenting class or the fairness of imposing the plan upon them. Indeed, given that the very premise of Part 26A is that the company is facing financial difficulties and hence may not have sufficient assets to pay everyone in full, the assenting class(es) may have voted overwhelmingly in favour precisely because the plan requires them to accept less risk of loss, or a lower discount on their claims, than the dissenting class.

134. Accordingly, I do not consider that the court can, when deciding whether it is fair to impose a plan upon a dissenting class under Part 26A, apply some form of rationality test based upon the level of voting in an assenting class or classes, or upon the overall value of claims voted in favour of the plan across the assenting and dissenting classes as a whole.

135. At this stage I should address the Judge's legal analysis in this respect, which is relevant to Grounds 2 and 5 of the appeal. As I have indicated above, at [66] of the Judgment, the Judge accepted a submission on behalf of the Plan Company which appeared to incorporate the underlying basis for the rationality test in scheme cases that "creditors are normally the best judges of their own interests" as a basis for concluding that the level of "overall support" for a plan was a relevant factor in the exercise of the court's discretion to impose a plan upon a dissenting class (albeit that the Judge then qualified this by saying that the overall support for a plan was "not [an] important or decisive factor").

136. At [67] the Judge relied in this respect upon the observations of Trower J in ED&F Man Holdings Limited [2022] EWHC 687 (Ch) ("ED&F Man") at [50]. ED&F Man was a case in which Trower J exercised the cross-class cram down jurisdiction, but it is important to note that the sanction application was not opposed, and his judgment was given *ex tempore*. At [48], Trower J accepted that the mere fact that Conditions A and B in section 901G had been satisfied did not create a presumption that the cross-class cram down discretion should be exercised. He then continued,

> "49. In this case there are a number of other factors which have to be taken into account. First, I am satisfied that having regard to the plan meetings, which agreed the plan by the statutory majorities, the conventional approach to sanction a Part 26 scheme would be satisfied in the present case. That this is a relevant factor is now established by the DeepOcean and Virgin Active decisions.
>
> 50. I say that for the following reasons. First of all each meeting of assenting creditors approved the plan by an overwhelming majority. I have already recited what they were. Furthermore, and perhaps more significantly, the total number of creditors who voted to approve the plan amounted to some 84% of plan creditors across all classes. That is a very significant majority.
>
> 51. Secondly, the provisions of the statute were otherwise complied with.

> 52. Thirdly, there is no evidence to indicate that the assenting classes were not fairly represented by those who attended the meeting. This is reflected by the very high turnouts at all of the class meetings. It is also reflected by the fact that there are a material number of creditors and members who had not been involved in the formulation of the plan, whether as members of the Co-Com or otherwise, who have voted in favour of the plan.
>
> 53. Fourthly, there is no indication that any member of the assenting classes acted other than bona fide, and there is no evidence that any of them were coercing those who did not vote in favour in order to promote interests adverse to those of the class whom they represented.
>
> 54. Fifthly, the plan is such as an honest intelligent person might reasonably approve. This is established by the large number of creditors who voted in favour of the plan. It is also reflected by the considered views of the directors of the company who resolved that it was in the best interests of the company, the group as a whole and each of the plan creditors and plan members for the plan to be approved and sanctioned.
>
> 55. So far as numbers alone are concerned, the position is obviously rather different for the dissenting class because the statutory majority was not achieved. Nonetheless, it seems to me that it remains relevant that a significant majority by value, some 69%, voted in favour of the plan, even though the number fell short of the value required by the statute. Taken together with the members of the assenting classes, there is considerable and indeed overwhelming support for the plan."

137. It can be seen from [49] that Trower J's first reference in [50] to the overall support for the plan of 84% of plan creditors across all classes was actually part of the application in [50]-[53] of the conventional Telewest test to the assenting classes of creditors who had voted in favour of the plan by the required majorities. Trower J was not purporting in [50] to consider what conclusions might be drawn from the overall voting for the position of the dissenting class. Trower J's comments in [55] were primarily directed to the level of support for the plan in the dissenting class (69%). His reference in the last sentence to the level of support for the plan in the assenting classes was a passing reference without any further analysis.

138. Accordingly, when Trower J's remarks are put into context, and having regard to the lack of opposition and the fact that the judgment was given *ex tempore*, I do not consider that ED&F Man should be taken as authority for the proposition that the overall level of support for a plan in the assenting classes is a relevant factor that should be taken into account by the court when considering whether it is fair to impose the plan upon the dissenting class.

139. Many of the points that I have made above were well summarised by Adam Johnson J in Great Annual Savings Co Ltd [2023] Bus LR 1163 ("GAS"), a case which was

decided after the Judge's decision in the instant case. The main issue in GAS was whether the court should sanction a Part 26A plan that had been supported by a large number of classes of creditors, but was opposed by HMRC and four other creditors who formed two dissenting classes. The judge found that Condition A - the "no worse off" test – was not satisfied in respect of HMRC, so that he had no jurisdiction to sanction the plan. However, he went on to consider, *obiter*, the exercise of discretion more generally.

140. At [99]-[103], under the heading of "Fairness", Adam Johnson J stated,

> "99. In scheme cases under Part 26, the concept of fairness has a particular role and is tested in a particular way. In short, a rationality test is used as a cross-check of fairness where there has been a majority vote in favour of a scheme by a particular class of creditor. The positive vote is not determinative: the court will also look to the terms of the scheme, in order to assure itself that it is fair to impose it on the dissentient minority. Thus (per David Richards J in Telewest), the court asks whether the scheme is one "that 'an intelligent and honest man, a member of the class concerned and acting in his own interest, might reasonably approve'".
>
> 100. The present context of course is different (see Virgin Active). Where the cram-down power is sought to be invoked, the relevant dissenting class will have voted against the plan, although other classes will have voted in favour. This is not a matter of imposing terms on a dissentient minority whose interests are materially the same as those of the assenting majority: it is a matter of imposing terms on dissenting creditor class whose interests are different to those of the assenting creditor classes.
>
> 101. In some instances, strong overall support for a plan can nonetheless be an important discretionary factor, and if there are *similarities* between the positions of an assenting class and a dissenting class, the vote of the assenting class can help justify the conclusion that the dissenting class *might* rationally have supported the plan, and thus that it is a fair one overall (see Deep Ocean, referenced by Snowden J in Virgin Active at [225]). But much will depend on the circumstances of each individual case.
>
> 102. In the present case, I do not consider that applying the Telewest rationality test to the majority votes of the classes who supported the Plan helps one evaluate its overall fairness, or that the relatively strong overall support for the Plan is of much assistance. For example, as I have noted, nine of the 12 classes who voted in favour of the Plan are classes of out of the money creditors: i.e., creditors who would receive nothing at all in the relevant alternative. Under the Plan, each of them will receive a positive return. That being so, it is entirely rational that they should have supported it: their choice was between getting

> something and getting nothing. In each of their cases, the question posed in Telewest would be answered affirmatively. But in this case that tells one little about the inherent fairness of the Plan and whether it would be right to impose it on a dissenting creditor in a different class with very different interests such as HMRC.
>
> 103. As the parties I think recognised, a more pertinent question to ask in such a case is whether the plan provides a fair distribution of the benefits generated by the restructuring between those classes who have agreed to it and those who have not, notwithstanding that their interests are different …"
>
> (emphasis in original)

141. It will be apparent from my analysis above that I agree with, and endorse, Adam Johnson J's comments in GAS at [99]-[100] and [103]. His observations on the particular facts of the case in [102] also provide a good illustration of the point I have made in [133] above that the fact that assenting classes have voted in favour of a plan for entirely understandable reasons tells you nothing about the fairness of imposing the plan upon dissenting classes whose interests are different.

142. I would, however, not endorse Adam Johnson J's analysis in GAS at [101]. In that paragraph, he suggested that Trower J's decision in Re DeepOcean 1 UK Limited [2021] EWHC 138 (Ch) ("DeepOcean") was authority for the proposition that strong overall support for a plan could be an important discretionary factor, and that if the court could find *similarities* in the position of the assenting classes and the dissenting classes, that might support the view that the dissenting class *might* rationally have supported the plan, and that it was thus a fair one overall. This is a misreading of DeepOcean.

143. In DeepOcean, identical plans were proposed for three companies in the same group (DSC, DO1 and ES), and meetings of classes defined in the same way were convened for each company. These included classes of "Secured Creditors" and "Other Plan Creditors". In the case of two of the companies (DO1 and ES), all classes voted in favour of the plan, either unanimously or by very large majorities well in excess of the required 75%, and so section 901G was not engaged. However, in the case of the third company (DSC), the Other Plan Creditors voted in favour, but not by the required 75% majority.

144. The relevant passage in Trower J's judgment was at [58]-[61],

> "58. As to the weight of votes more generally, more than 99% of all claims against DSC by value voted in favour of the Restructuring Plan. At first blush, this points to the arrangement being one which an intelligent and honest man, acting in respect of his own interests, might reasonably approve. However, the nature of the deal for Secured Creditors was very different from the nature of the deal for Other Plan Creditors and so this is not of great significance in assessing the justice of the Plan for DSC's Plan Creditors as a whole.

> 59. Of greater relevance is an analysis of the voting figures for all three groups of Other Plan Creditors (i.e. those with claims against each of DO1, ES and DSC). The reason for this is that all will receive the same percentage uplift on the liquidation value of their claims against the three different members of the DeepOcean Group ... In that limited sense, they were all concerned with very similar questions at their respective Plan meetings, even though they could not be placed in the same class because their claims were against different debtor companies.
>
> 60. The aggregate of claims by Other Plan Creditors of DO1, ES and DSC present and voting at their respective Plan meetings was just in excess of £4 million. Of these just under 84% voted in favour of the Restructuring Plan, and just over 16% voted against.
>
> 61. It follows that, although the meeting of DSC Other Plan Creditors did not agree the Restructuring Plan because the statutory majority of 75% was not achieved, all other classes of creditor did either unanimously or by a very substantial majority. In my view the majorities taken overall, particularly having regard to the fact that the proposal for the DO1 Other Plan Creditors and the ES Other Plan Creditors were to all intents and purposes the same as those for the DSC Other Plan Creditors, support a conclusion that it was open to an intelligent and honest man to vote in favour of the Restructuring Plan."

145. From [58], it is clear that Trower J was alive to the point that although "at first blush" it might have been thought significant that 99% by value of all creditors voted in favour of the plan in relation to DSC, this was not actually of any significance in assessing what he described as the justice of the plan, because most of those claims by value comprised the claims in the other classes (and in particular the Secured Creditors) who were being offered a very different deal under the plan than the dissenting class of the Other Plan Creditors.

146. The other point Trower J addressed in [58]-[61] was not, as Adam Johnson J mistakenly thought in GAS at [101], a suggestion that similarities existed between the position of the assenting and dissenting classes in DSC. Rather, it was a comparison between the dissenting class of Other Plan Creditors in DSC and the similarly placed but assenting classes of Other Plan Creditors in each of the other two companies, DO1 and ES.

147. DeepOcean therefore provides no support for the proposition that the court should attempt to find "similarities" between the positions of creditors in assenting and dissenting classes in relation to the same company. Indeed, I consider that the exercise envisaged by Adam Johnson J would be misconceived. Creditors should only have been placed into separate voting classes if there were insufficient similarities in their positions, i.e. if there was more that divided than united them. In such circumstances, searching for any component elements of similarity and then trying to identify how the classes might have factored those elements into their decision would be fraught with difficulties, if not impossible.

Vertical and horizontal comparisons

148. Although, for the reasons that I have given, I do not consider that the rationality test derived from scheme cases has any part to play outside a consideration of the appropriateness of a plan within an assenting class, there are other concepts that have been developed in scheme cases and cases involving challenges on the grounds of unfair prejudice to CVAs that can be modified and applied to the question of whether to impose a plan on a dissenting class under Part 26A. These involve what have come to be known as the "vertical comparison" and the "horizontal comparison".

149. These expressions were first used judicially by Etherton J in the context of an unfair prejudice challenge to a CVA in Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch) but have since been adopted in the context of Part 26 and Part 26A. The vertical comparison involves a comparison of the position of the particular class of creditors in question under the restructuring proposal with the position of that same class in the relevant alternative. The horizontal comparison compares the position of the class in question with the position of other creditors or classes of creditors (or members) if the restructuring goes ahead.

150. In relation to schemes, the use of the vertical comparison was explained by David Richards J in T&N Limited [2005] 2 BCLC 488 at [82] under the general heading of "fairness",

> "I find it very difficult to envisage a case where the court would sanction a scheme of arrangement … which was an alternative to a winding up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding up would, in reality be achieved and within an acceptable time-scale."

151. The logic is obvious. If a scheme is proposed as an alternative to a winding up but would be likely to result in a class of creditors being worse off than in a winding up, the decision of the majority in that class to vote in favour could be seen as irrational. It would thus not be fair for the court to impose the scheme upon the dissenting minority. The likely outcome in the alternative winding up thus provides a floor, below which the likely outcome under the scheme should not go.

152. In Part 26A, the vertical comparison finds similar expression in Condition A in section 901G(1) under which the cross-class cram down power is not exercisable unless the court is satisfied that the dissenting class will be no worse off than in the relevant alternative.

153. At [65], the Judge accepted that satisfaction of Condition A was a necessary jurisdictional requirement for cross-class cram down but gave rise to no presumption in favour of sanction. I consider that he was right to do so. As I explained in Virgin Active at [224], once the court is satisfied that Conditions A and B have been met, it must still go on to consider whether to exercise its discretion in light of all the relevant factors and circumstances. That is apparent from the permissive terms of section 901G(2) which refer back to the discretion given to the court under section 901F ("*may* sanction"), and the very clear statement in paragraph [15] of the Explanatory Notes that the court may refuse to sanction a plan even if Conditions A and B are satisfied.

154. If and to the extent that Trower J might be taken to have suggested otherwise in DeepOcean at [48] when he remarked that satisfaction of Conditions A and B would mean that a plan had "a fair wind behind it" when it came to the exercise of discretion, that approach should not be followed. Indeed, as I have indicated above, Trower J subsequently accepted in ED&F Man at [48] that there was "no kind of presumption" that the court should exercise its discretion in favour of sanctioning a plan merely because Conditions A and B have been satisfied.

155. The court is not generally required to make a horizontal comparison between voting classes in scheme cases, because of the particular requirement of Part 26 that all of the classes must have voted in favour before a scheme can be sanctioned. If the rationality test (and its preconditions) is satisfied within each class, the affirmative vote in each class indicates that the different classes of creditors are all content with the allocation of the required compromises and anticipated benefits of the restructuring as between them.

156. The position is very different under Part 26A. Given the inherent nature of the cross-class cram down power which enables the assenting votes of one class to form the basis of imposing a restructuring plan which they approve upon a dissenting class that has not approved the plan, it is obviously appropriate for the court to conduct some form of horizontal comparison when deciding whether to sanction a plan in circumstances in which section 901G is engaged.

157. This point was first made explicitly by Trower J in DeepOcean at [63], when he said,

> "63. In my view, because a class' right of veto is removed by the operation of section 901G, justice may require the court to look at questions of horizontal comparability in the context of a cross-class cram down to see whether a restructuring plan provides for differences in treatment of creditors *inter se*, and if so whether those differences are justified. In particular the court will be concerned to ascertain whether there has been a fair distribution of the benefits of the restructuring (what some commentators have called the "restructuring surplus") between those classes who have agreed the restructuring plan and those who have not."

158. Zacaroli J expanded upon the same point in Houst Limited [2022] EWHC 1941 (Ch) ("Houst") at [29]-[31],

> "29. Finally, an important factor – particularly in considering sanction where the cross-class cram-down power is engaged – is whether the plan provides a fair distribution of the benefits generated [by] the restructuring (or, per Dr. Riz Mokal, the "the restructuring surplus" ...) between those classes who have agreed and those that have not. In DeepOcean (above), Trower J pointed out at [63] that this raises similar issues to the "horizontal comparator" in a company voluntary arrangement. The court is required to see whether the plan provides for differences in treatment of creditors *inter se* and, if so, whether the differences are justified.

> 30. In doing so, a relevant reference point is the treatment of the creditors in the relevant alternative. The court will look to see whether the priority, as among different creditor groups, applicable in the relevant alternative is reflected in the distributions under the plan. A departure from that priority is not in itself, unlike the position in the closest equivalent procedure in United States federal bankruptcy law, the Chapter 11 plan, fatal to the success of the plan. The US Chapter 11 procedure contains an "absolute priority rule" so that, in essence, no junior class should recover until a senior class has recovered in full, and no senior class should recover more than it is owed. As pointed out in a paper published by Sarah Paterson of the London School of Economics (*Judicial Discretion in Part 26A Restructuring Plan Procedures)*, given that consideration was given by the UK government to including a modified form of the absolute priority rule in Part 26A (see also Virgin Active at [289]), its exclusion must be taken to have been deliberate.
>
> 31. In considering whether there has been a fair distribution of the benefits of the restructuring, it may be relevant to take account of the source of the benefits to be received under the restructuring, for example whether they come from the assets of the Company or from third parties willing to support the restructuring: see DeepOcean, at [64]."

159. I agree with both Trower J and Zacaroli J that a key issue for the court in exercising its discretion to impose a plan upon a dissenting class is to identify whether the plan provides for differences in treatment of the different classes of creditors *inter se* and, if so, whether those differences can be justified. I also agree with Zacaroli J that an obvious reference point for this exercise must be the position of the creditors in the relevant alternative.

160. This exercise cannot, however, properly be carried out merely by asking whether any dissenting creditor will be any worse off as a result of the restructuring plan than in the relevant alternative. That would simply be to restate Condition A in section 901G. As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.

161. It is this concept that has been encapsulated in the expression "the fair distribution of the benefits of the restructuring" or "fair distribution of the restructuring surplus": see DeepOcean and Houst (above). To similar effect, in the paper referred to in Houst at [30], Professor Sarah Paterson adopted a dictum of Mann J in the scheme case of Bluebrook Limited [2009] EWHC 2114 (Ch) ("Bluebrook") at [49] and suggested that