TMA NYC - Online Programming Committee

Cross-Border Insolvency Webinar: Adapting Global Strategies to Manage Global Risk

Program Materials

Articles

- <u>Choosing a restructuring venue: weighing US Chapter 11 against Europe's evolving regimes</u>, DiBlasi,
 Benson and Singh (Weil, Gotshal & Manges LLP), 14 November 2025, Global Restructuring Review (GRR)
- TaylorWessing *Latest news & insights Quick Reads*:
 - o <u>Cross-class cram down in action: English Court approves River Island's restructuring</u>, Patterson and Lim, 5 November 2025
 - o <u>English Court approves Poundland's rescue plan despite landlord resistance</u>, Patterson and Jennings, 5 November 2025
 - o <u>Madagascar Oil: different treatment of equal creditors deemed fair in English restructuring plan</u>, O'Grady and Smith, 2 September 2025
 - English Court refuses to sanction Waldorf Production's restructuring plan, O'Grady and Jennings,
 September 2025
 - o <u>UK Court of Appeal overturns Petrofac's restructuring plans due to unfair new money terms</u>, Patterson and Jennings, 9 July 2025
 - English Court of Appeal upholds Thames Water restructuring plan, O'Grady and Chapman, 7 May 2025
 - English Court of Appeal overturns Adler's restructuring plan, Patterson and Fulton-Fleming, 30
 January 2024
- <u>Brazil's restructuring revolution: how legal reforms and global integration are transforming corporate insolvency</u>, Machado, Sanches and Sanchez (Tauil & Chequer Advogados in association with Mayer Brown), 14 November 2025, Global Restructuring Review (GRR)

Court Decisions and Opinions

- In re Odebrecht Engenharia e Construção S.A. Em., 669 B.R. 457 (Bankr. S.D.N.Y. 2025)
- In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., 670 B.R. 150 (Bankr. D. Del. 2025)
- In re Oi S.A., No. 23-10193 (LGB), 2025 WL 2806591 (Bankr. S.D.N.Y. 2025)
- In re Goli Nutrition Inc., No. 24-10438 (LSS), 2024 WL 1748460 (Bankr. D. Del. Apr. 23, 2024)
- Select Judgments, Court of Appeals Civil Division (*United Kingdom*):
 - o In re AGPS Bondco Plc ("Adler") [2024] EWCA Civ 24
 - o In re Thames Water Limited [2025] EWCA Civ 475
 - o In re Petrofac Limited [2025] EWCA Civ 821
- Arrangement relatif à Lion Electric Company, 2025 QCCS 4192 (CanLII)
 [Superior Court Comm. Div., Province of Québec]
- Cleo Energy Corp (Re), 2025 ABKB 621 (CanLII) [Court of King's Bench Alberta]

Electronic and Other Resources

- Imperial Tobacco Canada Limited U.S. Chapter 15 Proceedings (Monitor's Website)
- Goli Nutrition Inc. U.S. Chapter 15 Proceedings (Monitor's Website)



Americas Restructuring Review

2026

Choosing a restructuring venue: weighing US Chapter 11 against Europe's evolving regimes

Americas Restructuring Review

2026

The Americas Restructuring Review is one of GRR's popular regional reviews series. It delivers insight and thought leadership from over 50 authors. This edition covers Bermuda, Brazil, the Cayman Islands, the Dominican Republic, the European Union, Mexico and the United States (in various ways), and has thought-provoking items on holdco instruments, debtor-in-possession financing and the value, internationally, of using Chapter 11 for mediation.

Generated: November 14, 2025

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2025 Law Business Research



Choosing a restructuring venue: weighing US Chapter 11 against Europe's evolving regimes

Kelly DiBlasi, Matt Benson and Sunny Singh

Weil, Gotshal & Manges LLP

Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
INTRODUCTION
US RESTRUCTURING PROCESS
ADVANTAGES OF CHAPTER 11
BINDING FOREIGN CREDITORS IN CHAPTER 11
EUROPEAN RESTRUCTURING PROCESSES
ADVANTAGES OF EUROPEAN RESTRUCTURING PROCESSES
RESTRUCTURING BY ENFORCEMENT
LIABILITY MANAGEMENT EXERCISES IN EUROPE
CONCLUSION
ACKNOWLEDGEMENTS
ENDNOTES

IN SUMMARY

With new developments in European restructuring law, companies in financial distress can choose from a wider array of potential venues to commence a restructuring process. This article focuses on some of the key differences between US Chapter 11 and European restructuring laws, why a company might choose one over the other and the strategic considerations on implementation.

DISCUSSION POINTS

- Advantages of restructuring through a Chapter 11
- · Binding foreign creditors in Chapter 11
- · Advantages of European restructuring processes
- · Restructuring by enforcement in Europe
- · Liability management exercises in Europe

REFERENCED IN THIS ARTICLE

- · Scandinavian Airlines
- · Nordic Aviation
- · Waypoint
- · CHC Helicopters
- · Inversiones Latin America Power Limitada
- EU Directive on Restructuring and Insolvency
- · English Scheme of Arrangement
- · French accelerated safeguard
- · German StaRUG
- · McDermott Group restructuring
- · Galapagos Group restructuring
- · English-law intercreditor agreement

INTRODUCTION

Companies facing insolvency must make a range of strategic decisions. Key among these decisions is the choice of venue. Restructuring regimes in the United States and in Europe each offer distinct advantages that a company must evaluate before commencing a restructuring process.

Over the years, many foreign companies have successfully availed themselves of the US restructuring process. While binding creditors outside of the United States may pose certain challenges, the United States remains a strategic choice for effectuating a restructuring.

However, in recent years, numerous European jurisdictions have introduced restructuring regimes that also present viable alternatives.

This article describes the distinct advantages of key restructuring processes in the United States and Europe and examines recent relevant restructurings in these regions. The jurisdiction in which a company chooses to restructure has many consequences. Therefore, companies must carefully evaluate their options before choosing, designing and launching any restructuring strategy.

US RESTRUCTURING PROCESS

US companies experiencing financial distress often turn to Chapter 11 of the US Bankruptcy Code to fix their balance sheets and operations. Chapter 11 is a court-supervised process that allows a company to reorganise its debts through a court-approved plan of reorganisation while the company continues to operate. However, Chapter 11 is not limited to domestic companies. There are many examples of foreign companies, even those with limited connections to the United States, implementing comprehensive restructurings through Chapter 11. Foreign companies turn to Chapter 11 because of its proven track record and unique features that are not present in comparative bankruptcy regimes. These features, which include (among others) flexible eligibility requirements, the automatic stay and access to debtor-in-possession (DIP) financing, are described in more detail below.

ADVANTAGES OF CHAPTER 11

Broad Eligibility

One of the key features of Chapter 11 attracting foreign debtors is its broad eligibility. Under the US Bankruptcy Code, a company is eligible to file for Chapter 11 if it resides or has a domicile, place of business or property in the United States. Some courts have held that a law firm retainer in a US bank account is sufficient to qualify a foreign company for Chapter 11 eligibility. This low threshold has allowed companies with limited connections to the United States to file Chapter 11.

For example, Scandinavian Airlines (SAS) filed Chapter 11 in July 2022, even though only one of the 14 filing entities was organised under US law and the companies had limited property in the United States. ^[4] Moreover, its funded debt obligations (in excess of US\$1 billion) were governed by non-US law, and its equity traded on a Swedish stock exchange. ^[5] Despite lack of connections to the United States, no one contested the filing, and SAS successfully confirmed its Chapter 11 plan of reorganisation in March 2024. The plan reduced the airline's prepetition debt by approximately US\$2 billion and provided a new money investment from third-party investors totalling US\$1.2 billion. ^[6] Chapter 11 provided SAS with a predictable and trusted forum for a robust, value-maximising reorganisation process with a stay and access to DIP financing to fund the restructuring.

Chapter 11's flexible eligibility threshold allows foreign businesses with multiple entities in need of restructuring to do so in a single proceeding, avoiding multiple filings across various jurisdictions. For example, in CHC Helicopters (CHC), the company's 43 entities were jointly administered in one US Chapter 11 proceeding, ^[7] saving CHC costs and eliminating uncertainty and the risk of inconsistent rulings.

Automatic Stay

Among the most important distinguishing features of Chapter 11 is the automatic stay. Upon filing a Chapter 11 case, the automatic stay immediately goes into effect globally and halts all collection efforts on prepetition claims and attempts to terminate contracts or exercise control over the debtor's property. This allows companies 'breathing room' to reorganise without the distraction and cost of defending against claims and creditors seeking to collect ahead of others. The global automatic stay is generally well respected worldwide and has very limited exceptions. While some other restructuring regimes may allow a company to seek a stay from the court, those regimes do not have a stay that goes into effect automatically, like in Chapter 11. This distinction may be critical when creditors are threatening to take immediate enforcement action.

For example, Nordic Aviation Capital (NAC), an aircraft leasing company headquartered in Ireland, was poised to execute a restructuring support agreement (RSA) with certain creditors but pivoted to a Chapter 11 filing out of concern that non-consenting lenders would exercise remedies upon the expiration of a forbearance period. NAC filed Chapter 11 the day the forbearance period was set to expire. The automatic stay prevented such lenders from exercising remedies and gave the debtors time to finalise negotiations and execute the RSA with consenting creditors. NAC subsequently confirmed its Chapter 11 plan, which implemented the restructuring transactions agreed to in the RSA.

Enforcement of the automatic stay may be limited if the US Bankruptcy Court lacks the authority to enforce any sanction against recalcitrant creditors. A US Bankruptcy Court needs personal jurisdiction over the stay violator to enforce any sanction. Nonetheless, it is rare that a creditor will ignore a US federal court order, especially if the creditor does business or has assets in the United States. For example, in SAS, foreign-based aircraft lessors did not seek to enforce remedies during the Chapter 11 cases despite existing defaults. With the protection of the stay, SAS renegotiated multiple above-market aircraft leases, resulting in approximately US\$98 million of annual cost savings.

'Free And Clear' Sales

Under section 363 of the Bankruptcy Code, a debtor may sell assets 'free and clear' of claims and other interests, including successor liability claims. ^[16] This is attractive to potential buyers who do not want to inherit additional liabilities not assumed under a purchase agreement. It also allows a company to sell assets free and clear of encumbrances, such as a lien, without the lienholder's consent. In such a scenario, the lienholder's interest attaches to the sale proceeds. Section 363 sales can be done quickly and in advance of a Chapter 11 plan, maximising the value of a debtor's estate.

For example, Waypoint, a global helicopter leasing company headquartered in Ireland, effectuated its restructuring through 'free and clear' sales of substantially all of its assets under section 363. [17] After a robust marketing process, Waypoint sold 120 of its aircraft to a third party for total consideration of approximately US\$445 million. [18] Waypoint then closed three additional transactions where it sold the majority of its remaining assets to prepetition secured lenders via credit bids. [19] After the sales closed, Waypoint confirmed a Chapter 11 plan of liquidation, which provided for the distribution of the sale proceeds to creditors and wind down of the remaining entities. [20]

Section 363 of the Bankruptcy Code also provides important protections for buyers. Under section 363(m), once a sale is consummated, it cannot be overturned or unwound on appeal if the sale was to a good-faith purchaser. Section 363 sale orders routinely include findings

of good faith sufficient to cloak the purchaser with section 363(m) protections, which can comfort prospective buyers who may fear purchasing assets in a bankruptcy proceeding. Without this, the potential for appeals could chill the bidding process. Taken together, these protections ensure the debtor receives maximum value for its assets.

DIP Financing

Companies experiencing distress often do not have the cash needed to both fund operations and finance the cost of a restructuring process. Chapter 11 offers a debtor the ability to attract financing (referred to as DIP financing) secured by superpriority claims and priming liens. [21] Without these protections that put lenders in first payment position, lenders would be more hesitant to provide funding to a debtor due to the uncertainty of repayment.

DIP financing may also be a tool to attract new equity investments. Recently, there has been a rise in DIP financings with loan-to-equity conversion features. In *Avianca*, for example, the debtors exercised their right under the DIP credit agreement to convert US\$935 million of DIP loans into at least 72 per cent of the equity of the reorganised business. ^[22] Similarly, the US\$700 million DIP financing in *SAS* included two equity-linked features, with the debtors maintaining the right to terminate these equity rights for a fee. ^[23] The ability to offer lenders potential equity opportunities, coupled with the protections of superpriority status and priming liens, encourages lenders to provide DIP financing, which means Chapter 11 debtors can obtain the capital necessary to continue operating while conducting a restructuring process.

Additional Advantages Of Chapter 11

Chapter 11 has various other advantageous features, including a DIP model, the power to impose cross-class cramdowns and the flexibility to effectuate a quick, surgical restructuring through a 'prepackaged' Chapter 11 case. The bankruptcy court forum itself is also a powerful advantage of Chapter 11; US bankruptcy courts are sophisticated and have well-developed precedent, resulting in certainty and predictability for Chapter 11 debtors and their stakeholders.

Chapter 11 is a DIP model, meaning a debtor's board and management team remain in control during the Chapter 11 case. While appointment of an independent trustee in Chapter 11 is possible, it is rare and usually requires a showing of fraud or gross mismanagement. Chapter 11 debtors also have the exclusive right to file a plan for the first 120 days of the case (which may be extended), which mitigates the risk of a competing plan and keeps a debtor in control of its restructuring. [24]

Furthermore, it is possible to impose a cross-class cramdown under a Chapter 11 plan if the plan is accepted by at least one impaired class, and the plan does not discriminate unfairly and satisfies the absolute priority rule. ^[25] The ability to restructure without unanimous consent gives a debtor leverage in negotiations and the power to bind holdouts.

Finally, while a common criticism of Chapter 11 is that it can be a costly and lengthy process, it is possible to prosecute a Chapter 11 case in a matter of months or even days. In a prepackaged Chapter 11 case, a debtor negotiates and solicits votes on its Chapter 11 plan before filing Chapter 11. This allows a debtor to spend as little time as possible in Chapter 11. For example, Inversiones Latin America Power Limitada, a Chilean company, was only in Chapter 11 for a brisk 43 days. [26] While surgical restructurings are common in European

regimes, a debtor can close a restructuring in a similar time frame by filing a prepackaged Chapter 11 case.

BINDING FOREIGN CREDITORS IN CHAPTER 11

Once a Chapter 11 plan is confirmed, a debtor company may require additional relief to ensure its plan is enforceable against foreign creditors and other stakeholders who may be beyond the reach of the US bankruptcy court's jurisdiction.

There is no one-size-fits-all strategy to bind foreign creditors. Options range from a debtor initiating ancillary proceedings in foreign jurisdictions to taking no further action and relying on creditors' voluntary compliance. Companies should develop a strategy or contingency plan to address this issue prior to entering Chapter 11 as it is vital to the effectiveness of the restructuring and may be necessary to confirm a Chapter 11 plan. [27]

Ancillary Proceedings

SAS is a recent example of a foreign company requiring an ancillary proceeding to implement its Chapter 11 plan. SAS had material creditors and shareholders in Sweden and elsewhere in Europe, including holders of debt governed by non-US law who considered themselves outside the reach of the US court, putting at risk enforceability of its Chapter 11 plan absent further process. [28]

Accordingly, the SAS parent company filed a Swedish company reorganisation to implement the Chapter 11 plan. ^[29] Under the Swedish reorganisation plan, SAS' publicly listed equity was cancelled and other key terms of its restructuring became enforceable in Sweden and other relevant jurisdictions. ^[30]

Recognition Proceedings

In certain scenarios, a foreign court may recognise and enforce the terms of a confirmed Chapter 11 plan. This typically requires the foreign court to find that the debtor company's centre of main interest, or COMI, is in the United States.

For example, in *CHC*, the debtors obtained an order from a Canadian Court recognising CHC's Chapter 11 cases as foreign main proceedings and enforcing CHC's Chapter 11 plan in Canada. [31]

It may also be necessary for a debtor to commence both an ancillary proceeding and a recognition proceeding to implement its Chapter 11 plan. In addition to the Canadian recognition proceedings, after confirmation CHC filed a Cayman Islands liquidation proceeding to implement the plan and cancel the publicly traded equity of the Cayman Islands parent company. [32]

Other Implementation Options

In certain scenarios, it may not be necessary to file additional proceedings to implement a Chapter 11 plan. For example, in *Avianca*, a case involving a Latin America-based airline, the debtors effectuated the cancellation of Avianca's equity by transferring all of the assets of the parent holding company to a new holding company, effectively stranding the existing equity at an empty shell. Equity of the new holding company was then issued to the plan investor. No ancillary proceedings were commenced to implement the restructuring. In other cases, ancillary relief may not be necessary if a substantial portion of the creditors consent or the debtor is comfortable creditors will not violate the Chapter 11 court's orders.

EUROPEAN RESTRUCTURING PROCESSES

The last five years have seen significant development in the legal framework for restructurings in Europe, with many European jurisdictions having introduced their own formal restructuring processes which reflect elements of US Chapter 11. ^[35] The introduction of such processes was partly a policy response by lawmakers to the wave of corporate insolvencies following the covid-19 pandemic in 2020. Action by lawmakers in EU member states was also driven by the EU Directive on Restructuring and Insolvency (the Directive),-^[36] which was approved by the European Parliament prior to the outbreak of the covid-19 pandemic in June 2019. ^[37]

These European processes have been used in high-profile restructurings in recent years, demonstrating their ability to implement complex commercial deals. In certain circumstances, the use of a European process, or several of such processes, may even be preferable to Chapter 11 to implement a cross-border restructuring, as the European processes can accommodate actions that would not be possible in Chapter 11 proceedings.

That said, it is unlikely that European processes will totally displace the use of Chapter 11 in European restructurings. Chapter 11 maintains some key advantages, including providing a sophisticated DIP financing regime, and, subject to recognition, the worldwide automatic stay. The respective advantages and disadvantages of Chapter 11 and European processes, and whether there could be a benefit to using more than one process, needs to be assessed on a case-by-case basis with reference to the particular circumstances of the situation.

ADVANTAGES OF EUROPEAN RESTRUCTURING PROCESSES

While a detailed examination of the European processes is beyond the scope of this article, this section highlights certain aspects of the English scheme of arrangement and restructuring plan, the French accelerated safeguard and the German *StaRUG*, and how these compare to US Chapter 11.

Extension Of Undrawn Commitments

A key advantage of each of these European processes is that they may be used to extend undrawn commitments without the unanimous consent of lenders. Courts in the United Kingdom have held that the extension or rolling of an undrawn revolving credit facility can be effected via a scheme, on the basis that this involves an alteration to existing obligations of creditors. While not tested, this would also likely also be possible in a German <code>StaRUG</code>. In France, because an accelerated safeguard can be used to effect rights and not just claims, it is also possible to extend the maturities of undrawn commitments.

Moreover, in the case of schemes and restructuring plans, it has proven possible to extend other kinds of undrawn financial instruments. A high-profile example is the 2024 restructuring plan in relation to the McDermott Group, a global provider of engineering and construction solutions to the energy industry, headquartered in Houston, Texas. Like other firms in that industry, the McDermott Group relies on letter of credit (LC) facilities, which require the LC issuer to pay a sum to a third party on the happening of certain specified events (eg, a payment to a customer on the failure of the borrower to achieve a designated milestone under a project contract). Going into the restructuring, the McDermott Group had approximately US\$ 1.85 billion of outstanding LCs. The McDermott Group launched an English restructuring plan in 2023 which proposed to, among other things, extend the

maturity of those LC facilities by three years. The restructuring plan was sanctioned by the English High Court of Justice in February 2024.

Third-party Releases

Another key advantage of the English processes is that, unlike Chapter 11, they may be used to effect third-party releases or amendments. ^[43] It is long-established under English law that a scheme can accommodate releases or amendments to non-proprietary claims of creditors against parties other than the company that is the proponent, even if those creditors have voted against the scheme. This also applies to restructuring plans. The principal qualification in either process is that the release or alteration of any claims against third parties must be ancillary to the arrangement between the company and its creditors and be necessary to ensure the effectiveness of such arrangement. ^[44] A typical example of a third-party release under a scheme or restructuring plan is that of guarantee claims against a guarantor of the proponent company.

It is also possible in a scheme or restructuring plan for the proponent company itself to be a guarantor, and for creditor claims against the principal obligor to be altered as third-party claims. In the McDermott Group restructuring plan, which involved an amendment and extension of some US\$2.3 billion of New York-law secured facilities, the Netherlands-incorporated principal obligor did not actually propose the restructuring plan. Rather, the plan proponent in that case was an English-incorporated entity, which had guaranteed the obligations of the principal obligor under a guarantee agreement, with the claims against the primary obligor amended through the plan as third-party amendments. The McDermott Plan also included broad third-party releases of certain contested unsecured claims against other members within the Group.

The German *StaRUG* also allows collateral and guarantees granted by affiliated group entities to be modified or released. This is irrespective of the jurisdiction of the affiliated entity, provided that the *StaRUG* can be recognised in such jurisdictions to prevent enforcement against such entity. The situation in France is different, in that it is not possible to effect non-consensual third-party releases through an accelerated safeguard. In practice, proceedings will often be initiated simultaneously for both the debtor and its guarantors within a group in order to address, within a single restructuring, both the claim and the related guarantees.

Limiting Business Disruption

European processes can also be used to implement a restructuring with relatively limited business disruption. An English scheme can be proposed by any company 'liable to be wound up under the Companies Act', which does not require the company to be experiencing any form of distress. A restructuring plan may be proposed by any such company, provided it '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'; the courts have held that this is a relatively low bar. Neither process involves the appointment of a bankruptcy trustee or equivalent, and neither is considered to be a formal insolvency process under English law. Moreover, it is the prerogative of the company proposing the scheme or plan to choose the creditors to which the compromise or arrangement applies; there is no requirement to deal with the whole balance sheet. As a result, a scheme or plan can be used to address problematic debts in a relatively 'surgical' manner.

In Germany, similarly to the English processes, the *StaRUG* company can select the debt that shall be included in the restructuring and target a specific group of creditors. To be eligible for a *StaRUG*, a company must be facing imminent insolvency. The key condition around the selection of debt is that the restructuring must place the company in a position to emerge as a going concern.

In France, the accelerated safeguard focuses only on financial creditors, leaving suppliers, trade creditors and employees unaffected. A safeguard can also be prepared confidentially, using preliminary steps such as *mandat ad hoc* or conciliation. This allows companies to build creditor support behind closed doors, avoiding the publicity and potential reputational damage that comes with a restructuring filing. Because of this discretion, the French accelerated safeguardis generally viewed as a technical restructuring tool, not as a sign of collapse, and can often be implemented while the company remains solvent.

Implementation Timelines

A further advantage of the European processes is the shorter implementation period relative to a traditional Chapter 11 case. The process and timetable for both schemes and restructuring plans are substantially the same, involving, in summary, notification to affected creditors, a convening hearing, meetings of creditors, and a sanction hearing. The processes can be completed in as little as two months, albeit this can be affected by court availability, challenges and the complexity of the case, with some cases taking 12 to 18 months. Even in the longer cases, schemes and plans generally offer a faster route than Chapter 11.

In Germany, the *StaRUG* typically takes only six to 12 weeks if it is pre-packed and pre-negotiated with the relevant number of creditors. The formal process can be launched by the proponent company by a notification to the competent restructuring court. This notification typically includes a draft restructuring plan, an overview of the current status of negotiations with creditors, and an explanation of the potential impact on consumer claims. The plan must then be submitted to affected creditors at least 14 days prior to the scheduled vote following which the creditors need to vote on the plan in a hearing. If the required majorities are achieved, the court typically confirms the plan on the spot. [54]

In France, the implementation period for an accelerated safeguard procedure is limited to a maximum of four months. The accelerated safeguard itself is typically preceded by an out-of-court process (conciliation), which lasts up to five months, so the entire process is capped at nine months. As a consequence, the cost of such French procedure is also considerably lower than Chapter 11.

Chapter 15 Recognition

Finally, the ability to utilise European processes to effect global restructurings is bolstered by the availability of Chapter 15 recognition in the United States. Chapter 15 of the US Bankruptcy Code permits a representative in a foreign bankruptcy proceeding to apply to have the proceeding recognised in the United States, such that the outcome of the proceeding is binding on creditors as a matter of US law. Chapter 15 recognition has successfully been obtained in respect of French, German and other foreign proceedings, including English schemes and restructuring plans where the English proceedings involved elements that would not have been permitted under Chapter 11. Once again, the McDermott Group restructuring plan provides an illustrative example. As set out above, the McDermott Group restructuring plan involved third-party releases and the extension of LC facilities. After

being sanctioned by the English High Court, the McDermott Group restructuring plan was ultimately recognised and granted enforcement by the US Bankruptcy Court for the Southern District of Texas in March 2024.

RESTRUCTURING BY ENFORCEMENT

Enforcements have also proven an effective implementation route for large-scale European restructurings. European leveraged buy-out (LBO) structures typically involve a European-style English-law intercreditor agreement (ICA), which generally includes a 'distressed disposal' regime. The distressed disposal regime regulates the rights of different creditors following an enforcement or distressed sale, including the waterfall for any sale proceeds. Typically, the distressed disposal regime permits the security agent (on the instructions of the enforcing lenders) to release all security and guarantees, which provides a proven mechanism to both drag any hold-outs into a new capital structure (avoiding any 'stub' debt) and to eliminate out-of-the-money claims.

The approximately €1 billion restructuring of the Galapagos Group in 2019 was implemented via a distressed disposal. [55] In that case, the senior secured noteholders instructed the security agent to enforce share pledges over the Group, which culminated in the sale of the Group to an entity ultimately owned by the Group's sponsor (BidCo). The security agent applied the sale proceeds in accordance with the ICA waterfall and, in accordance with the instructions of the senior secured creditors, released the original debt liabilities and associated security. Importantly, this involved releasing liabilities owed to the holders of junior ranking high-yield notes, notwithstanding that those holders had received zero proceeds from the sale via the ICA waterfall. BidCo was funded by an equity injection from the sponsor and new debt. Senior secured noteholders were entitled to cash proceeds from the sale equal to 90 cent per €1 of the principal amount of the senior secured notes. However, senior secured noteholders could elect to set off their right to payment with their pro rata share of the new debt, which was offered to all participating senior secured holders and included an original issue discount of 10 cent payable only to such holders that participated. [56] Ultimately, a substantial proportion of the senior secured noteholders supported the restructuring and elected to subscribe for their pro rata share of the new debt.

The jurisdiction of the relevant share pledge will inform the particular steps for the enforcement. Certain jurisdictions are considered challenging to conduct a share pledge enforcement, such as France or Germany, whereas others are more enforcement-friendly, such as Luxembourg. In the UK, an enforcement may include a 'pre-packaged administration sale', whereby the enforcing lenders exercise their rights under the share pledge to appoint an insolvency administrator who sells the business to a buyer under pre-agreed terms immediately after their appointment, potentially stranding junior creditors at the holding company level. [57] In the Netherlands, a share pledge can be enforced via a public auction, a private sale with court approval or a private sale with the consent of the pledgor. A private sale with court approval tends to be the preferred method for its efficiency and relative certainty of outcome. [58] Indeed, the recent comprehensive debt and equity recapitalisation of the Selecta Group involved the enforcement of a Dutch share pledge over the Group via a private sale to a newly incorporated company formed by a group of supportive, long-term institutional creditors, court approval for which was obtained in May 2025. [59] Both the Selecta Group and the Galapagos Group restructuring demonstrate the ability of lenders to utilise enforcement to effect a comprehensive restructuring in Europe.

LIABILITY MANAGEMENT EXERCISES IN EUROPE

While yet to reach the same level of prevalence as in the United States, complex US-style liability management exercises (LMEs) continue to gain traction in the European market. There are certain nuances that arise in European LMEs that differ from the typical position in the United States. For example, New York-law governed high-yield bonds issued in Europe typically require 90 per cent of holders to consent to any amendments to 'sacred rights' and 'money rights'. This is different from the standard position in the United States, which typically requires 100 per cent lender consent to amend such rights. 'No payment for consent' clauses are now also typically absent in high-yield bonds in Europe. Set against this, high yield bonds issued in the United States typically allow for releases of guarantees and collateral with 66.66 per cent or 75 per cent consent, whereas the European equivalents generally still require 90 per cent. The effect of these differences in the bond terms is that European LMEs need to be structured differently than in the United States from the outset, often with greater scope for creating incentive structures to achieve the 90 per cent threshold and drag dissenting lenders.

Differences between other European finance documents and their US equivalents also tend to influence the structure of European LMEs. As noted above, European LBO structures typically involve an English-law ICA, which include features absent in New York-law ICAs. For example, common collateral undertakings, sacred rights on ranking of priority and turnover trusts are common features of English-law ICAs, which must be navigated in the context of European LMEs. European-style facility agreements also often differ from their US equivalents in that the obligations thereunder tend to only apply to a designated 'restricted group', such that there is broader scope for non-pro rata buy backs and 'synthetic uptiers'. Additionally, European LBO structures typically exclude a variety of jurisdictions and asset types from the scope of the guarantees and collateral, leaving scope for additional quarantees and pledges to be granted in relation to LMEs.

The structure and steps of a European LME will also be moulded by the nuances of the particular jurisdictions involved. Despite some harmonisation across the EU member states as a result of the Directive, each European jurisdiction has its own legal framework, the nuances of which will be critical to determining the feasibility of certain LME transactions. Local law regarding directors' duties, related-party transactions and clawback claims tend to be especially relevant. It is also common for European LMEs to be 'stapled' to a formal European restructuring process, which may be used to drag dissenting lenders (or threaten the same). These considerations, in addition to the abovementioned differences in contractual terms, mean that the emergent European LME practice will continue to develop its own characteristics, distinct from its US origin.

CONCLUSION

Any large, complex company choosing to restructure should consider the full breadth of venue options available to them. For many companies, their home jurisdiction may not be the most prudent choice of venue. Companies should carefully evaluate the unique advantages and disadvantages of US and European restructuring regimes before pursuing a restructuring transaction.

ACKNOWLEDGEMENTS

The authors would like to acknowledge the contributions of Weil associates Jason George, Austin Crabtree, Peter Hession and Alicia Mortenson.

Endnotes

- 1 Although less common, it is also possible for a company to confirm a plan of liquidation in Chapter 11, typically after conducting a going concern sale of the business and pursuant to which the company's remaining assets (if any) are monetised and the proceeds distributed to creditors. ^ Back to section
- 2 11 U.S.C. § 109(a). ^ Back to section
- 3 In re JPA No. 111 Co., Ltd., No 21-12075, 2022 WL 298428, at *5 (Bankr. S.D.N.Y. Feb. 1, 2022). ^ Back to section
- 4 See Declaration of Erno Hilden Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York (Docket No. 3), *In re SAS AB, et al.*, Case No. 22-20925 (S.D.N.Y. 2022) at 7, 16. <u>ABACK to section</u>
- 5 SAS announces last day of trading in its common shares and commercial hybrids bonds, and confirms previously announced record date, (
 https://www.sasgroup.net/newsroom/press-releases/2024/sas-announces-last-day-of-trading-in-its-common-shares-and-commercial-hybrids-bonds-and-confirms-previously-announced-record-date/).

 Back to section
- 6 See Disclosure Statement for Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and its Subsidiary Debtors (Docket No. 1945), *In re SAS AB, et al.*, Case No. 22-20925 (S.D.N.Y. 2022) at 58−59; Findings of Fact, Conclusions of Law, and Order Confirming Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and its Subsidiary Debtors (Docket No. 2347), *In re SAS AB, et al.*, Case No. 22-20925 (S.D.N.Y. 2022). ↑ Back to section
- 7 See Order Directing Joint Administration of Chapter 11 Cases Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedures (Docket No. 52), *In re CHC Group Ltd.*, et al, Case No. 16-31854 (Bankr. N.D. Tex. 2016). ^ Back to section
- **8** 11 U.S.C. § 362(a). ^ Back to section
- 9 The Irish Examinership also provides for an automatic stay. However, the automatic stay in an Irish Examinership is more limited and only lasts for 70 days (or 100 days, if extended). See International Monetary Fund, 'Ireland: Financial sector Assessment Program -Technical Note on Insolvency and Creditor Rights' (https://www.imf.org/en/Publications/CR/Issues/2022/07/25/Ireland-Financial-Sector-Assessment-Program-Technical-Note-on-Insolvency-and-Creditor-Rights-521264). ^ Back to section
- See Notice of Filing of Modified Disclosure Statement Relating to the Third Amended Joint Chapter 11 Plan of Reorganization of Nordic Aviation Capital Designated Activity Company and its Debtor Affiliates, (Docket No. 536), *In re Nordic Aviation Capital Designated Activity Company, et al.*, Case No. 21-33693 (E.D. Va.. 2021) at 3-5. Backtosection">Backtosection

- 11 Ibid. ^ Back to section
- **12** ibid. ^ Back to section
- 13 See Order Confirming the Third Amended Joint Chapter 11 Plan of Reorganization of Nordic Aviation Capital Designated Company and its Debtor Affiliates (Technical Modifications), (Docket No. 743), Case No. 21-33693 (E.D. Va.. 2021). ^ Back to section
- **14** In re Arcapita Bank B.S.C.(c), 648 B.R. 489, 501 (S.D.N.Y. 2023) ('[P]ersonal jurisdiction has no impact on the applicability of the automatic stay. Rather, the issue of personal jurisdiction goes to the Court's ability to enforce the stay against the party in question, but it does not invalidate the violation itself.') ABack to section
- 15 See Disclosure Statement for Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and its Subsidiary Debtors (Docket No. 1945), *In re SAS AB, et al.*, Case No. 22-20925 (S.D.N.Y. 2022) at 46. ^Back to section
- **16** 11 U.S.C. § 363(f). ^ Back to section
- 17 See Disclosure Statement for Second Amended Modified Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors (Docket No. 819), *In re Waypoint Leasing Holdings Ltd.*, et al., Case No. 18-13648 (S.D.N.Y. 2019) at 28–34. ^ Back to section
- **18** id.at 31. ^ Back to section
- **19** id. at 32-34. ^ Back to section
- 20 id. at 59; Findings of Fact, Conclusions of Law, and Order Confirming Third Amended Chapter 11 Plan of Liquidation of Waypoint Leasing Holdings Ltd. and its Affiliated Debtors, (Docket No. 893), *In re Waypoint Leasing Holdings Ltd.*, et al., Case No. 18-13648 (S.D.N.Y. 2019) at 11. ^ Back to section
- 21 11 U.S.C. § 364. A foreign company must consider the enforceability of priming liens outside the United States. ^ Back to section
- 22 See Notice of Filing of Third Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (Docket No. 2132), *In re Avianca Holdings S.A.*, et al., Case No. 20-11133 (S.D.N.Y. 2020) at 27. ^ Back to section
- 23 See Disclosure Statement for Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and its Subsidiary Debtors (Docket No. 1945), *In re SAS AB, et al.*, Case No. 22-20925 (S.D.N.Y. 2022) at 43–44. ^ Back to section
- **24** 11 U.S.C. § 1121(c). ^ Back to section

- 25 11 U.S.C. § 1129(a)(8), (b). ^ Back to section
- 26 Notice of Entry of Order (A) Approving Disclosure Statement and (B) Confirming Debtors' Joint Prepackaged Chapter 11 Plan and (II) the Plan Effective Date (Docket No. 102), In re Inversiones Latin America Power LTDA., et al., Case No. 23-11891 (S.D.N.Y. 2023).
 Back to section
- 27 To confirm a plan, the Bankruptcy Code requires, among other things, that a plan provide for adequate means for the plan's implementation, 11 U.S.C. § 1123(a)(5), and that confirmation of the plan will not likely be followed by the liquidation or the need for further financial reorganisation of the debtor. 11 U.S.C. § 1129(a)(11). A Back to section
- 28 See Disclosure Statement for Second Amended Joint Chapter 11 Plan of Reorganization of SAS AB and its Subsidiary Debtors (Docket No. 1945), *In re SAS AB, et al.*, Case No. 22-20925 (S.D.N.Y. 2022), 100, 145. ^ Back to section
- 29 SAS AB's plan of reorganisation in Sweden approved applies for a conditional delisting of all common shares and commercial hybrid bonds, (https://www.sasgroup.net/newsroom/press-releases/2024/sas-abs-plan-of-reorganization-in-sweden-approved-applies-for-a-conditional-delisting-of-all-common-shares-and-commercial-hybrid-bonds/). ^ Back to section
- **30** ibid. ^ Back to section
- 31 See Order Made After Application (Recognition of U.S. Bankruptcy Court Orders) (14 Mar 2017), *Application of CHC Group Ltd. Under Section 46 of the Companies' Creditors Arrangement Act*, No. S-16709, (BCSC). ^ Back to section
- 32 See Revised Disclosure Statement for the Second Amended Joint Chapter 11 Plan of CHC Group Ltd. and its Affiliated Debtors, (Docket No. 1379), *In re. CHC Group Ltd. et al.*, Case No. 16-31854 (N.D. Tex. 2016); see also 'Weil navigates helicopter company through Cayman uncertainties as part of global restructuring', (https://eurorestructuring.weil.com/cross-border/weil-navigates-helicopter-company-cayman-uncertainties-part-global-restructuring/). ^ Back to section
- 33 See Notice of Filing of Third Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (Docket No. 2132), *In re Avianca Holdings S.A.*, *et al.*, Case No. 20-11133 (S.D.N.Y. 2020) at 58−60; See Notice of Filing of Plan Supplement (Docket No. 2385), *In re Avianca Holdings S.A.*, *et al.*, Case No. 20-11133 (S.D.N.Y. 2020) at Exhibit A at 1−6. △ Back to section
- **34** ibid. ^ Back to section

- 35 Restructuring processes introduced or expanded in the preceding five years include, among others, the English restructuring plan (2020), the Dutch wet homologatie onderhands akkoord (WHOA)-scheme (2021), the French accelerated sauvegarde accélérée (safeguard) (2021), and the German Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen) (StaRUG) (2021). ^ Back to section
- 36 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. ^ Back to section
- 37 The Directive was aimed at harmonising the restructuring framework across the EU and required member states to, among other things, introduce preventative restructuring procedures by mid-July 2021, with the ability for member states to avail themselves of a one-year extension in certain circumstances. ^ Back to section
- 38 As discussed above, the effectiveness of the Chapter 11 worldwide involves questions of the jurisdiction of the US bankruptcy courts and the local law of the jurisdiction in which the stay is purported to have effect; however, in practice, it at least provides a powerful disincentive against enforcement by creditors with some US nexus. ^ Back to section
- **39** See: *Re Apcoa Parking Holdings GmbH* [2015] Bus LR 374, [167] and *Re Premier Oil plc* [2020] CSOH 39, [110] to [114]. ^ <u>Back to section</u>
- **40** While a debt haircut or an interest rate deduction could not be imposed for an undrawn commitment, ancillary provisions can be amended. Although this has not yet been tested, it seems more likely than not that this would permit the extension of the maturity of an undrawn commitment. ^ Back to section
- 41 The scope of modifications to rights that can be made under an accelerated safeguard plan is very broad. The *Devialet* case, approved by the Tribunal des activités économiques de Paris on 8 April 2025, involved amendments to the company's bylaws and shareholders' agreement. ^ Back to section
- **42** Weil advised the ad hoc group of supporting sub-participant lenders in relation to the restructuring. ^ Back to section
- **43** The recent ruling by the Supreme Court in *Harrington v Purdue Pharma, L.P.*, 603 U.S. 204 confirms that the Bankruptcy Code does not permit non-consensual third-party releases. ^ Back to section
- 44 Re Gategroup Guarantee Ltd [2021] BCC 549, [163] (Gategroup). ^ Back to section

- **45** A parallel Dutch scheme (*WHOA*) was launched by the primary obligor in the Netherlands to ensure that the compromise under the English restructuring plan would be effective as a matter of Dutch law. ^ Back to section
- **46** Indeed, schemes are often utilised to effect non-distressed, public M&A transactions in the UK. ^ Back to section
- 47 See: Hurricane Energy PLC [2021] EWHC 1759 (Ch). ^ Back to section
- 48 The statutory framework for schemes and restructuring plans is contained in the Companies Act 2006, rather than the Insolvency Act 1986, which contains the framework for English-law insolvency processes, including administration and liquidation. It has, however, been held that a restructuring plan constitutes a bankruptcy process for the purposes of the Lugano Convention: see *Gategroup* at [91] and [100] to [103]. ^ Back to section
- **49** Subject to the disclosure obligations applicable to listed companies, which require public communication as soon as confidentiality can no longer be maintained, something that often occurs when a large number of creditors are involved in the discussions. ^ Back to section
- **50** Typically, the company will issue a 'practice statement letter' to affected creditors setting out the objectives of the scheme or plan and notifying them of the company's intention to apply to the court for directions to convene meetings of creditors. ^ Back to section
- 51 The purpose of the convening hearing is for the court to consider whether it has jurisdiction to sanction the plan or scheme and hear any challenges in respect of the same. If so satisfied, the court may give orders to convene meetings of creditors. ^ Back to section
- Where there are multiple classes, a separate meeting will be held for each creditor class. Creditors will vote on the scheme or plan at the meetings. ^ Back to section
- 53 The purpose of the sanction hearing is for the court to consider whether to exercise its discretion to sanction the scheme or plan as approved by creditors. In contested cases, this sanction hearing may occur over multiple days. ^ Back to section
- 54 Albeit the decision may subsequently be appealed. ^ Back to section
- 55 Members of the Weil London restructuring team represented the ad hoc group of senior secured noteholders, which drove the implementation of the lender-led restructuring solution in this case. A comprehensive summary of the restructuring and subsequent litigation is available here. ^ Back to section
- 56 In the ensuing litigation, the English High Court held that this set-off satisfied the cash consideration requirement in the ICA. ^ Back to section

- 57 Administrators are subject to various duties under English law and need to satisfy themselves that the sale is in the best interests of creditors. Market testing is usually undertaken prior to their appointment to ensure the pre-agreed sale price is the best achievable in the circumstances. ^ Back to section
- **58** The key consideration for the court is whether the sale will achieve the highest possible value for the shares. Credit bidding is not prohibited. <u>A Back to section</u>
- **59** Weil advised an ad hoc group of first lien noteholders in relation to the restructuring. For more information, see our announcement here. ^ Back to section



Kelly DiBlasi
Matt Benson
Sunny Singh

kelly.diblasi@weil.com matt.benson@weil.com sunny.singh@weil.com

767 Fifth Avenue, New York, NY 10153, United States

https://www.weil.com/

Read more from this firm on GRR

Taylor Wessing quick read articles

November 2025



Restructuring & Insolvency

Contents

Cross-class cram down in action: English Court approves River Island's restructuring	3
English Court approves Poundland's rescue plan despite landlord resistance	4
Madagascar Oil: different treatment of equal creditors deemed fair in English restructuring plan	6
English Court refuses to sanction Waldorf Production's restructuring plan	8
UK Court of Appeal overturns Petrofac's restructuring plans due to unfair new money terms	9
English Court of Appeal upholds Thames Water restructuring plan	11
English Court of Appeal overturns Adler's restructuring plan	12
Contacts	15

Cross-class cram down in action: English Court approves River Island's restructuring

5 November 2025 | Amy Patterson, Fedellis Le Ying Lim

The English High Court has given the green light to River Island's restructuring plan (RP) – the first of two recent decisions focused on extensive leasehold restructuring (see our alert on <u>Poundland</u>, for the second decision).

Background

River Island, a well-known UK fashion retailer faced severe financial difficulties due to increased costs, reduced in-store sales and high rent payments.

River Island's RP sought to extend the maturity date of existing facilities, provide new funding, close 33 unprofitable stores and amend lease terms for 71 viable stores. Some landlord creditor classes weren't happy with the proposals and voted against the RP.

Decision

The Court started by confirming that the two threshold requirements for cram down were met: no creditor was worse off than in the relevant alternative (receiving 200% of estimated administration returns); and at least one 'in the money' class approved the RP (including certain landlords).

Applying the guidance from the Court of Appeal's decisions in <u>Adler</u>, <u>Thames Water</u> and <u>Petrofac</u>, the Court then exercised its discretion to sanction the RP and cram down dissenting landlord creditors. Here's what convinced the Court:

- **Genuine restructuring:** The RP represented a real attempt to bridge a funding gap whilst the company worked through its operational restructuring.
- Rational methodology: Any different treatment of landlords was from a carefully applied rational methodology.
- **Market-beating terms:** The 'rescue' funding was on more favourable terms than River Island could have secured in the open market.
- **Fair distribution:** The RP was a fair sharing of the benefits and burdens between the creditors. Notably, this was one of the first cases to use a 'Plan Benefits Report' a tool that demonstrated the treatment of dissenting classes was not out of line with assenting classes.

Re River Island Holdings Ltd [2025] EWHC 2276 (Ch)

English Court approves Poundland's rescue plan despite landlord resistance

5 November 2025 | Amy Patterson, Louise Jennings

On 24 October 2025, the English High Court gave its reasons for sanctioning a restructuring plan (RP) for Poundland Limited, the discount retailer.

Poundland operates about 800 stores and employs 14,600 people. The company's expansion had been unsuccessful, with additional costs eroding profits. By the August 2025 hearing, Poundland was facing imminent insolvency.

Financial and leasehold restructuring

- After a competitive sales process, Poundland was sold to Peach Bidco (a Gordon Brothers company), for £1 subject to implementation of the RP.
- Poundland's parent company Pepco wrote off £245 million in loans for a 30% stake, contributing approximately £327 million.
- Peach injected £95 million, with Gordon Brothers providing specialist turnaround expertise at no cost.
- Landlords with profitable stores received full or near-full rent, those with over-rented stores, received rent
 reductions, nil rent or lease termination, 471 leases were compromised. All landlords retained 'break
 rights' to exit if better opportunities arose.

Sanction

Despite all but one landlord class voting against the RP, the court used its 'cram down' powers to impose it, finding landlords would receive better returns than in the relevant alternative, administration (a 170% uplift on the Estimated Return plus the prospect of a profit share), and at least one 'in the money' class approved the RP.

The judge applied the same guiding principles summarised in the River Island case (see our <u>alert</u>).

Key takeaways

- **Engagement counts:** The judge recognised the serious attempts of Poundland to engage with its landlords, who didn't appear at the sanction hearing. The company can't be expected to argue the case for absent dissenting creditors.
- Differential treatment had a rational basis: The treatment of landlords reflected their contribution to the business's future success. The puzzling opposition from unimpaired landlords suggested factors like block voting influenced the results.
- Fair allocation of benefits: The expert 'Allocation of Benefits Report' (only the second such report the court had seen) demonstrated no fundamental unfairness. Overall voting showed more support than opposition and the court was satisfied the plan represented a genuine attempt at a fair solution with no unfair allocation of benefits.

Re Poundland Limited [2025] EWHC 2755 (Ch)

Madagascar Oil: different treatment of equal creditors deemed fair in English restructuring plan

2 September 2025 | Stephen O'Grady, Natalie Smith

In one of the first restructuring plan judgments since the Court of Appeal's decision in *Petrofac* (see our alert <u>here</u>) the claims of two equal creditors were given different treatment under the plan, with one used to cram down the other.

Background

Madagascar Oil Ltd (MOL) is an intermediary holding company with a majority shareholding in Madagascar Oil S.A. (MOSA). The ultimate parent company of the group is BMK Resources Limited (BMK), one of two plan creditors, alongside Outrider Master Fund LLP (Outrider).

The plan was proposed to restructure MOL's debt so that MOSA may restart oil production at a site in Madagascar.

The plan

Under the plan, BMK would provide US\$7.5 million of new capital and would retain its equity in MOL and its US\$600 million intercompany loan. Outrider's debt would be written off in full and it could choose either an upfront cash payment of US\$200,000 or a yearly payment of 1.25% of MOSA's net revenue for 12 years.

Outrider asserted that the plan:

- was unfair
- left it "worse off"
- was a means to avoid the group's liability to Outrider and stifle insolvency proceedings against MOL.

Decision

The court held that the relevant alternative to the plan was a liquidation of MOL. BMK was an "*in the money*" creditor consenting to the plan, and Outrider's suggestion that it would be worse off under the plan was rejected.

Although the question of fairness was more complex, Outrider's potential revenue being dependent on unpredictable factors, the court was satisfied that BMK intended to improve the position of MOSA and that its forecasts were realistic.

The court sanctioned the plan, using its discretion to cram down the dissenting Outrider class.

Key takeaways

- This judgment highlights the challenges facing dissenting creditors holding out for "a better deal".
- Different treatment of creditors with equal footing can still be seen as fair.
- Unlike in *Petrofac*, the court did not insist that MOL evidence that the new money was on market terms, but the argument was only raised by Outrider at a late stage.

Re Madagascar Oil Limited [2025] EWHC 2129 (Ch)

English Court refuses to sanction Waldorf Production's restructuring plan

2 September 2025 | Stephen O'Grady, Louise Jennings

The High Court has refused to exercise its discretion to cram down dissenting unsecured creditors and approve Waldorf Production UK Plc's (Waldorf) restructuring plan finding it unfair to unsecured creditors.

Background

Waldorf, an oil and gas enterprise, faced serious financial difficulties partly due to paying an enormous dividend in October 2022. The parties to the plan were secured bondholders and unsecured creditors, Capricorn Energy and HMRC (UK tax authority). The company proposed giving unsecured creditors only 5% of what they were owed, while bondholders would just extend the maturity of the bonds for two years.

Decision

The court held that the company failed to prove the restructuring plan was fair and appropriate. The judge considered the trilogy of Court of Appeal restructuring plan judgments (see our alerts on <u>Adler</u>, <u>Thames</u> <u>Water</u> and <u>Petrofac</u>) on how the courts should use their power to cram down dissenting creditors. The court noted these cases reject the approach in *Re Virgin Active* that the views of "out of the money" can be disregarded.

The judge found the company had not attempted proper negotiations and had wrongly assumed it could offer minimal payments to unsecured creditors rather than what they might fairly and reasonably have negotiated.

Key takeaways

- "Out of the money" creditors cannot be ignored and given only tiny payments.
- There is no "precondition of negotiation" but it will be more difficult to prove the restructuring plan is fair where negotiations have not taken place.
- The judge encouraged further negotiations between all parties to reach an agreed solution, suggesting a revised plan could proceed quickly with court support.
- The company has requested permission to make a 'leapfrog' application to appeal this decision directly to the UK Supreme Court.

Re Waldorf Production UK plc [2025] EWHC 2181 (Ch)

UK Court of Appeal overturns Petrofac's restructuring plans due to unfair new money terms

9 July 2025 | Amy Patterson, Louise Jennings

The UK Court of Appeal has overturned the High Court's sanction of Petrofac's restructuring plans which compromised the international oil and gas services company's US\$4 billion in debts. This is the third restructuring plan to come before the Court of Appeal (see our alerts on the other two, <u>Adler</u> and <u>Thames Water</u>).

Grounds of appeal

Saipem and Samsung, two major creditors, appealed the High Court's approval of the Petrofac plans on two grounds:

- "No Worse Off" condition: they would be "worse off" under the plans when considering indirect benefits they would gain from Petrofac's liquidation, such as reduced competition in the market.
- Fairness and discretion: the restructuring benefits were not fairly shared between creditors. The new investors would receive over two-thirds of the restructured company's equity, representing a 211% return on their investment.

Decision

The Court of Appeal rejected the first ground of appeal, confirming that the "no worse off" test focuses on creditors' rights rather than broader economic consequences.

The Court allowed the second ground, that the restructuring benefits generated by the plan were not fairly shared between creditors. The Court criticised Petrofac for failing to provide expert evidence on market rates for funding a restructured company and for not properly testing the market. It found that the original judge had focused on the wrong question - assessing pre-restructuring risks rather than what funding would cost for the debt-free restructured company.

Key takeaways

This landmark judgment is the first to consider the fair share of post-restructuring benefits between creditors (including those who are "out of the money" in the relevant alternative) and establishes that:

- Companies must justify terms offered to new investors by demonstrating they reflect genuine market costs.
- Courts will scrutinise whether "new money" providers are receiving disproportionate returns compared to the value they contribute to the restructuring.
- Companies cannot simply rely on pre-restructuring financial distress to justify generous terms to new investors.

This ruling will likely require greater market testing and expert evidence in future restructuring cases, adding to the costs of a process which is prohibitively expensive for all but the largest companies.

We await to see whether permission is sought to appeal this judgment to the Supreme Court.

Saipem and others -v- Petrofac [2025] EWCA Civ 821

English Court of Appeal upholds Thames Water restructuring plan

7 May 2025 | Stephen O'Grady, Becky Chapman

On 15 April 2025, the English Court of Appeal gave its reasons for dismissing an appeal against an interim £3 billion restructuring plan for British utility company, Thames Water, avoiding a special administration of the company.

Background

The interim plan, sanctioned by the High Court (using its cross-class cram down powers) (see our <u>Alert</u>), provides the company with new funding to allow it to avoid insolvency and continue vital public services whilst a second restructuring plan is negotiated to take place by September 2025.

Certain junior and subordinated creditors and a Member of Parliament appealed against the sanction of the plan on grounds that it was unfair and not in the public interest.

Decision

The appeal was dismissed subject to a minor amendment to the plan to exclude releases of potential claims against directors and advisers by insolvency officeholders/special administrators.

Key takeaways

The Court of Appeal clarified a number of issues:

- 'Out of the money' creditors: can't always be disregarded when considering a restructuring plan's overall fairness.
- Benefits preserved or generated by the restructuring: can be non-monetary such as here, by preserving the company as a going concern.
- **Third party releases:** can be part of a restructuring plan if they are necessary to enable its implementation.
- **Public interest:** it is not for the court to consider if a plan or special administration will better serve the public interest.

The Thames Water decision highlights the flexibility of restructuring plans and cautions that guidance from previous cases may not always apply.

Companies looking to restructure should seek early advice on a plan, allow sufficient time for negotiations and for the court to consider any challenge, the Court of Appeal noted that the judge in this case had been put under unacceptable time pressure.

Kington S.A.R.L., Thames Water and another -v- Thames Water Utilities Holdings and others [2025] EWCA Civ 475

English Court of Appeal overturns Adler's restructuring plan

30 January 2024 | Amy Patterson, Kirsten Fulton-Fleming

On 23 January 2024, the Court of Appeal overturned the High Court's sanction of Adler Group's (Adler) restructuring plan (the Plan) (see our <u>alert</u>). This much anticipated judgment provides clarity on the court's discretion to sanction a plan where there are dissenting classes of creditors.

Background

The Plan envisaged:

- the subordination of the various series of noteholders to new money creditors as well as to the notes due to mature in 2024 (which were extended to 2025), but otherwise preserved the existing noteholders' maturity dates
- a wind down by the end of 2026 of the group's business and its assets sold to pay all of its debts in full.

An ad hoc group of holders of the 2029 notes (AHG) appealed the sanction of the Plan on grounds that, amongst other things, the Plan violated the *pari passu* principle.

Key takeaways

Pari passu principle

The Court of Appeal held that by preserving the maturity dates, the Plan, without good reason or justification, did not apply the *pari passu* principle of distribution which would have applied to the notes in an immediate liquidation (the agreed "relevant alternative" to the Plan) in which all noteholders would rank equally as unsecured creditors, meaning that creditors with later maturity dates bore more risk under the Plan. The security given to the 2024 notes was also in breach of the *pari passu* principle, but this was justifiable because of the postponement of the maturity date for the 2024 notes.

Court's discretion to sanction

When considering whether to exercise the court's discretion to impose a restructuring plan on a dissenting class by cross-class cram down (CCCD), satisfaction of the statutory conditions:

- "Condition A" the dissenting class will be "no worse off" than in the relevant alternative (vertical comparison), and
- "Condition B" that there is an assenting class with a genuine economic interest,

does not create a presumption in favour of CCCD. The court should compare the position of the class in question with the position of other classes of creditors (or members) if the restructuring goes ahead (horizontal comparison). Any differences in treatment of the different classes must be justified on a proper basis.

Is a better plan available?

The parties could have produced a fairer plan that eliminated the different treatment of the different series of notes by agreeing to harmonise the dates. The Judge had wrongly concluded that he did not need to inquire as to whether the Plan could have been fairer or could have been improved. Where CCCD is being proposed, the court is required to consider whether a different allocation of value would have been possible and if an alternative arrangement would have been fairer.

Treatment of shareholders

Retention of equity by existing shareholders was not unfair and the principle of *pari passu* distribution of assets in an insolvency does not require the shareholders of a company to forfeit their shares. Under the relevant alternative of liquidation, there would be no distribution to shareholders until all creditors have been paid which was reflected under the Plan.

Fairness and overall support for the plan

The Court of Appeal said that reliance upon the overall level of voting across all classes of creditors should not be considered in deciding whether it is fair or appropriate to cram down a dissenting class. Given that creditors are categorised into classes because they have *insufficient commonality* of interests to consider the merits of a plan together, by definition the views of the assenting class(es) cannot influence whether a plan is fair to or in the commercial interests of the dissenting class(es).

Consequently, the approach to fairness applied in relation to schemes and/or assenting classes which simply requires an assessment of rationality and the court considering the question of whether it is a scheme that "an intelligent and honest man.... might reasonably approve" does not apply in a CCCD context. Rather the court needs to consider the underlying commercial factors.

Conduct of proceedings

The Court of Appeal commented on a number of procedural points:

- Timing: initiating restructuring plan proceedings as soon as is reasonably practicable to allow sufficient time. The English courts will decide cases quickly to assist companies in urgent financial difficulties but this should not be abused. A restructuring involving foreseeable events such as the expiry of maturity dates must allow sufficient time for the proper conduct of contested proceedings or face being adjourned.
- Provision of information: providing clear information to creditors with regard to differential treatment and
 risks involved is critical. Adler's Explanatory Statement did not explain the impact that preserving the
 maturity dates would have on different creditors such that the court could place limited weight on the
 support by any of the 2029 noteholders.

What happens next?

Adler <u>announced</u> that it considers the "...amendments to the terms and conditions of its bonds remain in full force in accordance with German law". Members of the AHG have brought proceedings in Germany seeking declaratory relief that the issuer substitution carried out to enable the English court to exercise jurisdiction in respect of the Plan was invalid. These proceedings were stayed pending the outcome of the English appeal but may now be pursued.

In the meantime, the implications of the judgment will be felt on future restructuring plans looking to implement CCCD, not least given the revised framework for assessing fairness which differs to that used for schemes or within assenting creditor classes.

Find out more

To discuss the issues raised in this article in more detail, please contact a member of our Restructuring & Insolvency team

Contacts



Amy Patterson
Partner
+44 207 300 4867
a.patterson@taylorwessing.com



Stephen O'Grady Partner +44 207 300 4668 s.ogrady@taylorwessing.com



Nick Moser Partner +44 207 300 4866 n.moser@taylorwessing.com



Jordan Cooper Senior Associate +44 20 3077 7471 j.cooper@taylorwessing.com



Kirsten Fulton-Fleming Senior Associate +44 207 300 4206 k.fulton-fleming@taylorwessing.com



Associate +44 20 3077 7469 r.chapman@taylorwessing.com



Huguette Craggs Associate+44 203 077 7412
h.craggs@taylorwessing.com



Louise Jennings Senior Knowledge Lawyer +44 207 300 7025 lo.jennings@taylorwessing.com



Fedellis Le Ying Lim Trainee Solicitor +44 20 3077 7222 le.lim@taylorwessing.com

2650+ people1250+ lawyers350+ partners26 offices16 jurisdictions

Argentina*	Buenos Aires	Ireland	Dublin
Austria	Vienna	Italy**	Milan Rome
Belgium	Brussels	Mexico*	Mexico City
Brazil*	Belo Horizonte Brasilia Rio de	Netherlands	Amsterdam Eindhoven
	Janeiro São Paulo	Nicaragua*	Managua
Chile*	Santiago de Chile	Panama*	Panama City
China	Beijing Shanghai	Peru*	Lima
Colombia*	Bogotá Bogotá, main office	Poland	Warsaw
Costa Rica*	Guanacaste San José	Portugal*	Braga Lisbon Porto
Czech Republic	Brno Prague	Puerto Rico*	San Juan
Dominican	Santo Domingo	Slovakia	Bratislava
Republic*	_'	South Korea***	Seoul
Ecuador*	Cuenca Guayaquil Manta Quito	Spain*	Barcelona Canary Islands
El Salvador*	San Salvador		Madrid Pamplona Seville
France	Paris	111	Valencia Vitoria Zaragoza
		UAE	Dubai
Germany	Berlin Düsseldorf Frankfurt Hamburg Munich	Ukraine	Kyiv
Guatemala*	Guatemala	United Kingdom	Cambridge Liverpool London
			Uruguay
Honduras*	San Pedro Sula Tegucigalpa	Uruguay*	New York San Francisco
Hungary	Budapest	USA	

Powered by our strategic alliances: with: *ECIJA and **Orsingher Ortu. ***In association with DR & AJU LLC

© Taylor Wessing LLP 2025

Taylor Wessing statistics published are correct as of 1 April 2025.

This publication is not intended to constitute legal advice. Taylor Wessing entities operate under one brand but are legally distinct, either being or affiliated to a member of Taylor Wessing Verein. Taylor Wessing Verein does not itself provide services. Further information can be found on our regulatory page at:



Americas Restructuring Review

2026

Brazil's restructuring revolution: how legal reforms and global integration are transforming corporate insolvency

Americas Restructuring Review

2026

The Americas Restructuring Review is one of GRR's popular regional reviews series. It delivers insight and thought leadership from over 50 authors. This edition covers Bermuda, Brazil, the Cayman Islands, the Dominican Republic, the European Union, Mexico and the United States (in various ways), and has thought-provoking items on holdco instruments, debtor-in-possession financing and the value, internationally, of using Chapter 11 for mediation.

Generated: November 17, 2025

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2025 Law Business Research



Brazil's restructuring revolution: how legal reforms and global integration are transforming corporate insolvency

Liv Machado Fallet, Aline Sanches and Nathan Sanchez

Tauil & Chequer Advogados in association with Mayer Brown

Summary

IN SUMMARY

DISCUSSION POINTS

REFERENCED IN THIS ARTICLE

BRAZIL'S EVOLVING CROSS-BORDER INSOLVENCY FRAMEWORK: US INFLUENCES AND THE PATH TO RECOGNITION OF FOREIGN PROCEEDINGS

DEBTOR-IN-POSSESSION FINANCING IN BRAZIL: FUNCTIONAL ADOPTION OF A COMMON LAW INNOVATION

PRE-FILING PRECAUTIONARY RELIEF: THE NEED FOR URGENCY PROTECTIONS

CONCLUSION: BRAZIL'S FUNCTIONAL CONVERGENCE WITH INTERNATIONAL RESTRUCTURING STANDARDS

IN SUMMARY

In recent years, Brazil has seen an increasing overlap between its domestic insolvency regime and the influence of cross-border legal frameworks, particularly that of the United States.

While these cases are diverse, they share a common thread: the growing recognition that cross-border insolvency mechanisms are relevant and often necessary for complex, globally integrated companies. As Brazil continues to refine its insolvency framework and its courts demonstrate increasing openness to international cooperation, the influence of US legislation on Brazilian corporate restructuring will likely expand.

Brazil has recently undertaken reforms that align its insolvency regime more closely with international standards, particularly through the adoption of cross-border mechanisms based on the UNCITRAL Model Law and the US Bankruptcy Code. Courts are beginning to apply these provisions, while also experimenting with innovations such as debtor-in-possession financing and precautionary measures prior to filing. These developments mark a functional convergence with global restructuring standards and enhance Brazil's position as a hub for multinational reorganisations.

DISCUSSION POINTS

- Brazil's evolving cross-border insolvency framework: US influences and the path to recognition of foreign proceedings
- The *Mercon* case
- Post-petition financing: adoption of debtor-in-possession (DIP) financing models
- Pre-filing precautionary relief measures in Brazilian restructurings
- Increasing openness of Brazilian courts to international cooperation and court-to-court dialogue
- Implications for creditors, investors and multinational groups operating in Brazil

REFERENCED IN THIS ARTICLE

- Federal Law No. 11,101, Brazilian Bankruptcy Law
- Federal Law No. 14,112/2020, amended to Brazilian Bankruptcy Law
- UNCITRAL Model Law on Cross-Border Insolvency
- · US Bankruptcy Code
- · Brazilian Code of Civil Procedure
- Mercon Group Chapter 11 (US Bankruptcy Court, Southern District of New York)
- Recognition of Mercon Chapter 11 in Brazil, 3rd Civil Court of Varginha, Minas Gerais
- · Judicial reorganisation cases: Oi S.A., Americanas S.A. and OEC Group

BRAZIL'S EVOLVING CROSS-BORDER INSOLVENCY FRAMEWORK: US INFLUENCES AND THE PATH TO RECOGNITION OF FOREIGN PROCEEDINGS

Since the enactment of Federal Law No. 11,101/2005 (the Brazilian Bankruptcy Law), Brazil's corporate insolvency regime has undergone steady evolution. The most transformative development was brought by Federal Law No. 14,112/2020, which significantly amended the Bankruptcy Law. A central innovation was the introduction of Chapter VI-A, providing a comprehensive framework for cross-border insolvency and enabling judicial cooperation between Brazilian and foreign courts.

This legislative reform has aligned Brazil with international best practice, particularly the UNCITRAL Model Law on Cross-Border Insolvency, which served as the blueprint for the new provisions. The amended statute now sets out procedures for the recognition of foreign insolvency proceedings in Brazil and promotes more direct and efficient cross-border communication.

Alongside these domestic reforms, Brazilian restructuring practice has increasingly interacted with other legal systems. The acceleration of global trade and investment has reshaped insolvency law, highlighting the challenges of fragmented national regimes with divergent procedures, creditor hierarchies and jurisdictional rules. These conflicts often produced uncertainty and inefficiency in asset recovery and creditor coordination.

Brazil took a decisive step towards alignment in 2020 by amending its Bankruptcy Law to incorporate the Model Law's principles in Chapter VI-A (articles 167-A to 167-X).

The reform marked a milestone in Brazil's legal modernisation providing for the recognition of foreign proceedings as either foreign main or foreign non-main, depending on the debtor's centre of main interests (COMI), as defined in article 167-J.

Article 167-D further specifies that jurisdiction for recognition requests lies with the court where the debtor maintains its principal place of business in Brazil, a standard echoing US jurisprudence on COMI. Meanwhile, article 167-P dispenses with formal procedures such as letters rogatory, expressly authorising direct communication between Brazilian judges and foreign courts or insolvency representatives. This innovation greatly expedites cross-border coordination.

The law also levels the playing field for international stakeholders by granting non-Brazilian creditors the same substantive rights as domestic creditors. This provision not only aligns with international best practice but also signals Brazil's potential to become a creditor-friendly jurisdiction in global restructurings.

Although still in its early stages, the framework has already begun to shape case law. Courts are now setting important precedents that will define how Brazil's approach to cross-border insolvency operates in practice.

The Mercon Case

One of the first landmark applications of Brazil's new cross-border insolvency regime concerned the recognition of the Mercon Group's Chapter 11 proceedings in the United States, involving more than 362 million reais in debt. While recognition was granted, the Brazilian court emphasised that its effects would be aligned with the domestic framework of judicial reorganisation, thereby maintaining symmetry with Brazil's insolvency protections.

In December 2023, Mercon Coffee Corporation, acting as the foreign representative appointed by the US Bankruptcy Court for the Southern District of New York, filed a request with the 3rd Civil Court of Varginha, Minas Gerais, seeking recognition of the US Chapter 11 as the foreign main proceeding in Brazil. The petition was grounded in articles 167-H and following of Law No. 11,101/2005, as amended by Law No. 14,112/2020, which incorporated the UNCITRAL Model Law on Cross-Border Insolvency into the Brazilian legal system.

The request sought the automatic measures set forth in article 167-M of the Bankruptcy Law: suspension of enforcement proceedings and asset seizures involving Mercon Brasil, ineffectiveness of unauthorised transfers or encumbrances of non-current assets, and suspension of limitation periods for enforcement actions. The Brazilian court granted emergency relief, recognising the US proceeding as the main proceeding on the basis that the Mercon Group's COMI was located in the United States, where strategic decisions and core economic activity were concentrated.

Challenges Raised By Creditor Banks

Banco ABC and Banco Santander filed motions for clarification, arguing that the court should have made an analysis of article 167-M(3) of the Brazilian Bankruptcy Law. They maintained that their claims arose from an advance of foreign exchange contracts (*Adiantamento sobre Contrato de Câmbio*, (ACC)), which under article 49(4) are not affected by the judicial reorganisation. On this basis, they argued that the stay period could not affect their rights, particularly given that Mercon had allegedly misclassified such debts as ordinary bank loans.

The 3rd Civil Court partially granted the motions. It acknowledged that exchange agreements are indeed excluded from the Brazilian judicial reorganisation but stressed that this exclusion could not be applied in isolation, detached from the broader framework of cross-border cooperation. The court emphasised that interpretation must respect principles of international cooperation, uniformity of decisions and good faith, so as not to undermine the effectiveness of the foreign main proceeding.

Accordingly, it ruled that while claims arising from exchange agreements are excluded from Brazilian judicial reorganisation, this does not automatically entitle creditors to pursue unilateral enforcement in Brazil. Any such measures would require submission to the Brazilian court in coordination with the US court, at least during the stay period. Moreover, the court noted that only the principal amount advanced under such agreements is excluded, while ancillary charges such as interest, penalties and monetary correction may still fall within the scope of the reorganisation.

Appeal Before The Court Of Appeal Of Minas Gerais

Mercon Coffee Corporation filed an appeal to the State Court of Justice of Minas Gerais, arguing that the bankruptcy court's partial decision unduly restricted the effects of the stay ordered by the US Chapter 11 court, jeopardising the uniformity of the proceeding.

The State Court of Appeals of Minas Gerais partially upheld the appeal. It held that, in light of the reforms introduced by Law No. 14,112/2020, provisions on cross-border insolvency must be interpreted systemically and in accordance with the principles of cooperation and preservation of the enterprise. Although exchange agreement claims remain excluded from judicial reorganisation, the court determined that enforcement actions against assets essential to the debtor's continuity must be suspended, ensuring the effectiveness of the foreign main proceeding.

Insights And Implications

The recognition of Mercon's Chapter 11 in Brazil ensured the effectiveness of the foreign proceeding and prevented isolated creditors from disrupting the restructuring process. The banks' motions highlighted a tension between statutory creditor protections and the need for cross-border coherence. The decisions of both the lower court and the appellate court demonstrate an effort to reconcile these interests while aligning Brazil's practice with international standards.

This case also signals a growing receptiveness within Brazilian courts to harmonise with US restructuring models, particularly in adopting elements such as: (1) court-to-court cooperation; (2) unified treatment of creditors; and (3) debtor protections similar to the automatic stay.

Looking ahead, the *Mercon* precedent suggests that Brazil is likely to have: (1) greater procedural efficiency in global restructurings involving Brazilian assets; (2) improved asset recovery prospects for foreign creditors; and (3) enhanced predictability for investors in distressed assets.

By integrating elements of both Chapter 11 and Chapter 15, Brazil's reformed insolvency regime strengthens its credibility as a forum for complex multinational restructurings.

DEBTOR-IN-POSSESSION FINANCING IN BRAZIL: FUNCTIONAL ADOPTION OF A COMMON LAW INNOVATION

One of the defining features of the US Chapter 11 regime is the availability of debtor-in-possession (DIP) financing – a mechanism that allows companies in reorganisation to obtain new liquidity during the pendency of proceedings. In practice, DIP financing is often secured by superpriority status or liens over unencumbered assets, ensuring that lenders are repaid before almost all other creditors. This tool is widely considered a cornerstone of successful reorganisations in the United States, as it enables debtors to maintain operations, protect jobs and preserve the value of their businesses while negotiations with creditors unfold.

Until recently, Brazil lacked a statutory regime capable of providing similar assurance to lenders. Post-petition credit was possible in theory, but it suffered from uncertainty regarding its ranking in the payment waterfall and the enforceability of collateral granted during judicial reorganisation. As a result, debtors frequently faced acute liquidity shortages, and investors were reluctant to commit new funds without robust guarantees.

Federal Law No. 14,112/2020, which amended the Brazilian Bankruptcy Law (Law No. 11,101/2005), partially closed this gap. The reform introduced article 84, item I-A, granting priority to obligations incurred during the course of judicial reorganisation. These so-called *extraconcursal* claims are excluded from the restructuring plan and receive superpriority status in the event of liquidation. Moreover, the statute authorises such obligations to be secured by assets of the estate, even those already encumbered, subject to court approval and creditor consent where required.

Although Brazilian law does not expressly refer to these mechanisms as DIP financing, the functional equivalence is undeniable. They provide a pathway for debtors to obtain fresh capital during restructuring and offer investors a degree of security comparable to that available in common law jurisdictions. Recent practice has confirmed the viability of such

arrangements, with courts increasingly authorising debtors to raise capital under judicial supervision. In most cases, the judicial administrator plays a central role in monitoring compliance and ensuring that financing serves legitimate purposes, such as maintaining operations, safeguarding jobs and preserving enterprise value.

The convergence with international standards is significant. For the first time, distressed investors and restructuring professionals have a framework that enhances predictability in post-petition financing. This shift makes Brazil a more attractive jurisdiction for global funds and banks seeking opportunities in distressed assets. Nevertheless, challenges remain.

First, the Brazilian market lacks a deep pool of specialised DIP lenders. While in the United States hedge funds, private equity firms and investment banks actively compete to provide Chapter 11 financing, in Brazil most debtors still rely on negotiations with existing creditors or commercial banks, which tend to adopt a conservative approach. This limits the bargaining power of debtors and can drive up financing costs.

Second, judicial discretion remains a double-edged sword. Although court approval is necessary to prevent abuse, it can also introduce delay and unpredictability. Creditors often resist encumbrances over previously pledged assets, particularly in cases involving secured lending or fiduciary assignments. Courts must balance the immediate liquidity needs of debtors with the preservation of creditor rights, a task that has generated divergent outcomes in recent case law.

Third, there is still debate about the precise contours of priority. While article 84, item I-A establishes preferential ranking, questions remain as to whether DIP lenders would retain their priority in the event of conversion from reorganisation to bankruptcy, or if certain categories of pre-existing creditors might successfully challenge their treatment. These uncertainties may deter more aggressive investment strategies.

Despite these limitations, practice is evolving. In high-profile restructurings such as Oi and LATAM, debtors explored mechanisms similar to DIP financing, often relying on pre-existing creditor groups to provide bridge loans secured by assets or receivables. Although not always labelled as DIP, these financings reflected the growing demand for structured liquidity solutions. More recently, smaller Brazilian companies have tested the boundaries of article 84, item I-A by seeking judicial authorisation for post-petition loans tied to operational cash flows, with courts demonstrating a willingness to approve them where critical to business continuity.

The Oi Case: A Turning Point For Post-petition Financing In Brazil

The most emblematic example of DIP financing in Brazil is the restructuring of Oi S.A., one of the largest telecommunications groups in Latin America. When Oi filed for judicial reorganisation, it was the largest proceeding of its kind in Brazilian history, involving more than 65 billion reais in debt and thousands of creditors spread across multiple jurisdictions.

From the outset, Oi faced a liquidity crisis. While negotiations with creditors were ongoing, the company needed substantial working capital to maintain its operations, continue servicing its vast customer base and preserve the value of its telecom infrastructure. Without immediate financing, the reorganisation would likely have collapsed, triggering a disorderly liquidation.

To address this, Oi sought court authorisation to obtain new credit during the pendency of the judicial reorganisation. The financing was structured through bridge loans provided

largely by existing creditors, with security interests over specific assets of the group. The court approved these financings, granting them *extraconcursal* (non-impaired) treatment and recognising the essential nature of the liquidity injection.

The *Oi* case illustrated several critical dimensions of DIP financing in Brazil:

- Judicial discretion and pragmatism: the Rio de Janeiro court overseeing the Oi restructuring adopted a pragmatic approach, recognising that without fresh capital the reorganisation would fail. This judicial willingness to accommodate post-petition financing even in the absence of an explicit statutory framework was a decisive factor in preserving Oi as a going concern.
- Creditor resistance and negotiation dynamics: some creditor groups initially resisted
 the granting of new security interests, arguing that it diluted existing guarantees and
 could unfairly prejudice their recovery prospects. The court balanced these concerns
 by ensuring transparency and requiring close supervision of disbursements, but the
 debates revealed the tension between protecting legacy creditors and attracting new
 money.

The Oi restructuring thus served as a functional pilot project for DIP financing in Brazil and the economic substance of the transactions mirrored the logic of US Chapter 11: providing superpriority capital to ensure operational continuity and maximise recoveries for creditors as a whole.

Current Challenges And Future Prospects

Looking forward, Brazil is likely to experience gradual institutionalisation of DIP-style financing. As jurisprudence matures, creditors and debtors will gain greater clarity about permissible structures and the scope of superpriority protections. In parallel, international funds may become more active providers of restructuring capital, particularly if they can syndicate risk or obtain co-investment opportunities with local banks.

At a policy level, further refinements to the Bankruptcy Law may be needed to align Brazilian practice even more closely with global standards. One possibility is the introduction of explicit statutory recognition of DIP financing, with clearer rules on superpriority status and the ability to prime existing secured creditors under strict conditions. Such reforms would help establish Brazil as a jurisdiction capable of supporting complex, multinational restructurings that require substantial new capital injections.

For now, the Brazilian approach represents a pragmatic adaptation of common law principles to a civil law environment. Rather than adopting the US model wholesale, lawmakers and courts have chosen a functional convergence: transplanting the economic logic of DIP financing while embedding it within Brazil's more formalistic judicial tradition. This hybrid approach reflects both the opportunities and constraints of the Brazilian legal landscape. It is not yet a fully liberalised DIP market, but it marks a decisive step towards modernisation, signalling to international investors that Brazil is prepared to accommodate the demands of contemporary restructuring practice.

PRE-FILING PRECAUTIONARY RELIEF: THE NEED FOR URGENCY PROTECTIONS

A third and increasingly relevant development in Brazil's restructuring ecosystem is the use of precautionary or interim measures prior to the formal filing of judicial or extrajudicial reorganisation petitions.

Although such mechanisms were not expressly provided for in the original wording of the Brazilian Bankruptcy Law (Law No. 11,101/2005), they had long been recognised through a creative and pragmatic application of the Brazilian Code of Civil Procedure, which authorises judges to grant urgent relief when two elements are present: the plausibility of the right and the risk of imminent harm.

One of the most significant innovations brought by the 2020 reform of the Bankruptcy Law (Federal Law No. 14,112/2020) was the express inclusion of pre-filing precautionary relief in insolvency proceedings. Article 20-B, item IV, together with section 1 of Law No. 11,101/2005 now authorises debtors to request urgent protective measures before filing a judicial reorganisation petition.

This amendment consolidated what had already been an emerging judicial practice in Brazil. For years, debtors and practitioners relied on Code of Civil Procedure-based arguments to secure urgent relief, but the lack of a clear statutory basis often generated litigation and procedural uncertainty. The reform eliminated this ambiguity, expressly granting courts the power to stabilise a debtor's financial and operational situation in the critical pre-filing window.

Under article 20-B, IV and section 1, the court may grant precautionary measures for up to 30 days, allowing the debtor to prepare the documentation required for a reorganisation petition, negotiate with creditors, and safeguard essential assets or contracts. If the debtor files for judicial or extrajudicial reorganisation within this period, the protective measures are automatically extended and integrated into the reorganisation case.

This mechanism mirrors the rationale behind the automatic stay under US Chapter 11, though it operates in a civil law framework. It provides breathing space for distressed companies, preventing a 'rush to enforcement' by creditors and allowing the debtor to enter reorganisation proceedings in a more orderly and structured manner.

This judicial flexibility has enabled companies in financial distress to request protective measures in advance of a formal restructuring filing, thereby avoiding value-destroying enforcement actions by creditors and stabilising their operations. In functional terms, this innovation mirrors strategies observed in common law jurisdictions, particularly: (1) the automatic stay under US Chapter 11, which halts creditor actions immediately upon filing and (2) injunctive relief available under Rule 65 of the US Federal Rules of Civil Procedure.

Brazilian courts have increasingly accepted the legitimacy of these measures, recognising them as an essential tool for ensuring an orderly transition into judicial reorganisation.

The range of relief measures has varied depending on the circumstances, but common orders include: (1) suspension of imminent enforcement proceedings, anticipating the effects of the stay period; (2) preservation of essential commercial contracts, particularly supply and service agreements critical to ongoing operations; (3) judicial orders preventing asset seizures or acceleration of debt obligations; and (4) protection of bank accounts and operational cash flows until the filing is completed.

These measures provide companies with the necessary breathing space to negotiate with creditors and prepare a comprehensive restructuring plan while avoiding the dismemberment of their businesses through piecemeal enforcement.

Perhaps the most significant innovation in this area is the development of injunction reliefs, which are legal actions filed independently, but in anticipation of a judicial reorganisation or extrajudicial request. Through this procedural pathway, companies can secure urgent protection while they finalise the documentation required for a formal filing, negotiate with key creditors or arrange interim financing.

To justify such relief, Brazilian courts have required a well-substantiated factual narrative, typically including: (1) preliminary financial statements; (2) a description of the debtor's restructuring strategy; (3) evidence of creditor pressure or imminent enforcement risks; and (4) demonstration of good faith and intent to file for reorganisation within a reasonable time frame.

The case law shows a tendency towards pragmatism: courts balance the need to protect debtors against abusive creditor enforcement with the duty to safeguard the interests of the creditor body as a whole.

Practical Applications: Americanas And OEC

Recent high-profile cases confirm that pre-filing precautionary relief is no longer an exception but is gradually becoming the rule of best practice in Brazilian restructuring.

In January 2023, the widely publicised crisis of Lojas Americanas S.A. provided a vivid example. Shortly before formally filing for judicial reorganisation, the company obtained precautionary relief from the 4th Business Court of Rio de Janeiro, suspending enforcement actions and protecting bank accounts from immediate attachment. The injunction created the necessary breathing space for the company to stabilise operations, negotiate emergency financing and prepare what would become one of the largest judicial reorganisations ever filed in Brazil. Without such relief, creditor enforcement could have triggered a disorderly collapse before the restructuring even began.

Similarly, in the restructuring of Odebrecht Engenharia e Construção (OEC), precautionary relief was sought in advance of the reorganisation filing to prevent the acceleration of debts and preserve strategic contracts. The court's willingness to entertain such requests underscored a recognition that value destruction during the pre-filing window can compromise the feasibility of any subsequent restructuring effort.

These precedents illustrate an emerging trend: major insolvency proceedings in Brazil are increasingly preceded by a phase of precautionary relief. By doing so, companies ensure operational continuity, create space for negotiation and preserve enterprise value, while creditors gain assurance that the restructuring will unfold in an orderly and judicially supervised process.

As Brazil continues to refine its insolvency framework, it is reasonable to expect that antecedent precautionary measures will become an institutionalised first step in large corporate restructurings – mirroring, in functional terms, the immediate protections afforded by the automatic stay in US Chapter 11.

CONCLUSION: BRAZIL'S FUNCTIONAL CONVERGENCE WITH INTERNATIONAL RESTRUCTURING STANDARDS

The evolution of Brazilian insolvency law through the incorporation of the UNCITRAL Model Law, the functional adoption of DIP financing and the growing acceptance of pre-filing precautionary relief illustrates a strategic convergence with global best practices. While

rooted in civil law tradition, Brazil's courts and lawmakers have shown willingness to adapt, innovate and borrow from the functional logic of common law systems.

Three features stand out: (1) judicial pragmatism – Brazilian courts have crafted solutions not explicitly foreseen in the statute, ensuring debtor protection and system stability; (2) cross-border coordination – reforms and precedents (such as in the *Mercon* case) highlight a growing commitment to international cooperation; and (3) market responsiveness – the system is increasingly attractive to distressed investors, creditors and multinational groups seeking predictable restructuring outcomes.

Rather than a wholesale transplant of foreign models, Brazil's reforms represent a functional adaptation, balancing domestic legal culture with international expectations. If consolidated through further case law and legislative refinement, these innovations will become institutional pillars of Brazilian restructuring law, reinforcing the country's position as a credible and sophisticated forum for complex multinational insolvencies.

TAUIL CHEQUER MAYER BROWN

Liv Machado Fallet
Aline Sanches
Nathan Sanchez

Imachado@mayerbrown.com asanches@mayerbrown.com nsanchez@mayerbrown.com

https://www.tauilchequer.com.br/pt

Read more from this firm on GRR

669 B.R. 457 United States Bankruptcy Court, S.D. New York.

IN RE: ODEBRECHT ENGENHARIA E
CONSTRUÇ[O S.A. - EM RECUPERAÇ[O
JUDICIAL, et al., Debtors in a Foreign
Proceeding.

Case No. 25-10482 (MG) | | Signed April 21, 2025

Synopsis

Background: Foreign representative of Brazilian debtors filed motion seeking recognition of debtors' Brazilian judicial reorganization proceeding as foreign main proceeding and enforcement of related reorganization plan in the United States. United States Trustee (UST) objected to the extent language in proposed recognition order provided additional relief, including exculpation of certain non-debtor parties and injunction that UST argued constituted an impermissible nonconsensual third-party release.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

- [1] under Chapter 15, courts are not limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization;
- the Court would approve enforcement mechanism of proposed order that prevented disgruntled creditors who were bound by debtors' Brazilian plan from suing in the United States to recover on claims that were barred by the plan;
- [3] the Court would approve the proposed order's exculpation provision; and
- [4] as a matter of first impression for the court, assuming arguendo that subject paragraph of order created a nonconsensual third-party release, the Court had the power to issue such order in support of a foreign proceeding, pursuant to at least its power under the section of the

Bankruptcy Code outlining the discretionary relief a court may order upon recognition of a foreign proceeding.

Objections overruled; motion granted.

Procedural Posture(s): Motion for Recognition as Foreign Main or Nonmain Proceedings.

West Headnotes (28)

Bankruptcy Cases Ancillary to Foreign Proceedings

Although Chapter 15 of the Bankruptcy Code, based on the Model Law on Cross-Border Insolvency proposed by the United Nations Commission on International Trade Law, replaced the section of the Code setting forth the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries, many of the principles underlying that section remain in effect under Chapter 15, including the principles of comity and cooperation with foreign courts in deciding whether to grant foreign representative additional post-recognition relief. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. § 1501 et seq.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Bankruptcy court's discretion to order recognition of foreign proceeding is exceedingly broad, since court may grant "any appropriate relief" that would further purposes of Chapter 15 and protect debtor's assets and the interests of creditors. 11 U.S.C.A. § 1521(a).

2 Cases that cite this headnote

Bankruptcy Cases Ancillary to Foreign Proceedings

To determine what relief could fall under catchall "additional relief" language in the section of the Bankruptcy Court outlining the discretionary relief a court may order upon recognition of a foreign proceeding, courts look to relief available under the now-deleted section of the Code setting forth the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. § 1521(a)(7).

1 Case that cites this headnote

Bankruptcy Cases Ancillary to Foreign Proceedings

Relief under the section of the Bankruptcy Court outlining the discretionary relief a court may order upon recognition of a foreign proceeding will be granted only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C.A. §§ 1521, 1522(a).

2 Cases that cite this headnote

Bankruptcy Cases Ancillary to Foreign Proceedings

Section of the Bankruptcy Code governing additional assistance the court may provide if recognition of a foreign proceeding is granted provides additional discretionary grounds for the court to grant relief to a foreign representative. 11 U.S.C.A. § 1507.

Bankruptcy—Cases Ancillary to Foreign Proceedings

Public policy exception to Chapter 15, providing that a bankruptcy court may decline to grant relief requested in a Chapter 15 case if the action would be manifestly contrary to the public policy of the United States, is narrowly construed. 11 U.S.C.A. § 1506.

Bankruptcy Settlement, adjustment, or enforcement of claims

Exculpation provisions in a Chapter 11 plan are designed to insulate court-supervised fiduciaries and some other parties from claims that are based on actions that relate to a debtor's restructuring.

Bankruptcy Settlement, adjustment, or enforcement of claims

Exculpation clause approved at confirmation of a Chapter 11 plan may exculpate estate fiduciaries like a committee, its members, and estate professionals for their actions in the bankruptcy case, except where those actions amount to willful misconduct or gross negligence.

Bankruptcy Settlement, adjustment, or enforcement of claims

Exculpation provisions in Chapter 11 plans are "not uncommon" and are generally permissible so long as they are properly limited and not overly broad.

Bankruptcy Settlement, adjustment, or enforcement of claims

A proper exculpation provision in a Chapter 11 plan is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions; in absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that court authorized them to do and that court decided were reasonable things to do.

Bankruptcy Settlement, adjustment, or enforcement of claims

In the Chapter 11 context, exculpated parties who are not estate fiduciaries generally are entitled to benefit from a broad exculpation provision where they have been actively involved in all aspects of the cases and have made significant contributions to the success of the cases.

Bankruptcy Settlement, adjustment, or enforcement of claims

In determining whether to approve exculpation provisions in Chapter 11 plans, among factors that courts consider are whether the beneficiaries of the exculpation participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Under Chapter 15 of the Bankruptcy Code, courts, despite being ancillaries to foreign proceedings, are not limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization; although there are limitations to courts' discretionary powers under Chapter 15, they are

not obligated to grant only that relief which is similar or parallel to that granted abroad or specified in the plan at issue. 11 U.S.C.A. §§ 1507, 1521.

Bankruptcy Cases Ancillary to Foreign Proceedings

Under the expansive grant of power in the section of the Bankruptcy Code governing "additional assistance" the court may provide if recognition of a foreign proceeding is granted, even if a court cannot grant relief under the "additional relief" language in the catch-all subsection of the section of the Code outlining the discretionary relief a court may order upon recognition, the court may grant relief under the "additional assistance" section. 11 U.S.C.A. §§ 1507, 1521(a)(7).

Bankruptcy←Cases Ancillary to Foreign Proceedings

When a bankruptcy court is determining what relief to grant to a foreign representative upon recognition of a foreign proceeding, the drafters of Chapter 15 referenced principles of comity as limiting factors, rather than foreign rulings or even the availability of relief under foreign law. 11 U.S.C.A. §§ 1507, 1521.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Bankruptcy Court, on motion by foreign representative of Brazilian debtors seeking recognition of debtors' Brazilian judicial reorganization proceeding as foreign main and enforcement of proceeding related reorganization plan in the United States, would approve enforcement mechanism in proposed recognition order that prevented disgruntled creditors who were bound by debtors' Brazilian plan from suing in the United States to recover on claims that were barred by the plan, despite United States Trustee's (UST) objection that the provision provided relief beyond the scope provided by the Brazilian confirmation order and plan; granting the requested relief to the foreign representative was in furtherance of comity, as it enabled the full enforcement of debtors' plan by closing the door to potential workarounds to the plan. 11 U.S.C.A. § 1521.

[17] Courts Decisions in other circuits

Courts in the Southern District of New York are not bound by the analytical approach taken in a Fifth Circuit case.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Bankruptcy Settlement, adjustment, or enforcement of claims

Courts can provide exculpations in Chapter 15 proceedings to the same extent they can in Chapter 11 cases, so long as the exculpation is not contrary to United States public policy. 11 U.S.C.A. §§ 1506, 1507, 1521.

Bankruptcy Cases Ancillary to Foreign Proceedings

Bankruptcy Settlement, adjustment, or enforcement of claims

Exculpation provision in Chapter 15 debtors' proposed recognition order complied with requirements placed on exculpation provisions in Chapter 11 cases, and so would be approved by the Bankruptcy Court over United States Trustee's (UST) objection, where exculpated parties were indenture trustee of certain notes cancelled pursuant to debtors' Brazilian plan, custodians of those notes, and clearing system involved with effectuation of plan, those parties were clearly essential to implementation of plan, which was being supervised by Brazilian court, there was no indication in the record that exculpated parties acted in anything but good faith, it was uncontested that cancellation of subject notes was a central part of plan and that absent cooperation of exculpated parties the notes could not be cancelled, and so order's exculpation provision was integral to recognition and enforcement of plan. 11 U.S.C.A. §§ 1507, 1521.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Given that, in Chapter 11 context, estate fiduciaries are entitled to exculpation when they have been actively involved in bankruptcy proceeding and made significant contributions to

its success, and when exculpation applies to court-supervised and-approved transactions, although negligence and willful gross misconduct must be excluded from scope of exculpation provision, the logical analogue in the Chapter 15 context is exculpation of parties who have been actively involved in the foreign restructuring, and who are exculpated for behavior relating to court-supervised and approved transactions, whether those transactions are supervised in the United States or abroad.

Bankruptcy Cases Ancillary to Foreign Proceedings

Assuming arguendo that paragraph of proposed recognition order barring actions within territorial jurisdiction of United States that contravened relief provided in foreign debtors' Brazilian plan and confirmation order created a nonconsensual third-party release, Bankruptcy Court had power to issue such order, pursuant to at least its power under section of Bankruptcy Code outlining the discretionary relief court may order upon recognition of foreign proceeding; although Harrington v. Purdue Pharma, 144 S.Ct. 2071, prohibited nonconsensual third-party releases in Chapter 11 plans, Court wielded significantly more power under subject section of Chapter 15, whose plain text authorized it to grant "any" appropriate relief available to a trustee, than under Code provision at issue in Purdue, release enabled just treatment of all claimants and was not contrary to public policy of United States, and pre-Purdue caselaw as well as that under Chapter 15's predecessor supported Court's reading. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. §§ 1123(b), 1506, 1521, 1522(a).

Bankruptcy Cases Ancillary to Foreign Proceedings

Where subsections of section of the Bankruptcy Court outlining the discretionary relief a court may order upon recognition of a foreign proceeding do not expressly authorize the relief requested in a Chapter 15 case, to determine whether the relief can be considered "appropriate relief" under that section of the Code, court must first examine plain language of section, after which it looks at caselaw from Chapter 15's

statutory predecessor. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. § 1521(a).

Bankruptcy Cases Ancillary to Foreign Proceedings

Under section of the Bankruptcy Code permitting court to grant relief pursuant to Code section outlining the discretionary relief a court may order upon recognition of a foreign proceeding only if the interests of creditors, the debtor, and other interested entities are "sufficiently protected," term "sufficient protection" embodies three basic principles: the just treatment of all holders of claims against the bankruptcy estate, the protection of United States claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding, and the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by United States law. 11 U.S.C.A. §§ 1521, 1522(a).

1 Case that cites this headnote

Bankruptcy Settlement, adjustment, or enforcement of claims

Bankruptcy Code does not provide bankruptcy courts, in Chapter 11 cases, with the authority to authorize nonconsensual third-party releases. 11 U.S.C.A. § 1123(b).

Bankruptcy←Cases Ancillary to Foreign Proceedings

A party can lose rights in an ancillary proceeding under Chapter 15 which it otherwise would have had in a plenary case under the Bankruptcy Code.

Bankruptcy Cases Ancillary to Foreign Proceedings

In an ancillary proceeding under Chapter 15, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and do not contravene the laws or public policy of the United States. 11 U.S.C.A. § 1506.

Bankruptcy→Cases Ancillary to Foreign Proceedings

Bankruptcy courts, acting as ancillaries to

foreign proceedings, may extinguish claims that would be available in plenary actions in the United States in the name of comity.

Bankruptcy→Cases Ancillary to Foreign Proceedings

Bankruptcy courts, pursuant to the section of the Bankruptcy Code outlining the discretionary relief court may order upon recognition of a foreign proceeding, may issue orders pursuant to their discretionary powers which contain nonconsensual third-party releases, whether or not those releases originate from a foreign court. 11 U.S.C.A. § 1521.

Attorneys and Law Firms

*461 CLEARY GOTTLIEB STEEN & HAMILTON LLP, Attorneys for the Foreign Representative of Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial and affiliated debtors, One Liberty Plaza, New York, New York 10006, By: Luke A. Barefoot, Esq., Thomas S. Kessler, Esq.

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, Alexander Hamilton Custom House, One Bowling Green, Room 534, New York, NY 10004, By: Greg M. Zipes, Esq.

MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION OF FOREIGN MAIN PROCEEDINGS AND OVERRULING UST OBJECTIONS

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

This Court has already entered an order ("Order," ECF Doc. 21) granting all the relief requested by the foreign representative (Adriana Henry Meirelles, or "Foreign Representative") of the above-captioned foreign debtors ("Debtors"): recognizing the Debtors' Brazilian *recuperação judicial* ("RJ") proceeding as the Debtors' foreign main proceeding, recognizing the full force and effect of the

subsequent RJ plan ("RJ Plan"), giving full force and effect to the related Brazilian court confirmation order, and providing further relief which this Court deemed just and proper. No party objected to the recognition of the Brazilian RJ proceeding as the foreign main proceeding, nor to the recognition and enforcement of the RJ Plan in the United States. The only objection was filed by the United States Trustee ("UST"), which objected to language in the Debtors' proposed order which provided additional relief. ("Objection," ECF Doc. # 16.) The Foreign Representative filed a reply ("Reply," ECF Doc. # 18).

The Court entered the Debtors' final proposed order without further modifications. *462 The Court now writes separately to address two of the UST's objections, both of which were overruled at the hearing, to provide further clarification, as the UST has made similar objections in multiple Chapter 15 cases.

I. BACKGROUND

A. Company Structure and History

The Debtors, along with certain other related entities and affiliates (the "OEC Group"), are part of the business division of Novonor S.A. – Em Recuperação Judicial ("Novonor") and its related entities and affiliates (the "Novonor Group"), one of the largest private business groups in Brazil today, with businesses in engineering, construction and in the development and operation of infrastructure. (ECF Doc. # 2 at 3.) The OEC Group is one of the largest construction companies in the world and employs over 17,000 people. (*Id.* at 10.) The OEC Group's operational and economic activities are primarily concentrated in Brazil. (*Id.* at 12.) The Foreign Representative's motion seeking recognition and enforcement of the RJ Plan provides additional details on each of the Debtors and on the OEC Group as a whole. (*See generally id.*)

The Debtors or their affiliates have filed two previous Chapter 15 proceedings. On August 26, 2019, Novonor (formerly known as Odebrecht S.A.) and certain affiliates (the "Novonor Debtors") filed a petition ("Novonor Petition") seeking recognition of the jointly administered judicial reorganization proceeding pending at the time before a Brazilian court. (*Id.* at 3 n.3.) On September 18, 2019, this Court entered an order granting the relief sought in the

Novonor Petition and recognizing the Brazilian RJ proceeding as a foreign main proceeding for all the Novonor Debtors. (Id.) A bit over a year later, on November 24, 2020, a subset of three of the Debtors sought recognition of an extrajudicial reorganization (recuperação extrajudicial, or "EJ") and enforcement of an agreed plan of reorganization ("EJ Plan") which had been approved by the First Bankruptcy and Judicial Recovery Court of the District of the Capital of the State of São Paulo. (Id. at 3-4.) The aim of the Brazilian EJ Proceeding was to optimize the OEC Group's capital structure and provide additional runway for the OEC Group to reach an environment favorable to the resumption of its growth. (Id.) The EJ Plan only involved the obligations of a subset of the current set of Debtors and resulted in the replacement of certain New York lawgoverned notes with new notes, enabling a restructuring of a financial liability exceeding \$3.1 billion. (*Id.* at 4–5.)

Due to the pressures of the pandemic, a financial crisis in Brazil, a reduction in infrastructure investments, and lower demand for infrastructure projects in countries where the OEC Group operates, a broader restructuring became necessary. (Id. at 5.) In June 2024, the Debtors filed the Brazilian RJ Proceeding to implement a comprehensive restructuring of the OEC Group's liabilities to ensure the preservation and continuation of its business through an agreed plan of reorganization (the RJ Plan). In broad strokes, the RJ Plan involves (i) a restructuring of the OEC Group's existing capital structure both to satisfy the OEC Group's existing debt and strengthen its cash flow; (ii) the creation of a new business unit, with a healthy capital structure and high technical capacity; and (iii) an injection of liquidity to finance future projects through a minimum \$120 million debtor-in-possession financing facility, subject to certain conditions precedent being met. (Id. at 6.) After two rounds of voting, the ultimate result was a resounding vote in favor of the RJ Plan by the creditor classes and claimants *463 present to vote, and after resolving certain objections and finding that the requisite amount of creditor support and all other legal requirements were met, the Brazilian court issued an order confirming the RJ Plan (the "Brazilian Confirmation Order") on March 7, 2025. (*Id.* at 26–28.)

On March 14, 2025, the Foreign Representative filed in this Court a motion for recognition and enforcement, along with a proposed order and a copy of the RJ Plan. (ECF Doc. # 2.) The proposed order was modified before becoming the ultimate Order, but the relevant provisions, excerpted below,

did not change. The United States Trustee objected to portions of the proposed order, as discussed below.

B. Terms of RJ Plan

The only term of the RJ Plan that matters for the following discussion can be found at clause 11.5 of the RJ Plan:

11.5. Settlement. The fulfillment of the payment obligations in accordance with the terms and conditions established in this Plan will entail, automatically and regardless of any additional, broad, general and unrestricted formality, the discharge of all Bankruptcy Credits against the Companies under Reorganization and their officers, directors, agents, employees and representatives.

(Objection at 5 (citing RJ Plan).) All parties agreed during the recognition hearing that this provision does not constitute a nonconsensual third-party release.

C. UST Objection

The UST objected to portions of the proposed order granting recognition (but *not* to the recognition of the Brazilian RJ proceeding or to the enforcement of the RJ Plan as written). The Court overruled the UST's objections. However, two of the UST's objections merit further discussion, as they have recurred throughout multiple Chapter 15 cases.

First, the UST argued that the following limitation on liability is inappropriate because it is a "veiled exculpation clause," it goes beyond the relief granted by the Brazilian court, and there is no statutory basis for granting the limitation:

The Directed Parties² and their respective officers, directors, employees, representatives, advisors, attorneys, professionals and managers, in each case, solely in their respective capacities as a Directed Party, shall be entitled to a full limitation of liability from and shall have no liability for any and all claims, obligations, suits, judgments, damages, rights, causes of action, liabilities from, or in connection with, any action or inaction taken in furtherance of and/or in accordance with this Order, these Chapter 15 Cases, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan, except for

any liability arising from any action or inaction constituting gross negligence, fraud, willful misconduct or professional malpractice as determined by this Court.

(Order ¶ 7; Objection at 11.) Assuming arguendo that the limitation on liability is appropriate, the UST also objected on the grounds that the limitation "lacks the hallmarks of an acceptable exculpation provision in a chapter 11 proceeding": there is *464 no temporal limitation, and the clause creates "prospective immunity by exculpation." (Objection at 13-14.) Furthermore, the UST argued, the exculpation applies to too many parties—it applies to anyone in connection with "any action or inaction taken in furtherance of and/or in accordance with this Order, this Chapter 15 Case, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan," so the exact parties to whom the exculpation applies are not known, and it also covers non-estate fiduciaries. (Id at 15.) (The UST also objected to the absence of a carveout for bad faith, breach of fiduciary duty, and legal malpractice, all of which are required by the New York Rules of Professional Conduct; the Order was amended to include a carveout for malpractice claims.) Second, the UST argued that the proposed order created impermissible nonconsensual third-party releases. As compared to the release of the debtors contemplated by the RJ Plan (cited above, Section 11.5 of the RJ Plan), the order provides as follows:

Except as provided in paragraph 12 of this Order, all persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with or impede the administration. implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

(Order ¶ 11.) The UST took the position that (1) this language creates "an expansive third-party release" because it "enjoins all persons and entities from taking any action." (Objection at 16–17.) The UST argued that section 1521(a) of the Code does not provide courts with a statutory basis for issuing orders which contain third-party releases: applying the canon of ejusdem generis as the Supreme Court did in Harrington v. Purdue Pharma, 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024) (henceforth "Purdue"), the UST claimed that third-party releases are "not similar in nature to the relief provided in section 1521(a)" because third-party releases are not designed to protect a debtor (unlike the provisions of section 1521(a)), so cannot fit under that subsection of the Code. (Objection at 17–18.) The UST also argued that the release supposedly created by the above section of the Order does not fall within the category of "appropriate relief" under section 1521(a) of the Code because "third-party releases may not be imposed without consent through a bankruptcy plan under United States law," citing *Purdue*. (*Id.* at 18.)

D. Foreign Representative's Reply

The Foreign Representative's reply can be summarized as follows. First, the language of the order limiting liability is customary and similar to language this Court approved in other chapter 15 cases. (Reply at 4-5.) Second, the provision in Section 11.5 of the RJ Plan is proper under both Brazilian and U.S. law, as it does not create a third-party release. (Id. at 5-6.) The Foreign Representative then argued that the UST misread the language of the proposed confirmation order, as it does not *465 create a wide-reaching release but rather bars only those "actions that contravene relief set forth in the RJ Plan and Brazilian Confirmation Order" -i.e., the order sought only "enforcement of the relief granted in the Brazilian RJ Proceeding within the territorial jurisdiction of the United States and nothing more." (Id. at 6.) Even if Section 11.5 of the RJ Plan did create nonconsensual thirdparty releases, however, the Foreign Representative maintained that enforcement of such a provision is acceptable because *Purdue* does not apply in Chapter 15 cases. (Id. at 7-9.)

II. LEGAL STANDARD

A. Relief in a Chapter 15 Proceeding

[1] In 2005, Congress adopted Chapter 15 of the Bankruptcy Code based on the Model Law on Cross-Border Insolvency proposed by the United Nations Commission on International Trade Law in 1997. Chapter 15 replaced section 304 of the Bankruptcy Code, which originally provided the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries. Section 304 provided a bankruptcy court with broad discretion in fashioning an appropriate remedy in a particular case. While Chapter 15 replaced section 304, many of the principles underlying section 304 remain in effect under chapter 15, including the principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. In re SPhinX, Ltd., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) ("[C]hapter 15 maintains—and in some respects enhances—the 'maximum flexibility,' that section 304 provided bankruptcy courts ... in light of principles of international comity and respect for the laws and judgments of other nations." (internal citation omitted)).

Section 1520 outlines the mandatory relief automatically granted upon recognition of a foreign main proceeding under Chapter 15. The relief available under this provision is not at issue in this case. Rather, it is the relief available to the foreign representative at the Court's discretion under sections 1521 and 1507 of the Code which are relevant.

- ^[2] ^[3] ^[4] "Section 1521(a) outlines the discretionary relief a court may order upon recognition of a foreign proceeding, whether main or non-main The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors." *In re Atlas Shipping A/S*, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009) (internal citation omitted). Section 1521(a) reads as follows:
 - (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
 - (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);

- (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
- (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a):
- (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning *466 the debtor's assets, affairs, rights, obligations or liabilities;
- (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
- (6) extending relief granted under section 1519(a); and
- (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a). To determine what relief could fall under the catch-all at the beginning of the subsection ("additional relief"), courts look to relief available under the now-deleted section 304 of the Code. Courts give varying weight to section 304 precedent. See In re Vitro S.A.B. de CV, 701 F.3d 1031, 1057 (5th Cir. 2012) (holding that relief available under section 1521(a) is "co-extensive" with that available under section 304); compare In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012) (viewing section 304 caselaw as providing "useful precedents"). Relief under section 1521 will be granted only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C. § 1522(a).

^[5] Section 1507 provides additional discretionary grounds for the Court to grant relief to the foreign representative. Section 1507 reads:

- (a) Subject to the specific limitations stated elsewhere in this chapter the court, if re cognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
- (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional

assistance, consistent with the principles of comity, will reasonably assure—

- (1) just treatment of all holders of claims against or interests in the debtor's property;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of the debtor;
- (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507.

decline to grant relief requested in a chapter 15 case if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506. This public policy exception is narrowly construed. See In re Ocean Rig UDW Inc., 570 B.R. 687, 707 (Bankr. S.D.N.Y. 2017); see also In re Toft, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) ("[T]hose courts that have considered the public policy exception codified in [section] 1506 have uniformly read it narrowly and applied it sparingly.").

B. Exculpations in Chapter 11s

¹⁷¹ [8] ^{19]} "Exculpation provisions are designed to 'insulate court-supervised fiduciaries and some other parties from claims that are based on actions that relate to the restructuring.' "*467 *In re Genesis Glob. HoldCo, LLC*, 660 B.R. 439, 527 (Bankr. S.D.N.Y. 2024) (quoting *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 720 (Bankr. S.D.N.Y. 2019)). "It is well settled that an exculpation clause approved at confirmation may exculpate estate fiduciaries like a committee, its members, and estate professionals for their actions in the bankruptcy case except where those actions amount to willful misconduct or gross negligence." *In re LATAM Airlines Grp. S.A.*, No. 20-11254 (JLG), 2022 WL 2206829, at *50 (Bankr. S.D.N.Y. June 18, 2022) (citations omitted). Such provisions in chapter 11 plans are "not uncommon" and are generally permissible "so long as

they are properly limited and not overly broad." *Id.* at *49 (quoting *In re Nat'l Heritage Found., Inc.*, 478 B.R. 216, 233 (Bankr. E.D. Va. 2012)).

[10] Generally, it has been recognized that:

[A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also court-supervised and court-approved of transactions. If this Court has approved a transaction as being in the best interests of the estate and has authorized the transaction to proceed, then the parties to those transactions should not be subject to claims that effectively seek to undermine or second-guess this Court's determinations. In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do.

Aegean Marine Petroleum Network, 599 B.R. at 721.

[11] [12] In the Chapter 11 context, "in general, exculpated parties who are not estate fiduciaries are entitled to benefit from a broad exculpation provision where they have been actively involved in all aspects of the Chapter 11 Cases and have made significant contributions to the success of the cases." In re Wythe Berry Fee Owner LLC, No. 22-11340 (MG), 2024 WL 2767121, at *13 (Bankr. S.D.N.Y. May 29, 2024) (cleaned up). This Court in Wythe Berry exculpated a creditor group, among others, because its participation "was instrumental to the Debtor formulating a plan on an expedited basis, and their support was essential to the successful negotiation of the Plan" and related agreements. *Id.* (cleaned up). And while the exculpation reached beyond the set of estate fiduciaries, it still was limited just to "courtsupervised and court-approved transactions." Aegean Marine Petroleum Network, 599 B.R. at 721. See also In re Residential Cap. LLC, Case No. 12-12020 (MG), 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013) (order confirming plan contained exculpations for parties "instrumental to the successful prosecution of the Chapter 11 Cases or their resolution pursuant to the Plan, and/or provided a substantial contribution to the Debtors"); KG Winddown, LLC, et al., Case No. 20-11723 (MG) (Bankr. S.D.N.Y. 2020) (ECF Doc. # 494) (permitting exculpation of purchaser as non-estate fiduciary); Genco Shipping & Trading Ltd., 513 B.R. 233 (Bankr. S.D.N.Y. 2014) (ECF Doc. # 322) (approving exculpation provision in plan providing exculpation for non-estate fiduciaries). "In determining whether to approve exculpation provisions, courts also consider whether the beneficiaries of the exculpation participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan Courts in this and other districts have approved exculpation provisions ... for estate fiduciaries and non-estate fiduciaries." *468 In re: Klaynberg, No. 22-10165 (MG), 2023 WL 5426748, at *17-18 (Bankr. S.D.N.Y. Aug. 22, 2023). Finally, courts in the Second Circuit allow exculpation provisions so long as they apply to post-petition conduct and explicitly exclude gross negligence and willful misconduct. Id. ("Courts in the Second Circuit have held that [exculpation provisions] ... are appropriate when confined to postpetition activity and explicitly exclude gross negligence and willful misconduct."). But see In re PTL Holdings LLC, No. 11-12676 BLS, 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011) (sustaining UST's objection to exculpation of non-estate fiduciaries and limiting exculpation clause to just estate fiduciaries).

Additionally, courts in this district have exculpated behavior that occurred after the effective date of a plan of reorganization when that behavior was "authorized by bankruptcy courts to carry out the bankruptcy process." See In re Ditech Holding Corp., No. 19-10412 (JLG), 2021 WL 3716398, at *9 (Bankr. S.D.N.Y. Aug. 20, 2021) ("It is settled that exculpatory provisions are proper to protect those authorized by bankruptcy courts to carry out the bankruptcy process, even after the effective date of a plan The Exculpation Provision expressly covers acts falling under the 'administration of the Plan'—which by definition occurs post-Effective Date [T]he Exculpation Provision in Section 10.7 of the Plan applies to shield the conduct of these Individual Defendants [in implementing the plan] from collateral attack in a separate lawsuit."); In re Aegean Marine Petroleum Network Inc., 599 B.R. at 720 ("I think that a proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court supervised and court-approved transactions In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do."); In re Granite Broad. Corp., 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation clause "for actions in connection, related to, or arising out of the Reorganization Cases," noting that the language "generally follows the text that has become standard in this district and is sufficiently narrow to be unexceptional" and that "the Plan provides

exculpation only for acts or omissions in connection with the Plan and the bankruptcy cases. It requires, in effect, that any claims in connection with the bankruptcy case be raised in the case and not be saved for future litigation."); In re Flushing Hosp. & Med. Ctr., 395 B.R. 229, 235 (Bankr. E.D.N.Y. 2008) ("It is apparent that the exculpation provisions quoted above are not limited to pre-effective date claims. By their terms, these provisions apply to 'any act or omission in connection with, or arising out of ... the administration of the Plan.' Adopting [the objector's] interpretation would render the 'administration of the Plan' meaningless, clause because conduct during administration of the Plan necessarily occurs after the effective date of the Plan.").

Exculpations have been granted by courts in this district in Chapter 15 cases, including protection of non-fiduciaries. See, e.g., In re Olinda Star Ltd., 614 B.R. 28, 48 (Bankr. S.D.N.Y. 2020) (exculpating, among others, the indenture trustees and record holders of certain debtor-issued notes, as well as an information agent, because "such relief is necessary and appropriate to prevent interference with the consummation of" the foreign scheme of arrangement and "because without such exculpations the ability of [the foreign debtors' liquidators] and their advisors to take action to effectuate the restructuring would be limited"); In re Oi S.A., 587 B.R. 253, 269 n.3 (Bankr. S.D.N.Y. 2018) (noting that the court found that the exculpation *469 requested by the foreign representative was "appropriate under the circumstances").

C. Purdue in Chapter 15s

Courts in this district have long enforced foreign restructuring plans in Chapter 15 cases which include nonconsensual third-party releases, most doing so pursuant to sections 1507 and 1521 of the Code. See, e.g., In re Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); In re Towergate Fin. plc, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) (ECF Doc. # 16); In re New World Res. N.V., Case No. 14-12226-SMB (Bankr. S.D.N.Y. Sept. 9, 2014) (ECF Doc. # 20); In re Sino–Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); In re Magyar Telecom B.V., Case No. 13-13508-SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) (ECF Doc. # 26); In re Metcalfe & Mansfield Alt. Inv., 421

B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (concluding that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

The Supreme Court held in *Purdue* that "the Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants." 603 U.S. 204, 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024). To date, only one written decision has been issued on the question whether *Purdue* applies in chapter 15 proceedings: *In re: Credito Real, S.A.B. de C.V., SOFOM, E.N.R.*, No. 25-10208 (TMH), 2025 WL 977967, at *1 (Bankr. D. Del. Apr. 1, 2025). The *Credito Real* case is discussed below.

III. DISCUSSION

For this Court to provide the relief requested by the Foreign Representative, it must be available to the Foreign Representative under either sections 1507 or 1521 of the Code. The authority to issue the exculpation and the third-party release contained in the Order must, therefore, stem from one of these two sections of the Code.

One of the UST's objections is consistent across both provisions: that the provision provides relief beyond the scope provided by the Brazilian Confirmation Order and the RJ Plan. This objection is addressed first, followed by provision-specific objections.

A. Provision of Relief Outside Scope of Foreign Court Orders and Plan

^[13] Both the text of Chapter 15 and caselaw building upon it indicate that U.S. courts operating pursuant to Chapter 15 are *not* limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization. There are limitations to courts' discretionary powers under Chapter 15, but they are not obligated to grant only that relief which is similar or parallel to that granted abroad or specified in the plan at issue.

[14] [15] The text of Chapter 15 of the Code indicates that U.S. courts, despite being ancillaries to foreign proceedings when operating under Chapter 15, see In re Foreign Econ. Indus. Bank Ltd., "Vneshprombank" Ltd., 607 B.R. 160, 168 (Bankr. S.D.N.Y. 2019), are not hamstrung by the operations of foreign courts and law when determining what relief to grant to *470 the foreign representative. Section 1521(a) enables courts to grant "any appropriate relief" so long as that relief is "necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors" (followed by a non-exclusive list of examples of the type of relief the court may grant). Section 1507 permits a court to grant "additional assistance" subject to "specific limitations stated elsewhere in" Chapter 15, so long as the "additional assistance" is available "under this title or under other laws of the United States." Under the "expansive grant of power" in section 1507, "even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507." Credito Real, 2025 WL 977967, at *11. The drafters of Chapter 15 referenced principles of comity as limiting factors, rather than foreign rulings or even the availability of relief under foreign law. See 11 U.S.C. § 1507(b) (requiring court to consider "the principles of comity" when deciding whether to grant relief); In re Comair Ltd., No. 21-10298(JLG), 2021 WL 5312988, at *9 (Bankr. S.D.N.Y. Nov. 14, 2021) ("Post-recognition relief under section 1521 'is largely discretionary and turns on subjective factors that embody the principles of comity." ") (internal citation omitted).

enforcement mechanism in the U.S. order that prevents disgruntled creditors who are bound by the RJ Plan from suing in the U.S. to recover on claims that are barred by the RJ Plan. Granting this relief to the Foreign Representative is in furtherance of comity, as it enables the full enforcement of the RJ Plan by closing the door to potential workarounds to the Plan.

B. Exculpation

The provision in the Order which provides for an exculpation reads as follows:

The Directed Parties and their respective officers, directors, employees, representatives, advisors, attorneys, professionals and managers, in each case, solely in their respective capacities

as a Directed Party, shall be entitled to a full limitation of liability from and shall have no liability for any and all claims, obligations, suits, judgments, damages, rights, causes of action, liabilities from, or in connection with, any action or inaction taken in furtherance of and/or in accordance with this Order, these Chapter 15 Cases, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan, except for any liability arising from any action or inaction constituting gross negligence, fraud, willful misconduct or professional malpractice as determined by this Court.

(Order ¶ 7.)

The UST objected to the provision of this relief, as discussed above. It relies on a Fifth Circuit case, Vitro S.A.B. de C.V., 701 F.3d 1031, 1044 (5th Cir. 2012), to structure its analysis of section 1521 and 1507. The Fifth Circuit in Vitro adopted a three-step framework to determine whether relief requested by a foreign representative is available: "a court ... should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand 'appropriate relief' to be relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as 'additional assistance' under § 1507." Id. at 1054. Following this rubric, the UST argued that none of the seven *471 enumerated bases for relief under section 1521 apply: the first five concern the debtor and do not explicitly authorize exculpations, the sixth concerns extension of relief upon the filing of a petition, and the seventh concerns the relief available to a trustee which the UST claimed is irrelevant to the limitation of liability in the Order. (Objection at 12.) The UST also found no support for the exculpation in section 1507. Without providing much support for its argument, it claimed that the foreign representative "can only get the relief that is set forth in the RJ Plan or is otherwise sanctioned by the Bankruptcy Code—neither of which circumstance exists here." (Objection at 17.) The first part of this argument—that this Court cannot grant such an exculpation because the exact relief is not in the RJ Plan—is addressed and rejected above. The second part of the argument—that such exculpation is not "sanctioned by the Bankruptcy Code"—is addressed below.

¹¹⁷¹ First, courts in this district are not bound by the analytical approach taken in *Vitro*. *See*, *e.g.*, *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 877 (Bankr. S.D.N.Y. 2021) (noting that, as between sections 1521 and 1507, "often courts have found it unnecessary to determine the primacy of these two provisions if the outcome would be the same under either section," and collecting cases); *In re Atlas Shipping*, 404 B.R. at 741 (granting relief under section 1521 and concluding that it was unnecessary to determine whether "additional assistance" was available under section 1507).

^[18] Courts can provide exculpations in Chapter 15 proceedings to the same extent they can in Chapter 11 cases pursuant to sections 1507 and 1521, so long as the exculpation is not contrary to U.S. public policy in violation of section 1506.

[19] [20] In the Chapter 11 context, at least in this district, non-estate fiduciaries are entitled to exculpation when they have been actively involved in the bankruptcy proceeding and made significant contributions to its success, and when the exculpation applies to court-supervised and -approved transactions. In re Wythe Berry Fee Owner LLC, 2024 WL 2767121, at *13; In re: Klaynberg, No. 22-10165 (MG), 2023 WL 5426748, at *17 (Bankr. S.D.N.Y. Aug. 22, 2023) (noting that courts also look to whether parties have acted in good faith and look to whether the exculpation provision is critical to plan implementation). Gross negligence and willful misconduct must be excluded from the scope of the exculpation provision. In re Wythe Berry Fee Owner LLC, 2024 WL 2767121, at *13. The logical analogue in the Chapter 15 context is exculpation of parties who have been actively involved in the foreign restructuring, and who are exculpated for behavior relating to court-supervised and approved transactions, whether those transactions are supervised here or abroad. (Where a foreign plan is enforced in the U.S. pursuant to a Chapter 15 recognition proceeding, the U.S. court may also be the one supervising and approving.) Here, the exculpated parties (the Directed Parties) are the indenture trustee of certain notes cancelled pursuant to the RJ Plan, the custodians of those notes, and the clearing system involved with the effectuation of the RJ Plan. (Order ¶ 7.) These parties are clearly essential to the implementation of the RJ Plan, which is being supervised by a Brazilian court. There is no indication in the record before the Court that the Directed Parties have acted in anything but good faith. Moreover, the Foreign Representative has submitted that the cancellation of these notes is "one of the central parts of the RJ Plan" and that without the cooperation of the Directed Parties, they cannot be cancelled; *472 no party has contested this claim. (Reply at 9.) The exculpation provision in the Order is, therefore, integral to the recognition and enforcement of the RJ Plan. The Court finds that the exculpation provision in the Order complies with the requirements courts place on exculpation provisions in Chapter 11 cases. *See also In re Olinda Star*, 614 B.R. at 48 (granting exculpation when "necessary and appropriate to prevent interference with the consummation of the foreign restructuring scheme").

C. Putative Nonconsensual Third-Party Release

The provision in the Order which the UST claims creates impermissible third-party releases reads as follows:

Except as provided in paragraph 12 of this Order, all persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with impede the administration. implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

(Order ¶ 11.)

language creates a third-party releases; the third parties are on the plaintiff's side of the "v." ("all persons and entities," language which conceivably covers more than just the debtors' creditors and claimholders), as the defendant's side consists only of "the Debtors [and] their property." Assuming *arguendo* that paragraph 11 of the Order does create nonconsensual third-party releases, the Court finds that it has the power to issue such an order in a Chapter 15

case, pursuant to at least section 1521, in support of a foreign proceeding.

l²²| Since subsections 1521(a)(1)–(7) do not expressly authorize non-debtor third-party releases, a court should decide whether the requested relief can be considered "appropriate relief" under section 1521(a). To do so, the Court must first examine the plain language of section 1521. *Grajales v. Comm'r of Internal Revenue*, 47 F.4th 58, 62 (2d Cir. 2022) ("Statutory interpretation always begins with the plain language of the statute.") (internal citation and quotation marks omitted). It will then look at caselaw from Chapter 15's predecessor, section 304, which, as noted above, is instructive in interpreting the scope of section 1521(a).

*473 1. Text of Chapter 15

Judge Horan's recent opinion in Credito Real provides a lucid explanation why courts can enforce nonconsensual third-party releases found in foreign plans of reorganization. Here, all parties agreed during the recognition hearing that there is no third-party release in the RJ Plan, or even in the Brazilian court order confirming the RJ Plan. Rather, there is a provision in this Court's order recognizing the Brazilian proceeding as the foreign main proceeding and enforcing the RJ Plan which might be construed as a nonconsensual thirdparty release. However, there is no meaningful difference between enforcing, via order, a foreign plan with a thirdparty release provision, and issuing an order enforcing a foreign plan, which order contains a third-party release which itself is not in the foreign plan. The practical effect is the same—a U.S. court issues an order, which takes effect in the United States, which releases claims over which the U.S. court has jurisdiction.

In *Credito Real*, Judge Horan addressed a common objection to the grant of third-party releases under sections 1521 and 1507, one which the UST made here: that courts must apply *Purdue*'s *ejusdem generis* approach to interpreting section 1123(b) of the Code to sections 1521 and 1507, and in so doing, find that courts have no authority to grant third-party releases under those sections. Judge Horan walked through the differences in language between section 1123(b) and, in turn, 1521 and 1507, to find that courts wield significantly more power under the latter two sections. Regarding section 1521, he notes first that it allows a court to grant "any" appropriate relief, and then provides a non-exhaustive list of

examples. 2025 WL 977967 at *9. Section 1521(a)(7) qualifies the "any ... including" language in the section "by explaining that any additional relief a court grants should be of the kind that is available to a trustee." Id. at *10. (Per Judge Horan, it is "well-settled that enforcement of a thirdparty release contained in a foreign plan is appropriate under that section." Id. (citing In re Arctic Glacier Int'l, Inc., 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of arrangement); In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a))).) Section 1521 thus differs from section 1123(b), which "simply states that a court may include any 'other' chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title." " Id. The Supreme Court in *Purdue* read "other" as directing courts to look to the other provisions of 1123(b) to determine what further relief a court could grant. But "section 1521(a) does not direct courts to look to the 'other' provisions"-listed in subsections (a)(1)–(7)—"when providing relief under its catchall," instead allowing "courts to grant 'any additional relief that may be available to a trustee." Id. The limitation in section 1521(a), therefore, is not whether the relief is similar to those listed in 1521(a)(1)-(7), but whether the relief is available to the trustee. Moreover, section 1521(a)(7) qualifies its "any ... including" language by listing specific relief a court is barred from granting under that section—and that list of prohibited relief does not include nonconsensual third-party releases. "By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can grant, bearing in mind the guiding principles of comity and cooperation." *474 Id.; see also id. at *11 (citing the canon of expressio unius to support the conclusion). Judge Horan conducts a similar analysis of section 1507 to again find that, unlike section 1123(b), it establishes a broad set of powers and precisely defines the court's limitations under that section, "provid[ing] a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6)." Id. at *11. In sum, both sections 1521 and 1507 differ from 1123(b) "because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions [in 1521 and 1507], courts do not need

to read further into its words like they do for section 1123(b). The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously." *Id.* at *12

l²³ Section 1522(a) permits the Court to grant relief pursuant to section 1521 only if the interests of creditors, the debtor, and other interested entities are "sufficiently protected." "Sufficient protection" embodies "three basic principles: 'the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." "Atlas Shipping, 404 B.R. at 740. The Court finds that, in the present case, the issuance of a third-party release which enables the distribution of the foreign debtor's estate in the manner set forth in the RJ Plan enables the just treatment of all claimants, substantially in accordance with U.S. law.

[24] Section 1506 provides another boundary: a bankruptcy court may decline to grant relief requested in a Chapter 15 case if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506. This public policy exception is narrowly construed. See In re Ocean Rig UDW Inc., 570 B.R. at 707. Purdue did not hold that nonconsensual third-party releases are contrary to the public policy of the U.S. In fact, the majority expressly stated that "[b]oth sides of this policy debate may have their points." Purdue, 603 U.S. at 226, 144 S.Ct. 2071. The Supreme Court's holding was narrow: Chapter 11 of Title 11 does not provide bankruptcy courts, in Chapter 11 cases, with the authority to authorize such releases. It cannot be read to hold that nonconsensual third-party releases are "manifestly contrary to" U.S. public policy such that they would be barred by section 1506. See also Credito Real, 2025 WL 977967, at *15–16 (similar).

Following the logic of *Credito Real* and *Purdue*, the Court finds that the text of section 1521 permits the grant of a nonconsensual third-party release in support of a foreign debtor's plan of reorganization. Pre-Code caselaw, as well as opinions interpreting section 304, also support this finding.

Longstanding precedent holds that bankruptcy courts can strip U.S. parties of rights they have under the laws of the United States. As far back as 1883, the Supreme Court sanctioned the enforcement of a Canadian scheme of arrangement under which certain bonds would be issued to replace prior ones. U.S. bondholders argued that the scheme of arrangement, to which they had not consented, was imposed in such a way that violated the U.S. Constitution's bar on certain contractual impairments and hence the scheme should not be recognized by U.S. courts; the Supreme Court rejected this argument:

*475 [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.

Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527, 537–38, 3 S.Ct. 363, 27 L.Ed. 1020 (1883). And building on Gebhard, the Second Circuit in Cunard dismissed a U.S. lawsuit solely on the grant of comity to a foreign proceeding. Cunard S.S. Co. Ltd. v. Salen Reefer Servs. A.B., 49 B.R. 614, 618 (S.D.N.Y. 1985), aff'd sub nom. Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 452 (2d Cir. 1985). The sole concern of the Second Circuit was that the foreign court governing the foreign proceeding was a court of competent jurisdiction, and that enforcement of the foreign proceeding would not violate public policy in the U.S.; the fact that U.S. law would have led to a different outcome, and even the fact that a right granted by U.S. law was being stripped by enforcement, did not matter. Id. at 617–19.

lose rights in an ancillary proceeding which it otherwise would have had in a plenary case under the Bankruptcy Code. See, e.g., In re Ephedra Prods. Liab. Litig., 349 B.R. 333, 337 (S.D.N.Y. 2006) (recognizing Canadian order as an exercise of comity even though it overrode a defendant's constitutional right to a civil jury trial); In re Bd. of Directors of Multicanal S.A., 307 B.R. 384, 389–91 (Bankr. S.D.N.Y. 2004) (holding that foreign law can "override" U.S. law (specifically, the Trust Indenture Act) via the enforcement of a foreign plan pursuant to section 304 which deprived a creditor of rights that he would have had under the TIA); see

also Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 999-1000 (2d Cir.1993) (dismissing bondholders' federal securities fraud action in granting comity to Australian insolvency proceeding, as it would have been "inefficient and inequitable to permit the individual claims to go forward. Indeed, since these individuals were sued solely because of their affiliation with the [foreign debtors], to allow these claims to go forward in the United States ... would defeat the purpose of granting comity in the first place."); Lindner Fund, Inc. v. Polly Peck Int'l PLC, 143 B.R. 807, 807–11 (S.D.N.Y.1992) (dismissing federal securities fraud action in favor of foreign reorganization based on comity and noting that "American courts have traditionally extended comity to foreign bankruptcy proceedings by dismissing actions filed by creditors in United States courts"); Smith v. Dominion Bridge Corp., No. 96-7580, 1999 WL 111465, at *1-5 (E.D. Pa. Mar. 2, 1999) (staying action against foreign debtor in U.S. courts out of comity considerations, and noting that courts have, under certain circumstances, extended the stay to cover non-debtor co-defendants).

¹²⁶ ¹²⁷ As the Second Circuit has previously stated, "deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States." *United JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005). So long as these guidelines are respected, *476 a long string of caselaw indicates that bankruptcy courts may, acting as ancillaries to foreign proceedings, extinguish claims that would be available in plenary actions in the U.S. in the name of comity.

2. Pre-Purdue Caselaw

Given the above analysis, it is not surprising that pre-*Purdue* chapter 15 courts which faced the question whether limitations on a bankruptcy court's powers in plenary cases carried over into the chapter 15 context came to the same conclusion that courts operating under section 304 did: ancillary cases are fundamentally different, and limitations that exist in plenary cases do not always carry over. In *In re Metcalfe & Mansfield Alternative Invs.*, the court had to determine whether a third-party release which might not be available in a plenary case under chapter 11 should be granted in a chapter 15. 421 B.R. at 694. The potential limiting factor there was not the appropriateness of the

release under Metromedia (moot post-Purdue), but a more fundamental one-the jurisdictional limitation on chapter 11 courts in Manville. The Metcalfe court determined that the scope of its authority to release non-debtors in plenary proceedings did not matter because such jurisdictional limitations did not carry over into the chapter 15 context: "whatever the precise limits of a bankruptcy court's jurisdiction to approve a third-party non-debtor release and injunction in a plenary chapter 11 case, the important point for present purposes is that the jurisdictional limits derive from the scope of bankruptcy court 'related to' jurisdiction under 28 U.S.C. § 1334, and the prudential limits courts have applied in chapter 11 cases under the Bankruptcy Code. This Court is not being asked to approve such provisions in a plenary case; rather, the Court is being asked to order enforcement of provisions approved by the Canadian courts. The correct inquiry, therefore, is whether the foreign orders should be enforced in the United States in this chapter 15 case." Id. at 695-96. The Metcalfe court then moved onto what it considered to be the sole limiting factor: whether principles of comity counseled in favor of the grant. Id. Metcalfe was a section 1507 case, but its holding carries over into section 1521: there is no reason why a jurisdictional limitation on bankruptcy courts acting in plenary cases should hamper courts' ability to act as ancillaries to foreign proceedings. Its logic still holds after Purdue: Purdue only held that chapter 11 of the Code does not give courts the power to grant such releases, and did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15.

caselaw under its predecessor (section 304), and (3) pre-Purdue caselaw in this district all support a finding that courts can, pursuant to section 1521 of the Code, issue orders pursuant to their discretionary powers under section 1521 which contain nonconsensual third-party releases, whether or not those releases originate from a foreign court. Having found that this power exists under section 1521, this Court need not conduct a full analysis of section 1507 to determine whether it, too, so permits. See In re Sino-Forest Corp., 501 B.R. at 666 (recognizing and enforcing foreign court order approving non-debtor release); In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (same); Metcalfe & Mansfield, 421 B.R. at 696 (same). For the foregoing reasons, this Court finds that it had the authority under the Code to issue the Order as written. The *477 United States Trustee's objections were OVERRULED.

All Citations

669 B.R. 457

IV. <u>CONCLUSION</u>

Footnotes

- The proposed order was edited twice, but the language to which the UST objected remained the same throughout. This opinion therefore relies on the language in the order ultimately entered, *see* ECF Doc. # 21.
- The "Directed Parties" are: (i) The Bank of New York Mellon, as the indenture trustee (the "Indenture Trustee") under the indentures related to the 2024 Notes, the 2026 Notes, the 2027 Notes, the 2029 Notes, the 2033 Notes, the 2046 Notes, and the Perpetual Notes (collectively, the "NY Notes"); (ii) the Depository Trust Company ("DTC"), Euroclear Bank S.A./N.V., and/or Clearstream Banking, Société Anonyme, as clearing systems, as applicable; (iii) Epiq Corporate Restructuring LLC; and (iv) the custodians of the NY Notes. (Order ¶ 5 n.3.)
- If this provision is not, in fact, a third-party release, it should be considered an injunction in support of the RJ Plan, given that, as the Foreign Representative convincingly explained, this section of the Order is carefully limited to bar only those actions that contravene relief provided in the RJ Plan and the Brazilian Confirmation Order. (Reply at 6.) All this provision does, per the Foreign Representative, is enforce the relief granted in the Brazilian RJ Proceeding within the territorial jurisdiction of the United States. (*Id.*) Under this reading, the provision would be enforced as a foreign plan-supporting injunction, a type of relief available under section 1521 of the Code. *See, e.g., In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014); *In re Olinda Star*, 614 B.R. at 47–48.

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

670 B.R. 150 United States Bankruptcy Court, D. Delaware.

IN RE: CRÉDITO REAL, S.A.B. DE C.V., SOFOM, E.N.R., Debtor in a foreign proceeding.

Case No. 25-10208 (TMH) | Signed April 1, 2025

Synopsis

Background: Foreign representative petitioned for recognition of Chapter 15 debtor's Mexican insolvency proceeding as a foreign main proceeding and enforcement of its Mexican-court-approved "concurso" plan, which contained nonconsensual third-party releases. The United States International Development Finance Corporation (DFC), a claimant in the Mexican proceeding, objected to enforcement of plan, arguing that releases were not authorized under Chapter 15 and would be manifestly contrary to public policy of the United States.

Holdings: The Bankruptcy Court, Thomas M. Horan, J., held that:

- Pharma, 144 S.Ct. 2071, which held that Chapter 11 plan of reorganization cannot provide for nonconsensual third-party release of claims against non-debtor, does not change the way bankruptcy courts should interpret "catchall" provisions of sections of Chapter 15 empowering courts to grant appropriate relief and to provide additional assistance upon recognition of foreign proceeding;
- [2] Chapter 15 authorizes bankruptcy courts to enforce nonconsensual third-party releases ordered by foreign courts; and
- [3] nonconsensual third-party releases contained in debtor's "concurso" plan were not manifestly contrary to the public policy of the United States.

Objection overruled; recognition granted.

Procedural Posture(s): Motion for Recognition as Foreign Main or Nonmain Proceedings; Motion to Enforce.

West Headnotes (32)

Bankruptcy Cases Ancillary to Foreign Proceedings

By enacting Chapter 15 of the Bankruptcy Code, Congress sought to facilitate cooperation between the courts of the United States and the courts of foreign countries in cross-border insolvency cases and to empower a court exercising bankruptcy jurisdiction to render assistance to the foreign court. 11 U.S.C.A. § 1501 et seq.

Bankruptcy Cases Ancillary to Foreign Proceedings

In a proceeding under Chapter 15 of the Bankruptcy Code, the bankruptcy court should be guided by the main policy goals of the chapter, namely, cooperation and comity with foreign courts and deference to those courts within the confines established by the chapter. 11 U.S.C.A. § 1501.

Bankruptcy Cases Ancillary to Foreign Proceedings

Upon recognition of foreign main proceeding, bankruptcy court has broad discretion to order enforcement of orders entered in that proceeding, consistent with guiding principles of comity. 11 U.S.C.A. § 1521.

Bankruptcy Cases Ancillary to Foreign Proceedings

Principles of comity are particularly compelling in bankruptcy context, where United States courts have long recognized need to extend comity to foreign bankruptcy proceedings, since equitable and orderly distribution of debtor's property requires assembling all claims against the limited assets in single proceeding; if all creditors cannot be bound, then plan of reorganization will fail.

Bankruptcy Cases Ancillary to Foreign Proceedings

When considering whether to enforce order entered in foreign main proceeding, bankruptcy courts should aim to maximize assistance to foreign court conducting that proceeding. 11 U.S.C.A. §§ 1507, 1521.

Bankruptcy Cases Ancillary to Foreign Proceedings

Two provisions through which bankruptcy courts may enforce orders entered in a foreign main proceeding are the section of the Bankruptcy Code empowering courts to grant appropriate relief and the Code section empowering courts to provide additional assistance upon recognition of a foreign proceeding. 11 U.S.C.A. §§ 1507, 1521.

Bankruptcy Cases Ancillary to Foreign Proceedings

Broad grants of discretion afforded by the sections of the Bankruptcy Code empowering bankruptcy courts to grant appropriate relief and to provide additional assistance upon recognition of a foreign proceeding are limited in multiple ways, including by the Code section setting forth Chapter 15's public policy exception. 11 U.S.C.A. §§ 1506, 1507, 1521.

Bankruptcy—Cases Ancillary to Foreign Proceedings

Because refusing to take an action under the public policy exception of Chapter 15, that is, one that is manifestly contrary to the public policy of the United States, is an extraordinary act, that section of the Bankruptcy Code should be narrowly interpreted; the word "manifestly" in international usage restricts the exception to the most fundamental policies of the United States. 11 U.S.C.A. § 1506.

Bankruptcy Cases Ancillary to Foreign Proceedings

Under the public policy exception of Chapter 15, the bankruptcy court's discretion to enforce orders of a foreign court is circumscribed by fundamental policies of fairness. 11 U.S.C.A. § 1506.

Bankruptcy←Cases Ancillary to Foreign Proceedings

For a bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, relief that is granted in the foreign proceeding does not have to be identical to relief that might be available in a proceeding in the United States; instead, courts should look to the fairness of the foreign proceeding. 11 U.S.C.A. §§ 1506, 1507, 1521.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Under Chapter 15 of the Bankruptcy Code, judgment of foreign court should be enforced, as matter of comity, if forum of foreign proceeding offers full and fair trial abroad before court of competent jurisdiction, conducting trial upon regular proceedings, after due citation or voluntary appearance of defendant, and under system of jurisprudence likely to secure impartial administration of justice between citizens of its own country and those of other countries, and there is nothing to show either prejudice in court, or in system of laws under which it is sitting. 11 U.S.C.A. §§ 1506, 1507, 1521.

Bankruptcy←Cases Ancillary to Foreign Proceedings

In examining procedural fairness of foreign main proceeding, for purposes of determining whether order of foreign court should be enforced in light of Chapter 15's public policy exception, among factors bankruptcy courts may consider are whether: (1) creditors of the same class are treated equally in the distribution of assets, (2) liquidators are considered fiduciaries and are held accountable to the court, (3) creditors have the right to submit claims which, if denied, can submitted to bankruptcy court adjudication, (4) liquidators are required to give notice to debtor's potential claimants, (5) there are provisions for creditors' meetings, (6) foreign country's insolvency laws favor its own citizens, (7) all assets are marshaled before one body for centralized distribution, and (8) there are provisions for an automatic stay and for lifting of such stays to facilitate the centralization of claims. 11 U.S.C.A. §§ 1506, 1507, 1521.

Bankruptcy Cases Ancillary to Foreign Proceedings

Supreme Court's analysis in Harrington v. Purdue Pharma, 144 S.Ct. 2071, in holding that Chapter 11 plan cannot provide nonconsensual third-party release of claims against non-debtor, does not change the way bankruptcy courts should interpret Chapter 15 "catchall" provisions empowering courts to grant appropriate relief and to provide additional assistance upon recognition of a foreign proceeding, based on plain language of Bankruptcy Code and canons of statutory interpretation; in contrast to catchall section relied upon by the Purdue Court, which enumerates relief Chapter 11 plans may provide, is limited to matters concerning the debtor, and directs courts to look to rest of Code to determine whether a provision is appropriate, Chapter 15 catchalls afford courts a broad grant of authority to provide relief while setting out express limitations, bearing in mind guiding principles of comity and cooperation, and nowhere prohibit nonconsensual third-party releases. 11 U.S.C.A. §§ 1123(b)(6), 1507, 1521(a)(7).

1 Case that cites this headnote

Bankruptcy Construction and Operation

In determining how to construe particular sections of the Bankruptcy Code, court's interpretation starts where all such inquiries must begin: with the language of the statute itself.

Bankruptcy Construction and Operation

If the text of the Bankruptcy Code is unambiguous, courts construe it according to its plain meaning.

[16] **Bankruptcy** Construction and Operation

If the text of the Bankruptcy Code is ambiguous, then courts turn to legislative history and the canons of construction to determine congressional intent in enacting the statute.

Statutes Rules, principles, maxims, and canons of construction in general

Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation.

Bankruptcy Cases Ancillary to Foreign Proceedings

Chapter 15 of the Bankruptcy Code, in particular, its "catchall" provisions empowering courts to grant appropriate relief and to provide additional assistance upon recognition of foreign proceeding, authorizes United States bankruptcy courts to enforce nonconsensual third-party releases granted in a foreign insolvency proceeding under that country's laws; plain language of Chapter 15 catchalls affords courts a broad grant of authority to provide relief while setting out express limitations, the relief in question would be available to a trustee and so was permissible under catchall, catchall's list of prohibited relief does not include nonconsensual third-party releases, by enforcing nonconsensual third-party releases originating in foreign courts bankruptcy courts would promote Chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings, and such releases are widely accepted by foreign courts. 11 U.S.C.A. §§ 1501, 1507, 1521(a)(7).

1 Case that cites this headnote

[19] **Bankruptcy** Construction and Operation

Bankruptcy Code's definition of "includes" and "including" codifies the rule of statutory construction that such terms are illustrative, and not exclusive or limiting. 11 U.S.C.A. § 102(3).

Statutes Express mention and implied exclusion; expressio unius est exclusio alterius

Canon of statutory construction "expressio unius est exclusio alterius" stands for the proposition that the expression of one thing means the exclusion of another.

Bankruptcy Cases Ancillary to Foreign Proceedings

In determining whether relief may be granted as part of the "additional assistance" referenced in the section of the Bankruptcy Code empowering bankruptcy courts to provide additional assistance upon recognition of a foreign proceeding, court should look to the remainder of Chapter 15 to guide its decision. 11 U.S.C.A. § 1507.

Bankruptcy Cases Ancillary to Foreign Proceedings

In determining whether to provide "additional assistance" upon recognition of a foreign proceeding under Chapter 15, bankruptcy courts do not have to reject relief solely because it would be unavailable in the United States. 11 U.S.C.A. § 1507.

Bankruptcy Cases Ancillary to Foreign Proceedings

A major purpose in the enactment of Chapter 15 of the Bankruptcy Code was to promote comity for the orders of foreign courts. 11 U.S.C.A. § 1501 et seq.

Bankruptcy Cases Ancillary to Foreign Proceedings

"Catchall" provisions of Chapter 15 of the Bankruptcy Code, empowering courts to grant appropriate relief and to provide additional assistance upon recognition of foreign proceeding, should be read in their context pursuant to the canon of ejusdem generis. 11 U.S.C.A. §§ 1507, 1521(a)(7).

Bankruptcy←Cases Ancillary to Foreign Proceedings

Bankruptcy courts should use Chapter 15's public policy exception to deny enforcing foreign relief sparingly. 11 U.S.C.A. § 1506.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Nonconsensual third-party releases contained in Chapter 15 debtor's Mexican-court-approved "concurso" plan were not manifestly contrary to the public policy of the United States; United States International Development Finance Corporation (DFC), a claimant in debtor's Mexican insolvency proceeding, objected to debtor's concurso plan, but not to the releases, in the Mexican proceeding and only raised concerns

about releases on appeal, DFC did not object to fairness of Mexican proceeding, in which it played an active role, nor did it identify a constitutional or statutory right on which debtor's concurso plan impinged, concurso plan was product of a fair process and of arms'-length negotiations among debtor, recognized creditors, and shareholders, concurso plan's releases were customary and permitted under Mexican law, concurso plan was approved by majority of recognized creditors, and permitting third-party releases was a policy decision that Congress could and had made. 11 U.S.C.A. § 1506.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Chapter 15's public policy exception applies where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections, or where recognition of the foreign proceeding would impinge severely a United States constitutional or statutory right. 11 U.S.C.A. § 1506.

[28] Constitutional Law-Notice and Hearing

Full and fair opportunity to be heard is a central tenet of procedural fairness in the United States.

Bankruptcy←Cases Ancillary to Foreign Proceedings

Nonconsensual third-party releases are not manifestly contrary to the public policy of the United States, for purposes of Chapter 15's public policy exception; rather, such releases are expressly permitted under the Bankruptcy Code in the context of asbestos cases. 11 U.S.C.A. §§ 524(g), 1506.

Bankruptcy←Cases Ancillary to Foreign Proceedings

To be "manifestly contrary" to the public policy of the United States within the meaning of Chapter 15's public policy exception, which provides that the court may refuse to take an action governed by Chapter 15 if the action would be manifestly contrary to such policy, the contested relief must impinge on some constitutional or statutory right. 11 U.S.C.A. § 1506.

Bankruptcy Cases Ancillary to Foreign Proceedings

Lack of specific availability in United States courts does not equate to manifest contrariness to United States public policy, within meaning of Chapter 15's public policy exception. 11 U.S.C.A. § 1506.

Bankruptcy Cases Ancillary to Foreign Proceedings

Simple fact that a United States court could not grant nonconsensual third-party releases in a typical Chapter 11 plan did not make them manifestly contrary to United States public policy so as to require the Bankruptcy Court to prohibit enforcement of such releases in foreign debtor's Chapter 15 case. 11 U.S.C.A. §§ 1123(b)(6), 1506.

1 Case that cites this headnote

Attorneys and Law Firms

John Henry Knight, Richards, Layton & Finger, P.A., Wilmington, DE, for Debtor.

Timothy Jay Fox, Jr., Office of the United States Trustee, Wilmington, DE, for U.S. Trustee.

OPINION

Thomas M. Horan, United States Bankruptcy Judge

*154 In its June 27, 2024 decision in Harrington v. Purdue Pharma, L.P.,² the Supreme Court held that a chapter 11 plan of reorganization cannot provide for a nonconsensual third-party release of claims against *155 a non-debtor.³ Following that decision, the international insolvency community has debated whether, under chapter 15, a bankruptcy court nonetheless may enter an order enforcing a *foreign plan* containing such releases.⁴ That is the question presented here. At the recognition hearing held in this chapter 15 case on March 11, 2025, in an oral bench ruling, this Court held that such an order is permissible after Purdue and granted enforcement of a Mexican plan containing such releases.

^[1] Section 1501 of title 11 of the United States Code (the "Bankruptcy Code") describes the "purpose and scope of application" of chapter 15.⁵ When it enacted chapter 15, Congress sought to facilitate cooperation between the courts of the United States and the courts of foreign countries in cross-border insolvency cases and to empower a court exercising bankruptcy jurisdiction to render assistance to the foreign court.⁶

In this case, Robert Wagstaff, the foreign representative (the "Foreign Representative") of Crédito Real, S.A.B. de C.V., SOFOM, E.N.R. (the "Chapter 15 Debtor"), petitioned for entry of an order recognizing the Chapter 15 Debtor's Mexican bankruptcy case (the "Mexican Prepack Proceeding") as a foreign main proceeding.⁷ That request was unopposed.

The Foreign Representative also asked this Court to render assistance to the Mexican court by recognizing and enforcing the plan that the Mexican court approved. The parties refer to that plan as the Concurso Plan⁸ and the order approving it as the Concurso Order.⁹

The United States International Development Finance Corporation (the "<u>DFC</u>") opposed this relief, arguing that the nonconsensual third-party releases contained in the Concurso Plan are not authorized under chapter 15 and would be "manifestly contrary to the public policy of the United States." This Court overruled that objection and entered its Order Granting (I) Recognition of Foreign Main Proceeding, (II) Full Force and Effect to Concurso Plan and Certain Related Relief (the "<u>Recognition Order</u>"). On March 25, 2024, the *156 DFC filed its notice of appeal. This is the Court's written opinion in support of the Recognition Order.

I. Background¹⁴

The Chapter 15 Debtor was one of Mexico's largest non-bank financial lending institutions. Its customers were located predominantly in Mexico, elsewhere in Latin America, and in the United States. It is a Mexican company, and it held or holds direct or indirect equity interests in entities located in Mexico, the United States, Honduras, Panama, Turks and Caicos, Costa Rica, Nicaragua, Guatemala, and El Salvador. It

In 2021, amid a liquidity crisis, the Chapter 15 Debtor began discussions with its key creditors on a restructuring.¹⁸ These negotiations failed, and in June 2022, an ad hoc group of unsecured creditors (the "Ad Hoc Group") filed an involuntary chapter 11 petition against the Chapter 15 Debtor (the "Involuntary Chapter 11 Case").¹⁹

On June 28, 2022, one of the Chapter 15 Debtor's shareholders commenced a liquidation proceeding in the 52nd Civil State Court of Mexico City, Mexico (the "Mexican Liquidation Proceeding").²⁰ The court appointed Fernando Alonso-deFlorida Rivero as judicial liquidator (the "Mexican Liquidator").²¹

Then, on July 14, 2022, the Foreign Representative filed a petition under chapter 15 in this Court (the "Prior Chapter 15 Case"), along with a petition for recognition of the Mexican Liquidation Proceeding as a foreign main proceeding.²²

Following these events, the Chapter 15 Debtor, the Mexican Liquidator, the Foreign Representative, and the Ad Hoc Group adjourned pending disputed matters in the Involuntary Chapter 11 Case and the Prior Chapter 15 Case to pursue *157 settlement discussions.²³ These negotiations succeeded, and the Chapter 15 Debtor, the Mexican Liquidator, and the Ad Hoc Group entered into a restructuring support agreement (the "RSA") to implement a global restructuring of the Chapter 15 Debtor's assets and liabilities.²⁴ It was under the terms of the RSA that the Mexican Liquidator commenced the Mexican Prepack Proceeding.²⁵ The parties agreed that that Foreign Representative would seek recognition here of the Mexican Prepack Proceeding as a foreign main proceeding and an order giving full force and effect to the Concurso Plan.²⁶

On October 6, 2023, the Chapter 15 Debtor commenced the Mexican Prepack Proceeding at the direction of the Mexican Liquidator by filing a voluntary petition with the Mexican court.²⁷ On November 13, 2023, the Mexican Court issued a judgment officially commencing the conciliation stage of the Mexican Prepack Proceeding (the "Concurso Judgment").²⁸

The Concurso Judgment imposed protective measures designed to preserve the Chapter 15 Debtor's estate, including a stay on all enforcement and collection actions against the Chapter 15 Debtor's assets and a prohibition on paying obligations due before the date of the commencement of the Mexican Prepack Proceeding.²⁹ Miguel Escamilla Villa was appointed as the Conciliator³⁰ of the Mexican Prepack

Proceeding.³¹ The Concurso Judgment was served on creditors and other parties through publication in a nationwide newspaper and in the Official Journal of the Federation; additionally, a summary of the judgement was registered in the Public Registry of Commerce to ensure that all interested parties, including foreign creditors, were adequately informed.³²

On March 20, 2024, the Mexican Court issued a judgment of recognition that confirmed the ranking and classification of all the creditors' claims (the "Recognition Judgment").³³

On May 21, 2024, the Concurso Plan was presented to the creditors recognized under the Recognition Judgment, and on July 1, 2024, with the consent of the majority of the recognized creditors, the Conciliator formally submitted the plan to the Mexican Court.³⁴ On August 15, 2024, the Mexican Court issued the Concurso Order overruling all objections to the Concurso Plan and finding that the Concurso Plan satisfied all of the requirements of the Mexican Bankruptcy Law and did not violate Mexican public policy.³⁵ The Concurso *158 Plan received support representing 56.55% of the aggregate outstanding unsecured claims.³⁶

The Concurso Plan is consistent with the terms of the RSA and provides for the repayment of creditors who are located in the United States.³⁷ It establishes the creation of a special purpose vehicle through a Mexican trust, to which almost all of the Chapter 15 Debtor's remaining assets will be transferred.³⁸ Upon the monetization, sale, or assignment of such assets, the corresponding proceeds will be distributed according to the priority scheme set forth in the Mexican Bankruptcy Law, *pari passu* and *pro rata* among unsecured creditors.³⁹ Upon the distribution, the unsecured claims will be cancelled or extinguished in accordance with the Concurso Plan.⁴⁰

Clause 16 of the Concurso Plan contains exculpatory provisions that shield certain parties who played roles in the negotiation and implementation of the Chapter 15 Debtor's restructuring process, including the Ad Hoc Group, the Mexican Liquidator, the Chapter 15 Debtor's former directors and officers, the Indenture Trustee, and certain related parties (the "Release"). These parties are exculpated for any actions or inactions taken during the restructuring process prior to the creditors' formal acceptance of the plan, subject to the Concurso Plan's carve-outs and exceptions. Specifically, the Concurso Plan provides:

In any event, [the Chapter 15 Debtor] and the Recognized Creditors agree not to bring any action, complaint, suit or claim, as the case may be, against the Participating Recognized Creditors nor [the Chapter 15 Debtor], respectively, as well as their shareholders, its former general manager Felipe Guelfi Regules, liquidator, directors, officers, secretaries. depositaries and officers, and The Bank of New Mellon, as trustee for [the Chapter 15 Debtor]'s foreign-denominated bonds denominated in U.S. dollars, legal tender in the United States of America, and euros, legal tender in the European Union as the case may be, for any act or omission incurred by them during Bankruptcy Proceeding and at any time prior to the execution of this Agreement, except for actions, complaints, claims or demands, as the case may be, for acts or omissions of [the Chapter 15 Debtor] that have caused damage or impairment to the Bankruptcy Estate and that they have failed to declare or disclose to the Participating Recognized Creditors during the negotiations of this Settlement Agreement and up to the date of its execution.43

As written, the Release is customary in Mexican settlement agreements and is permitted under Mexican Bankruptcy Law.⁴⁴ Under the Concurso Order, the Mexican Court determined that the Concurso Plan and the Release are consistent with Mexican Bankruptcy Law and not in violation of the public or individual interest of any specific creditor.⁴⁵ The Concurso Order has not been subject to a stay in *159 Mexico, so it remains in effect and is enforceable under Mexican law.⁴⁶

The DFC was an active participant in the Mexican Prepack Proceeding.⁴⁷ It filed a proof of claim and objected to the approval of the Concurso Plan on grounds that were unrelated to the Release.⁴⁸ On November 21, 2024, the DFC appealed the Concurso Order, challenging, among other things, the Release.⁴⁹ On December 10, 2024, the Ad Hoc Group, the Chapter 15 Debtor, and the Conciliator each filed a reply to the DFC's appeal.⁵⁰ In their respective briefs, the Chapter 15 Debtor and Ad Hoc Group argued that the Release does not violate Mexican Bankruptcy Law, and they defended the propriety of the Release.⁵¹ The DFC appeal remains pending.⁵²

On February 7, 2025, the Foreign Representative filed the Verified Petition, commencing this chapter 15 case and seeking entry of an order recognizing the Mexican Prepack Proceeding and enforcing the Concurso Plan and Concurso Order. The DFC objected.⁵³

On March 11, 2025, this Court conducted an evidentiary hearing to consider the Verified Petition and concluded that it possessed the power to grant (i) recognition to the Mexican Prepack Proceeding as a foreign main proceeding, and (ii) comity and full force and effect to the Concurso Plan. The Court accordingly entered the Recognition Order.⁵⁴

II. The DFC Objection

In the DFC Objection, the DFC argued that the Concurso Plan cannot be recognized in its current form because the Release is not authorized under Bankruptcy Code sections 1507 and 1521.

It contends that Bankruptcy Code section 1521(a) does not include third-party releases as relief available to a foreign debtor. Specifically, the DFC argues that the term "any appropriate relief" used in that section refers to relief available under the Bankruptcy Code. The DFC contends that non-consensual third-party releases are not available. Relatedly, it contends that Bankruptcy Code section 1507, which provides that a U.S. court may grant "additional assistance" to a foreign representative, also does not provide for such relief.

The DFC posits that the Foreign Representative wrongly relies on the catchall provisions of Bankruptcy Code section 1521(a)(7) and 1507 to justify enforcement of the Concurso Plan. In so doing, it points to Purdue. However, the DFC does not argue that Purdue's refusal to approve a nonconsensual third-party release in that chapter 11 case means that such a release cannot be available in chapter 15. Instead, the DFC argues that Purdue offers a framework for thinking about statutory interpretation *160 that means this Court lacks authority to order enforcement of the Release.

The DFC contends that this Court should read the catchall provisions of Bankruptcy Code sections 1521(a)(7) and 1507 in the same way the <u>Purdue</u> Court read Bankruptcy Code section 1123(b)(6), and therefore conclude that catchall provisions like these are limiting provisions that provide no authority for enforcement of the Release.

The DFC also argues that the Release is "manifestly contrary to the public policy of the United States" as provided in Bankruptcy Code section 1506.

III. Discussion

This is a core proceeding under 28 U.S.C. § 157(b)(2)(P) because it involves "matters under chapter 15 of title 11." The DFC did not contest that recognition of the Mexican Prepack Proceeding under Bankruptcy Code section 1517 was appropriate, and this Court entered an order granting recognition of the Mexican Prepack Proceeding as a foreign main proceeding. As a consequence of that recognition, this Court "shall grant comity or cooperation to the [F]oreign [R]epresentative." ⁵⁵

Chapter 15 begins with a policy statement. Section 1501, which is titled "Purpose and scope of application," provides:

- (a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
 - (1) cooperation between—
 - (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
 - (B)) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
 - (2) greater legal certainty for trade and investment;
 - (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
 - (4) protection and maximization of the value of the debtor's assets; and
 - (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.⁵⁶
- *161 ^[2] No other chapter of the Bankruptcy Code sets forth a similar statement about its purpose. The inclusion of this policy statement in section 1501 highlights that the Court

should be guided by the main policy goals of chapter 15—cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15.

The importance of comity is reinforced in section 1507(b), which instructs that the provision of "additional relief" be "consistent with the principles of comity"⁵⁷ It is then further emphasized in section 1509(b)(3), which provides that when a U.S. court grants recognition of a foreign proceeding under Bankruptcy Code section 1517, it "shall grant comity or cooperation to the foreign representative."⁵⁸ Therefore, in deciding the issues presented here, this Court is mindful of the context in which it operates and considers the centrality of cooperation and comity in reaching its decision.

Court has broad discretion to order enforcement of orders entered in a foreign main proceeding, consistent with the guiding principles of comity. These principles of comity are particularly compelling in the bankruptcy context, where "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings, because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail." Therefore, when considering whether to enforce an order entered in a foreign main proceeding, U.S. bankruptcy courts should aim to maximize assistance to the foreign court conducting the foreign main proceeding.

¹⁶¹ Two provisions through which a U.S. bankruptcy court may enforce orders entered in a foreign main proceeding are Bankruptcy Code sections 1521(a) *162 and 1507. The Foreign Representative asked that this Court enforce the Concurso Plan under those sections. Section 1521(a) empowers bankruptcy courts to grant appropriate relief, whereas section 1507 empowers bankruptcy courts to provide additional assistance.

^[7] ^[8] However, Bankruptcy Code section 1521(a)'s and 1507's broad grants of discretion are limited in multiple ways. A main limitation on the court's discretion under these sections is Bankruptcy Code section 1506. That section provides that the court may "refus[e] to take an action governed by [chapter 15] if the action would be manifestly contrary to the public policy of the United States." Refusing to take an action under Bankruptcy Code section 1506 is an extraordinary act. That section should be "narrowly

interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." As a consequence, that authority rarely is exercised. 64

[9] [10] [11] [12] Under Bankruptcy Code section 1506, the Court's discretion to enforce orders of a foreign court is circumscribed by fundamental policies of fairness. Since before the enactment of chapter 15, for a U.S. bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, courts have required that the foreign proceeding afford litigants the same fundamental protections that they would have received in a U.S. court.65 Relief that is *163 granted in a foreign proceeding does not have to be identical to relief that might be available in a U.S. proceeding.66 Instead, the cases teach that we should look to the fairness of the foreign proceeding.⁶⁷ Therefore, as a matter of comity, if the forum of the foreign proceeding offers "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced.68

*164 A. Statutory Interpretation of Bankruptcy Code Sections 1521(a) and 1507

^[13] The DFC argues that the Supreme Court's analysis of Bankruptcy Code section 1123(b) in <u>Purdue</u> changes the way courts should interpret sections 1521(a) and 1507. It does not.

This section begins by recounting the DFC's argument in further detail. Next, it examines the plain meaning of the language in Bankruptcy Code sections 1521(a) and 1507. Then, it analyzes congressional intent through canons of statutory construction to confirm the plain meaning interpretation. As it proceeds through the plain language analysis and then the canons of construction analysis, it also compares the conclusions derived from sections 1521(a) and 1507 to section 1123(b)(6) and the conclusions the Supreme Court derived from that section. Because the power to enforce the Concurso Plan and the Concurso Order may only derive from Bankruptcy Code sections 1521(a)(7) or 1507(a)

(the "Chapter 15 Catchalls"), the focus of this analysis is on those subsections.

The DFC specifically argues that the Chapter 15 Catchalls are analogous to the catchall provision of Bankruptcy Code section 1123(b)(6), so the Court should interpret them all the same way. 69 Section 1123(b) enumerates certain relief that a chapter 11 plan may provide. Subsection (6)—or, as the Supreme Court refers to it in Purdue, the "catchall" provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."70 The Purdue Court held that subsection (6) does not allow a chapter 11 plan to include nonconsensual third-party releases when interpreted in light of its surrounding context pursuant to the statutory canon of ejusdem generis.71 It explained that the other provisions in section 1123(b) authorized relief that concerns the debtor, its rights and responsibilities, and its relationship with its creditors.72 Because none of the other provisions in section 1123(b) consider a third-party's relationship with a creditor, the Supreme Court explained, subsection (6) must be interpreted in that context and should not extend to govern a third-party's relationship with a creditor by granting nonconsensual third-party releases.73

The DFC urges this Court to apply a similar analysis to sections 1521(a)(7) and 1507(a). It asserts that because those subsections are catchalls, like section 1123(b)(6), and because neither section 1521(a) nor 1507 discusses third-party relationships, then the Chapter 15 Catchalls *165 should not extend to allow nonconsensual third-party releases. Neither the plain language nor canons of statutory interpretation support the DFC's arguments.

[14] [15] [16] [17] In determining how to interpret sections 1521(a) and 1507, "[o]ur interpretation ... starts 'where all such inquiries must begin: with the language of the statute itself.' "74 If the text of the statute is unambiguous, we construe it according to its plain meaning. The it is ambiguous, then we turn to legislative history and the canons of construction to determine congressional intent in enacting the statute. However, "[i]n any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation[.]"77

Section 1521, subsection (a) provides:

Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

- (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
- (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
- (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
- (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, *166 including an examiner, authorized by the court;
- (6) extending relief granted under section 1519(a); and
- (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).⁷⁸

Meanwhile, section 1507 provides:

- (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
- (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
 - (1) just treatment of all holders of claims against or interests in the debtor's property;

- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of the debtor;
- (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
- (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.⁷⁹

that the DFC's interpretation is incorrect for multiple reasons. Beginning with section 1521, subsection (a) enumerates some relief that a bankruptcy court may grant at the request of a foreign representative. However, the section begins by explaining the court may grant "any" appropriate relief. Even though that statement is followed by a list of some relief a court may grant, the word "including" indicates that the enumerated relief is not a complete and exclusive list. Congress expressly addresses the term "including" at Bankruptcy Code section 102(3), providing that the word "includes' and 'including' are not limiting." This definition codifies the rule of statutory construction that the terms "includes" and "including" are illustrative, and not exclusive or limiting.

It is true that when comparing this "any ... including" language to that in section 1123(b), they are, at first blush, similar. Section 1521(a) allows a bankruptcy court to "grant any appropriate relief, including ... any additional relief" while section 1123(b) allows a plan to "include any other appropriate provision." But the critical difference lies in the language that qualifies "any ... including" in each section.

Section 1521(a) qualifies that language by explaining that any additional relief a court grants should be of the kind that is *167 available to a trustee, 82 and then lists relief that a court should not grant. It is well-settled that enforcement of a third-party release contained in a foreign plan is appropriate under that section. 83

Meanwhile, section 1123(b) simply states that a court may include any "other" chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title." In <u>Purdue</u>, the Supreme Court explained that the word "other"

directs courts to look to the other provisions in section 1123(b) to determine what further relief a court could grant. By looking at section 1123(b)(1)–(5), the Supreme Court thus concludes that subsection (6) should only grant similar relief, as in relief that concerns the debtor and its rights, responsibilities, and relationships. However, section 1521(a) does not direct courts to look to the "other" provisions when providing relief under its catchall. Instead, section 1521(a) allows courts to grant "any additional relief that may be available to a trustee." Accordingly, section 1521(a) does not direct courts to limit its relief to the kind afforded in other provisions, but rather, to relief available to a trustee. Because the relief in question would be available to a trustee, it is permissible under section 1521(a)(7).

Second, section 1521(a)(7) qualifies its "any ... including" language by listing specific relief that a court is not permitted to grant under that section. 88 That list of prohibited relief does not include nonconsensual third-party releases. 89 By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries.

On the other hand, in section 1123(b), rather than provide specific prohibited relief, Congress directs courts to look to the whole of the Bankruptcy Code to determine if the requested provision is consistent with it. In Purdue, the Supreme Court framed this section as one that "set[s] out a detailed list of powers, followed by a catchall."90 It explained, "Congress could have said in [section 1123(b)](6) that 'everything not expressly prohibited is permitted[]' " but instead limited it to "any other appropriate provision not inconsistent with the applicable provisions of this title."91 In comparison, in section 1521(a)(7), Congress did expressly enumerate what it wanted to prohibit; in a chapter 15 case, a court cannot grant relief under sections 522, 544, 545, 547, 548, 550, and 724(a). By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can *168 grant, bearing in mind the guiding principles of comity and cooperation.

^[20] Briefly turning to a canon of statutory construction before moving onto examining the plain language of section 1507, the canon of *expressio unius* confirms this reading of the express prohibitions established in section 1521(a)(7). "Expressio unius est exclusio alterius" stands for the proposition that the expression of one thing means the exclusion of another. ⁹² By establishing a list of relief that

courts should not grant under section 1521(a)(7), the section implies that other forms of relief not expressly prohibited are permitted. Therefore, enforcing foreign orders providing for nonconsensual third-party releases is within the scope of authority that section 1521(a) provides.

Section 1507 similarly affords courts a broad grant of authority to provide relief while setting out express limitations. Section 1507 establishes that a court may provide "additional assistance to a foreign representative" if the court has recognized the proceeding. Notwithstanding that the term "additional assistance" is a broad term at the outset, it also suggests that even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507. Thus, section 1507 implies an even more expansive grant of power than already found in section 1521(a).

[21] However, section 1507 does have limitations. First, it states that any assistance should be "[s]ubject to the specific limitations stated elsewhere in this chapter[.]"93 Therefore, in determining whether relief may be granted as part of section 1507's "additional assistance," a court should look to the remainder of chapter 15 to guide its decision. Nevertheless, this instruction differs from section 1123(b)(6)'s instruction to look at subsections (1)–(5) to contextualize appropriate relief because chapter 15 covers a broader array of topics than section 1123(b)(1)-(5), which is limited to matters concerning and connected to the debtor. Section 1507's instruction also differs from section 1123(b)(6)'s other instruction that any other provisions not be inconsistent with applicable provisions of "this title" (as in, the Bankruptcy Code). Chapter 15 has a much different purpose and context-mainly to promote comity and international cooperation—thus entailing different limitations when compared to the Bankruptcy Code at large.94 Accordingly, relief that is appropriate subject to limitations in chapter 15 must be different than relief that is not inconsistent with the applicable provisions of the Bankruptcy Code.

Second, section 1507(b) establishes a list of considerations for courts when determining whether to provide such additional assistance. Those factors, like much of chapter 15, focus on whether relief would be "consistent with principles of comity[.]" They direct a court to confirm that any additional assistance would reasonably assure just treatment of creditors, protection of U.S. claim holders against prejudice, prevention of preferential or fraudulent transfers, equitable distribution of assets in accordance with the

Bankruptcy Code, and the provision of an opportunity for a fresh start for the debtor.⁹⁶

*169 [22] By adding this list of considerations, Congress again established boundaries for courts in granting relief under chapter 15 and directed courts on how to determine if it is appropriate to grant relief. And again, these express prohibitions provide a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6), and they direct a court to focus on principles of comity when considering granting the relief. Because comity is central to chapter 15, the relief granted in the foreign court does not have to be available in U.S. courts under chapter 11.97 In other words, U.S. courts do not have to reject relief solely because it would be unavailable in the United States. However, there must be metrics to assess whether the proposed relief is appropriate. Section 1507(b) solves that problem by providing these considerations while prioritizing comity to foreign courts.

As with section 1521, section 1507 thus differs from section 1123(b) because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions, courts do not need to read further into its words like they do for section 1123(b). The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously.

Here, the Mexican Prepack Proceeding provided all the protections set out in section 1507(b). Therefore, section 1507 allows this Court to enforce the relief entered in the Mexican Prepack Proceeding.

Accordingly, the plain language of both section 1521(a)(7) and section 1507(a) permit a U.S. court to enforce a foreign order for nonconsensual third-party releases. Nevertheless, even if the Chapter 15 Catchalls are ambiguous, the legislative history and canons of statutory construction confirm this interpretation and corresponding Congressional intent.¹⁰⁰

l²³ Congress enacted chapter 15 in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act to "provide effective mechanisms for dealing with cases of cross-border insolvency." The legislative history of chapter 15 shows that a major purpose in its enactment was to promote comity for the orders of foreign courts. In fact, as

discussed above, section 1501 explicitly establishes one of its purposes as promoting cooperation between U.S. courts and foreign *170 courts.¹⁰² Further, section 1508 directs courts "[i]n interpreting this chapter, [to] consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."¹⁰³ Thus, granting bankruptcy courts the authority to enforce nonconsensual third-party releases originating in foreign courts would promote chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings.¹⁰⁴

Moreover, in examining multinational laws, as chapter 15 directs, nonconsensual third-party releases are widely accepted by foreign courts. Courts have previously looked to multinational laws in interpreting chapter 15 and determining whether certain relief would comport with international insolvency norms and the UNCITRAL Model Law on Cross-Border Insolvency, on which chapter 15 is based. Other countries recognize nonconsensual third-party releases in insolvency proceedings. Most relevant here, Mexican law provides for such releases. That Mexican law provides for such releases further encourages the authority of this Court to enforce such releases in comity with the Mexican court.

be read in their context pursuant to the canon of *ejusdem* generis. The Supreme Court has repeatedly stated that "a 'fundamental canon of statutory construction' [is] that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' "108 However, the DFC neglects the major differences between the contexts of chapters 11 and 15. Namely, chapter 15 exists to provide assistance to foreign courts by granting comity to their orders. ¹⁰⁹ Doing so promotes the purpose of an insolvency proceeding, which is to provide for equitable and orderly distribution of a debtor's assets in a manner that is enforceable across borders. ¹¹⁰

Of course, a court's ability to enforce a foreign court's order has limitations, but *171 Congress specified such limitations in the Bankruptcy Code. It specified relief that a court cannot grant under section 1521(a)(7).¹¹¹ It provided protections to consider before granting relief under section 1507.¹¹² It established that if such relief is manifestly contrary to public policy or violates a U.S. citizen's fundamental rights or procedural fairness, then it is not available.¹¹³ All these limitations provide boundaries for relief under chapter 15

and ensure that it can have far-reaching consequences, so long as it is within these boundaries. 114 Accordingly, enforcing nonconsensual third-party releases granted in a foreign insolvency proceeding under that country's laws and in a fair proceeding is within this Court's authority under the Bankruptcy Code.

B. <u>The Third-Party Releases Are Not Manifestly Contrary</u> to the Public Policy of the United States

¹²⁵ The DFC also contends that the Concurso Plan should not be enforced under the public policy exception of Bankruptcy Code section 1506. As explained above "[t]he public policy exception has been narrowly construed, because the 'word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." "¹¹⁵ Therefore, courts should use this exception to deny enforcing foreign relief sparingly.¹¹⁶

l²⁶ l²⁷ "The public policy exception applies 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would impinge severely a U.S. constitutional or statutory right.' "117 The DFC did not object to the fairness of the proceedings, nor did it identify a constitutional or statutory right on which the Concurso Plan impinges. Nonetheless, the facts demonstrate that the Mexican proceeding comported with U.S. standards of procedural fairness, and the Concurso Plan does not violate any constitutional or statutory rights.

In the Mexican Prepack Proceeding, the DFC did not object to the Release and only raised the issue on appeal. There was an opportunity for objection, consistent with our own procedures, but the DFC did not avail itself of that opportunity. Article 164 of the Mexican Bankruptcy Law provides for an opportunity to object to a *concurso* plan, after which the Mexican court is to verify that the *concurso* plan complies with all the requirements for a valid plan and is not contrary to public policy; only then can a *concurso* plan be approved. The DFC, having failed to object in the Mexican Prepack Proceeding, cannot contend that there was a procedural unfairness, and in fact, does not contend that the Mexican's courts procedures were unfair.

*172 Even though the DFC does not argue the Mexican proceedings were unfair or identify any facts that would

support a finding of unfairness, this Court finds that the Mexican proceedings offered "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting."119

U.S. courts frequently have recognized Mexican *concurso* plans as being the product of a fair process.¹²⁰ In so holding, those courts have found that the contested Mexican *concurso* plans embodied arms'-length agreements and conformed to the general distribution priorities established in the Bankruptcy Code.¹²¹ Mexican law also provides for due process to consider objections to a plan.¹²² After creditors have been given the opportunity to object, Mexican law provides that the court may verify the plan if it complies with all the requirements for a valid plan and is not contrary to public policy.¹²³

The present decision does not diverge from those prior decisions confirming the fairness of Mexican proceedings. The uncontroverted evidence before the Court is that the Concurso Plan's Release is customary and permitted under Mexican law; the Release is the product of arms'-length negotiations among the Chapter 15 Debtor, the Recognized Creditors, and the Shareholders; and the Concurso Plan was approved by a majority of the Recognized Creditors.¹²⁴

[28] It also is undisputed that the DFC played an active role in the Mexican Prepack Proceeding. 125 The DFC filed a proof of claim asserting that it was a privileged creditor. 126 The Mexican Court instead allowed the DFC's claim as an unsecured creditor and granted the DFC status as a Recognized Creditor.¹²⁷ The DFC has appealed that ruling, and the appeal remains pending. 128 The DFC did not object to the *173 Release but did object to the Concurso Plan on other grounds. 129 The Mexican Court overruled the DFC's plan objection and entered the Concurso Order approving the Concurso Plan. In so doing, the Mexican Court found that the Concurso Plan complied with Mexican law and "neither the public interest nor the individual interest of any specific creditor is violated, since the terms agreed to will apply to all creditors equally" The extent of the DFC's participation and the Mexican court's finding that the Concurso Plan would not violate the public interest or the interests of any

creditors both emphasize the DFC's opportunity (of which it did not avail itself) to object to the Release before the approval of the Concurso Plan. The Mexican court provided the DFC with a full and fair opportunity to be heard, which is a central tenet of U.S. procedural fairness.¹³¹

Therefore, in consideration of the fairness of this proceeding, the procedural safeguards typical under Mexican law, and the fact that the DFC has not identified an example of lack of fairness, this Court finds that the Mexican proceeding was procedurally fair.

[29] [30] [31] Likewise, the DFC has identified no constitutional or statutory right upon which the Concurso Plan impinges. Its only argument is that nonconsensual thirdparty releases are manifestly contrary to U.S. public policy because the Purdue decision prohibits them in most chapter 11 plans. 132 However, far from being "manifestly contrary to the public policy of the United States," nonconsensual thirdparty releases are expressly permitted under Bankruptcy Code section 524(g) in the context of asbestos cases. Furthermore, in Purdue, the Supreme Court noted that while it held that nonconsensual third-party releases are not permitted under chapter 11 (except in the asbestos context under Bankruptcy Code section 524(g)), Congress could have authorized them.¹³³ Indeed, the Supreme Court framed this issue in terms of the policy choices that Congress is authorized to make. To be manifestly contrary to U.S. public policy, the contested relief must impinge on some constitutional or statutory right; if a nonconsensual thirdparty release impinged on some constitutional right, the Supreme Court would not have said that Congress could provide for it. Accordingly, Congress has authorized nonconsensual third-party releases before, and the Supreme Court has explicitly said that it could do so again in the context of chapter 11 if it so desired. Lack of specific availability in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as *174 here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress. 134

The In re Vitro S.A.B. de C.V. court makes a similar point. While the Fifth Circuit denied enforcement of a Mexican plan's third-party release provisions, it noted that "although our court has firmly pronounced its opposition to [nonconsensual third-party] releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or

United States law."¹³⁵ Thus, it found that it could not deny the relief simply on the basis that third-party releases were not available in its jurisdiction.¹³⁶ Instead, the In re Vitro court only declined to enforce the plan in that case because of the role in the approval process of the votes of insiders holding intercompany claims.¹³⁷

decision that Congress can and has made, it cannot also be true that enforcing such releases where principles of cooperation and comity so require in chapter 15 would be "manifestly contrary to the public policy of the United States." The simple fact that a U.S. court could not grant such releases in a typical chapter 11 plan does not make them manifestly contrary to U.S. public policy so as to require this Court to prohibit enforcement of the Release in this chapter 15 case. The DFC's public policy exception argument fails.

CONCLUSION

Accordingly, chapter 15 authorizes this Court to enforce nonconsensual third party releases ordered by foreign courts. The plain language of Bankruptcy Code sections 1521(a) and 1507 give this Court a broad grant of discretion to aid foreign courts in accordance with principles of comity. Nothing in the plain language of these statutes or the legislative history or canons of construction indicates that Congress intended to diverge from this policy of comity to prohibit enforcing releases entered by foreign courts. The Mexican Prepack Proceeding was fair, and the Concurso Plan and the Concurso Order are not manifestly contrary to U.S. public policy. Therefore, this Court enforces the Concurso Plan and the Concurso Order in their entirety.

All Citations

670 B.R. 150

Footnotes

- The last four identifying digits of the tax number and the jurisdiction in which the Chapter 15 Debtor pays taxes is Mexico 6815. The Chapter 15 Debtor's corporate headquarters is located at Avenida Insurgentes Sur No. 730, 20th Floor, Colonia del Valle Norte, Alcaldía Benito Juárez, 03103, Mexico City, Mexico.
- ² 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024).
- Id. at 226–27, 144 S.Ct. 2071 ("Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.").
- See, e.g., Joshua Kieran-Glennon, <u>Restructuring Update: Third-Party Releases after Purdue Pharma Solutions in Irish Law</u>, McCann FitzGerald (Nov. 7, 2024), available at https://perma.cc/HR72-YR79; Michelle McGreal, Douglas Deutsch, & Robert Johnson, <u>Purdue Pharma Bankruptcy Ruling Sidesteps Chapter 15 Implications</u>, Bloomberg (July 10, 2024), available at https://perma.cc/5U5G-CXBF.
- ⁵ 11 U.S.C. § 1501.
- Id.; see also In re ABC Learning Ctrs. Ltd., 728 F.3d 301, 304–05 (3d Cir. 2013) (examining Congress's purpose in enacting chapter 15 and explaining the objectives of the legislation); In re Irish Bank Resol. Corp., No. 13-12159 (CSS), 2014 WL 9953792, at *9–10 (Bankr. D. Del. Apr. 30, 2014), aff'd, 538 B.R. 692 (D. Del. 2015).
- Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Verified Petition") [D.I. 2].
- Foreign Rep. Ex 7.
- 9 Foreign Rep. Ex. 8.
- 10 11 U.S.C. § 1506.
- D.I. 51.
- 12 D.I. 58.
- See Del. Bankr. L.R. 8003-2 ("Any bankruptcy Judge whose order is the subject of an appeal may file a written opinion that supports the order being appealed or that supplements any earlier written opinion or recorded oral bench ruling or opinion within 7 days after the filing date of the notice of appeal.").
- This background section is based on the (i) Verified Petition; (ii) the Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Estrada Dec.") [D.I. 3] (Foreign Rep. Ex. 2); and (iii) the Supplemental Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Estrada Supp. Dec.") [D.I. 41] (Foreign Rep. Ex. 11). The Verified Petition, Estrada Dec., and Estrada Supp. Dec. were admitted without objection. Messrs. Wagstaff and Estrada were not crossexamined.
- Verified Petition ¶ 1.
- 16 Id.
- 17 <u>Id.</u> ¶ 4.

- <u>Id.</u> ¶ 11.
- 19 <u>Id.</u> ¶ 12; <u>In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.</u>, Case No. 22-10696 (TMH) (formerly Case No. 22-10842 (DSJ) in the United States Bankruptcy Court for the Southern District of New York).
- 20 <u>Id.</u> ¶ 13.
- Estrada Dec. ¶ 48.
- Verified Petition ¶ 14; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10630 (TMH).
- 23 <u>Verified Petition</u> ¶ 15.
- <u>Id.</u> ¶ 20; Foreign Rep. Ex. 9.
- Verified Petition ¶ 20.
- 26 <u>Id.</u>
- 27 <u>Id.</u> ¶ 21; Foreign Rep. Ex. 4.
- Foreign. Rep. Ex. 5.
- Estrada Dec. ¶ 55.
- Under Mexican bankruptcy law, the court appoints the Conciliator to work with the debtor and its recognized creditors on an agreement about the debtor's restructuring. See id. ¶ 29 for a description of the role of the Conciliator.
- <u>Id</u>. ¶ 56.
- 32 <u>Id.</u> ¶ 57.
- 33 <u>Id.</u> ¶ 58; Foreign Rep. Ex. 6.
- Estrada Dec. ¶ 60.
- Id. ¶ 61; see also Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.) (establishing the requirements for a plan to obtain approval under Mexican Bankruptcy Law).
- Estrada Dec. ¶ 62.
- 37 <u>Id.</u> ¶ 63.
- 38 <u>Id.</u>
- 39 <u>Id.</u>
- 40 <u>Id.</u>
- 41 <u>Id.</u> ¶ 66; Concurso Plan, Clause 16.
- 42 Concurso Plan, Clause 16.
- Concurso Plan Clause 16.
- 44 See Estrada Supp. Dec. ¶ 17.
- 45 <u>Id.</u> ¶ 25.
- 46 <u>Id.</u>
- 47 <u>Id.</u> ¶ 22.

- 48 <u>Id.</u> ¶¶ 23–24.
- 49 <u>Id.</u> ¶ 26.
- 50 <u>Id.</u> ¶ 27.
- 51 <u>Id.</u>
- 52 <u>Id.</u> ¶ 23.
- See Objection of United States International Development Finance Corporation to Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant To 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "DFC Objection") [D.I. 30].
- Following entry of the Recognition Order, this Court entered orders dismissing the Involuntary Chapter 11 Case and the Prior Chapter 15 Case.
- 11 U.S.C. § 1509(b)(3) (directing a court to grant comity if it has granted recognition under section 1517 and subject to any limitations consistent with the policy of chapter 15).
- 56 11 U.S.C. § 1501(a). The language of this section closely tracks the Preamble of the UNCITRAL Model Law of Cross-Border Insolvency, which provides that:

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.
- ⁵⁷ 11 U.S.C. § 1507(b).
- ⁵⁸ 11 U.S.C. § 1509(b)(3).
- See In re Energy Coal S.P.A., 582 B.R. 619, 626–27 (Bankr. D. Del. 2018) (quoting In re Daebo Int'l Shipping Co., 543 B.R. 47, 52–53 (Bankr. S.D.N.Y. 2015)) (explaining that the Bankruptcy Code gives courts "broad discretion" and instructs them to be "guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief"); In re Grant Forest Prods., Inc., 440 B.R. 616, 621 (Bankr. D. Del. 2010) (stating that this broad power is designed to promote cooperation between U.S. courts and foreign courts in cross-border insolvency cases); In re Elpida Memory, Inc., No. 12-10947 CSS, 2012 WL 6090194, at *7–8 (Bankr. D. Del. Nov. 20, 2012) (reiterating the broad discretion certain sections of chapter 15 accord, consistent with principles of comity). See generally Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895) (defining comity as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws").
- In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)) (internal quotation marks and alterations omitted). See generally In re ABC Learning Ctrs. Ltd., 728 F.3d at 304–07 (discussing the origins of chapter 15 and emphasizing the role of comity in bankruptcy proceedings).
- See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining that chapter 15 directs U.S. courts to act "in aid of the main proceedings, in preference to a system of full bankruptcies ... in each state where assets are found" (quoting H.R. Rep. No. 109–31(1), at 109 (2005) reprinted in 2005 U.S.C.C.A.N. 88, 171)).
- 62 11 U.S.C. § 1506.

- 63 <u>In re Ephedra Prods. Liab. Litig.</u>, 349 B.R. 333 (S.D.N.Y. 2006) (citing H.R. Rep. No. 109–31(I) at 109, <u>reprinted in 2005 U.S.C.C.A.N. 88, 172).</u>
- See In re PT Bakrie Telecom Tbk, 628 B.R. 859, 890–91 (Bankr. S.D.N.Y. 2021) (reading the public policy exception narrowly because the word "manifestly" restricts it to the "most fundamental" U.S. policies and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (emphasizing that courts should construe this section narrowly and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (construing the section narrowly and finding that, prior to Purdue, U.S. bankruptcy courts could enforce non-consensual third-party releases because they were not manifestly contrary to U.S. public policy). Compare In re Rede Energia S.A., 515 B.R. 69, 98 (Bankr. S.D.N.Y. 2014) (stating that section 1506 should be construed narrowly and used sparingly and finding that to enact the Brazilian plan would not be manifestly contrary to the public policies of the United States because "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence"), with In re Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (finding that while a difference in U.S. law from the foreign law does not necessarily preclude enforcement under chapter 15, the plan component at issue was affirmatively banned under U.S. law, enforcement would subject the enforcer to criminal liability, and enforcement would directly compromise privacy rights established in a comprehensive statutory scheme and based on constitutional rights).
- 65 Courts are divided on the statutory source of this limitation, but they agree that it is a central tenet of whether to afford foreign orders comity in insolvency proceedings, and it has remained so throughout multiple iterations of the Bankruptcy Code and the U.S. bankruptcy system itself. See Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th 169, 180 (3d Cir. 2024) (holding that a court should examine the foreign proceeding's fairness pursuant to principles of comity); In re Irish Bank Resol. Corp., 2014 WL 9953792 at *18 (explaining that a court must examine the procedural fairness of the foreign proceedings pursuant to the public policy exception of section 1506); In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (clarifying that the considerations of fairness a court must examine in its determination of whether to enforce an order of a foreign court overlap with the considerations of Bankruptcy Code sections 1521 and 1507, all combining to "assure the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections"); In re Rede Energia S.A., 515 B.R. at 90 (holding that Bankruptcy Code section 1507 establishes the fairness considerations that courts must examine in determining whether to grant comity to a foreign court's order); In re Sino-Forest Corp., 501 B.R. at 662-63 (emphasizing the importance of ensuring fairness in the foreign proceeding when determining whether to grant a foreign order comity under chapter 15); In re Atlas Shipping A/S, 404 B.R. at 733 (explaining that before Congress enacted chapter 15, Bankruptcy Code section 304 required bankruptcy courts, when considering whether to enforce foreign orders, to determine that such enforcement would not prejudice the rights of U.S. citizens); Phila. Gear Corp. v. Phila. Gear de Mex., S.A., 44 F.3d 187, 193–94 (3d Cir. 1994) (directing the District Court, in determining whether to grant comity to a Mexican proceeding, to make findings on certain considerations of fairness, including whether the Mexican court was a duly authorized tribunal, whether the plan provided for equal treatment of creditors, whether recognition would be inimical to the U.S. policy of equality, and whether the U.S. creditor would be prejudiced); Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 536, 3 S.Ct. 363, 27 L.Ed. 1020 (1883) (considering whether to afford comity to a Canadian insolvency plan and determining that the Canadian proceedings did not deprive creditors of their property without due process of law).
- In re Metcalfe, 421 B.R. at 697 (explaining that enforcement of relief in a foreign plan does not require identical relief to be available in the United States); In re Toft, 453 B.R. at 198 (emphasizing that the mere fact that U.S. law differs from the law of the foreign main proceeding does not preclude enforcement as "manifestly contrary" to U.S. public policy).
- See In re Elpida Memory, Inc., 2012 WL 6090194, at *7–8 (explaining that comity is limited to instances where U.S. parties are provided the same fundamental protections that litigants in the United States would receive and finding that Bankruptcy Code section 1520(a) requires U.S. Bankruptcy Courts to apply the standard for a sale of assets under Bankruptcy Code section 363 to comport with this limitation); In re Agrokor d.d., 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018) (construing section 1506 to allow deference to the foreign court so long as the foreign proceedings are procedurally fair and not manifestly contrary to U.S. public policy); In re Atlas Shipping A/S, 404 B.R. at 733 ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.").
- Hilton v. Guyot, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895); accord In re Metcalfe, 421 B.R. at 698; see also In re Elpida Memory, Inc., 2012 WL 6090194, at *7 (requiring, for enforcement of the foreign plan, that the foreign proceeding afford the litigants the same fundamental protections that they would receive in the United States); In re PT Bakrie Telecom Tbk, 628 B.R. at 878–79 (looking to Hilton and other cases for factors of fairness in determining whether to grant comity). In examining the

procedural fairness of a foreign main proceeding, courts have also looked at:

(1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th at 181 (internal alterations omitted); accord <u>In re PT Bakrie Telecom Tbk</u>, 628 B.R. at 879 (quoting <u>Allstate Life Ins. v. Linter Grp.</u>, 994 F.2d 996, 999 (2d Cir. 1993)); <u>In re Sino-Forest Corp.</u>, 501 B.R. at 662–63 (quoting <u>Finanz AG Zurich v. Banco Economico S.A.</u>, 192 F.3d 240, 249 (2d Cir. 1999)).

- DFC Objection at 4.
- ⁷⁰ 11 U.S.C. 1123(b)(6).
- 71 <u>Purdue</u>, 603 U.S. at 217–18, 144 S.Ct. 2071.
- ⁷² Id. at 218, 144 S.Ct. 2071.
- 73 <u>Id.</u>
- Ransom v. FIA Card Services, N.A., 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (quoting <u>United States v. Ron Pair Enters.</u>, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)); see also <u>In re Phila. Newspapers, LLC</u>, 599 F.3d 298, 304 (3d Cir. 2010), as amended (May 7, 2010) ("It is the cardinal canon of statutory interpretation that a court must begin with the statutory language.").
- See Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015) ("Our interpretive task begins and ends with the text of the statute unless the text is ambiguous or does not reveal congressional intent with sufficient precision to resolve our inquiry." (internal quotations omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); In re Smale, 390 B.R. 111, 113 (Bankr. D. Del. 2008) ("[T]he starting point is to examine the plain meaning of the text of the statute.... '[W]hen a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms." (quoting Hartford Underwriters Ins. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000))).
- See <u>In re WW Warehouse</u>, Inc., 313 B.R. 588, 591 (Bankr. D. Del. 2004) ("If, after a studied examination of the statutory context, the natural reading of a provision remains elusive, the statute is ambiguous and the Court must seek guidance beyond the statutory text." (internal quotations omitted)); <u>In re Smale</u>, 390 B.R. at 114 ("[A]pplying the plain meaning of the statute is the default entrance—not the mandatory exit.").
- 77 Conn. Nat'l Bank v. Germain, 503 U.S. at 253, 112 S.Ct. 1146.
- ⁷⁸ 11 U.S.C. § 1521(a).
- ⁷⁹ 11 U.S.C. § 1507.
- 80 11 U.S.C. § 102(3).
- See, e.g., Am. Sur. Co. v. Marotta, 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466 (1933) (overruling lower court that found the word "includes" in section 1(9) of the Bankruptcy Act of 1898 to be one of limitation); Friedman v. P+P, LLC (In re Friedman), 466 B.R. 471, 482, n.20 (B.A.P. 9th Cir. 2012) (explaining and providing sources to support the proposition that "including" is not a word of limitation).
- The term "trustee" is defined in chapter 15 as "includ[ing] a trustee [and] a debtor in possession in a case under any chapter of this title" 11 U.S.C. § 1502(6).
- See, e.g., In re Arctic Glacier Int'l, Inc., 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of

<u>arrangement)</u>; <u>In re Avanti Commc'ns Grp. PLC</u>, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a)).

- Purdue, 603 U.S. at 218, 144 S.Ct. 2071.
- 85 <u>Id.</u> at 218–19, 144 S.Ct. 2071.
- 86 11 U.S.C. § 1521(a)(7).
- 87 Id.
- 88 11 U.S.C. § 1521(a)(7) ("except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").
- 89 <u>Id.</u>
- 90 Purdue, 603 U.S. at 218, 144 S.Ct. 2071.
- 91 Id.; 11 U.S.C. § 1123(b)(6).
- 92 <u>In re Thompson</u>, 217 B.R. 375, 378 n.5 (B.A.P. 2d Cir. 1998).
- 93 11 U.S.C. § 1507(a).
- 94 See 11 U.S.C. § 1501 (establishing the scope and purpose of chapter 15).
- ⁹⁵ 11 U.S.C. § 1507(b).
- ⁹⁶ Id.
- 97 In re Metcalfe, 421 B.R. at 697.
- See Kaufman v. Allstate N.J. Ins., 561 F.3d 144, 155 (3d Cir. 2009) ("In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end." (citing Conn. Nat'l Bank v. Germain, 503 U.S. at 253–54, 112 S.Ct. 1146)).
- For a fuller discussion of the fairness of the Mexican proceeding, see <u>infra</u> section B on section 1506's public policy considerations.
- Even where the plain language of a statute is ambiguous, courts will often examine the congressional intent to confirm their interpretation, especially for chapter 15 cases. See In re Elpida Memory, Inc., 2012 WL 6090194, at *5 ("[I]n interpreting Chapter 15, 'the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.' "(quoting 11 U.S.C. § 1508)); In re Premier Int'l Holdings, Inc., 423 B.R. 58, 63–64 (Bankr. D. Del. 2010) ("Moreover, regardless of whether the text is plain or ambiguous, it is appropriate to identify, if possible, a congressional purpose consistent with the Court's interpretation.").
- In re ABC Learning Ctrs. Ltd., 728 F.3d at 304.
- 102 11 U.S.C. § 1501.
- 103 11 U.S.C. § 1508.
- See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (finding that chapter 15 directs courts to act in aid of main proceeding and to maximize assistance).
- See In re Servicos de Petroleo Constellation S.A., 600 B.R. 237, 273-74 (Bankr. S.D.N.Y. 2019) ("[I]t is therefore appropriate for U.S. bankruptcy courts to consider interpretations from other international jurisdictions that have adopted the Model Law." (citing In re Fairfield Sentry Ltd., 714 F.3d 127, 136 (2d Cir. 2013)).
- See In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding such schemes common under United Kingdom law); In re Metcalfe, 421 B.R. at 699 (explaining that a Canadian court had the power to enter such relief).
- See supra note 35, 44–46 and accompanying text (explaining that the Mexican court here found the releases to be valid under

Mexican law); Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.), 701 F.3d 1031, 1039–40 (5th Cir. 2012) (explaining that a Mexican court approved the releases at issue and that relief available in a foreign court need not be identical to or available under U.S. law).

- United States v. Miller, 604 U.S. —, —, 145 S.Ct. 839, 221 L.Ed.2d 373 (2025) (quoting <u>Davis v. Mich. Dept. of Treasury</u>, 489 U. S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).
- 109 <u>See In re ABC Learning Ctrs. Ltd.</u>, 728 F.3d at 306 (explaining courts should "maximize assistance").
- See In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. at 733) (explaining how comity to foreign court orders in the bankruptcy context is particularly important to promote the goals of bankruptcy).
- See 11 U.S.C. § 1521(a)(7) ("except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").
- 112 See 11 U.S.C. § 1507(b).
- 113 <u>See</u> 11 U.S.C. § 1506.
- See In re Atlas Shipping A/S, 404 B.R. at 741 (acknowledging the boundaries for discretionary relief that Congress set in chapter 15).
- In re ABC Learning Ctrs. Ltd., 728 F.3d at 308 (quoting H.R. Rep. No. 109–31(1), at 109 reprinted in 2005 U.S.C.C.A.N. 88, 172).
- In re ENNIA Caribe Holding N.N., 594 B.R. 631, 640 (Bkrtcy.S.D.N.Y. 2018) (citing In re Toft, 453 B.R. at 193).
- In re ABC Learning Ctrs. Ltd., 728 F.3d at 310 (quoting In re Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010)).
- Estrada Supp. Dec. ¶ 25.
- Hilton v. Guyot, 159 U.S. at 202–03, 16 S.Ct. 139. Some courts have held that even where a claimant does not object to the fairness of the foreign proceeding, the bankruptcy court should nevertheless make a finding that the foreign proceeding was fair.

 See In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (finding that, to enforce a foreign plan, a bankruptcy court must make a finding that the foreign proceeding abided by fundamental standards of procedural fairness).
- See, e.g., In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 114–17 (Bankr. S.D.N.Y. 2012) (finding a Mexican insolvency proceeding fair); In re Metrofinanciera, S.A.P.I. de C.V., Sociedad Financiera de Objeto Multiple, E.N.R., No. 10-20666, 2010 WL 10075953, *3–4 (Bankr. S.D. Tex. Sept. 24, 2010) (same); JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (same).
- See, e.g., In re Metrofinanciera, 2010 WL 10075953, at *3.
- 122 See, e.g., id.
- Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.); see also Estrada Supp. Dec. ¶ 25 (confirming the availability under Mexican law).
- 124 Estrada Supp. Dec. ¶¶ 15–21.
- 125 <u>Id.</u> ¶ 22.
- <u>Id.</u> ¶ 23.
- 127 Id
- Id. It bears noting that should the Mexican appellate court determine that the Release is impermissible, the Release would become ineffective here. This Court is not granting the Release. Instead, it is simply enforcing the Concurso Plan. If the Release provision of the Concurso Plan is later altered as a result of the DFC's appeal, the Release would only be enforceable in the United States—if at all—to the extent provided by the Concurso Plan.

- 129 <u>Id.</u> ¶ 24.
- Concurso Order at 60.
- Cf. Vertiv, Inc., 92 F.4th at 181 ("[A] United States court is well within its discretion to deny the extension of comity to foreign proceedings that deny 'notice and opportunity to be heard' to a party opposing comity.").
- But see In re Metcalfe, 421 B.R. at 697 (explaining that even if relief in a foreign order is not typically available in a U.S. proceeding, it may be available in a chapter 15 proceeding pursuant to principles of comity).
- See <u>Purdue</u>, 603 U.S. at 222, 144 S.Ct. 2071 (noting that "the [Bankruptcy Code] *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context" (emphasis in original)).
- See In re Metcalfe, 421 B.R. at 697 (so holding); In re Rede Energia S.A., 515 B.R. at 91 (holding the same and emphasizing that the "public policy exception is clearly drafted in narrow terms and the few reported cases that have analyzed section 1506 at length recognize that it is to be applied sparingly" (internal quotations and alterations omitted)); In re ABC Learning Ctrs., 728 F.3d at 311 (finding that although Australian insolvency law used a different prioritization scheme from U.S. bankruptcy law, recognizing and enforcing the Australian proceeding would not be manifestly contrary to U.S. public policy, and in fact, refusing to recognize and enforce it would allow claimants to circumvent the Australian courts and undermine U.S. public policies of ordered proceedings and equal treatment).
- In re Vitro, 701 F.3d at 1062.
- 136 <u>Id.</u>
- 137 <u>Id.</u> at 1067. Because the court decided that case on other grounds, it did not rule on whether third-party releases would be manifestly contrary to public policy under section 1506. <u>Id.</u> at 1069–70

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

2025 WL 2806591

Only the Westlaw citation is currently available. United States Bankruptcy Court, S.D. New York.

IN RE: OI S.A. et al., Debtors in a Foreign Proceeding.

Case No. 23-10193 (LGB) | Signed October 1, 2025

Attorneys and Law Firms

WHITE & CASE LLP Counsel for the Foreign Representative of Oi S.A. and affiliated debtors 1221 Avenue of the Americas New York, NY 10020 By: Jason N. Zakia Richard S. Kebrdle Ricardo M. Pasianotto Jade Yoo Ashley Chase

QUINN EMANUEL URQUHART & SULLIVAN, LLC Counsel for BGC Fibra Participações S.A. and V.tal – Rede Neutra de Telecomunicações S.A 295 5th Avenue, 9th Floor New York, NY 10016 By: Benjamin I. Finestone Mario Gazzola K. John Schaffer Jeremy Baldoni

DAVIS POLK & WARDWELL LLP Counsel to the Ad Hoc Group 450 Lexington Avenue New York, New York 10017 By: David Schiff

MEMORANDUM OPINION AND ORDER DENYING MOTION TO TERMINATE AND DISMISS

LISA G. BECKERMAN, UNITED STATES BANKRUPTCY JUDGE

*1 The Motion to Terminate the Recognition Order and Dismiss the Chapter 15 Cases (the "Motion," ECF No. 46) was filed by Rodrigo Caldas de Toledo Aguiar in his capacity as the authorized foreign representative (the "Foreign Representative") of the debtors in the above-captioned cases (the "Chapter 15 Debtors," together with their non-debtor affiliates, the "Oi Group" or the "Company"). The Company is the subject of a jointly-administered judicial reorganization (*recuperação judicial* or "RJ") proceeding pursuant to Federal Law No. 11.101 of February 9, 2005, as amended (the "Brazilian Bankruptcy Law") of the laws of

the Federative Republic of Brazil before the 7th Business Court of the City and State of Rio de Janeiro, Brazil (the "RJ Court"). In support of the Motion, the Foreign Representative submitted the Declaration of Paulo Calil Franco Padis (the "Padis Declaration," ECF No. 47) and the Declaration of Marcelo Jose Milliet (the "Milliet Declaration," ECF No. 48). The Motion seeks termination of the recognition order (the "Recognition Order," ECF No. 30) entered by this Court on March 29, 2023, as well as dismissal of the Chapter 15 Debtors' cases (the "Chapter 15 Cases").

On July 30, 2025, BGC Fibra Participações S.A. and V.tal – Rede Neutra de Telecomunicações S.A. ("V.tal") filed the Objection and Opposition to Motion to Terminate the Recognition Order and Dismiss the Chapter 15 Cases (the "Objection," ECF No. 58). In support of the Objection, V.tal submitted the Declaration of Thiago Braga Junqueira (the "Junqueira Declaration," ECF No. 59) and the Declaration of Daniel Carnio (ECF No. 83).

On August 4, 2025, the Foreign Representative filed the Reply in Support of Motion to Terminate the Recognition Order and Dismiss the Chapter 15 Cases (the "Reply," ECF No. 69).

On August 14 and 18, 2025, this Court conducted an evidentiary hearing, including oral argument on the Motion (the "Hearing"). All four declarants appeared and were subject to cross-examination. Joint exhibits were admitted into evidence at the Hearing (JX001-JX033), as were excerpts from depositions of Padis, Milliet, Junqueira, and the Foreign Representative.

1. BACKGROUND

a. Company Overview and History of their Brazilian RJ Proceedings

The Oi Group is one of the world's largest telecommunications services companies, providing digital services, business process outsourcing, network maintenance, and customer experience services for call centers. Motion ¶ 36. The Company employs ~14,000 people and generates over R\$3.3 billion in revenue per year. *Id.* The Oi Group operates almost exclusively in Brazil. Petitioner's

Declaration and Verified Petition (the "Verified Petition"), at 2, ECF No. 3.

Since 2016, the Company or its affiliates have been involved in two RJ proceedings. The Company commenced their first RJ proceeding in 2016 (the "2016 RJ Proceeding") which resulted in the confirmation of an RJ plan in 2018 (the "2018 RJ Plan"). Motion ¶ 9. This Court gave full force and effect to the 2018 RJ Plan in a separate Chapter 15 case on July 9, 2018. See In re Oi. S.A., 587 B.R. 253 (Bankr. S.D.N.Y. 2018) (ECF No. 280). Following confirmation of the 2018 RJ Plan, the Company faced continued pressure on their operations. Verified Petition ¶ 18. To address these issues, the Company amended the 2018 RJ Plan on October 5, 2020. Id. ¶ 19. The 2016 RJ Proceeding concluded on December 14, 2022, and the corresponding Chapter 15 cases were closed on February 6, 2023. Id. ¶¶ 20-21.

*2 Following the conclusion of the 2016 RJ Proceeding, the Company encountered unanticipated weakness in their business. See id. ¶ 22. This necessitated the filing of a second RJ proceeding on March 1, 2023 (the "2023 RJ Proceeding"). Motion ¶ 10. Before filing the 2023 RJ Proceeding, the Company sought provisional relief from this Court. See id. ¶ 10. This necessitated the filing of the pending Chapter 15 Cases on February 8, 2023. See id. ¶ 13. On March 29, 2023, this Court entered the Recognition Order which recognized the 2023 RJ Proceeding as a Foreign Main Proceeding, as defined under the Bankruptcy Code, and found that Brazil was the center of main interests of each of the Chapter 15 Debtors. Recognition Order at 4.

On May 28, 2024, the RJ Court entered an order confirming a formal reorganization plan (the "2024 RJ Plan"). Motion ¶ 12. This Court entered an order (the "Enforcement Order," ECF No. 42) giving full force and effect to the 2024 RJ Plan on June 17, 2024. Enforcement Order at 8. The Enforcement Order recognized, granted comity, and gave full force and effect, to the 2024 RJ Plan. *Id*.

b. Implementation of 2024 RJ Plan

Following the entry of the Enforcement Order, the Oi Group began implementing the 2024 RJ Plan. The Company completed the restructuring of its capital structure, as required by the 2024 RJ Plan, on August 8, 2024. Motion ¶ 20. The appointment of a new board of directors, also required by the 2024 RJ Plan, was completed on December

11, 2024. *Id.* ¶ 22. The management of the Company has changed. Hr. Tr. 76:13-14, Aug. 14, 2025 [ECF No. 103]. In addition, the 2024 RJ Plan provided for the sale of certain key assets known as "Isolated Production Units" or "UPIs." Milliet Declaration ¶ 12. Some of these sales have already taken place, while others remain outstanding. *See* Motion ¶ 27.

c. Events Following Confirmation

The Company's performance following the RJ Court's confirmation of the 2024 RJ Plan has shown that the 2024 RJ Plan relied on overly optimistic projections of proceeds from UPIs, revenue, fixed costs, and the macroeconomic climate. See id. ¶¶ 29-32. As a result, the Company faces severe liquidity constraints and is unable to meet all their debt obligations as they come due. Certified Translation of the July 18, 2025 RJ Court Order, ECF No. 54, Ex. A., at 8. To address this liquidity shortfall and preserve the Company as a going concern, management has explored various restructuring options. See Motion ¶ 36. One of these options is the filing of an amendment to the 2024 RJ Plan. See Padis Declaration ¶ 25.

On July 1, 2025, the Oi Group filed a motion with the RJ Court to amend the 2024 RJ Plan (the "Proposed Plan Amendment"). *Id.* The Proposed Plan Amendment seeks to "realign the short-time payment terms for local labor creditors and small suppliers with updated cash flow projections, and to impose an additional stay of at least 180 days with respect to such creditors." *Id.* At least six creditors have filed objections to the Proposed Plan Amendment, and at least six other creditors have filed motions with the RJ Court seeking additional time to respond to the motion for the Proposed Plan Amendment. Junqueira Declaration ¶ 86.

On July 9, 2025, the RJ Court issued a summons that appointed a watchdog (the "Watchdog"). The summons requested that the Watchdog, the court appointed trustee (administrador judicial or "Trustee"), and the Public Prosecutor's Office comment on the Proposed Plan Amendment. See id. ¶ 84. Those entities issued their respective reports on July 15, 2025. Id. Importantly, the Watchdog's report found that the Company was unable to satisfy its short-term obligations, including obligations under the 2024 RJ Plan. Id. The Trustee found that the Oi Group failed to fully comply with its obligations under the 2024 RJ Plan and noted that the Company would likely be unable to

meet all its obligations over the next three months. *Id.* The report from the Public Prosecutor's Office described concerns over the legality of certain provisions in the Proposed Plan Amendment. *Id.*

*3 On July 18, 2025, the RJ Court issued an order that directed the Oi Group to provide additional information in connection with the reports and ordered the Trustee to inform this Court that the 2023 RJ Proceeding remains pending, and the Company is not in compliance with all its obligations under the 2024 RJ Plan. See Statement Notifying the Court, ECF No. 52, ¶ 7; Certified Translation of the July 18, 2025 RJ Court Order, ECF No. 54, Ex. A., at 8. As of the date of this Opinion, the RJ Court has not issued a final ruling on the Proposed Plan Amendment or the Company's compliance with the 2024 RJ Plan.

On July 25, 2025, Judge Monica Maria Costa di Piero of the First Chamber of Private Law of the Supreme Court of the State of Rio de Janeiro (the "Brazilian Appellate Court") issued an order (the "July 25 Appellate Order," ECF No. 56) recommending that this Court await the decisions of the RJ Court on (i) the verification and consequences of Oi Group's non-compliance with the 2024 RJ Plan and (ii) the request for the Proposed Plan Amendment before ruling on the Motion. July 25 Appellate Order, ECF No. 56, Ex. A, at 16-17.

On August 12, 2025, the RJ Court issued an order (the "August 12 RJ Order," ECF No. 89) implementing a stay, until August 31, 2025, on the enforcement of obligations that the Company sought to include in the Proposed Plan Amendment. August 12 RJ Order, ECF No. 89, Ex. B, at 2. In addition, the August 12 RJ Order requested that the Company and Oi Group's regulators prepare reports on a potential transition plan to avoid interruptions in public services should the 2023 RJ Proceeding be converted to a liquidation. *Id*.

On August 29, 2025, the Brazilian Appellate Court issued a preliminary *ex parte* order (the "August 29 Temporary Injunction Order") that (i) ratified the July 25 Appellate Order's request for this Court to await a ruling on the Motion until the RJ Court's decisions are made on non-compliance with the 2024 RJ Plan and viability of the Proposed Plan Amendment and (ii) stated that the continuation of the Chapter 15 Cases is necessary and essential for the effectiveness of the 2023 RJ Proceeding. August 29 Temporary Injunction Order, ECF No. 118, Ex. A, at 33-34.

On August 29, 2025, the Brazilian Appellate Court issued a second order (the "August 29 Stay Order") that extended the stay imposed by the August 12 RJ Order until the RJ Court issues a decision on the Proposed Plan Amendment and the Oi Group's regulators present the public service transition plan. August 29 Stay Order, ECF No. 118, Ex. B, at 18.

On September 2, 2025, the Chapter 15 Debtors sought reconsideration of the August 29 Temporary Injunction Order. On September 4, 2025, the Brazilian Appellate Court issued an order (the "September 4 Order") that did not seem to address the Company's request that the Brazilian Appellate Court retract its recommendations contained in the July 25 Appellate Order with respect to this Court and the Chapter 15 Cases. *See* September 4 Order, ECF No. 121, Ex. A-2, at 4-6.

d. The Motion

The Motion argues that the Proposed Plan Amendment is insufficient to properly restructure the Company's outstanding obligations, and Brazilian Bankruptcy Law does not offer any suitable alternatives for an appropriate restructuring of the debts incurred by the Company since the time that the 2023 RJ Proceedings were commenced. Motion ¶ 2.

Brazilian Bankruptcy Law prohibits the Company from filing a new RJ proceeding for five years following confirmation of the 2024 RJ Plan. *Id.* This prohibition prevents the Company from achieving a comprehensive restructuring of their obligations through a new plenary proceeding under Brazilian Bankruptcy Law since the 2024 RJ Plan was confirmed approximately 14 months ago. *See id.*

*4 Within the five-year period following confirmation of an RJ plan, Brazilian Bankruptcy Law only provides a debtor with two options for restructuring their obligations—the RJ debtor may propose an amendment to their RJ plan or convert the RJ proceeding into a judicial liquidation proceeding (*falência*). See id. The Company is currently pursuing the first of these options through the Proposed Plan Amendment. However, the Proposed Plan Amendment is insufficient to fully address the Company's liquidity shortfall. Id.

Brazilian Bankruptcy Law does not allow an amendment to the 2024 RJ Plan to restructure a "considerable portion" of the Company's debt obligations. Id. Under Brazilian Bankruptcy Law, amendments are unable to modify, defer, or discharge post-petition debts and certain categories of liabilities. See Padis Declaration ¶ 22. Post-petition debts are debts that arose after the commencement of the RJ proceeding. Id. Further, other types of liabilities are also excluded from the scope of an RJ proceeding ("Exempt Claims"). Id. ¶ 21. These types of liabilities include tax claims, fiduciary liens (alienações fiduciárias)², and financial leases, among other categories. See Junqueira Declaration ¶ 14. Holders of Exempt Claims may enforce their claims notwithstanding an ongoing RJ proceeding, and an amendment to an RJ plan cannot modify Exempt Claims. See Padis Declaration ¶ 21-22. In addition, under Brazilian Bankruptcy Law, executory contracts and leases for property and services must be paid in full. Id. ¶ 24. The Company's post-petition indebtedness, Exempt Claims, and executory contracts and leases represent a significant portion3 of the Company's outstanding obligations such that an amendment to the 2024 RJ Plan cannot sufficiently restructure the Company's obligations. *Id.* ¶ 25.

Another option for the Company to restructure under Brazilian Bankruptcy Law would be to convert the 2023 RJ Proceedings to a *falência*. However, the Company believes that a *falência* would be value-destructive and lead to job losses. Motion ¶ 35; Padis Declaration ¶ 14. As a result, the Company is exploring a potential filing of chapter 11 cases under the Bankruptcy Code. Motion ¶ 39. A chapter 11 filing, it is argued by the Foreign Representative, could allow the Company to restructure the post-petition indebtedness, Exempt Claims, and executory contracts and leases that cannot be restructured under Brazilian Bankruptcy Law. *Id.* ¶ 37. Without relief from this Court, however, the Company would be unable to pursue this process due to 11 U.S.C. § 1528 ("Section 1528"). *Id.* ¶ 3.

Section 1528 provides that the effects of a chapter 11 case commenced after "recognition of a foreign main proceeding" shall be "restricted to the assets of the debtor that are within the territorial jurisdiction of the United States" This provision may not allow for the type of "global" restructuring envisioned by the Company if the Chapter 15 Cases remain open because this Court previously recognized the 2023 RJ Proceeding as a Foreign Main Proceeding. See id. ¶ 42. The Motion seeks to remove the restriction potentially imposed by Section 1528 by terminating the

Recognition Order and dismissing the Chapter 15 Cases. *Id.* ¶ 43.

i. Terminating Recognition

*5 The Motion argues that terminating the Recognition Order is appropriate under 11 U.S.C. § 1517(d) ("Section 1517(d)"). Section 1517(d) allows "modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist." The Foreign Representative argues that the reasons justifying the original filing of the Chapter 15 petition no longer exist, and so the Court should terminate the Recognition Order. See id. ¶ 45. The Motion also asserts that the Chapter 15 Debtors do not need any further relief from this Court. Id. ("[T]he Chapter 15 Debtors' need for chapter 15 relief no longer exists"); Hr. Tr. 135:3-8, Aug. 14, 2025. In addition, it is argued that changed circumstances now affirmatively support terminating the Recognition Order since (i) termination would provide an opportunity for the RJ Debtors to restructure US \$5.07 billion through chapter 11, (ii) no creditors that relied on the recognition order would be negatively impacted by its termination, and (iii) the Company is unable to restructure appropriately in Brazil. See Motion ¶ 47.

In the alternative, the Motion argues that terminating the Recognition Order is appropriate under 11 U.S.C. §§ 1507 ("Section 1507") and 105(a) ("Section 105(a)"). *Id.* ¶ 48. Section 1507 enables the Court to provide the Foreign Representative with "additional assistance" that is consistent with the factors outlined under Section 1507(b). In turn, Section 105(a) allows the Court to issue orders, processes, or judgments that are necessary or appropriate to carry out the provisions of title 11. Read in conjunction, the Motion argues that Sections 1507 and 105(a) permit the Court to terminate recognition since doing so would "maximize[] value for all of [the Company's] stakeholders," improve Oi Group's liquidity, maintain employment, and ensure a fair and orderly alternative to a liquidation. *Id.* ¶ 51.

ii. Dismissing the Chapter 15 Cases

In addition to terminating the Recognition Order, the Motion seeks to dismiss the Chapter 15 Cases pursuant to 11 U.S.C. §§ 305 ("Section 305") and 1521 ("Section 1521"). Section 305(a) purportedly allows a chapter 15 case to be dismissed

if doing so would be in the best interests of creditors and the debtor and if the purposes of chapter 15 would be best served by dismissal. *Id.* ¶ 53. The Motion seemingly argues that Section 305 is imputed to chapter 15 through Section 1521. *See id.* Section 1521(a) enables the Court to provide "any appropriate relief" and the Motion argues that dismissal under Section 305 would qualify as appropriate relief. *See id.* ¶ 4. In addition, relief under Section 1521 must be consistent with 11 U.S.C. § 1522 ("Section 1522"). Section 1522 states that relief under Section 1521 may only be provided if the interests of "creditors and other interested entities, including the debtor, are sufficiently protected." The Motion argues that dismissal of the Chapter 15 Cases would be consistent with this requirement. *Id.* ¶ 53.

e. The Objection

The Objection argues that the Motion has not demonstrated a sufficient basis for terminating the Recognition Order under Section 1517(d). Section 1517(d) purportedly allows the Court to terminate recognition only when one of the three grounds for granting recognition described in Section 1517(a) cease to exist. See Objection at 14. Those three grounds are (1) the foreign proceeding for which recognition sought is a foreign main proceeding or foreign nonmain proceeding, (2) the foreign representative applying for recognition is a person or body, and (3) the petition meets the requirements of section 1515. Id. V.tal argues that none of these three grounds have ceased to exist-the 2023 RJ Proceeding is still the foreign main proceeding, the foreign representative is a person, and the petition satisfied Section 1515. Id. at 15. Since these three grounds still exist, V.tal argues that the Court should deny relief under Section 1517(d). *Id*.

The Objection also argues that relief under Section 1517(d) should be denied because terminating the Recognition Order would prejudice V.tal and offend principles of comity. *Id.* at 16. Section 1517(d) requires the Court to consider whether terminating the Recognition Order would "prejudice ... parties that have relied upon the order granting recognition." V.tal argues that it extended post-petition financing to the Company in reliance upon the Recognition Order and the Enforcement Order. *Id.* Further, terminating the Recognition Order would offend principles of comity since doing so would allow the Oi Group to file a plenary chapter 11 proceeding. *Id.* at 19. The Objection argues that allowing this to occur would be an "inappropriate usurpation by [Oi

Group], through United States courts, of the Brazilian courts' extensive, ongoing administration of [Oi Group's] bankruptcy." *Id.* This alone justifies denying the Motion. *Id.*

*6 The Objection argues that relief under provisions other than Section 1517(d), such as Sections 305, 1507, and 1521, should be denied since Section 1517(d) is the exclusive provision that governs termination of a recognition order. *Id.* at 25.

f. The Reply

The Reply argues that the standard for terminating recognition under Section 1517(d) is not as rigid as the interpretation proffered by the Objection. Reply ¶ 2. It is argued that relief under Section 1517(d) is discretionary and not the exclusive basis for terminating recognition. *Id.* \P 7. However, the Company purportedly satisfies even the more restrictive interpretation of Section 1517(d) presented by the Objection since the circumstances underlying Recognition Order have fundamentally changed. Id. ¶ 13. For example, the debt outstanding at the time of the Recognition Order has now been completely restructured, and the purpose of the 2023 RJ Proceeding is now to monitor the RJ Debtors. See id. As a result, the nature of the 2023 RJ Proceeding has changed since entry of the Recognition Order—the 2023 RJ Proceeding is no longer pending "for the purpose of reorganization or liquidation" and therefore is not a "foreign proceeding" as required under Section 1517. Id.

Further, the Reply argues that V.tal will not be prejudiced if the Court terminates the Recognition Order since V.tal did not rely on the Recognition Order. *Id.* ¶ 14. V.tal did not participate in any of the U.S. cases, and the documents governing their financing agreements do not mention U.S. proceedings. *Id.*

The Reply also rejects the Objection's characterization of whether the relief sought in the Motion would contravene principles of comity. *Id.* ¶ 17. The sole issue is whether the termination of the Recognition Order would be prejudicial to V.tal—not whether a hypothetical chapter 11 filing would be prejudicial to V.tal. *Id.*

2. LEGAL STANDARD

Section 1517 states the requirements for granting recognition to a foreign proceeding. It reads,

- (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
 - (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
 - (2) the foreign representative applying for recognition is a person or body; and
 - (3) the petition meets the requirements of section 1515.
- (b) Such foreign proceeding shall be recognized—
 - (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or
 - (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.
- (c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter.
- (d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350.

*7 11 U.S.C. § 1517.

"Section 1521(a) outlines the discretionary relief a court may order upon recognition of a foreign proceeding, whether main or non-main The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors." In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, 669 B.R. 457, 465 (Bankr. S.D.N.Y. 2025) (quoting In re Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009)). Section 1521 states,

- (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
 - (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
 - (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
 - (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
 - (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
 - (6) extending relief granted under section 1519(a); and
 - (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a).

Courts determining what relief is available under the "any appropriate relief" clause of Section 1521 look to the relief available under the now repealed 11 U.S.C. § 304. *Odebrecht*, 669 B.R. at 465. Courts may only provide relief under Section 1521 if "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a).

In addition to Section 1521, the Foreign Representative may seek relief under Section 1507. Section 1507 states,

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

- (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
 - (1) just treatment of all holders of claims against or interests in the debtor's property;
 - *8 (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions of property of the debtor;
 - (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
 - (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507.

Section 105(a), cited in the Motion, allows the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). However, a Court exercising discretion under Section 105(a) may not "contravene specific statutory provisions." Law v. Siegel, 571 U.S. 415, 421, 134 S. Ct. 1188, 1194, 188 L.Ed.2d 146 (2014). The exercise of Section 105(a) must "be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 92 (2d Cir. 2003) (quoting 2 Collier on Bankruptcy ¶ 105.01[1]); Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.), 69 F.4th 45, 73 (2d Cir. 2023), rev'd on other grounds, 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721.

Section 305 is entitled "Abstention." 11 U.S.C. § 305. It states,

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)

- (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
- (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.
- (b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.
- (c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

Id. "The decision to abstain, either by suspension or dismissal, is committed to the Court's discretion." In re Compania de Alimentos Fargo, S.A., 376 B.R. 427, 433 (Bankr. S.D.N.Y. 2007). "Although abstention under [Section 305] is considered an extraordinary remedy, the pendency of a foreign insolvency proceeding alters the balance by introducing considerations of comity into the mix. The Second Circuit, in this regard, has frequently underscored the importance of judicial deference to foreign bankruptcy proceedings." Id. at 434 (internal citations omitted).

Of particular relevance for this Opinion is Section 305(a)(2). Read together with Section 305(a), Section 305(a)(2) allows the Court to dismiss a "case under [title 11]" if "(A) a petition under section 1515 for recognition ... has been granted; and (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension." 11 U.S.C. § 305(a)(2). The "purposes of chapter 15," in turn, are provided by 11 U.S.C. § 1501(a) ("Section 1501(a)"). Section 1501(a) states,

- *9 The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
 - (1) cooperation between—

- (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
- (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
- (2) greater legal certainty for trade and investment;
- (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
- (4) protection and maximization of the value of the debtor's assets; and
- (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

11 U.S.C. § 1501(a).

3. DISCUSSION

In enacting Chapter 15, Congress incorporated the Model Law on Cross-Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). See 11 U.S.C. § 1501(a); H.R. Rep. No. 109-31, pt. 1, at 105 (2005) (the "House Report") ("Section 801 introduces chapter 15 to the Bankruptcy Code, which is the [Model Law] promulgated by [UNCITRAL] at its Thirtieth Session on May 12–30, 1997.").

The Model Law was designed to be adopted universally by countries with both common law and civil law legal systems. U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2, at 19 (2014) (the "UNCITRAL Guide") ("The [Model Law] ... is designed to assist [s]tates to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency."). As a result, Section 1517, and specifically Section 1517(d), exists to support cooperation with countries that have civil law legal systems. H.R. Rep. No. 109-31, pt. 1, at 113 (2005) ("Consistent with the position of various civil law representatives in the drafting of the Model Law, recognition creates a status with the effects set forth in section 1520, so

those effects are not viewed as orders to be modified, as are orders granting relief under sections 1519 and 1521."). To this Court's knowledge, no court has fleshed out the differences between terminating recognition and dismissing a chapter 15 case. As a result, this Opinion treats both as independent forms of relief.

a. Whether to terminate recognition

i. Section 1517(d)

Section 1517(d) provides the relevant standard for modifying or terminating a recognition order. In re Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 203 (Bankr. S.D.N.Y. 2017) [the "2017 Oi Decision"] ("[Section 1517(d)] provides the standard for a request to terminate or modify recognition—a discretionary standard that examines where there was a mistake in the initial grant of recognition or has been a subsequent change in circumstances. As such, there is no need for Rule 60(b) to fill a gap in the statutory standard."). Section 1517(d) states, "[t]he provisions of [chapter 15, subchapter III] do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition." 11 U.S.C. § 1517(d). Therefore, Section 1517(d) requires the Court to take a three-step inquiry. First, the Court must consider whether the grounds for granting recognition were fully or partially lacking or have ceased to exist. Second, the Court must consider the prejudice that would result to parties that relied upon the Recognition Order. Third, the Court must consider whether any other reasons exist for not terminating the Recognition Order since relief under Section 1517(d) is permissive—not mandatory.

*10 The first inquiry under Section 1517(d) requires the Court to determine whether (i) the grounds for granting the initial recognition order were fully or partially lacking, or (ii) the grounds for granting the initial recognition order have ceased to exist. These are two separate prongs. 2017 Oi Decision, 578 B.R. at 196. The first prong "looks backwards to see whether the basis for recognition previously presented to the Court was flawed in some way." *Id.* at 197. The second prong "looks forwards to whether something has changed since recognition." *Id.* Here, the Motion does not

argue that the Recognition Order should be terminated under the first prong. Instead, the Motion argues that the Recognition Order should be terminated under the second prong since "[t]he grounds for granting the Recognition Order have ceased to exist." Motion ¶ 45.

Courts in this Circuit have not fully identified when the grounds for granting a recognition order have ceased to exist. One out-of-circuit court has stated that "[t]he grounds for recognition of a foreign proceeding are determined under section 1517(a) of the Bankruptcy Code, which requires a court to recognize a foreign proceeding if 'the proceeding is a foreign main proceeding or a foreign nonmain proceeding; the foreign representative is a person or body; and the petition meets the requirements of section 1515 of the Bankruptcy Code.' " Zhejiang Topoint Photovoltaic Co. v. Zhi Chen (In re Zhejiang Topoint Photovoltaic Co.), 600 B.R. 312, 318 (Bankr. D.N.J. 2019) (internal citation omitted). This approach has not been explicitly adopted by courts in this Circuit. While the factors enumerated under Section 1517(a) are clearly relevant, it is unclear whether those factors are the sole "grounds" that courts should evaluate for purposes of the second prong. See In re Cozumel Caribe, S.A. de C.V., 508 B.R. 330, 335 (Bankr. S.D.N.Y. 2014) ("The same factors relevant in determining whether to grant recognition are therefore relevant in determining whether to terminate a recognition order.") (emphasis added).

The 2017 Oi Decision suggests that an analysis under Section 1517(d) is different from the analysis required under Section 1517(a). In the 2017 Oi Decision, the movant sought to "overturn" the prior recognition of foreign proceedings pending in Brazil in order to recognize a new foreign proceeding pending in a different jurisdiction. 2017 Oi Decision, 578 B.R. at 175. The movants argued that the debtors' center of main interests ("COMI") shifted after the entry of the initial recognition order, and so the court should terminate the recognition order related to the Brazilian proceedings. Id. Although the movants urged the court to conduct a de novo review for recognition pursuant to Section 1517(a), the Court declined to do so. Id. at 197 ("While the Movants look to Section 1517(a) to lobby for a de novo COMI determination, it is Section 1517(d) that most directly applies to this situation."). In so holding, the court found that Section 1517(d) provided its own discretionary standard for determining whether to terminate recognition. See id. at 203 ("[Section 1517(d)] provides the standard for a request to terminate or modify recognition—a discretionary standard

that examines where there was a mistake in the initial grant of recognition or has been a subsequent change in circumstances.").

The policy and text of Section 1517(d) indicates that a court determining whether to modify or terminate recognition under the second prong should consider more than just the factors enumerated by Section 1517(a). The 2017 Oi Decision noted that "the recognition process must be sufficiently flexible to achieve the goals of Chapter 15." *Id.* at 203. This flexibility would seemingly be restricted if a court could only consider whether the three factors under Section 1517(a) have ceased to exist. "Chapter 15 recognizes that the status of the foreign proceeding can change, and the change can affect the right to recognition before or after it is granted." Id. (quoting In re Oversight & Control Comm'n of Avanzit, S.A., 385 B.R. 525, 533 (Bankr. S.D.N.Y. 2008)). Further, the text of Section 1517(d) implies that a court may consider circumstances apart from Section 1517(a)'s three factors. Importantly, Section 1517(d) asks the Court to consider whether the "grounds" for granting recognition have ceased to exist. It does not ask the Court to consider whether the factors enumerated under Section 1517(a) have ceased to exist.

*11 In the Court's opinion, the grounds for granting recognition are broader than just the requirements of Section 1517(a). For example, one of the grounds for granting recognition is that there has been an application for recognition filed by the foreign representative pursuant to 11 U.S.C. § 1515. An application would only be filed, presumably, if there was a need for recognition in the first place. Therefore, the general circumstances of a given restructuring appear relevant to a court considering whether to modify or terminate recognition under Section 1517(d). However, the Court reiterates that the factors enumerated by Section 1517(a) are still relevant to any such analysis. As a result, the Court will first determine whether those three factors have changed since the Recognition Order was granted.

Section 1517(a) requires the Court to enter a recognition order, subject to 11 U.S.C. § 1506, if three factors are met. Those factors are that "the proceeding is a foreign main proceeding or a foreign nonmain proceeding; the foreign representative is a person or body; and the petition meets the requirements of section 1515 of the Bankruptcy Code." *Zhejiang*, 600 B.R. at 318 (internal citation omitted). Here, the second and third factors are not relevant to the analysis—

the Foreign Representative is a person, and the petition met the requirements of 11 U.S.C. § 1515. At issue is the first factor—whether the 2023 RJ Proceeding has ceased to be a foreign proceeding as defined under 11 U.S.C. § 1502.

The Bankruptcy Code defines a "foreign proceeding" as a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23). The Company argues that the 2023 RJ Proceeding no longer satisfies this description since it is no longer pending "for the purpose of reorganization or liquidation." Reply ¶ 13. They argue that the 2024 RJ Plan has already been confirmed, and the 2023 RJ Proceeding only remains open to ensure that the Company complies with the 2024 RJ Plan. Id. Since the purpose of the 2023 RJ Proceeding is now "supervisory," it is no longer pending "for the purpose of reorganization or liquidation." Id.

This analysis fails since it does not comport with the Court's holding in Comair. In Comair, the Court held that a collective judicial proceeding is pending "for the purpose of reorganization or liquidation" if the proceeding is governed by foreign laws relating to the adjustment of debt. See In re Comair Ltd., No. 21-10298 (JLG), 2023 WL 1971618 at *12, 2023 Bankr. LEXIS 363 at *43 (Bankr. S.D.N.Y. Feb. 12, 2023) ("The Provisional Liquidation meets this standard. It is a collective judicial proceeding governed by the South African Insolvency Act 24 of 1936 and the Companies Act 61 of 1973, which are laws relating to the adjustment of debt."). Further, a foreign proceeding is for the purpose of reorganization or liquidation when there has not been a final order, and the debtors can still propose a court-approved restructuring agreement. See id. at *15, 2023 Bankr. LEXIS 363, at *44 (finding that an "interim proceeding" was still for the purpose of reorganization or liquidation in part because there had not been a final order, and the debtors retained the ability to propose a court approved restructuring agreement).

Here, the 2023 RJ Proceeding remains pending pursuant to Brazilian Bankruptcy Law—laws that relate to the adjustment of debt. *See* July 25 Appellate Order, Ex. A, at 16-17 (Brazilian Appellate Court noting that the 2023 RJ Proceeding remains pending). Additionally, while the 2023 RJ Proceeding may have a supervisory element, the Company can still propose a court approved restructuring

agreement. This is something the Company is pursuing through the Proposed Plan Amendment. See Comair, at *—

–, 2023 Bankr. LEXIS 363, at *44 (finding that an "interim proceeding" was still for the purpose of reorganization or liquidation in part because the debtors retained the ability to propose a court approved restructuring agreement). Therefore, the 2023 RJ Proceeding is unchanged for purposes of Section 1517(d). Since the 2023 RJ Proceeding is still a foreign main proceeding, none of the factors provided by Section 1517(a) have ceased to exist. However, as discussed above, this finding does not end the Court's analysis.

*12 The Court must still determine whether any broader "grounds" for granting the recognition order have ceased to exist. The UNCITRAL Guide⁴ provides some guidance as to what "grounds" the Court should consider. *See Comair*, at *——, 2023 Bankr. LEXIS 363, at *26 ("Congress has specifically pointed to the [UNCITRAL Guide] as providing historical and interpretive guidance to the meaning and purpose of the provisions in chapter 15.") (quoting *In re Black Gold S.A.R.L.*, 635 B.R. 517, 525 (B.A.P. 9th Cir. 2022)). The UNCITRAL Guide states,

Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be converted into a liquidation proceeding) or if the status of the foreign representative's appointment has changed or the appointment has been terminated. Also, new facts might arise that require or justify a change of the court's decision, for example, if the foreign representative disregarded the conditions under which the court granted relief.

UNCITRAL Guide § 165. Therefore, the UNCITRAL Guide instructs the Court to consider the nature of the foreign proceeding, the status of the foreign representative, and whether the Foreign Representative disregarded any conditions under which the Court granted the recognition order.⁵ A change in the nature of the foreign proceeding, for example, might provide a basis for a court to modify a recognition order even where there has not been a change in the foreign proceeding as defined under 11 U.S.C. § 101(23). *C.f. Comair*, at *——, 2023 Bankr. LEXIS 363, at *19 (finding that a proceeding that was converted from

reorganization to liquidation constituted the same "foreign proceeding" while still allowing an amendment to the recognition order to account for the change in status.). Importantly, however, the UNCITRAL Judicial Guide notes that, "a decision to modify recognition might need to be carefully considered, particularly if any disputed issues remain subject to foreign court proceedings." UNCITRAL Judicial Guide ¶ 60 n.91.

To determine whether the grounds for granting recognition have ceased to exist, the Court must first "examine what has changed since entry of the Prior Recognition Order." See 2017 Oi Decision, 578 B.R. at 221. To date, the Oi Group has implemented certain key aspects required by the 2024 RJ Plan. Reply ¶ 13. It has completed the debt restructuring contemplated by the 2024 RJ Plan. Id. Further, the Company has appointed a new board of directors and management, and the new board of directors has completed the sale of certain assets as contemplated by the 2024 RJ Plan. Motion ¶ 22-23. In addition, the Company's liquidity position has deteriorated significantly since the Recognition Order was entered. Motion ¶ 46 ("Additional circumstances exist to justify the Requested Relief. While the Chapter 15 Debtors restructured their debts in Brazil under the [2024 RJ Plan] and through these Chapter 15 Cases, they now lack the liquidity to meet their short-term obligations."). Ultimately, these changed circumstances are insufficient to justify terminating the Recognition Order.

*13 The status of the 2023 RJ Proceedings has arguably changed since the Recognition Order given the confirmation of the 2024 RJ Plan. However, any modification to a recognition order that accounts for a change in the status of the foreign proceeding should seemingly reflect the change in status. Here, the Company does not seek to terminate the Recognition Order to reflect the now supervisory status of the 2023 RJ Proceeding. The Company, in the Motion, seeks to terminate the Recognition Order to free itself of the strictures imposed by Section 1528 for a hypothetical future chapter 11 proceeding.

Likewise, the change in the Company's liquidity position is not a justification for terminating the Recognition Order. The Company commenced the 2023 RJ Proceeding and the accompanying Chapter 15 Cases because it faced significant liquidity concerns. Verified Petition at 3 ("In the interim, however, the Company faces significant debt service obligations in the near term, including the obligation to pay upcoming interest on the 2025 PIK Notes As a result, the

Company determined that it was necessary to commence the Brazilian Preliminary Proceeding in anticipation of a potential RJ proceeding to protect their assets, operations, and their employees."). If anything, the Company's depleted liquidity is a consistent circumstance between when the Recognition Order was granted and the date of this Opinion. The fact that there are still pending disputes⁶ in the 2023 RJ Proceeding also guides the Court against terminating the Recognition Order. *See* UNCITRAL Judicial Guide ¶ 61 n.91.

To the extent that the Company seeks to terminate the Recognition Order because it does not need further relief from this Court—terminating the Recognition Order is procedurally improper. See Motion ¶ 45 ("[T]he Chapter 15 Debtors' need for chapter 15 relief no longer exists after (i) the issuance of and subscription to the New Priority Secured Notes, (ii) the issuance of the roll-up debt, (iii) V.Tal's acquisition of UPI ClientCo, and (iv) the capital increase converting much of the Company's debt to equity."). Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 5009(c) requires a foreign representative to "file a final report describing the nature and results of the representative's activities in the court" once the "purpose of a foreign representative's appearance is completed." Fed. R. Bankr. P. 5009(c). If the United States trustee or a party in interest does not file an objection within 30 days, then "the case is presumed to have been fully administered." See id.

Unlike Bankruptcy Rule 5009(a), Rule 5009(c) requires a foreign representative to file a report upon the occurrence of an event—the completion of the purpose for the foreign representative's appearance. This requirement is mandatory and not permissive. Fed. R. Bankr. P. 5009(c)(1) ("[W]hen the purpose of the foreign representative's appearance is completed, the representative must file a final report") (emphasis added). Therefore, if the purpose of the Foreign Representative's appearance in the Chapter 15 Cases is completed, then the Foreign Representative must file a final report pursuant to Bankruptcy Rule 5009(c). Here, the Foreign Representative sought chapter 15 protection "to protect the Chapter 15 Debtors and their assets in the United States, given that much of the Chapter 15 Debtors' debt is US-law governed." Verified Petition at 4. Since this debt has now been restructured and the Company asserts that the Foreign Representative does not need further relief from this Court, it is unclear what further purpose exists for the Foreign Representative's appearance.

*14 Important policy goals underlie Rule 5009(c) and the related Section 350. "The purpose of section 350 is to expedite disposition of the case and ensure fair treatment of all interested parties." *In re Lupatech S.A.*, 611 B.R. 496, 503 (Bankr. S.D.N.Y. 2020). Terminating the Recognition Order because the Chapter 15 Debtors do not need further relief from this Court would be an end run around these goals.

Since the Court finds that the Company has not met its burden of proof, that the grounds for granting recognition have ceased to exist, the Court does not proceed with the analysis with respect to the other steps.

ii. Sections 1507 and 105(a)

The Company's request to terminate the Recognition Order under other sections of the Bankruptcy Code fails since Section 1517(d) is the exclusive standard governing the modification or termination of a recognition order. Section 1517(d) "provides the standard for a request to terminate or modify recognition." *See In re Foreign Econ. Indus. Bank*, 607 B.R. 160, 167 (Bankr, S.D.N.Y. 2019).

Courts have found that certain provisions other than Section 1517(d) are inapplicable to a request to modify or terminate a recognition order. For example, Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") does not govern a request to modify or terminate a recognition order. 2017 Oi Decision, 578 B.R. at 203 ("[Section 1517(d)] provides the standard for a request to terminate or modify recognition—a discretionary standard that examines where there was a mistake in the initial grant of recognition or has been a subsequent change in circumstances. As such, there is no need for Rule 60(b) to fill a gap in the statutory standard.); In re Foreign Econ. Indus. Bank, 607 B.R. at 167 ("Bankruptcy courts have found that Rule 60(b) does not apply to vacating orders granting recognition of a foreign proceeding because section 1517(d) of the Bankruptcy Code already provides the standard for a request to terminate or modify recognition."). Similarly, courts have applied the "antisuperfluous canon" to find that Section 1517(a) does not provide the relevant standard—that standard is provided by Section 1517(d). See 2017 Oi Decision, 578 B.R. at 197.

As discussed above, Section 1517(d) already applies a cognizable standard for determining whether to modify or terminate a recognition order. 2017 Oi Decision, 578 B.R. at 203. Since Section 1517(d) provides the relevant standard,

there is no need for provisions other than Section 1517(d) to fill a gap in the statutory standard. See 2017 Oi Decision, 578 B.R. at 203 ("[T]here is no need for Rule 60(b) to fill a gap in the statutory standard."). Sections 1507 and 105(a) do not govern the modification or termination of a recognition order for this reason. See 2017 Oi Decision, 578 B.R. at 198 ("[N]o violence is done to the language of Chapter 15 by viewing Section 1517(d) as the controlling authority for a request to modify or terminate a prior order of recognition."). Accordingly, Section 1517(d) is the controlling authority for modifying or terminating recognition—not Sections 1507 or 105(a).

In so holding, the Court notes that there may be a slight difference of opinion in this Circuit as to whether a court can modify or terminate a recognition order by applying a standard other than the one described in Section 1517(d). In Comair, the Court amended a recognition order pursuant to Section 1517(d) and 11 U.S.C. § 1522(c) ("Section 1522(c)"). Amended Order Granting Recognition, Case No. 21-10298, ECF No. 96, ¶ P. The opinion accompanying the amended recognition order noted that several other courts have amended a recognition order pursuant only to Section 1522(c).7 Comair, at *——, 2023 Bankr. LEXIS 363, at *32. Comair did apply the standard of Section 1517(d) but also modified the recognition order pursuant to Section 1522(c). While not explicitly discussed, the *Comair* court presumably used the affirmative power to modify or terminate an order provided by Section 1522(c) to amend the recognition order since Section 1517(d) does not explicitly provide such an affirmative grant.

*15 However, even if a court could modify or terminate a recognition order pursuant only to Sections 1507 or 105(a), doing so here would be inappropriate. Relief under Section 1507 is "[s]ubject to the specific limitations stated elsewhere in [chapter 15]." 11 U.S.C. § 1507(a). Granting relief under Section 1507 that could not be provided under Section 1517(d) would seemingly offend this restriction. Section 105(a) standing alone also does not provide a basis for terminating the Recognition Order. Relief under Section 105(a) is only available when appropriate. 2017 Oi Decision, 578 B.R. at 201. "Under Section 105(a), the standard for appropriate action is whether the exercise of discretion would contravene another section of the Bankruptcy Code." Id. Terminating the Recognition Order would directly contravene Section 1517(d). As a result, relief solely pursuant to Section 105(a) is not appropriate.

b. Whether to dismiss the Chapter 15 Cases

i. Sections 305 and 1521

There is a difference in opinion between courts as to whether Section 305 permits a Court to dismiss or suspend a chapter 15 case itself. See, e.g., In re B.C.I. Fins. Pty Ltd., 671 B.R. 669, — n.5 (Bankr. S.D.N.Y. 2025). This difference of opinion arises from the interplay of Sections 103, 305, 1528, and 1529.8

Section 103 is titled "Applicability of chapters," and Section 103(a) states, "[Chapter 1], sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15." 11 U.S.C. § 103(a). Notably, Section 305 is not one of the provisions made applicable to a case under Chapter 15, so Section 103(a) would suggest that Section 305 does not apply to "a case under chapter 15." However, by its terms, Section 305 applies to any case under title 11. It states, "[t]he Court, after notice and a hearing, may dismiss a case under [title 11], or may suspend all proceedings in a case under this title" 11 U.S.C. § 305(a). Since a chapter 15 case is a "case under [title 11]," relief under Section 305 would seemingly be available. While the generalized nature of Section 305 is not dispositive to the Court's analysis, it does seemingly contradict the text of Section 103(a). Further, Section 305(a)(2) specifically references chapter 15 and Section 1515. This begs the question—If Congress didn't intend for Section 305 to apply to a chapter 15 case, why would Section 305(a)(2) specifically reference chapter 15 and Section 1515? Further complicating the Court's analysis are Sections 1528 and 1529 which specifically reference Section 305. Thus, notwithstanding the language of Section 103, it is difficult for this Court to believe that Congress intended for section 305 to not apply to any circumstance occurring in a chapter 15 case. The question for the Court, therefore, is how and when Section 305 applies to a chapter 15 case. In making this determination, the Court looks to ordinary principles of statutory interpretation.

"Statutory enactments should, moreover, be read so as 'to give effect, if possible, to every clause and word of a statute.'
"Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet), 737 F.3d 238, 247 (quoting United States v. DiCristina, 726 F.3d 92, 96 (2d Cir. 2013)); see also Nwozuzu v. Holder, 726 F.3d 323, 328 (2d Cir. 2013) ("[A] statute must be construed to give effect, if possible, to every clause and word") (internal quotation marks omitted);

Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 156 (2d Cir. 2013) ("One of the most basic interpretive canons is that a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotation marks and brackets omitted); Sebelius v. Cloer, 569 U.S. 369, 378, 133 S.Ct. 1886, 185 L.Ed.2d 1003 (2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Bates v. United States, 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997)). In its analysis, the Court is obligated to interpret title 11 as a "coherent scheme" without looking to certain provisions in isolation. See Biden v. Texas, 597 U.S. 785, 827, 142 S.Ct. 2528, 213 L.Ed.2d 956 (2022) ("We have an obligation to read the INA as a 'coherent regulatory scheme.'").

*16 Because Section 305(a)(2) refers to chapter 15 and because Section 305 is expressly incorporated by reference in sections 1528 and 1529, a comprehensive analysis of the statute as a whole is required.

This Court held in dicta that "[Section 305] authorizes the court to abstain from hearing a chapter 15 case, after entry of a recognition order, if 'the purposes of chapter 15 ... would be best served by such dismissal or suspension." " B.C.I. Fins. Pty Ltd., 671 B.R. at 679. In other instances, this Court has also indicated that Section 305 may apply to the dismissal or suspension of a chapter 15 case. See In re Millard, 501 B.R. 644, 652 (Bankr. S.D.N.Y. 2013) ("If the default judgments are found to be valid after appropriate judicial review, and if it then appears—though this would surprise me—that proceedings in the Caymans or this Court would be used to shelter assets in the U.S. without subjecting them to legitimate debts, the Marianas could come back to me to seek dismissal of this chapter 15 case under section 305."); In re Octaviar Admin. Pty Ltd., 511 B.R. 361, 375 (Bankr. S.D.N.Y. 2014) (denying request to dismiss chapter 15 case by applying the standard of Section 305(a)(2)); In re Gerova Fin. Grp., Ltd., 482 B.R. 86, 93 (Bankr. S.D.N.Y. 2012) (denying request to abstain from providing an initial recognition order by applying the standard of Section 305(a)(2)). However, none of the cases from this district, apart from B.C.I. Fins. Pty Ltd., discussed whether Section 305 is even applicable to a chapter 15 case in the first instance.

One out-of-circuit court has found that Section 305 is not applicable to a chapter 15 case due to Section 305's omission from Section 103(a). British Am. Ins. Co. v. Fullerton (In re British Am. Ins. Co.), 488 B.R. 205, 239 (Bankr. S.D. Fla. 2013). The British Am. court held that Section 305 still retained a purpose—its inapplicability to chapter 15 proceedings does not render Section 305 void. In that court's view, Section 305 applies to plenary cases under title 11 that are filed after a chapter 15 court has already recognized a foreign main proceeding. Id. at 239 n.40.

Some commentators have disagreed with the British Am. court's holding-noting that the British Am. court did not address the reference to Section 305 in Section 1529. Daniel M. Glosband, The International Scene, Abstention and Chapter 15, 39-10 ABIJ 18, 19 n.10 (Oct. 2020). Those commentators argue that Section 305 is imputed to chapter 15 through Section 1529(4). Id. Section 1529 states, "[i]f a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply" 11 U.S.C. § 1529. Section 1529(4), in turn, states, "[i]n achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305." The commentators argue that this reference imputes Section 305 to chapter 15 proceedings. See The International Scene, 39-10 ABIJ at 19. As stated earlier, this Court also previously held that Section 305 applies to chapter 15—noting that most decisions finding Section 305 inapplicable "make no mention of [Section 305(a)(2)]" B.C.I. Fins. Pty Ltd., 671 B.R. at 679 n.5.

1. Introduction

*17 The Court has struggled with how to interpret Section 305 within the context of a chapter 15 case. The text of title 11 and legislative history, however, suggests that the only way to reconcile Sections 103(a), 305, 1528, and 1529 is to hold that Section 305 does not provide for the dismissal of a chapter 15 case.

2. Section 1529

As discussed *supra*, commentators point to Section 1529(4) as creating an ambiguity in whether Section 305 applies to chapter 15. This question arises because of a reference to

Section 305. Section 1529(4) states, "[i]n achieving cooperation and coordination under Sections 1528 and 1529, the court may grant any of the relief authorized under section 305." The context of Section 1529, however, shows that this reference does not make Section 305 applicable to the dismissal or suspension of chapter 15 cases themselves.

Section 1529 provides guidelines for situations where "a foreign proceeding and a case under another chapter of [title 11] are pending concurrently regarding the same debtor." 11 U.S.C. § 1529. By its terms, subsection (4) only applies "[i]f a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor" Id. (emphasis added). Therefore, subsection (4)'s "grant [of] any of the relief authorized under section 305" only refers to the Court's ability to use Section 305 with respect to a case under another chapter of title 11. Likewise, subsection (4)'s reference to Section 1528 suggests the same finding. In relevant part, Section 1528 states, "[a]fter recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States." 11 U.S.C. § 1528 (emphasis added). This context therefore supports the interpretation that Section 305(a)(2) is limited to dismissal or abstention with respect to a case commenced under another chapter of title 11 and is not applicable to dismissal or abstention with respect to the chapter 15 case.9 While an alternative reading of Section 1528 in isolation may suggest that Section 305 could apply to the dismissal or suspension of the chapter 15 case and not just the other case (as referenced by Section 1528), the broader context of title 11 reflects otherwise.

The purpose of chapter 15 is to "provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a). Dismissing a chapter 15 case would leave the foreign main proceeding without these mechanisms. Discussion of some hypothetical situations may help to explain this.

First, if a petition is filed under chapter 15, but the case does not satisfy the standards of Section 1517, then a recognition order should not be granted and relief, for example, under 11 U.S.C. § 1520 does not take effect. The provisions governing the effect of recognition ensure that the relief provided by this Court does not interfere with the pending foreign proceeding.

Second, if a recognition order has been granted, chapter 15 provides a mechanism for concluding or terminating the

recognition order through Section 1517(d). This, again, ensures that relief provided from this Court does not conflict with the pending foreign proceeding.

*18 Third, if a recognition order has been entered, chapter 15 does not prevent the Court from providing relief under another chapter of title 11 should the foreign representative seek to commence a case under another chapter of title 11. While Section 1528 limits relief under the non-chapter 15 case to assets within the territorial jurisdiction of the United States, relief could still be provided with respect to "other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of [title 11], and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter." 11 U.S.C. § 1528. This restriction ensures that the title 11 case does not interfere with the pending foreign proceeding, while providing the foreign debtor with access to title 11 relief for assets that are not under the jurisdiction of another court.

Fourth, if the purpose of the foreign representative's appearance is completed, then Rule 5009(c) requires the foreign representative to file a final report. Subject to the requirements of subsection (2) and (3), the case is then presumed to be fully administered, and the Court should close the case pursuant to Section 350. Therefore, Section 5009(c) and Section 350 provide important procedural restrictions.

Sections 305 and 103(a) therefore reflect Congress' goal that "Section 1509 erect[] a structure in which the foreign representative must first pass through the bankruptcy court by way of a foreign proceeding recognition prior to applying to a court in the United States for relief requiring the comity or cooperation of that court." *In re Loy*, 380 B.R. 154, 164 (Bankr. E.D. Va. 2007); *see also* H.R. Rep. No. 109-31, pt. 1, at 110 (2005) ("[C]hapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a [f]ederal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property.").

3. Section 1334

While Section 305 is titled "[a]bstention" and is frequently thought of in jurisdictional terms, Section 305 is not a "jurisdictional decree." See Stern v. Marshall, 564 U.S. 462, 480, 131 S. Ct. 2594, 2607, 180 L.Ed.2d 475 (2011) ("Section 157(b)(5) does not have the hallmarks of a jurisdictional decree. To begin, the statutory text does not refer to either district court or bankruptcy court 'jurisdiction'"). Instead, bankruptcy court jurisdiction is governed by Section 1334. Since Section 1334 governs abstention, understanding how it interacts with Section 305 could prove useful to understanding whether the Court's interpretation of Section 305 would interfere with the statutory scheme underlying chapter 15.

While granting district courts subject matter jurisdiction for cases under title 11, Section 1334(c) also permits district courts to "abstain[] from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1). Usually, courts interpret Section 1334(c)(1) as providing the basis for abstaining from a particular proceeding while Section 305 provides courts with a basis for abstaining from an entire case. 2 Collier on Bankruptcy ¶ 305.01 (16th ed. 2025) ("If a party wishes the bankruptcy court to abstain from a particular adversary proceeding, section 1334(c) is the proper vehicle; if it seeks suspension of all proceedings within a case, section 305(a) should be invoked."). Importantly, subsection (c) contains a notable carveout.

Section 1334(c)(1) states, "[e]xcept with respect to a case under chapter 15 of title 11, nothing in [Section 1334] prevents a district court ... from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1) (emphasis added). Therefore, Section 1334(c)(1) does not permit abstention "with respect to a case under chapter 15." Id. Courts offer differing interpretation of "[e]xcept with respect to a case under chapter 15 of title 11" (the "Excepting Clause"). If the Excepting Clause does not permit the Court to abstain from a chapter 15 case itself, then the statutory scheme would clearly suggest that Section 305 is inapplicable to the chapter 15 case. Therefore, the Court must consider what is the proper interpretation of the Excepting Clause.

*19 One court has found that subsection (c)(1) permits courts to abstain from hearing actions related to a case under chapter 15 but prohibits abstention from actions arising "under" chapter 15.10 Abrams v. Gen. Nutrition Cos., No. 06-

1820 (MLC), 2006 WL 2739642 at *—, 2006 U.S. Dist. LEXIS 68574 at *22 (D.N.J. Sep. 25, 2006). This approach would seemingly suggest a policy underlying chapter 15 that courts cannot abstain from hearing a chapter 15 case—if Section 305 permitted abstention, then this grant of authority would conflict with Section 1334(c)(1). However, other courts have interpreted subsection (c)(1) differently by considering the remainder of its text. Under these opinions, the exception provided by subsection (c)(1) "must refer to matters arising under, arising in or related to a case under chapter 15, and not the chapter 15 case itself." British Am. Ins. Co. v. Fullerton (In re British Am. Ins. Co.), 488 B.R. 205, 238 (Bankr. S.D. Fla. 2013) (emphasis added); accord Firefighters' Ret. Sys. v. Citco Grp. Ltd., 796 F.3d 520, 526 (5th Cir. 2015) (agreeing with British Am. but also finding that Section 1334 applies to a chapter 15 case itself). Under this interpretation, a chapter 15 case itself may not be subject to the exception provided by Section 1334(c)(1).

The Excepting Clause must be read in the context of subsection (c)(1). The Excepting Clause modifies a clause that permits abstention with respect to a particular proceeding that arises under title 11 or arises in or relates to a case under title 11. Subsection (c)(1) does not permit abstention with respect to the title 11 case itself. British Am., 488 B.R. at 238. Therefore, the phrase, "[e]xcept with respect to a case under chapter 15 of title 11," must mean that abstention is not permitted with respect to particular proceedings that arise under the chapter 15 case or arising in or are related to a chapter 15 case. Subsection (c)(1) does not permit abstention from a title 11 case itself, so the Excepting Clause does not permit abstention of a chapter 15 case either. While this finding lends credence to the view that Sections 305's application to chapter 15 does not conflict with Section 1334, it does not show that the plain meaning of Sections 305 and 103(a) is wrong. As a result, the Court only finds that Section 1334 does not render Sections 103(a) and 305 ambiguous.

4. Other Provisions

The Court's interpretation does not render other provisions of title 11 meaningless. Of particular importance are the functions of Sections 305(a)(2), 305(b), or 1529(4).

Under the Court's interpretation, Section 305(a) provides two independent standards for dismissal or suspension that apply to different circumstances. Subsection (a)(1) provides the

standard that ordinarily applies to cases commenced under title 11—the Court must weigh the interests of creditors and the debtor. Subsection (a)(2), however, provides the applicable standard once a foreign proceeding has been recognized under chapter 15. That standard requires the Court to consider whether abstention would further the purposes of chapter 15. There is good reason for Congress to adopt a different standard in this context. Once a foreign proceeding has been recognized, the Court must consider how its actions could interfere with the proceedings occurring overseas. If Section 305 does not allow the Court to dismiss or suspend the chapter 15 case, subsection (a)(2) then governs situations where a court granted recognition of a foreign proceeding and the Court subsequently is considering whether to dismiss a non-chapter 15 case concerning the same debtor.

Section 305(b) also retains a purpose. Subsection (b) states, "[a] foreign representative may seek dismissal or suspension under subsection (a)(2) of this section." 11 U.S.C. § 305(b). This subsection provides the foreign representative with the affirmative ability to seek the dismissal or suspension of the non-chapter 15 case. Section 305(b), therefore, avoids ambiguity as to whether dismissal or suspension of a case is available to the foreign representative." Alternatively, Section 305(b) could seemingly alleviate any concerns over the foreign representative's standing to pursue Section 305 relief once a chapter 15 case has been closed. Similarly, Section 1529(4) still retains a purpose under the Court's interpretation. It also exists to avoid any ambiguity over Section 305's applicability to non-chapter 15 cases that may arise due to Section 103(a). The legislative history of chapter 15's implementing statute, discussed infra, furthers this interpretation.

5. Legislative History

*20 In 2005, Congress made a number of changes to title 11 and the United States Code through passage of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Of relevance to this discussion, BAPCPA (i) repealed 11 U.S.C. § 304 and replaced it with chapter 15; (ii) amended Section 103(a); (iii) amended Section 305; and (iv) amended 28 U.S.C. § 1334 ("Section 1334"). The amendment to Section 103(a) was done "to clarify the provisions of the Bankruptcy Code that apply to chapter 15 and to specify which portions of chapter 15 apply in cases under other chapters of title 11." H.R. Rep. No. 109-31, pt. 1,

at 118 (2005). Notably, Section 103(a) was changed to make 11 U.S.C. §§ 307 and 362(n) applicable to chapter 15. Second, Section 305 amended Section 305(a)(2). Prior to the enactment of BAPCPA, Section 305(a)(2) read, "[t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if— ... (2)(A) there is pending a foreign proceeding; and (B) the factors specified in section 304(c) of this title warrant such dismissal or suspension." H.R. Rep. No. 109-31, pt. 1, at 186 (2005). BAPCPA implemented today's Section 305(a)(2) which states, "[t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—...(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension." Id. Third, Section 1334(c)(1) was amended, in relevant part, by substituting, "[e]xcept with respect to a case under chapter 15 of title 11, nothing in" for "[n]othing in." Id. at 328. BAPCPA modified the relevant provisions to this discussion at the same time and through the same act and this lends further support for the argument that there is a clear statutory scheme to limit Section 305's applicability in chapter 15 cases. See Drawbridge, 737 F.3d at 250.

In explaining chapter 15's purpose, the House Report states,

Cases brought under chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter. If the full case is not dismissed, it will be subject to the provisions of this chapter governing cooperation, communication and coordination with the foreign courts and representatives.

H.R. Rep. No. 109-31, pt. 1, at 106 (2005). This statement implies that Section 305 is only intended to apply to cases other than chapter 15—"even if a full case is brought, the court may decide under section 305 to stay or dismiss the *United States case* under *the other chapter.*" *See id.* (emphasis added). The House Report reiterates this interpretation in its description of 11 U.S.C. § 1504 ("Section 1504"):

The title "ancillary" in the title of [Section 1504] and in the title of [chapter 15] emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called "secondary" proceedings) in each state where assets are found. Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529). In the United States, the court will have the power to suspend or dismiss such cases where appropriate under section 305.

Id. at 108 (emphasis added). This description therefore notes that Section 305 gives courts the ability to suspend or dismiss "full bankruptcy cases,"—not chapter 15 cases themselves. Id. This seemingly furthers the United States policy of preventing a "system of full bankruptcies ... in each state where assets are found." Id.

In describing Section 1529, the House Report states,

[Section 1529] follows the Model Law almost exactly, but subsection (4) adds a reference to section 305 to make it clear the bankruptcy court may continue to use that section, as under present law, to dismiss or suspend a United States case as part of coordination and cooperation with foreign proceedings. This provision is consistent with United States policy to act ancillary to a foreign main proceeding whenever possible.

Id. at 117 (emphasis added). This quote helps to explain Section 305's reference in Section 1529. Use of Section 305 is permitted to dismiss a United States case to further coordination and cooperation with foreign proceedings. The "United States case" seemingly refers to cases other than chapter 15 since the House Report notes that permitting Section 305 is "consistent with United States policy to act ancillary to a foreign main proceeding whenever possible."

Id. It is unclear how dismissing a chapter 15 case could ever result in a situation where a United States court acts "ancillary" to a foreign main proceeding. Indeed, chapter 15 is titled "Ancillary and Other Cross-Border Cases"—its purpose is to "provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a). As a

result, dismissing a chapter 15 case pursuant to Section 305 would be inconsistent with a stated purpose of chapter 15. Chapters 7, 11 and 13 of the Bankruptcy Code each contain specific provisions for dismissal of cases under those chapters. But, chapter 15 does not contain a specific dismissal provision. Perhaps that is additional evidence that Congress did not intend for a chapter 15 case to be subject to dismissal.

*21 Finally, the Court does not believe that it can dismiss or suspend a chapter 15 case through Section 1521. Section 1521(a) only allows the Court to grant "any appropriate relief" if doing so is "necessary to effectuate the purpose of [chapter 15]." Prohibiting abstention from chapter 15 furthers a purpose of chapter 15. See Firefighters' Ret. Sys., 796 F.3d at 525-26 ("The 2005 amendment to § 1334(c)(1), which limits a court's ability to permissively abstain from Chapter 15 cases, is consistent with Chapter 15's emphasis on concentrating the resolution of cases involving foreign bankruptcies in one court system."). Section 1501(a) states the purpose of chapter 15—"[t]he purpose of [chapter 15] is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency" 11 U.S.C. § 1501(a).

Section 305(a)(2) is not a part of the Model Law and is not part of chapter 15 except for sections 1528 and 1529 which the Court has previously addressed. Therefore, it is unclear how, other than in the context of sections 1528 and 1529, the Court could find that abstention or dismissal from an ancillary case is provided for in the Model Law. As discussed above, the only way that this Court was able to harmonize sections 103, 305(a)(2), 1528 and 1529 of the Bankruptcy Code, given the legislative history, and 28 U.S.C. § 1334, results in the interpretation that Congress did not intend Section 305(a)(2) be utilized to suspend or dismiss a chapter 15 case. Therefore, it would be difficult for this Court to find that abstention or dismissal of a chapter 15 case is necessary to effectuate the purpose of chapter 15.

Nevertheless, if Section 1521(a) allowed the Court to dismiss or abstain from a chapter 15 case, doing so here would not be appropriate. Relief under Section 1521(a) is only available when it is necessary to effectuate the purpose of chapter 15—dismissing these Chapter 15 Cases is not necessary to effectuate the purpose of chapter 15. As discussed above, Section 1501(a) provides that the purpose of chapter 15 is to incorporate the Model Law "so as to provide effective mechanisms for dealing with cases of cross-border

insolvency." Section 1501(a) then provides a list of objectives that the use of chapter 15 is meant to achieve. 11 U.S.C. § 1501(a). Those are:

- (1) cooperation between—
 - (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
 - (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
- (2) greater legal certainty for trade and investment;
- (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
- (4) protection and maximization of the value of the debtor's assets; and
- (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Id.

Dismissing these Chapter 15 Cases would not satisfy subsections (1) and (3). The Brazilian Appellate Court has requested that the Chapter 15 Cases remain open. On August 29, 2025, Judge Costa of the Brazilian Appellate Court issued a decision that ratified its prior July 25 Appellate Order regarding this request. July 25 Appellate Order, ECF No. 56, Ex. A, at 16-17; August 29 Temporary Injunction Order, ECF No. 118, Ex. A., at 33-34. In justifying this recommendation, the Brazilian Appellate Court stated that, "[i]n this context, it is essential and important for the [RJ Court] to maintain Chapter 15 for the effectiveness of the decisions handed down in the context of [the 2023 RJ Proceeding, as well as for compliance with the judicial reorganization plan approved and homologated in court, and analysis of any amendments." August 29 Temporary Injunction Order, Ex. A., at 33. While the Company sought reconsideration of this recommendation, the Brazilian Appellate Court did not seem to retract its recommendation in its September 4 Order. See September 4 Order, ECF No. 121, Ex. A, at 13-14 (noting Brazilian Appellate Court's "position on the limits of international cooperation has been clarified" through its reasoning in the August 29 Temporary Injunction Order). These communications suggest that Judge Costa of the Brazilian Appellate Court clearly wants this Court to continue to cooperate with the Brazilian courts and wants the Chapter 15 Cases to continue. Accordingly, the Court does not find that subsection (1) of Section 1501(a) supports dismissal of the Chapter 15 Cases.

*22 It is also unclear that dismissing the Chapter 15 Cases would promote the "fair and efficient administrations of cross-border insolvencies that protect the interests of all creditors, and other interested entities, including the debtor." See 11 U.S.C. § 1501(a)(3). While the Company argues in the Motion that dismissal of the Chapter 15 Cases would further subsection (3) since dismissal would permit a hypothetical future chapter 11 filing, Motion ¶ 56, it is not a certainty that the Company would file a chapter 11 case or that a future chapter 11 filing would be successful if the Company pursued it. The proper framing for purposes of subsection (3) is whether dismissal of the Chapter 15 Cases—not a hypothetical future chapter 11 filing—would promote the fair and efficient administration of the case that protects the interests of creditors and other interested parties. Here, dismissing the Chapter 15 Cases would not accomplish this objective since it is possible that the Company could need further relief from this Court.

The Company argues in the Motion that the "Chapter 15 Debtors' need for chapter 15 relief no longer exists after (i) the issuance of and subscription to the New Priority Secured Notes, (ii) the issuance of the roll-up debt, (iii) V.Tal's acquisition of UPI ClientCo, and (iv) the capital increase converting much of the Company's debt to equity"-all of which have been completed. See Motion ¶ 45; see also Hr. Tr. 135:3-8, Aug. 14, 2025 (Padis stating that the Proposed Plan Amendment would not require cooperation or orders from this Court). However, the Court must also consider certain statements of Mr. Padis during cross-examination and the statements of the Brazilian Appellate Court. See Hr. Tr. 166:15-167:3, Aug. 14, 2025 (Padis stating that it is possible the Company could seek recognition from this Court for hypothetical new notes issued under the 2024 RJ Plan and that the hypothetical lenders may even require the Company to do so); August 29 Temporary Injunction Order, Ex. A. at 35 ("[T]he maintenance of Chapter 15 is necessary and essential for the effectiveness of the decisions handed down in the context of Judicial Recovery in this Court of Justice, as well as for compliance with the judicial recovery plan approved and homologated by the courts, and analysis of any amendments."). In contrast, the filing of a future chapter 11 case is only speculative. The Court notes that parties may not be able to attain such relief from this Court if the Chapter 15 Cases were dismissed. *See* Hr. Tr. 166:15-167:3, Aug. 14, 2025. The 2023 RJ Proceeding is active and the Company is currently pursuing a Proposed Plan Amendment to the 2024 RJ Plan which this Court already gave full force and effect to. *See id.*

Further, the Court finds that dismissing the Chapter 15 Cases alone is unlikely to further the objectives provided by subsections (4), "protection and maximization of the value of the debtor's assets" and (5), "facilitation of the rescue of financially businesses, thereby protecting troubled investment and preserving employment." The Company's arguments for why dismissing the Chapter 15 Cases furthers these objectives center on how a future chapter 11 filing would maximize the value of the Company, see Motion ¶ 56; 11 U.S.C. § 1501(a)(4), and facilitate the rescue of a financially troubled business, see Motion ¶ 57; 11 U.S.C. § 1501(a)(5).

The Court notes that there is no question that the Company is in dire financial condition. Hr. Tr. 62:2-14, Aug. 14, 2025 (Milliet stating that the Company has "very restricted cash" and expects to end August 2025 with only R\$30 million); see also Joint Ex. 17, Houlihan Lokey Oi S.A. July 2025 DIP Discussion Materials, at 1. It has not been making certain payments under the 2024 RJ Plan for some months. Hr. Tr. 63:9-13, Aug. 14, 2025. The Brazilian law experts all agree that there is no way under Brazilian Bankruptcy Law to further restructure the Company other than through a consensual arrangement and/or an amendment of the 2024 RJ Plan to sufficiently alter the terms of the 2024 RJ Plan. Certain types of claims, and the debts incurred after the commencement of the 2023 RJ Proceeding, cannot be compromised except consensually under Brazilian Bankruptcy Law. And the Company cannot file a third RJ proceeding until after 5 years have passed from the date that the 2024 RJ Plan was confirmed by the RJ Court. See Hr. Tr. 87:24-88:2, Aug. 14, 2025.

*23 The Company is a systemically important corporation which employs approximately 14,000 employees. *See* Milliet Declaration ¶ 23; Hr. Tr. 71:5-24, Aug. 14, 2025. Clearly, a successful rescue of the Company would be a better outcome than a liquidation that would occur over six plus years. *See* Hr. Tr. 137:2-14, Aug. 14, 2025 (Padis stating that *falências* usually last between six and 16 years). However, as discussed above, the relevant question is whether dismissing the Chapter 15 Cases would further these objectives—not

whether a speculative chapter 11 case would further these objectives.

Dismissal of the Chapter 15 Cases alone will not maximize value or facilitate the rescue of the Company. The objective provided by Section 1501(a)(5) is the "facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment." 11 U.S.C. § 1501(a)(5) (emphasis added). Dismissal of the Chapter 15 Cases may not protect investment and preserve employment. Instead, dismissal would leave the RJ Court and parties to the 2023 RJ Proceeding without means to seek relief from this Court should they need it. The RJ Court still has the tools provided by Brazilian Bankruptcy Law to deal with these objectives in this difficult situation. It is also possible that the Brazilian government may provide assistance with the formulation and/or implementation of solutions to deal with the operational and financial challenges that the Company faces, given the Company's systemic importance.

Even if the Court were to broaden its consideration of the requested relief so as to assume that the Company would file under chapter 11 if the Chapter 15 Cases were dismissed, the challenges of any future chapter 11 show that dismissing the Chapter 15 Cases would not necessarily maximize value or facilitate the rescue of the Company. If the Court were to dismiss the Chapter 15 Cases and the Company were to subsequently file under chapter 11 in the United States, the chapter 11 filing might protect and maximize the value of the debtor's assets and result in a confirmed plan of reorganization which resolves treatment of Exempt Claims, executory contracts, and debts incurred after the filing of the 2023 RJ Proceeding.

But it also might not. All of the assets of the Company are part of the estate under supervision of the RJ Court and are located in Brazil. If a chapter 11 case were to be filed for the Company, these assets may also be part of the estate under the supervision of the United States Bankruptcy Court. If neither proceedings are ancillary proceedings, the Model Law and chapter 15 will likely not provide a basis for resolving any disputes that arise regarding any sales of assets, dueling jurisdiction over claims, the treatment of Exempt Claims, debts incurred after the filing of the 2023 RJ Proceeding and executory contracts, the granting and enforcement of debtor-in-possession financing and related liens, requests to dismiss or abstain with respect to the chapter 11 case, and the recognition and enforcement of

orders entered by the United States Bankruptcy Court in Brazil, to name just a few issues that might arise.

The RJ Court and the United States Bankruptcy Court might be able to work these complex issues out so that the restructuring process works and results in a successful restructuring of the Company. But, they also may not be able to do so. So, the success of a chapter 11 case, and thus the protection and maximization of the value of the assets, under these facts is simply not certain.

However, even if the Court were to find that dismissal of the Chapter 15 Cases furthered the objectives provided by subsections (4) and (5), this alone is not a sufficient basis under section 1521(a) for the Court to dismiss the Chapter 15 Cases, in light of the failure to satisfy the purposes set forth in subsections (1) and (3).

*24 The Court has been deferential to the Brazilian Appellate Court's request to wait until the RJ Court rules on the Proposed Plan Amendment and compliance with the 2024 RJ Plan for several months. However, given that the Court's ruling will not alter the *status quo*, the Court has determined to issue its ruling now, rather than wait. The Court hopes that both the RJ Court and the Brazilian Appellate Court understand that no disrespect is intended with respect to either Court.¹²

Having considered the contradiction between Section 103 and Section 305(a)(2) by reviewing title 11, including the legislative history of the applicable provisions, the Court finds that there is not a basis to grant dismissal of the Chapter 15 Cases.

6. Conclusion

While there may be policy goals underlying different interpretations, the role of the Court is to interpret the meaning of the statute as Congress intended. As a result, the Motion is denied.

All Citations

--- B.R. ----, 2025 WL 2806591

Footnotes

- The Trustee performs an oversight function in a RJ proceeding. It is subject to the supervision of the RJ court, Public Prosecutor's Office, the debtor, and creditors. The Trustee acts on behalf of the judiciary and must act in the interest of the overall RJ proceeding. *Id.* ¶ 26.
- Fiduciary liens are a form of security interest. Padis Declaration ¶ 21.
- Post-petition claims represent R\$1.51 billion of indebtedness. Milliet Declaration ¶ 22. Exempt Claims represent R\$17.2 billion of indebtedness. Padis Declaration ¶ 22. Executory contracts and leases represent a three-year go-forward cost of R\$1.3 billion. *Id.* ¶ 24. The Company's total liabilities, as of March 31, 2025, is R\$26.7 billion. Milliet Declaration ¶ 19.
- The "UNCITRAL Guide" is first referenced under the introduction to Section III, Discussion.
- This factor requires the Court to consider whether the Foreign Representative has "breached conditions on which relief had been granted." UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, U.N. Comm'n on Int'l Trade L., U.N. Sales No. 23.V.1, at ¶ 61 (2022) (the "UNCITRAL Judicial Guide").
- The RJ Court still has not decided on the Proposed Plan Amendment or the Company's non-compliance with the 2024 RJ Plan.
- Section 1522(c) allows the Court to "modify or terminate" relief "granted under section 1519 or 1521." 11 U.S.C. § 1522(c).
- 8 11 U.S.C. § 1529 ("Section 1529").
- By amending Section 305(a)(2), Congress intended that any dismissal or abstention request where there has been an order for recognition entered be addressed under Section 305(a)(2) and not under Section 305(a)(1).
- This court did not discuss whether actions "arising in" a chapter 15 cases are excepted.
- In addition, 11 U.S.C. § 1509 allows courts to impose "limitations" on a foreign representative. Section 305(b) therefore overrides any limitation that a court may impose on the foreign representative to pursue relief under Section 305(a)(2).
- The Court appreciates the Brazilian Appellate Court keeping this Court apprised about developments in its court and the mediation ordered by such court between the Company and V.tal. The best way to send email to this Court is Beckerman.Chambers@nysb.uscourts.gov.

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

2024 WL 1748460

Only the Westlaw citation is currently available. United States Bankruptcy Court, D. Delaware.

IN RE: GOLI NUTRITION INC., et al., Debtors in a Foreign Proceeding.

Case No. 24-10438 (LSS) (Jointly Administered)

Filed April 23, 2024

Attorneys and Law Firms

Michael Berthiaume, Norton Rose Fulbright US LLP, Dallas, TX, Joshua Brooks, Matthew B. McGuire, Matthew R. Pierce, Landis Rath & Cobb LLP, Wilmington, DE, Andrew Rubin Rosenblatt, Francisco Vazquez, Norton Rose Fulbright US LLP, New York, NY, for Debtors in a Foreign Proceeding.

Malcolm M. Bates, Office of the United States Trustee, Wilmington, DE, for U.S. Trustee.

Dkt Nos. 2, 7, 8 & 88

BENCH RULING1

This Bench Ruling was read in court on April 18, 2024.

Minimal, minor, non-substantive corrections were made and citations were added.

Laurie Selber Silverstein, United States Bankruptcy Judge

*1 Before the Court are two motions in the chapter 15 cases of Goli Nutrition Inc., a Canadian Corporation ("Goli Canada"), and Goli Nutrition Inc., a Delaware, corporation ("Goli US"). The motions were brought by the Foreign Representative, Deloitte Restructuring Inc., appointed in the Canadian Proceedings² of these same entities. The first motion is the Foreign Representative's motion for recognition of the Canadian Proceedings and request for related relief.³ The second motion is the Foreign Representative's motion for recognition and enforcement of the RVO and Atos Sale Order entered in Canada and approval of each of those transactions, denominated "sale transactions," free and clear of liens, claims and encumbrances.⁴

- All capitalized terms not defined herein shall have the meaning given in the Pet'r's Motion for Entry of an Order (I) Recognizing and Enforcing the RVO and the Atos Sale Order, (II) Approving the Sale Transactions Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief, ECF Nos. 7 (Sealed), 8 (Redacted).
- Pet'r's Verified Pet. Under Chapter 15 for Recognition of the Canadian Proceedings and Req. for Related Relief, ECF No. 2.
- Pet'r's Motion for Entry of an Order (I) Recognizing and Enforcing the RVO and the Atos Sale Order, (II) Approving the Sale Transactions Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief, ECF Nos. 7 (Sealed), 8 (Redacted).

An evidentiary hearing was held on April 15, 2024. Of the several objections that were filed or informally made, only one proceeded – the objection of the Hoffman Parties. The rest were resolved. For completeness, I will repeat my rulings on the record with respect to recognition of the Canadian Proceedings and enforcement of the RVO (with certain exceptions). I will also now rule on the request to enforce the Atos Sale Order and for approval of the Agency Agreement and the liquidation of the Atos Equipment. For purposes of this Bench Ruling, when I use the term Atos Equipment, it means all the Equipment in the Norco Facility in California regardless of its genesis.

- Obj. to (A) Pet'r's Verified Pet. Under Chapter 15 for Recognition of the Canadian Proceedings and Req. for Related Relief and (B) Pet'rs' Mot. for Entry of an Order (I) Recognizing and Enforcing the RVO and Atos Sale Order, (II) Approving the Sale Transactions Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief, ECF No. 55; Suppl. Obj. to (A) Pet'r's Verified Pet. Under Chapter 15 for Recognition of the Canadian Proceedings and Req. for Related Relief and (B) Pet'rs' Mot. for Entry of an Order (I) Recognizing and Enforcing the RVO and Atos Sale Order, (II) Approving the Sale Transactions Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief, ECF No. 68.
- 6 04/15/2024 Hr'g Tr. 137:10-139:6, ECF No. 84.

Recognition Motion

The recognition motion seeks recognition of the CCAA Proceedings for the two Goli entities as foreign main proceedings. The Hoffman Parties objected to recognition to the extent that their litigation pending in the United States against current officers and directors of Debtors and certain non-Debtor affiliates would be stayed. That objection was resolved by representations before the Canadian Court that the Hoffman litigation was not to be stayed. This should be documented appropriately. Accordingly, the recognition motion was unopposed.

*2 CCAA proceedings are consistently recognized by courts in the United States and there is no reason not do so in this case. The request here is for recognition of the CCAA Proceedings for both debtors as foreign main proceedings. Again, no one challenged this categorization. I do note that one of these debtors is a Delaware corporation. But, as there was no objection and I do not perceive a difference in how I would rule on the motions before me if recognition were as a foreign non-main proceeding, I will grant this request.

Motion to Enforce the RVO and Atos Sale Order and Approving the Sale Transactions

As confirmed by counsel at the hearing, this motion actually embodies two separate requests and two separate transactions. They were addressed separately at the hearing.

A. Subscription Agreement/Reverse Vesting Order

The first transaction is Goli Canada's entry into the Subscription Agreement with the Purchaser (which consists of three entities, one of which is a former founder of Goli Canada). The Subscription Agreement contemplates what is called a reverse vesting order transaction. As described, this transaction contemplates that (i) Goli Canada will authorize and issue new shares of its own stock, which Purchaser will purchase, (ii) Goli Canada will redeem, terminate and cancel all current outstanding shares of its stock, (iii) a new Canadian entity will be created named Residual Co., (iv) Excluded Assets, Excluded Contracts and Excluded Liabilities will be vested out of Goli Canada into Residual Co, (v) Residual Co will be added as a debtor in the CCAA Proceedings; (vi) Goli Canada shall exit from the Canadian Proceedings; and (vii) certain releases will be provided. As described by the Foreign Representative, this transaction gives the Purchaser "the benefits of equity ownership ... while at the same time providing the purchaser with the benefits of a 'free and clear' asset sale by 'vesting out' certain unwanted liabilities, claims and unwanted assets."7

Pet'r's Suppl. In Supp. of Mot. for Entry of an Order (I) Recognizing and Enforcing the RVO and the Atos Sale Order, (II) Approving the Sale Transaction Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief ¶ 1, ECF No. 53.

Deloitte touts this as a "'innovative' solution" to be used where appropriate and "a valuable tool in Canadian insolvency proceedings." For example, this structure permits the preservation of permits, licenses and tax attributes that might be difficult to transfer or lost in other structures. Through one of Mr. Zucker's declarations various decisions of the Canadian courts approving reverse vesting orders were submitted to the court. Our own research revealed several instances in which a Canadian court did not approve such transactions, including as referenced in a February 29, 2024 Practical Note penned by certain Norton Rose attorneys.

- 8 Id. at $\P 2$.
- Evan Cobb et al., Reverse Vesting Orders, https://l.next.westlaw.com/Document/
 I1071e159396911ebbea4f0dc9fb69570/View/
 FullText.htm l?
 transitionType=Default&contextData=(sc.Default)
 (updated Feb. 29, 2024).

Here, the CCAA Court, through Judge Martin Sheehan, approved the Subscription Agreement and the Reverse Vesting Order in a document titled Amended and Restated Initial Order and Other Relief, Including the Approval of a Transaction and an Agency Agreement. This includes his reasoning for approval and I will call it the Canadian Opinion. ¹⁰

ECF No. 67-1.

At the hearing, I stated that I would enforce the order as there were no objections to the transaction as a whole or its structure. Notice was provided to all parties, including shareholders whose stock is being redeemed and cancelled for no consideration and those who may hold liabilities that are being vested out to Residual Co. I must emphasize, however, that I do not know how I would rule on a similar reverse vesting transaction if there were objections. So, I cannot stress enough that the order I enter should not be cited in future motions for the proposition that U.S. courts have unconditionally approved such transactions.

*3 What I will not do, however, is approve the entire transaction, independently, under section 363 of the

Bankruptcy Code. The proposed order with the motion does just that. It has almost eight pages of findings of fact related to the Subscription Agreement and the "free and clear" nature of the "sale" of the stock. The Order seeks all the bells and whistles of a 363 sale order in a chapter 11 case. First, the issuance of stock in a debtor company is not a sale transaction under section 363. Goli Canada is not selling an asset, it is issuing stock. Second, even if it were, the new stock, which is stock in a Canadian company is not the "transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States."11 Thus, section 1520(a)(2), which automatically applies section 363 upon recognition of a foreign main proceeding, does not apply. As noted in Colliers, a chapter 15 proceeding is ancillary to a foreign proceeding and "should not invoke the universal jurisdiction over property of an estate created in a case filed under section 301, 302 or 303. For property outside the United States to be affected, the foreign representative would be required to commence a case under another chapter of title 11."12 Accordingly, I will not separately approve the entire Subscription Agreement and reverse vesting transaction under section 363 of the Code as requested.

- 11 U.S.C. § 1520(a)(2).
- 12 8 Collier on Bankruptcy ¶ 1520.01 (16th ed. 2024) (citing H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 114-15 (2005).

But, there is one piece of the reverse vesting transaction that may require my approval. At the hearing, the Hoffman Parties objected to the enforcement of the RVO solely to the extent that the Atos Equipment was being transferred from Goli Canada to Residual Co. Arguably, this requires my approval under section 363. I say arguably because this is not a sale of the Atos Equipment, but it might be a use and it is certainly out of the ordinary course. To the extent necessary, I will approve this transfer. The transfer of the Atos Equipment from Goli Canada to Residual Co. in no way impacts the ownership dispute. As discussed at the hearing, the Atos Equipment transfer will not be free and clear of liabilities and will be subject to claims, including the ownership dispute with the Hoffman Parties. The Hoffman Parties' concern that the transfer will result in the loss of an ability to raise their dispute at the April 30 hearing should not be a concern as Residual Co. will be substituted in as a CCAA debtor. In essence, this transfer from Goli Canada to Residual Co. effects a quit claim deed, which I will discuss further in my ruling on the Liquidation Order.

The last thing to address is the request for the substitution of Residual Co. for Goli Canada in the chapter 15 case. While Judge Sheehan is permitting Residual Co. to be substituted for Goli Canada in the CCAA proceedings, there is no such concept in the Bankruptcy Code. Residual Co. is a different entity with different assets. The Foreign Representative's counsel stated at the hearing that it will file a new chapter 15 case for Residual Co. and seek to dismiss Goli Canada's case. I instructed counsel to consult with the Office of the United States Trustee on the best way for the Goli Canada case to be concluded.

B. Atos Equipment/Liquidation Order

The second transaction contained in the motion and approved by Judge Sheehan is the sale of the Atos Equipment. The Atos Equipment is not necessary for the go forward business and the Purchaser is not taking it in the RVO transaction. Rather, the Atos Equipment is, collectively, an Excluded Asset under the RVO, and will be vested out to Residual Co.

After the failed marketing process for the Atos Equipment, Goli Canada entered into an Agency Agreement with a Gordon Brothers entity pursuant to which Gordon Brothers will liquidate the equipment per a marketing and auction process. It is undisputed that the Atos Equipment is located in California. What is disputed is ownership of that equipment.

The Hoffman Parties assert that they and certain related entities or entities in which they are majority stockholders own certain pieces of the Atos Equipment. They originally did not object to the sale of the Atos Equipment by Gordon Brothers provided that this court retained jurisdiction to determine the allocation of proceeds based on ownership of the Atos Equipment and that the proceeds be kept in an account in the United States. In a Supplemental Objection filed the day before the hearing, however, the Hoffman Parties pivoted their position and fully objected to the sale until the ownership issue was decided. 13 Citing my previous decision in Crystallex, ¹⁴ as well as former Judge Sontchi's Elpida decision, 15 the Hoffman Parties argue that the bankruptcy court has in rem jurisdiction over a debtor's assets located in the United States and charges this court (not the court presiding over CCAA proceedings) with the responsibility to approve the transfer of those assets. They further argue that if ownership of assets is disputed, this court must decide the ownership issue before it can approve a sale. Though the Supplemental Objection was filed only the day before the hearing, I permitted it to be heard. These proceedings are moving quickly and due process and fairness requires that the objection be heard as it goes to a fundamental issue ownership of property.

- Suppl. Obj. to (A) Pet'r's Verified Pet. Under Chapter 15 for Recognition of the Canadian Proceedings and Req. for Related Relief and (B) Pet'rs' Mot. for Entry of an Order (I) Recognizing and Enforcing the RVO and Atos Sale Order, (II) Approving the Sale Transactions Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief, ECF No. 68.
- In re: Crystallex Int'l Corp., 2022 WL 17254660 (Bankr.
 D. Del. Nov. 28, 2022).
- 15 In re Elpida Memory, Inc., 2012 WL 6090194 (Bankr. D. Del. Nov. 20, 2012).
- *4 Because of the late filing, however, the Foreign Representative did not have a chance to put in a written reply nor did I have the opportunity to consider all issues surrounding the objection prior to the hearing.

At the hearing, the Foreign Representative's response came in multiple parts. First, it argued that the matter was already in front of Judge Sheehan in the CCAA Proceedings. Indeed, the Canadian Opinion reflects that the Hoffman Parties filed an opposition to the sale of the Atos Equipment on April 8 and that the hearing on the matter was postponed until April 11 "to allow all parties to understand each other's position and propose a viable solution." ¹⁶ No resolution was reached. Judge Sheehan states that the Hoffman Parties asked that the disputed property "be segregated or the liquidation sale be deferred until their property rights have been adjudicated," but the Hoffman Parties "have so far filed no proceedings to have their rights recognized nor have they filed evidence supporting any prejudice they could suffer in the liquidation proceeds."¹⁷ The Canadian Court then fashioned a remedy, which permits the Monitor to set aside \$1 million from the sale of the Atos Equipment less expenses related to the Atos Equipment that have to date been picked up by Goli Canada. 18 Judge Sheehan also set a hearing date of April 30 to determine the Hoffman Parties' claims to the sale proceeds, Deloitte's claim for retroactive contribution to expenses related to the Atos Equipment such as rent, as well as any claim Deloitte may choose to present for "abuse of process." 19

- Canadian Opinion ¶ 40.
- 17 *Id.* at ¶ 43.

- 18 *Id.* at ¶ 52.
- 19 *Id.* at ¶¶ 56, 89.

Second, the Foreign Representative contends that comity requires me to defer to the Canadian Court on all matters related to the auction of the Atos Equipment.

Third, either the Foreign Representative's or the Lenders' counsel argued that the ownership decision need not be made before section 363 can be applied and that courts all the time reserve sale proceeds in the event of a dispute over ownership.

Fourth, the Foreign Representative argued that section 541 was not specially enumerated in the sections of the Code that are applied in chapter 15 cases so this concept is not imported into chapter 15 and, again, I must defer to the Canadian Court on the ownership issue.

Ruling

While I gave some preliminary thoughts on this motion, I stated at the conclusion of the hearing that because the matter had not been briefed, I would need to read some cases before I could rule. I have done so. Would time and my schedule have permitted (and the schedule of the case Debtors are insisting upon permitted) I would have read more. As I stated at the hearing, I find chapter 15 cases challenging and this case did not disappoint on that score. Accordingly, I am making the best decision I can in the time allotted.

First, the Foreign Representative is seeking relief under many sections of the Code, but the most applicable section is 1520(a) and particularly subsection (2) which provides that "Upon recognition of a foreign proceeding that is a foreign main proceeding – sections 363, 549 and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the section would apply to property of an estate." Subsection (1) and (3) address sections of the Code that apply to "property of the debtor" within the territorial jurisdiction of the United States. ²¹

- 20 11 U.S.C. § 1520(a)(2).
- 21 11 U.S.C. § 1520(a)(1), (a)(3).
- *5 I previously held in *Crystallex* that section 1520 establishes that the court presiding over the chapter 15 case has *in rem* jurisdiction over a debtor's assets in the United States and that the bankruptcy court—not the court

presiding over the foreign main proceeding—is charged with approving transfers of those assets. In so ruling, I relied on the *Elpida* decision which contains a fulsome discussion of section 1520(a)(2) and section 363, including a plain meaning discussion, a legislative intent discussion and a discussion of comity. Former Judge Sontchi concludes by ruling that "the Model Law [on which chapter 15 is based] follows an in rem division of labor between competing sovereignties – tasking the domestic courts with responsibility over assets in their jurisdiction."²²

22 Elpida, 2012 WL 6090194, at *7

I also relied in Crystallex on the Second Circuit's decision in Fairfield Sentry. 23 In that case, the bankruptcy court deferred to a British Virgin Islands (BVI) court presiding over a foreign proceeding in connection with the sale of the debtor's claim in the Madoff-related SIPA proceedings in the bankruptcy court in the Southern District of New York. The BVI court approved the sale, but also directed the foreign representative to seek approval or disapproval of the sale in the bankruptcy court. On ultimate appeal to the Second Circuit, the court determined that the situs of the SIPA claim was in the United States and that under section 1520(a)(2), the bankruptcy court must apply section 363 to the sale. It could not defer. After doing its statutory analysis, the Circuit then turned to comity because the bankruptcy court also deferred to the BVI court on that basis. The Second Circuit held that chapter 15 imposes certain requirements that "act as a brake or limitation on comity" and that the plain language of section 1520(a)(2) was one such break.²⁴ On remand, applying the 363 standard, the court did not approve the sale.²⁵

- 23 In re Fairfield Sentry Ltd., 768 F.3d 239 (2d Cir. 2014).
- 24 *Id.* at 245.
- In re Fairfield Sentry Ltd., 539 B.R. 658 (Bankr. S.D.N.Y. 2015).

These cases, though not Third Circuit authorities, so not binding, require me to apply the 363 standard to the transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States. And I am persuaded by these cases. I also note that the Foreign Representative specifically seeks relief under section 363 and wants all the findings and bells and whistles that go with a sale conducted under chapter 11. Comity does not require me to defer to the Canadian Court on approval. In fact, the cases I have cited say I cannot.

The standard for section 363 in this jurisdiction is well-settled. A sale outside of the ordinary course of business can be approved if: (i) a sound business purpose exists, (ii) the sale price is fair, (iii) adequate notice has been provided and (iv) the purchaser has acted in good faith. The Hoffman Parties do not challenge any of these factors. And, based on the evidence admitted at the hearing, I can easily conclude that each of these factors have been met. The Agency Agreement is the result of good faith negotiations and was the best offer received from liquidation firms vying for the opportunity to sell the assets. Further, the prepetition marketing and sale process (the SISP) did not result in any offers for the Atos Equipment.

I am left therefore with two questions. Does the ownership dispute have to be decided before I can approve the sale under section 363? And, if so, who must decide this dispute?

As I said before, at the hearing, it was argued that the ownership dispute does not need to be decided, that the disputed Atos Equipment can be sold and that the Hoffman Parties can be relegated to the receipt of proceeds. While I have never written on this issue, I do not agree. While there may be cases to the contrary, I see nothing in section 363 of the Code that permits me to authorize the sale of property that is not property of the estate—in other words that the debtor has no interest in at all. Further, I see nothing in section 363 that permits me to relegate the non-debtor owner of property to proceeds of a sale process.

*6 The Hoffman Parties cite a recent case out of the bankruptcy court in Massachusetts, *Worcester Country Club Acres*, which summarizes and discusses the issue clearly. ²⁶ Section 363(b)(1) states that the after notice and a hearing the trustee may use, sell or lease *property of the estate* outside the ordinary course of business. ²⁷ While property of the estate does include interests in property that the debtor may not currently have in its possession—such as property recovered under avoidance actions, and property which the debtor jointly owns with others in certain delineated circumstances (such as community property)—it does not include property in which the debtor has absolutely no interest. ²⁸

- 26 In re: Worcester Country Club Acres, LLC, 655 B.R. 41 (Bankr. D. Mass. 2023).
- 27 11 U.S.C. 363(b)(1) (emphasis added).
- Worcester Country Club, 655 B.R. at 46.

Further, courts that rely on 363(f)(4) in order to approve a sale of property in which ownership is disputed are mistaken. Section 363(f) does not provide independent authority for a trustee to sell assets. Rather, section 363(f) provides for a free and clear sale of property that can be sold by the Trustee under subsection (b) or (c). So, in order to invoke the "free and clear" sale, the trustee must first own the property. Disputes envisioned by section 363(f)(4), therefore, are not ownership disputes. ²⁹ For a similar proposition, I would point to the Third Circuit's decision in *Integrated Solutions, Inc.* v. Service Support Specialties, Inc., in which the court ruled that a debtor could not sell property in violation of state law, and that section 363 is simply an enabling statute that does not expand or change a debtor's interest in property because it filed bankruptcy. ³⁰

- See id.
- Integrated Solutions, Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487 (3d Cir. 1997).

Thus, with one exception, I conclude that the ownership issue must be decided before I can authorize property to be sold. The one exception, as pointed out in the *Worcester Country Club* decision, is if the Debtor is selling its disputed interest in the property. If a purchaser is willing to buy whatever interest the debtor has in the property—in essence, take a quitclaim deed—that could be permissible. The dispute would survive the sale, to be fought now by the purchaser, not the debtor. That is what I am approving with the transfer of the Atos Equipment from Goli Canada to Residual Co. I could enter such an order on the Liquidation Order, but that is not what the Foreign Representative wants. And, that is not what Gordon Brothers wants.

Worcester Country Club, 655 B.R. at 46.

Having ruled that the ownership issue must be decided before I can enter a nonconditional sale order, the question is who must decide this dispute. Once again, I have no briefing on the issue.

At argument, the Hoffman Parties insisted that I have to make the decision. If this were a case under chapter 11, I would conclude that while the decision has to be made, the Canadian Court is in the best position to determine the ownership issue. It has already conducted a hearing on this matter and has a hearing scheduled for April 30. That hearing is on the Hoffman Parties' claim to the proceeds of the sale of the Atos Equipment as well as whether the Hoffman Parties should contribute to any of the expenses attendant to the equipment. In order to make those determinations, the Canadian Court must decide the ownership issue. Permitting the Canadian Court to make the ownership decision in that context is consistent with the *Worcester Country Club* decision in which the court ruled that the ownership dispute would proceed in the Massachusetts Land Court, which was presiding over the ownership dispute prepetition. Indeed, had the ownership issue been determined by the Canadian Court prior to the chapter 15 case being filed, or maybe even prior to the motion being filed, my instinct is that there would be no reason to revisit the decision.

32 *Id.* at 47 n.8.

*7 But the question is: does the fact that this is a chapter 15 case change that result? The cases I have reviewed provide no definitive guidance. In re Koreag, Controle, is a Second Circuit decision from 1991, and is interpreting section 304, not chapter 15.³³ The facts are these: Upon the filing of its petition under section 304, the foreign representative appointed in a Swiss insolvency proceeding sought turnover of funds held in a bank account in the United States. Section 304(b)(2) provided that the court may "order turnover of property of such estate" and sets forth factors to guide the court in granting that relief.³⁴ The ownership of the funds in the account was disputed. Similar to the section 363 issue I have just discussed, one question presented to the court was whether the ownership issue had to be decided before the court could order turnover to the foreign representative. The district court presiding over the matter said no. The Circuit Court reversed.

- In re: Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc., 961 F.2d 341 (2d Cir. 1992).
- 34 Koreag, 961 F.2d at 346 n.4 (citing 11 U.S.C. 304 (repealed)).

The Circuit held that the use of the words "'property of such estate' presupposes an antecedent determination of property interests as a condition to turnover of property to a foreign representative." In so concluding, the court analogized it to section 541 of the Bankruptcy Code and notes that while federal bankruptcy law determines property of the estate, "state law determines the nature of a debtor's interest in a given item." The court then suggests that this same concept should apply in section 304 cases. By analogy, then, before property may be turned over to a foreign representative, a

bankruptcy court should apply local law to determine whether the debtor has a valid ownership interest in that property. As the court puts it, "property interests have an independent legal source, antecedent to the distributive rules of bankruptcy administration." ³⁷

- 35 *Id.* at 348.
- 36 Id. at 349 (quoting Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.), 902 F.2d 1098, 1101 (2d Cir. 1990) (internal quotation omitted)).
- 37 *Id.*

The foreign representative next contended that if local law was to be applied, the foreign court presiding over the Swiss proceeding should apply that law. The Second Circuit appears to disagree. It concludes that because the foreign representative was asking a United States court for reliefi.e. turnover—that the bankruptcy court whose authority is invoked must determine the legitimacy of that invocation. The power of the court to order turnover extended only to "property of the estate" which the court said demanded that the U.S. court determine the ownership issue first. If the debtor did not own the funds in the account, it could not be property of the estate. Koreag's holding is confirmed in Altos Hornos de Mexico, another Second Circuit decision issued in 2005 and another section 304 turnover case. ³⁸ The conclusion of that court is that "[p]roperty ownership questions thus precede distribution and, for the reasons stated in Koreag, are best resolved under local law."39 But, the court then concludes: "we thus reaffirm Koreag's rule that U.S. courts may resolve bona fide questions of property ownership arising under local law while a foreign bankruptcy proceeding is ongoing without deferring to the parallel foreign proceeding on grounds of international comity."40

- 38 JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. DE C.V., 412 F.3d 418 (2d Cir. 2005) (emphasis added).
- 39 *Id.* at 426.
- 40 *Id.* (emphasis added).

Both the *Koreag* Court and the *Altos Hornos* Court alternate between permissive and mandatory language. Thus, while the courts are clear that the ownership decision must be made before the property is turned over, no clear guidance is given

on which court must decide the ownership issue. One more case cements this lack of clarity for me. In *Cozumel Caribe*, *S.A. de C.V.*, applying chapter 15, the court discusses both *Altos Hornos* and *Koreag* and states that those cases "allow" a U.S. court to determine the ownership of property within the United States that is subject to a bona fide ownership dispute arising under U.S. Law. All Cozumel Caribe also concerned the ownership of funds in a bank account. The court ruled on the very specific factual circumstances of that case, to permit the dispute to be resolved by the Mexican court if it did so in a timely fashion. In that case, the issue did include whether a previous order of the Mexican court covered all funds in the account. But the Mexican court was also permitted to determine the amount of funds not covered by the previous order—that is, not owned by the Debtor. 42

- 41 CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (In re Cozumel Caribe, S.A. de C.V.), 482 B.R. 96 (Bankr. S.D.N.Y. 2012).
- 42 *Id.* at 117.

*8 I conclude, therefore, based on the limited research time permitted that this Court can decide the ownership dispute, but need not do so in an appropriate circumstance. I also conclude that this is such a circumstance. Judge Sheehan has already held one hearing related to this ownership dispute and currently has a second hearing teed up for April 30. As I understand it, in order to determine whether the Hoffman Parties are entitled to any proceeds of a liquidation sale and whether they must contribute to equipment expenses, the court must determine ownership of the Atos Equipment by applying applicable law. And I will note that what law is applicable has not been the subject of discussion before me. If the Canadian Court makes those decisions on April 30, I see no reason to preside over parallel proceedings. Of course, my decision does not compel the Canadian Court to hold a hearing, make a determination on ownership or provide a timeframe in which any decision should be made.

What I will do is hold the liquidation motion in abeyance until the ownership decision is made. The parties should report back on the status after the April 30 hearing.

All Citations

Not Reported in B.R. Rptr., 2024 WL 1748460

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.



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 Appellants
FUND LP and others

- 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 <u>Practice Statement (Companies: Schemes of Arrangement)</u> [2020] 1 WLR 4493 (the "<u>Practice Statement</u>"), 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 <u>Virgin Active Holdings Limited</u> [2021] EWHC 1246 (Ch) ("<u>Virgin Active</u>"), 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 <u>Virgin Active</u> 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 SARL [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 <u>Practice Statement</u>, 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 <u>ED&F Man Holdings</u> 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.
- 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.
 - 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.
- 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 <u>not</u> engaged, or (iii) how to exercise the discretion under section 901F in a case in which section 901G <u>is</u> 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 <u>Hawk Insurance Co Ltd</u> [2001] EWCA Civ 241, [2001] 2 BCLC 480 ("<u>Hawk</u>") 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 <u>Virgin Atlantic Airways Limited</u> [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 <u>Gategroup Guarantee Limited</u> [2021] EWHC 304 (Ch) ("<u>Gategroup</u>") at [181]-[182], and I took a similar approach in the convening judgment in <u>Virgin Active Holdings Limited</u> [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 <u>Telewest Communications plc (No.2)</u> [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 ("<u>Telewest</u>") 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 <u>Re National Bank Limited</u> [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 <u>Virgin Atlantic Airways Limited</u> [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 <u>Noble Group</u> that requires the greatest modification in its application to cross-class cram down under Part 26A.
- 122. As David Richards J explained in <u>Telewest</u> 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 <u>Telewest</u> 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 <u>Telewest</u> 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 <u>Sunbird Business Services Limited</u> [2020] EWHC 2493 (Ch) at [53]-[58], and <u>ALL Scheme Limited</u> [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 <u>DeepOcean</u> and <u>Virgin</u> 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 <u>Telewest</u> test to the <u>assenting</u> 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 <u>Great Annual Savings Co Ltd</u> [2023] Bus LR 1163 ("<u>GAS</u>"), a case which was

decided after the Judge's decision in the instant case. The main issue in <u>GAS</u> 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 <u>Virgin Active</u>). 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 <u>Deep Ocean</u>, referenced by Snowden J in <u>Virgin Active</u> 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 <u>Telewest</u> 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 <u>GAS</u> 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 <u>GAS</u> at [101]. In that paragraph, he suggested that Trower J's decision in <u>Re DeepOcean 1 UK Limited</u> [2021] EWHC 138 (Ch) ("<u>DeepOcean</u>") 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 <u>DeepOcean</u>, 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 <u>GAS</u> 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. <u>DeepOcean</u> 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 <u>Prudential Assurance Co Ltd v PRG Powerhouse Ltd</u> [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 <u>T&N Limited</u> [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 <u>Virgin Active</u> 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 <u>DeepOcean</u> 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 <u>Houst Limited</u> [2022] EWHC 1941 (Ch) ("<u>Houst</u>") 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 <u>DeepOcean</u> (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

- the essential question for the court is whether any class of creditor is getting "too good a deal (too much unfair value)".
- 162. In the instant case, the horizontal comparison of the treatment of the Plan Creditors under the Plan was simplified by two factors. The first was that in the Relevant Alternative, the claims of all Plan Creditors would be unsecured and would rank equally for *pari passu* distributions in a formal insolvency of the Group. The second was that the Plan did not envisage a continuation of the business of the Group as a going concern. The Plan was designed simply to achieve a more advantageous realisation and distribution of the Group's assets in a wind down process controlled by management than would be the case in a formal insolvency.
- 163. The horizontal comparison required in this case was accordingly far more straightforward than in a case where, for example, it might be suggested that the relevant alternative was a different restructuring or sale process rather than a formal insolvency; or where the plan creditors had different priority rankings of secured and unsecured debts; or where the company proposed a complex restructuring of its debts in order to continue trading after the plan was implemented (c.f. the plan in <u>Virgin Active</u>).
- 164. It was against that specific background of the instant case that the Judge made his observations in [74], which bear repetition,
 - "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."
- 165. I agree with the Judge that in a case in which a "wind down" plan is proposed as an alternative to a formal insolvency in which the claims of all plan creditors would rank equally for a *pari passu* distribution of the debtor's assets, a court would normally approve a plan which replicated that *pari passu* distribution in relation to the benefits of the restructuring over and above the distributions that could be expected in the relevant alternative.
- I also agree with the Judge that in such a case, a departure from the principle of *pari* passu distribution of the benefits of the restructuring is permissible and can be approved by the court <u>provided that</u> there is a good reason or proper basis for that departure (or, as Trower J said in <u>DeepOcean</u> and Zacaroli J said in <u>Houst</u>, whether the departure is "justified"). But the question remains, by what criteria does the court determine whether a departure from the *pari passu* principle is "justified" by a "good" reason or a "proper" basis?
- 167. In my judgment, it is neither possible nor advisable to attempt to prescribe an exhaustive list of the criteria that might qualify. However, to give one obvious example, it is likely to be justifiable that creditors who provide some additional benefit or accommodation

to assist the achievement of the purposes of the restructuring in the interests of creditors as a whole, should be entitled to receive some priority or a proportionately enhanced share of the benefits. That would give effect to the legislative intention that Part 26A plans should be a practical and effective restructuring tool. It was also the point made by Zacaroli J in <u>Houst</u> at [31], referring to what Trower J had said in <u>DeepOcean</u> at [64].

- 168. So, for example, it has been considered justifiable that creditors who provide new money to facilitate a restructuring should be entitled to receive full repayment of that new money under a plan in priority to the pre-existing creditors. The new money avoids an immediate cashflow insolvency and provides a breathing space for the debtor company to carry out the restructuring in the interests of creditors generally.
- 169. In other cases, of which <u>ED&F Man</u> is an example, some enhanced priority ("elevation") has also been extended to the existing claims of the providers of the new money. It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money.
- 170. A further example of a justified departure from the principle of *pari passu* distribution of a debtor company's assets is the exclusion of the claims of trade creditors or employees from the ambit of a plan. Such exclusion results in those trade creditors or employees being paid in full from the assets of the company rather than being subjected to the same reduction of their claims as other unsecured creditors with whom they would rank equally in a formal insolvency. The usual reason is that the continued supply of goods or services by those creditors is regarded as essential for the beneficial continuation of the company's business under the plan: see e.g. <u>Virgin Atlantic Airways</u> at [63]-[67] and <u>Virgin Active</u> at [13].
- 171. It is also of significance that these examples of a departure from the principle that a plan company's assets should be distributed *pari passu* have some, albeit not precise, analogies in established principles of insolvency law. It is, for example, permissible for an administrator to make a payment to a creditor in full otherwise than in accordance with the statutory rules as to priority if to do so is necessary or incidental to the performance of his functions, or if the administrator thinks it likely to assist achievement of the purposes of the administration: see paragraph 13 of Schedule 1 and paragraph 66 of Schedule B1 to the Insolvency Act 1986. In cases such as Collins & Aikman Europe SA [2006] BCC 861 at [30]-[31], and Nortel Networks UK Limited (14 January 2009, Blackburne J, unreported, but referred to in Nortel Networks UK Limited [2015] EWHC 2506 (Ch) at [31]-[34]), administrators were authorised to undertake to make payments to overseas employees otherwise than in accordance with English law so as to preserve the business of the company in an effort to achieve a more beneficial sale for the benefit of creditors as a whole.
- 172. Similarly, there is a long-established "salvage" principle of insolvency law under which, if a liquidator or administrator retains and uses property of a creditor (such as

land leased to the company) in order to achieve a better realisation of the company's business and assets, the court can, as a matter of "common sense and ordinary justice", direct that liabilities to the creditor in respect of the property can be treated "as if" they were expenses of the liquidation. The result will be that they will have priority and be paid in full, rather than simply ranking for a *pari passu* distribution: see <u>Lundy Granite</u>, ex parte Heavan (1871) LR 6 Ch App 462 and <u>Oak Pits Colliery</u> (1882) 21 ChD 322, explained by Lord Hoffmann in <u>Toshoku Finance UK plc</u> [2002] 1 WLR 671, and further considered by this court in <u>Jervis v Pillar Denton</u> [2015] Ch 87.

Should the court ask whether a better or fairer plan is available?

- 173. At this stage in the analysis, it is convenient to address the Judge's decision, at [75]-[77], that when considering the fair distribution of the benefits of the restructuring, the court should not inquire as to whether a better or fairer plan might have been available. In that regard, the Judge relied upon what he considered to be remarks to that effect by Sir Alastair Norris in Amicus Finance at [45], and declined to follow the approach suggested by Zacaroli J in New Look at [191]-[196].
- 174. In Amicus Finance, a Part 26A plan was proposed to compromise the claims of consumers who had been mis-sold financial products by the plan company (Amicus). The plan involved payment of compensation at a discounted rate to the consumers, funded by the owners of the company who intended the company to continue to trade after the plan had been implemented. The plan was approved by all of the classes of creditors by the necessary 75% majority, except for one class of senior secured creditors in which a creditor which had provided a platform for consumers to make loans to the company held 49.9% of the votes and voted against the plan.
- 175. In giving his judgment, after setting out the facts, at [21], Sir Alastair Norris stated,
 - "21. The meetings were duly held, and the application now before me is for the sanction of the proposed restructuring plan. On applications under Part 26A there is a natural tendency to focus upon the proposed scheme of arrangement in relation to the dissentient class of creditors. But the assenting classes of creditors must not be overlooked, and the scheme must be considered in relation to them in the same way as a scheme under Part 26. This latter approach is well settled, and I shall follow the established framework by identifying the relevant matters to consideration."
- 176. Sir Alastair then embarked, at [23] [44], upon a conventional application of the <u>Telewest</u> approach to the <u>assenting</u> classes of creditors. At the end of that analysis, he applied the conventional rationality test to the assenting classes, referring to it at [41] as the "fairness" test and noting that it did not operate in Part 26A cases in precisely the same way as in Part 26 cases. He concluded his analysis in this respect, at [43], by stating that the plan was a rational one and that it was understandable why it was attractive to most creditors.
- 177. Sir Alastair then continued, at [45],

- "45. There is one submission of counsel for [the dissenting creditor] that I must specifically address. Counsel submitted that the scheme failed the "fairness" test purely and simply because none of the benefits (if any) from future trading accrued to the compromised creditors; the benefits accrued solely to the Amicus shareholders. I have previously expressed some sympathy with this view when considering schemes for the compromise of compensation claims against a company, where it is those who have been wronged by the company who sacrifice their redress to enable the wrongdoing company to be rescued for the benefit of its shareholders: Re Provident SPV Ltd [2021] EWHC 1341 (Ch) at [44]-[46]. But the situation here is very different. [The dissenting creditor] enabled investors using its platform to risk commercial advances to Amicus for reward, advances of which [the dissenting creditor] is now (on its own case) the sole beneficial owner. The context is an entirely straightforward commercial one in which it is very well established that it is not the role of the court to consider whether the scheme submitted for sanction is the best scheme or the only fair scheme or could be improved in some respect, but rather to assure itself that it is one approved by the requisite majority of properly informed and consulted creditors acting in accordance with their ordinary class interests and not oppressively in pursuit of some special interest: Telewest Communications plc (No.2) [2005] 1 BCLC 772, at [21]-[22]...."
- 178. After dealing with this point, Sir Alastair then turned to the question of cross-class cram down, continuing, at [46],
 - "46. This brings me to the eighth question: is it appropriate for the court to exercise its jurisdiction to override the views of the dissenting class?"

That question occupied the remainder of the judgment from [47] – [78].

- 179. Accordingly, when Sir Alastair Norris' judgment in <u>Amicus Finance</u> is read in full, it is quite apparent that his comments in [45] that the court was not required to consider whether the plan was the best or fairest plan, or whether it could be improved in some respect, were directed only at the position within the <u>assenting</u> classes. In that regard, the decision is entirely consistent with my analysis in [121]-[128] above. I therefore do not consider that <u>Amicus Finance</u> stands as authority for the proposition that a court considering whether to exercise the power of cross-class cram down does not need to ask whether a fairer or improved plan might have been available.
- 180. <u>New Look</u> involved a challenge to a CVA. At [191]-[196], in considering the horizontal comparison, Zacaroli J said,
 - "191. Whether unfair prejudice exists depends on all the circumstances, including those that would be taken into account in exercising the discretion to sanction a scheme ... and in

exercising the discretion to cram-down a class in a Part 26A plan.

- 192. Without attempting to define what all the circumstances in any case might be, I make the following four points which are of particular relevance on the facts of this case.
- 193. First, an important consideration is whether there is a fair allocation of the assets available within the CVA between the compromised creditors and other sub-groups of creditors. That will include considering the source of the assets from which the treatment of the different sub-groups derives, and whether they would or could have been made available to all creditors in the relevant alternative.

. . .

- 195. ... if assets that would, in the relevant alternative, have been available for all unsecured creditors are allocated in a greater proportion to other creditors (e.g. where critical creditors are paid in full), then the fact that the requisite majority was reached by reason of the votes of those creditors may point towards the CVA being unfairly prejudicial, even if there was an objective justification for their payment in full.
- 196. ... in considering whether the allocation of assets is fair, the court is necessarily required to consider whether a different allocation would have been possible, so the principle adopted in scheme cases, against considering whether an alternative arrangement would have been fairer, needs to be modified."

In my judgment, Zacaroli J was entirely correct in this approach to the horizontal comparison in a CVA, and the point which he made in [196] applies equally to the same exercise in relation to a plan under Part 26A.

181. That was also the view taken by Adam Johnson J in GAS at [106],

"106. ... if the question to be addressed is one about the overall balance and fairness of the proposed plan in light of the relative treatment of the different creditor classes, I fail to see why that should not involve comparing the plan with other possible alternative structures. Points of comparison might well be helpful. Indeed, in many cases the basic challenge is likely to be: this is not fair - things could and should have been done differently. As I read it, Zacaroli J said something similar in Houst, because in addressing the question of fairness at para 37, he posited an alternative plan structure in which the cramdown power was sought to be used against the company's bank (rather than HMRC) and not the other way around (as was the case under the plan in that case)."

I agree with that analysis.

182. Accordingly, in my view the Judge was wrong to reject the Appellants' contentions in this regard. Ground 1 of the appeal is well-founded.

The principle of pari passu distribution

- 183. Before turning to consider the application of the principles which I have discussed to the appeal in the instant case, in light of its significance to the arguments, it is important to understand what the principle of *pari passu* distribution actually involves.
- 184. The *pari passu* principle can be traced back to section 2 of Henry VIII's Statute of Bankrupts 1542 (34 & 35 Henry 8 c.4), under which the assets and debts of a bankrupt were to be identified and appraised, and the assets sold,
 - "... for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion, rate and rate alike, according to the quantity of their debts ..."
- 185. In *Goode on Principles of Corporate Insolvency Law* (5th ed) ("*Goode*") at [8-02], the principle of *pari passu* distribution is described in these terms,

"The most fundamental principle of insolvency law is that of *pari passu* distribution, all creditors participating in the common pool in proportion to the size of their admitted claims....

The principle is based on the notion that losses should be borne by unsecured creditors equally: as the Supreme Court has recently put it, the statutory provisions for rateable distribution embody "the fundamental principle of equality"."

The reference to the Supreme Court is to <u>Lehman Brothers (International) Europe (in administration) No.4</u> [2018] AC 465 at [20] (per Lord Neuberger).

186. As the extract from *Goode* makes clear, the rationale for a *pari passu* distribution is to ensure that losses in an insolvency are borne equally, i.e. that any ultimate shortfall in the assets available for payment of the claims of creditors is borne rateably by all creditors. The concept is one of a *pari passu* distribution of a pool of assets under which payments are made at the same time and rateably to all creditors who have established their claims. It is vital to appreciate that no creditor should be paid any amount from the common pool ahead of other creditors who rank equally with him if to do so creates a risk that the other creditors will not be able to be paid the same rateable proportion of their claims. That explains why, for example, when declaring a dividend, a liquidator will make a provision for claims which have not been settled and for other purposes that might rank ahead of the claims of the creditors: see e.g. Rule 14.35 of the Insolvency (England and Wales) Rules 2016.

Analysis

Adherence to the principle of pari passu distribution

- 187. I therefore turn to the first main theme of the appeal. Under Grounds 3 and 4 the Appellants 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.
- 188. There were two aspects to this contention: the first was the preservation of different maturity dates requiring sequential payment of the different series of Notes, and the second was the priority given to the 2024 Notes under the Transaction Security.
 - Sequential payment of the different series of Notes
- 189. At [298], the Judge held that the provisions of the Plan under which the different series of Notes would be paid sequentially on their original maturity dates (or, in the case of the 2024 Notes, one year later than the original date) did not involve a departure from the *pari passu* principle. His stated reason for that conclusion was, "I have found that if the Plan is implemented, it is likely that the Plan Creditors will be paid in full".
- 190. When the true nature of the principle of *pari passu* distribution of assets is appreciated, it can be seen that the Judge's reasoning was wrong. The Judge had simply found, at [217], that,

"on a balance of probabilities ... if the Plan was implemented, the Group would be more likely to realise the sums forecast in the BCG Report than the Knight Frank Report and that it is likely that the 2029 SUNs will be repaid in full."

(my emphasis)

The central finding that the outcome forecast in the BCG Report was more likely than the outcome forecast in the Knight Frank Report was only a finding reached on the balance of probabilities. Nor did it logically justify a conclusion that the outcome forecast in the BCG Report was more likely than not to be achieved. Crucially, neither finding provided any assurance that sufficient sums would be realised by the Group under the Plan to pay all the Noteholders in full.

191. The material risks for the 2029 Noteholders in this regard can be illustrated by the fact that the BCG Report forecast that the amount of €3.684 billion required to pay the Notes in full would only be exceeded by a margin of €400 million under the Plan (referred to in argument as the "available headroom"). This margin arose from proceeds from asset sales estimated by BCG at €6.7 billion, which were reduced to €4.1 billion by payments of bank debt, interest and tax. However, as the Judge recorded in the Judgment at [201], Mr. Wolf made various adjustments to this figure in his evidence, with the result that the available headroom was significantly reduced to €309 million. This meant that the margin for error in the forecasted property values upon which the Plan was based was only about 4.6% (€309 million/€6.7 billion). The Judge recorded at [201] that in cross-

examination, Mr. Wolf agreed that this was "a very small margin for error". It should also be borne in mind that this was not simply a current valuation of properties, but a forward-looking projection that assumed and relied on an anticipated recovery in the property market. In short, as the Judge accepted at [291], "it will be ambitious for the Plan Company to pay off the 2029 [Noteholders] in full".

- 192. The same error of logic was repeated in the second part of [298]. There the Judge acknowledged that he might have found that the Plan involved a departure from the *pari passu* principle if he had accepted the valuation evidence in the Knight Frank Report, but he stated that he had not accepted that evidence. The reason that the Judge had not accepted the Knight Frank Report was simply that he found it more likely that the predictions in the BCG Report would be achieved. Again, however, there was no certainty whatever that this would be so.
- 193. Given the existence of these material risks that the Group might fail to realise the sums forecast in the BCG Report, the payment of the different series of Notes sequentially under the Plan thus carried the risk that the Group would pay the earlier dated Notes in full, but would run out of money from realisations before being able to pay the 2029 Notes. As I have pointed out above, adherence to the principle of *pari passu* distribution of the Group's assets would have eliminated that risk by proportionate distributions being made rateably to all Noteholders from time to time. Put shortly, sequential payments to creditors from a potentially inadequate common fund of money are not the same thing as a rateable distribution of that fund.
- 194. The Judge's second reason for finding that the Plan would not depart from the principle of *pari passu* distribution was in [299], in which he stated,

"If the Group falls significantly short of [the forecasts in the BCG Report], then in my judgment the most likely outcome is that this will trigger an acceleration of all the Notes, enforcement of the Transaction Security and distribution in accordance with the *pari passu* principle subject to repayment of the Secured Parties."

That reasoning, based upon the Judge's acceptance of the Plan Company's Alternative Case was, however, based on similar flawed logic to the Judge's first reason, and contained a number of further errors.

- 195. The first mistake, again, was that the Judge's findings as regards the likely outcome in the Alternative Case were necessarily forward-looking and were arrived at on the balance of probabilities. They provided no certainty whatever that the predicted sequence of events would in fact occur.
- 196. The second point is that the Judge's reasoning was based upon an assumption that the predicted realisation values in the Knight Frank Report would be accurate, rather than those in the BCG Report. He accepted that this would result in an LTV covenant breach at the end of 2024, an acceleration of the Notes, and an enforcement process being commenced before any scheduled payments had been made to any of the Noteholders. But there was no logical basis for the Judge to assume that this was the only other alternative to success of the Plan. It is entirely possible indeed inherently likely that neither BCG's nor Knight Frank's predictions would turn out to be 100% accurate, and

that the asset values and realisations obtained might therefore fall somewhere between the two extremes that they identified. There is also force in the point made by Mr. Smith KC that the values predicted in the BCG Report might more readily be achieved in respect of properties that were easy to sell earlier in the process but would be less likely to be achieved with the more difficult sales later in the process.

- 197. Taken together, there was a material possibility that the LTV covenant would not be breached until <u>after</u> some payments had been made in full in respect of some of the earlier dated Notes. Again, this gave rise to a material risk that there would be inadequate funds available in an enforcement to pay the remaining Notes, including the 2029 Notes. In that event, the principle of *pari passu* distribution would not have been adhered to in respect of all of the Noteholders.
- 198. The third point is that even if the Knight Frank predictions turned out to be accurate, and even if the events in the Alternative Case occurred as predicted, the 2024 Notes had priority under the Transaction Security over the other series of Notes. The occurrence of a process of acceleration and enforcement of that security would thus prioritise the repayment to the 2024 Notes and would not result in the same *pari passu* distribution to all Noteholders as would have been the case in the Relevant Alternative.
- 199. Accordingly, the Judge was in my view wrong to conclude that the Plan did not depart from the principle of *pari passu* distribution of assets that would have applied in the Relevant Alternative. The Plan represented a clear departure from that principle.
- 200. Curiously, having made his findings in [298] and [299] that the Plan did not depart from the principle of *pari passu* distribution, the Judge then correctly and neatly summarised in [300] [301] the very reasons why that conclusion was wrong. He said,
 - "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.
 - 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."

Those are precisely the reasons why the Plan did not respect the principle of *pari passu* distribution, the essential purpose of which, as I have indicated, is to eliminate the risk that creditors might end up bearing the losses of an insolvency unequally.

201. At [302], the Judge then gave a series of reasons for concluding (as he put it) that it was "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". Unfortunately, because the Judge had wrongly failed to appreciate that this increased risk existed precisely because the Plan did <u>not</u> comply with the principle of *pari passu* distribution, he failed to address squarely the critical requirement that he had (correctly) accepted at [74], namely that the court could approve a plan in such circumstances "<u>provided that</u> there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment" (my emphasis).
- 202. Had the Judge sought to address the test that he had himself formulated in [74], he would undoubtedly have concluded that there was no good reason or proper basis for the Plan's adherence to sequential payments in accordance with the maturity dates of the Notes. That is because, as the Judge stated at [302(7)],
 - ".... 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."
- 203. The Judge also failed to appreciate or address the further significance of this point, namely the parties could easily have produced a fairer plan that eliminated the different treatment of the different series of Notes by agreeing to harmonise the dates. The reason that the Judge did not do so is because, for the reasons that I have explained, he had earlier wrongly concluded (in reliance on the dicta in <u>Amicus Finance</u>) that he did not need to inquire as to whether the Plan could have been fairer or could have been improved. This was a point that he reiterated in the preceding sub-paragraph [302(6)],
 - "(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."
- 204. Although the Judge thus failed to address the critical question he had identified at [74], he did give a series of reasons at [302] for sanctioning the Plan, even though the retention of different maturity dates imposed a greater risk of non-payment on the 2029 Noteholders. In my judgment, none of those reasons were well-founded, and certainly not sufficient to overcome the fundamental unfairness to the Appellants of the unjustified departure from the *pari passu* principle.
- 205. The Judge's first reason at [302(1)] was that preserving the existing maturity dates of the Notes (apart from the 2024 Notes) "reflects the commercial risks which the [2029] Noteholders assumed when they purchased them." That is wrong. The relevant "commercial risk" that 2029 Noteholders took when purchasing the 2029 Notes was the risk that the Group might become unable to pay its debts the so-called "insolvency risk". But in that event, the bargain with the 2029 Noteholders was that all outstanding series of Notes would rank equally in a formal insolvency and receive *pari passu* distributions from a common pool of assets. The Plan did not respect that bargain.
- 206. The Judge's second set of reasons spanned [302(2)]–[302(4)]. The Judge first repeated his finding that it was "most likely" that the 2029 Notes would be paid in full under the Plan, and then repeated his further finding that if the Plan's primary purpose were to

fail, the 2029 Noteholders would likely be able to accelerate the Notes, would be likely to recover more under the Alternative Case than in the Relevant Alternative, and would likely not be treated differentially. For the reasons that I have already given, these findings, reached on the balance of probabilities, simply encapsulated the risk of differential treatment leading to non-payment rather than mitigating the unfairness that this feature of the Plan involved. The reference to the Relevant Alternative also did no more than restate satisfaction of Condition A and ignored the question of whether there was a fair distribution of the benefits of the restructuring.

- 207. At [302(5)] the Judge placed reliance upon the fact that a majority of the 2029 Plan Creditors supported the Plan. He said that he gave greater weight to this because a number of the 2029 Noteholders did not have holdings of the 2024 Notes.
- 208. For reasons that I have explained, I accept that it is permissible for a court considering whether to exercise the cross-class cram down power to have some regard to the level of support for the plan, short of the required 75% majority, within a dissenting class. However, as I have also indicated, that should require no less scrutiny by the court of the representative nature, completeness of information and absence of extraneous motives of those comprising the majority, than would be required if the class were to have voted in favour by the required 75%; and the court cannot simply apply a rationality test to a majority short of 75%. Instead, it must engage with the underlying commercial issues.
- 209. Moreover, in a case in which a horizontal comparison shows that a plan allocates the benefits of the restructuring differentially between the assenting and dissenting class in a material respect, and no justification has been given for that, it would, I suggest, take a compelling reason to persuade the court to sanction the plan nonetheless. The Judge's analysis in [302(5)] came nowhere near providing such a reason.
- 210. In particular, the Judge did not, in this section of his analysis, address the extent to which the majority of the 2029 Noteholders voting in favour of the Plan also held Notes in the classes of earlier-dated Notes. All he said was that "a number of the 2029 Plan Creditors do not have holdings in the 2024 Notes". But that ignored the fact that apart from those who held 2024 Notes, many of the 2029 Noteholders who voted in favour of the Plan had holdings in the other series of 2025, 2026 and 2027 Notes that also stood to benefit from sequential payment under the Plan.
- 211. The factors that the Judge ultimately relied upon in this respect were identified at [302(9)],
 - "(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."
- 212. That reasoning was also echoed in the very final paragraph [344] of the Judgment,

- "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."
- 213. As I have already set out, I consider that reliance upon the overall level of voting across all classes of creditors is not something that should be taken into account in conducting the horizontal comparison and deciding whether it is fair or appropriate to cram down a dissenting class. By his acknowledgement in [302(9)] that what ultimately persuaded him to sanction the Plan was that "everyone is better off and the best judges of this are the Plan Creditors who voted by the requisite majority in every class for the Plan", the Judge treated both satisfaction of Condition A, and the overall votes in the assenting classes, to be relevant and important factors in the exercise of his discretion. Both those conclusions were wrong. Indeed, in placing significant weight upon them, the Judge disregarded his own comments at [65] that satisfaction of Condition A was merely a jurisdictional requirement and did not give rise to any presumption that a plan should be sanctioned, and his further qualification at [66] that the overall support for a plan was "not [an] important or decisive factor".
- 214. In his analysis in this respect, the Judge also did not deal with a point to which he had alluded earlier in his Judgment at [84], and upon which Mr. Bayfield KC placed significant reliance on appeal, namely that the Plan was supported by about 65% by value of "pure" 2029 Noteholders i.e. those who had no cross-holdings in any other series of Notes. When that point is investigated in greater detail, as it was on appeal, it does not provide the court with anything like the confidence that the Plan should be regarded as fair to the 2029 Noteholders notwithstanding the differential risk of non-payment to which the class was exposed.
- 215. The detailed report of the Chair of the Plan Meetings shows that there were 35 entities which only held 2029 Notes, of which 28 voted in favour of the Plan. However, those entities held a total of €23.7 million by value of the 2029 Notes, amounting to only about 3% of the total face value of €800 million. Moreover, 8 of those voting in favour held only the bare minimum investment of €100,000, and 15 had holdings of less than €500,000. On any view, that cannot be regarded as a representative cross-section of the class of 2029 Noteholders.
- 216. Additionally, there is real force in Mr. Smith KC's point that the holders of such small investments in the 2029 Notes might well not have had the time, resources or inclination to analyse the merits of the Plan carefully for their series of Notes, and might well have been unduly influenced in their decision by the overall thrust and tone of the Explanatory Statement, which was (to say the least) considerably less informative than it should have been in a number of critical respects.
- 217. The Explanatory Statement summarised its conclusions and recommendations for Noteholders at paragraphs 3.28 3.29 in Part 2. It did not distinguish in any material respect between the treatment of the different series of Notes,
 - "3.28 Based on BCG's assessment and following the implementation of the Restructuring Plan and the Restructuring, the Group is forecast to repay the [Notes] in full as they fall due (as amended in accordance with the Proposed Amendments) or,

in some cases, potentially earlier than their stated maturity. As of the date of this Explanatory Statement, BCG has reached the conclusion that, by way of comparison, the distribution that would be received by Plan Creditors in the Relevant Alternative (being formal insolvency or bankruptcy proceedings of the Plan Company and certain key Group companies) would be significantly less than the face value of the Notes.

- 3.29 Having consulted with its legal and financial advisers, the Plan Company accordingly considers that the Restructuring Plan is likely to result in a materially higher return for each class of Plan Creditors than in the Relevant Alternative ..."
- 218. Whatever a sophisticated entity with a greater level of investment might have been able to deduce from a review of the Comparator Analysis in the BCG Report annexed to the Explanatory Statement, at no point did the Explanatory Statement (which ran to a total of 111 closely spaced pages even without appendices), draw attention to the fact that by preserving sequential payment dates for the various series of Notes, the Plan departed in a material respect from the *pari passu* distribution of assets to Noteholders that would have applied in the Relevant Alternative. There was simply no attempt to explain the difference in treatment and the risks involved for the different series of Noteholders in this respect when compared with the Relevant Alternative.
- 219. Further, in a detailed and apparently comprehensive Section 5 to the Explanatory Statement headed "Risk Factors", which itself ran to 16 pages, there was no mention whatever that the effect of making payment in accordance with sequential maturity dates was to place a greater risk of non-payment under the Plan on the 2029 Noteholders than the earlier series of Notes.
- 220. The only two places in the total of 111 pages at which the Explanatory Statement could even realistically be thought to have come close to identifying the point for 2029 Noteholders was in one paragraph dealing with the question of class composition, and one paragraph dealing with the objections voiced by the Appellants to the Plan.
- 221. The first of those paragraphs, 3.21 in Section 3 dealing with the legal aspects of the Restructuring stated,

"The Plan Company did consider whether it would be appropriate to place all of the Plan Creditors into a single class for the purpose of voting on, and if thought fit, approving the Restructuring Plan (on the basis that the [Notes] are all unsecured claims and would have the same rights in an insolvency). However, despite the equality of treatment amongst the [Notes] (other than the 2024 [Notes]) under the Restructuring Plan, in light of differences between the maturity dates and contractual interest rates of the different series of [Notes], and the difference of opinion indicated by the results of the Consent Solicitation, the Plan Company considered it prudent that Plan Creditors be divided into six separate classes."

- 222. That paragraph was completely muddled, if not actually misleading. Although it alluded to the requirement in <u>Hawk</u> that the comparison of rights in a restructuring which is being put forward as an alternative to a formal insolvency must be by reference to creditors' rights in the insolvency, it also wrongly referred to the Plan as providing "equality of treatment" to the Noteholders, when the reality was that the Plan maintained the differences in the timing of payment of them.
- 223. Paragraph 6.47 in Part 1, setting out the background and reasons for the restructuring, was no more informative and also did not engage substantively with the *pari passu* issue. It stated,

"On 17 February 2023, Akin Gump (on behalf of the AHG [the Appellants]) notified White & Case [for the Plan Company] by letter that the AHG intends to vote against, and oppose the sanctioning of, the Restructuring Plan. The letter provided a high level summary of the AHG's grounds for opposing the Restructuring Plan, including that it considers the Issuer Substitution invalid and unenforceable as a matter of German law and that the Restructuring Plan would not be capable of recognition in Germany unless and until the German court has determined the validity of the Issuer Substitution. The AHG also alleges that the Restructuring Plan results in unequal treatment of pari passu creditors. The AHG has yet to particularise its complaints in detail. Nevertheless, the Group is confident that the Issuer Substitution is effective as a matter of German law. that the Restructuring Plan treats all classes of creditors fairly and leads to materially better recoveries for all creditors than the relevant alternative, and that the Issuer Substitution and the Restructuring Plan would be recognised by the German courts."

- Mr. Smith KC did not suggest that the inadequacies of the Explanatory Statement in these respects was an independent ground of appeal, but he maintained that they fatally undermined any confidence that the court could have in the support for the Plan among the 65% of the small cohort of "pure" 2029 Noteholders. I accept that submission.
 - The priority given to the 2024 Notes by the Transaction Security
- 225. At [306(1)], the Judge appeared to acknowledge that the provisions of the Plan which gave enhanced priority under the Transaction Security to the claims of the 2024 Noteholders amounted to an alteration of the priority which the 2024 Noteholders would have in the Relevant Alternative. However, at [302(3)], he restated his earlier view that because of his findings as to the likely outcome under the Plan and in the Alternative Case, this did not involve a departure from the *pari passu* principle.
- 226. For similar reasons to those that I have already given at [198] above, that conclusion was wrong. There was no assurance that all Noteholders would be paid in full under the Plan, and even if the Transaction Security was enforced as envisaged in the Alternative Case, the 2024 Noteholders would be paid in priority to the other Noteholders, rather than ranking equally with them as would have been the case in the Relevant Alternative.

- 227. By reason of this error, the Judge thus did not directly address the relevant test that he had proposed at [74] of his Judgment. Instead, at [306], he accepted a submission by Mr. Bayfield KC that the question he should ask was whether the priority given to the 2024 Notes meant that the Plan was so flawed that the Court should not sanction it. However, when addressing that question, at [306(2)], the Judge found that giving the 2024 Noteholders priority over the other Noteholders was a *quid pro quo* for their agreement to defer the maturity date of the 2024 Notes by a year to 2025, and he held that this was "a good reason why an honest intelligent person might approve the Plan".
- 228. At the hearing of the appeal I was sceptical of this justification, but on reflection I consider that if the Judge had asked himself the right question that he posed at [74], he could reasonably have concluded that this was a good reason or proper basis for a departure from the principle of *pari passu* distribution that would have applied in the Relevant Alternative.
- 229. The deferral of the maturity date was designed to facilitate the achievement of the purposes of the Plan by ensuring that the Group would not need to find the €400 million plus interest needed to repay the 2024 Notes on their due date. Instead, the Group could have a longer period within which to implement the realisation of assets to pay that liability in accordance with the Management Case. In that respect, and in contrast to the other series of Noteholders who were not required to give any such deferrals, the deferral by the 2024 Noteholders could properly be considered to be an additional accommodation or benefit given by them to the Group for the benefit of the Plan Creditors as a whole. In that regard, it would be consistent with the approach in the type of cases to which I have referred in paragraphs [168]-[170] above.
- 230. It is true that in the Relevant Alternative, the Group would have entered a formal insolvency before any extension of the maturity date of the 2024 Notes from a date at the end of July 2024 to 2025 could have taken effect. But that does not prevent the Plan Company from relying on the extension of the maturity date if the Plan becomes effective as a reason for the grant of priority security. In the same way as the beneficial continuation of the supply of services or goods by employees or trade suppliers to a plan company can be a legitimate reason for continuing to pay them in full outside a plan, I see no reason why the continuation of credit by the 2024 Noteholders to the Plan Company could not justify an elevation of the priority of their claims above other creditors.
- 231. The Judge did not expressly consider whether the enhanced security given to the 2024 Noteholders was a proportionate response to the extra year's extension of their loans, taking into account, for example, the enhanced interest that the 2024 Noteholders stood to receive over that period. Instead, as I have indicated, he simply held that this was "a good reason why an honest and intelligent person might approve the Plan". It is unclear whether the Judge took this view from the perspective of the creditors in the classes of Noteholders who had approved the Plan, or from the perspective of the 2029 Noteholders who had not. However, this aspect of the Judge's reasoning was not criticised by the Appellants.
- 232. Accordingly, I would not have allowed the appeal on the basis that the grant of priority to the 2024 Noteholders was a departure from the principle of *pari passu* distribution that was unfair to the 2029 Noteholders.

Conclusion on the pari passu arguments

- 233. For the reasons that I have given, I consider that the Judge was wrong to sanction the Plan which preserved the sequential payment of the different series of Notes, leaving the 2029 Notes to be paid last, because it thereby departed without good reason or justification from the principle of *pari passu* distribution that would have applied to all series of Notes in the Relevant Alternative.
- 234. Standing back for a moment, I consider that this conclusion is not surprising or at odds with the legislative intention behind the introduction of the cross-class cram down power in Part 26A.
- 235. The Group and the SteerCo arrived at a proposed deal in 2022 which they intended should be put into effect by the consent solicitation. On the basis that it would be given effect in accordance with the contractual regime under the Notes, the parties were, of course, free to negotiate on whatever basis they chose. The basis for those negotiations was alluded to in the Plan Company's skeleton argument for the appeal, and seems to have been based upon the differential pricing of the Notes in the bond markets while the Group was a going concern,

"The bond markets have always attributed materially different prices to the six series of [Notes] so as to reflect their different temporal priorities, and this was the basis on which the Plan was negotiated."

- 236. When the deal negotiated by reference to traded prices failed to attract consensual support, it seems to have been assumed that the same deal could simply be transplanted into the Part 26A regime without any further consideration or modification, and the opposition from the 2029 Noteholders overridden by cross-class cram down. But that ignored the fact that Parliament clearly intended that the use of the cross-class cram down power in Part 26A should have, as a relevant reference point, the position in which creditors would find themselves in the relevant alternative to the proposed plan.
- 237. What the proponents of the Plan therefore appear to have overlooked, or chosen to ignore, is that although the bond markets might have attributed different prices to the different series of Notes to reflect the different times at which they were payable, that was not the relevant metric for seeking to invoke the power of cross-class cram down. That required a reference to the Relevant Alternative in which all Notes would rank equally. If that were the relevant metric for trading the Notes, they would all have been priced equally, and the deal should have reflected that.
- 238. In short, it is not surprising that a deal negotiated by reference to a materially different frame of reference than the Relevant Alternative should fail to fulfil the necessary requirements to justify the court exercising its power under Part 26A to impose it on a dissenting class of the Noteholders.

Retention of equity by the shareholders of the Parent Company

239. Although subsumed by the Appellants within Ground 4 of their appeal, I should deal separately with an argument that the Plan was also unfair to the 2029 Noteholders because it required them to bear the greatest risk of non-payment, but left the

- shareholders of the Parent Company, who would rank below them in a formal insolvency, still holding their shares (albeit diluted to 77.5% by the additional 22.5% of new shares issued to the providers of New Money under the restructuring).
- 240. The argument was advanced in the Appellants' skeleton argument on the basis that it represented a further departure of the Plan from the principle of *pari passu* distribution that would have applied in the Relevant Alternative, and that there was no justification for this.
- 241. I do not accept that submission. Even putting aside the fact that the Plan relates to the Plan Company and the argument is advanced by reference to the status of the shareholders in the Parent Company (a Luxembourg company), the principle of *pari passu* distribution of assets in an insolvency does not require the shareholders of a company to forfeit their shares. The only relevant principle in this respect under English law is that there should be no distribution of assets to shareholders until after all creditors have been paid in full: see e.g. section 107 of the Insolvency Act 1986 and Armstrong Whitworth Securities Limited [1947] Ch 673 at 689.
- 242. The Plan does not in any way infringe that principle. As Mr. Bayfield KC pointed out, the Plan Creditors are not required to accept any reduction under the Plan of the amount of the claims that they would be entitled to make in the Relevant Alternative, and no distributions will be made under the Plan of any surplus assets to the existing shareholders of the Parent Company unless and until all of the Noteholders, including the 2029 Noteholders, have been paid in full. So far as adherence to the principle of pari passu distribution of assets in the Relevant Alternative is concerned, there is thus nothing in the point.
- 243. However, as recorded by the Judge at [323], and repeated on appeal, Mr. Smith KC's alternative way of putting the Appellants' submissions was altogether more adventurous. He asserted that, in economic terms, where a company would be insolvent in the relevant alternative, it is the "in the money" creditors who would stand to receive something in that relevant alternative who effectively "own" the company. His contention was that for the purposes of assessing the fairness of a plan under Part 26A, it is *prima facie* those creditors who alone should stand to benefit from any excess value generated over and above the amount required to repay their debts.
- 244. Mr. Smith KC accordingly submitted that in the absence of any other factors justifying the retention of equity by the shareholders, a company that would be insolvent in the relevant alternative and promotes a restructuring plan in which there is a prospect of a solvent surplus <u>must</u> provide for the compulsory cancellation or reallocation of the existing shares in the company among the creditors who would be "in the money" in the relevant alternative.
- 245. Importantly, Mr. Smith KC further confirmed in argument that the logic of his contention dictated that the existing shares should be compulsorily cancelled or transferred to the in the money creditors for no consideration (i.e. that they should be confiscated or expropriated).
- 246. Although the Judge indicated at [324] that it was these submissions that gave him the greatest concern about approving the Plan, he rejected them. I consider that he was

right to do so, albeit that I do not think that they have the force that the Judge thought they had.

- 247. Mr. Smith KC founded his submissions in this respect on what I had said in <u>Virgin Active</u>. In that case, I considered an argument by a dissenting class of landlord creditors, who were being required under the plan to accept substantially reduced payments in respect of their claims, that it was unfair to require them to accept such a reduction when the shareholders were being permitted to retain their equity in the company, and hence stood to benefit from its continued trading after the restructuring. I was not, however, required to consider the submission now made by the Appellants that a plan under Part 26A might actually have to provide for the confiscation of the shares held by the members of the company and their transfer to the plan creditors.
- 248. At [238], I referred to a line of scheme cases including <u>Tea Corporation Limited</u> [1904] 1 Ch 12 ("<u>Tea Corporation</u>"), <u>Bluebrook</u> and <u>Noble Group</u>. In those cases, the essence of the proposal was that the business and assets of the failed company should be transferred to a new company to be owned by those who would be entitled to share in a distribution of those assets in a formal insolvency. By this route, the shareholders and any creditors who would be out of the money in the formal insolvency would be left behind in the shell of the old company and the benefits of future trading would be enjoyed by those who would be in the money in a formal insolvency. The cases determined that where the <u>legal</u> rights of the out of the money creditors or shareholders against the scheme company were not being altered, it was not necessary to make them parties to the scheme or convene a class meeting of them.
- 249. At [242], I summarised what I understood to be the established approach in such cases,
 - "242. That established approach in relation to scheme cases reflects the view that where the only alternative to a scheme is a formal insolvency in which the business and assets of the debtor company would be held on the statutory trusts for realisation and distribution to creditors, that business and assets in essence belongs to those creditors who would receive a distribution in the formal insolvency. The authorities take the view that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which use of such business and assets might generate following the restructuring ..."
- 250. One of the major changes introduced in 2020 was designed to ensure that out of the money creditors and shareholders <u>could</u> be bound to a plan under Part 26A. In that respect, at [244], I cited paragraph 5.148 of the *Government's Response*, published on 26 August 2018, to its 2016 consultation entitled *Review of the Corporate Insolvency Framework*. That response proposed the introduction of what later became Part 26A. It stated.

"The Government agrees with the majority of respondents that a procedure that allows for the cross-class cram down of dissenting classes of creditors, subject to safeguards, would be a useful addition to the UK's business rescue tools. The introduction of such provisions will help the UK maintain its

position as a leading global restructuring hub. The restructuring plan will represent a streamlined procedure in which dissenting classes of creditors, most importantly those who are 'out-of-themoney' (i.e. those who, under the order of priority for creditor repayment in administration or liquidation, would not receive any dividend), may be bound to an arrangement that is in the best interests of all stakeholders. The Government also agrees with those respondents who opined that the existence of such a procedure may well encourage more consensual restructurings."

(my emphasis)

- 251. In <u>Virgin Active</u> I also referred, at [249], to the provision in section 901C of the 2006 Act that creditors with no genuine economic interest in the plan company can be bound by a plan but need not be summoned to a class meeting to consider it. I stated,
 - "249. The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was "unfair" or "not just and equitable" to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in DeepOcean."
- 252. Applying these principles to the facts of <u>Virgin Active</u>, I concluded that it was for the secured creditors, who would be in the money in the relevant alternative but were accepting a compromise of their claims, to decide, for rational commercial reasons, whether to share any of the value that might be obtained from the restructuring with the shareholders by permitting them to retain some or all of their equity in the revived company. I held that the views of the out of the money landlords in this respect carried no weight by comparison. In holding that the shareholders' retention of their equity was not unfair to the dissenting landlords, I also placed reliance on the fact that the shareholders were providing some new money and waiving some of their own claims to benefit the restructuring. These two possible justifications for a departure under a plan from the order of priority that shareholders would occupy in the relevant alternative, have been referred to (borrowing terms used in Chapter 11 cases in the US) as "gifting" and the provision of "new value".
- 253. Mr. Smith KC did not contend that my approach in <u>Virgin Active</u> had been wrong: he sought to take it further. His point was that in the instant case, the shareholders of the Parent Company were adding nothing of commercial value, because the business of the Group was not intended to continue after the restructuring, and they were not providing any new money. Thus, he contended, there was no basis upon which the shareholders should have been permitted to share in any potential benefits generated by the Plan, and hence their shares should have been cancelled or transferred to the Plan Creditors.

- 254. In essence, although Mr. Smith KC did not say so expressly, the Appellants were contending that the SteerCo had missed a trick when settling for an issue of new shares amounting to only 22.5% of the enlarged equity share capital of the Parent Company to the providers of the New Money. By implication, he was saying that if the SteerCo had conducted their negotiations and struck their deal with the Group by reference to Part 26A rather than the earlier consent solicitation, they could and should have insisted on the existing shares being cancelled or transferred to the Plan Creditors for nothing.
- 255. In addressing these arguments, I first note that the Appellants did not suggest that the supposed failure to confiscate the existing shares in the Parent Company was particularly unfair to them, or to the class of 2029 Noteholders, as opposed to any other Noteholders or class of Noteholders. Nor did they take issue with the term of the Plan under which the SteerCo and any other Noteholders who provided New Money to support the restructuring would be entitled to share in 22.5% of the enlarged equity of the Parent Company.
- 256. Secondly, and as recorded by the Judge at [326(1)] the Appellants did not suggest that the SteerCo had acted in anything other than a commercially rational way when negotiating only a 22.5% stake in the enlarged share capital in return for providing New Money. It follows that the Appellants did not contend that it was irrational for SteerCo to have agreed to leave the existing shareholders in place. Although the Group was not intended to survive as a going concern, this might, for example, have been perceived as appropriate to maintain good relations with the shareholders during the smooth wind down of the Group's business in accordance with the Management Case under the Plan.
- 257. Thirdly, the Appellants did not suggest (still less provide any evidence of Luxembourg law to support a contention) that a viable mechanism existed under which, as a term of the Plan or even the wider restructuring, the existing shares in the Parent Company (incorporated in Luxembourg) could be cancelled or compulsorily transferred out of the hands of their current owners and into the hands of the Plan Creditors. At least at first blush, such a confiscation would have required some form of parallel proceeding in relation to the share capital of the Parent Company, over which the English court has no obvious basis to exercise its jurisdiction under Part 26 or 26A. Mr. Smith KC objected that this point had little merit given that it was the Group that had chosen to bring its restructuring to the English court. That objection might have had more traction if the Appellants had also been contending that the Issuer Substitution was an artificial device and the application under Part 26A should not be entertained, but as I have indicated, the Appellants did not make that argument.
- 258. Finally, my provisional view is that there is no jurisdiction under Part 26A to sanction a compulsory cancellation or transfer of the shares in a debtor company for no consideration. Although, given my views on the other grounds of appeal, it is not strictly necessary to decide this point of principle, and it was argued less fully than the other grounds, I nevertheless consider that it is appropriate to set out the reasons for that provisional view. That is because, as Mr. Smith KC acknowledged, his argument applies both to the question of whether Part 26A permits the cancellation or compulsory transfer of the shares in a plan company, and also to the question of whether Part 26A permits the extinction of debts owed to creditors, in each case for no consideration. These are questions of wider importance to the restructuring community engaged in the formulation of Part 26A plans.

- 259. The essence of Mr. Smith KC's argument was that such a power is inherent in the terms of Part 26A. He also contended that, at least so far as shareholders and creditors who would be out of the money in the relevant alternative are concerned, this would not give rise to a result for such shareholders or creditors that was commercially any different from the position that they would be left in under a Part 26 scheme of the type referred to in Bluebrook or Noble Group.
- 260. In support of his thesis, Mr. Smith KC pointed to the legislative history and the Explanatory Notes to which I referred in <u>Virgin Active</u>, that make it clear that one of the aims of Parliament in introducing the cross-class cram down power in Part 26A was to provide a new "streamlined" procedure which would enable a company in financial difficulties to be restructured in a single court process. This would mean that the company would not have to resort to the two-stage process involving a Part 26 scheme of arrangement in conjunction with an administration that had evolved from the approach taken in cases such as <u>Tea Corporation</u> and <u>Bluebrook</u>: see e.g. paragraph 9.9 of the Government's *Review of the Corporate Insolvency Framework* (above).
- 261. In such a two-stage process, a scheme of arrangement would be used under which the claims of the creditors who would be in the money in a formal insolvency would be discharged as part of a restructuring under which a newly formed company would assume liability for those claims (in whole or in a reduced amount) and issue equity to the in the money creditors. The scheme company would go into administration and its business and assets would be the subject of a "pre-packaged" sale to the new company in consideration of the discharge and assumption of the liabilities to the scheme creditors. The end result of the two-stage process would be that the business and assets would be owned by the new company which would in turn be owned by the in the money creditors who might also have debt claims against that new company. The out of the money creditors and the shareholders of the scheme company would be left behind in an empty shell.
- 262. Such a two-stage process was needed because it was not legally or practically possible under Part 26 either to extinguish the claims of out of the money creditors for no consideration, or to cancel or compulsorily transfer the existing shares in the scheme company for no consideration. That was essentially for two reasons.
- 263. The first reason is that if it were actually intended to extinguish the legal claims of creditors or confiscate their shares, it would have been necessary to make them parties to the scheme. But under Part 26, such classes of creditors and/or shareholders would inevitably exercise their right of veto by voting against a scheme that simply extinguished their claims or confiscated their shares for nothing. They would instead hold out, either to be paid a small amount to compensate them for the enforced surrender of their rights, or (in the case of shareholders) to be allowed to retain some reduced proportion of the shares in the scheme company to reflect their importance to the continuation of the business.
- 264. When Parliament enacted Part 26A, it is clear that it intended to deal with this problem by introducing the possibility of cross-class cram down to remove the ability of a dissenting class of out of the money creditors or shareholders to veto a restructuring: see e.g. the *Government's Response* cited at [250] above, and paragraph 9 of the Explanatory Notes.

- 265. The second reason was that there is a long-standing line of authority that the central statutory concept of a "compromise or arrangement" in Part 26 does not include a confiscation or expropriation of rights without compensating advantage. That principle was most clearly expressed in NFU Development Trust Ltd [1972] 1 WLR 1548, where, after referring to dicta in Alabama, New Orleans, Texas and Pacific Junction Railway Co. [1891] 1 Ch 213 at 243, Brightman J held, at 1555C-D,
 - "...Section 206(2) of the Companies Act 1948 [the equivalent of sections 895(1) and 901A(3)] is dealing with what is described as a "compromise or arrangement between a company and its creditors or a company and its members." The word "compromise" implies some element of accommodation on each side. It is not apt to describe total surrender. A claimant who abandons his claim is not compromising it. Similarly, I think that the word "arrangement" in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A member whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression."
- 266. In that regard, in contrast to the clear statement that Parliament intended to remove the right of veto and to enable dissenting creditors and shareholders to be bound to a restructuring plan under Part 26A, there is not the slightest indication anywhere in the legislative history or in the legislation itself that Parliament intended to introduce any power to sanction the extinction of creditor claims or the confiscation of shares for no consideration. Still less is there any indication that such expropriation should not only be permitted, but should in some situations be mandatory, as Mr. Smith KC contended.
- 267. The introduction of a new statutory provision that permitted debts or shares to be extinguished or expropriated for no consideration would have been highly controversial. That is not only because of the very nature of confiscation or expropriation of legal rights and property, but also because, contrary to Mr. Smith KC's argument, it would have very different consequences for the affected creditors or shareholders than the existing two-stage process that I have described above.
- 268. Although the two-stage process resulted in out of the money creditors and shareholders being left behind in the shell of the old company, the pre-packaged sale of the business and assets would be carried out at a value determined by an administrator, who was an independent officer of the court, who owed duties to them, and whose decisions could be challenged in court. Moreover, and importantly, because the scheme would not have extinguished the debts owed to the creditors or deprived the shareholders of their shares, they would retain the necessary standing to pursue any remedies available to them in respect of the failure of the scheme company.
- 269. A power to extinguish claims and confiscate shares for no consideration under a Part 26A would potentially permit the plan company itself to continue to trade profitably, free from the burden of the debts which would be out of the money in the relevant alternative, and for the sole benefit of the in the money creditors. Unlike under the two-stage process, the creditors would also actually acquire ownership of the existing company, displacing the existing shareholders, for no consideration. That result would be achieved without the safeguard of any independent officeholder, and on the basis of

valuation evidence put forward by experts instructed by the management of the plan company or by the creditors themselves. Importantly, and in contrast to the two-stage process, the out of the money creditors whose debts would be extinguished and the shareholders who would have been divested of their shares would also have no standing after the plan was sanctioned to take proceedings to complain about how the company had become insolvent in the first place.

- 270. In contrast to the clear statement about removing a right of veto for out of the money creditors or shareholders, none of these points are referred to or discussed in any way in any of the legislative history or the Explanatory Notes. There is simply no indication that Parliament intended to introduce such a new power of confiscation or expropriation. Quite the reverse. Parliament deliberately chose to use, as the central concept of Part 26A, precisely the same wording of "compromise or arrangement" as in Part 26. Although Parliament thereby doubtless intended parties to have the same flexibility in designing restructuring plans under Part 26A as they have in relation to schemes under Part 26, the use of the same expression confirms that Parliament did not intend to introduce a power to sanction a confiscation or expropriation of rights for no compensation under Part 26A.
- 271. That conclusion is the one reached by Professor Jennifer Payne in her influential work on *Schemes of Arrangement* (2nd ed., 2021) at page 319,

"Crucially, the restructuring plan allows for the cramdown of whole classes of creditors and shareholders. The intention underpinning the Act is that shareholder equity can be transferred, diluted or extinguished as part of a court-approved restructuring plan. This aligns the restructuring plan with Chapter 11 but stands in contrast to cross-class cramdowns elsewhere in the world (such as Singapore) which are confined to creditor classes. It is therefore possible for the restructuring plan to include provisions for shareholders that will involve a reduction in their equity interest in the company and which, provided that these provisions involve more than just a confiscation of their interest and so still represent a 'compromise' of their rights, will be capable of being imposed on them under the cross-class cramdown procedure. It is notable that amongst the amendments to the Companies Act 2006 that the 2020 Act makes to facilitate the implementation of restructuring plans, there is included a disapplication of preemption rights. These powers are likely to be welcomed by those seeking to rescue financially distressed companies."

(my emphasis)

- 272. That view also appears to be shared by many judges in the field. So, for example, in Gategroup at [141]-[142], Zacaroli J held that the same broad meaning is to be given to the expression "compromise or arrangement" in Part 26A as in Part 26, but that it does not permit a "mere surrender or forfeiture",
 - "141. In the case of a scheme under Part 26, the requirement that there be a "compromise or arrangement" between the

company and its creditors or a class of them has been given a broad interpretation. All that is required is some element of give and take, as opposed to mere surrender or forfeiture: see Re Savoy Hotel Limited [1981] Ch 351, per Nourse J at 359D–F; Re Lehman Brothers International (Europe) (in administration) [2018] EWHC 1980 (Ch); [2019] BCC 115, per Hildyard J at [64].

- 142. In <u>Virgin Atlantic Airways</u> [2020] EWHC 2191 (Ch); [2020] BCC 997, at [38], Trower J said that there was no reason to think that the phrase "compromise or arrangement" in section 901A was intended to be interpreted any differently. The same approach was adopted by Sir Alistair Norris in <u>Re PizzaExpress Financing 2 plc</u> [2020] EWHC 2873 (Ch) at [27] and by Trower J in DeepOcean at [43]. I agree."
- 273. In Smile Telecoms Holdings Ltd [2022] EWHC 740 (Ch), [2023] 1 BCLC 352, Mr. Smith KC advanced the same arguments that he now makes in the instant case to justify the extinction of out of the money creditor claims for no consideration: see [27]-[29]. On the facts, I did not need to decide the issue whether that was permissible under Part 26A, because I found that the creditors were being given a small payment under the plan in exchange for the extinction of their claims: see [30]-[31].
- 274. However, in <u>Re Prezzo Investco Limited</u> [2023] EWHC 1679 (Ch), a case in which there was no contrary argument on the point, Richard Smith J accepted Mr. Smith KC's argument. After referring briefly to the authorities (but not including Professor Payne's book) he stated, at [43],
 - "43. The question arises whether the "give and take" requirement applies in relation to a Part 26A plan in respect of creditors who are "out of the money" in the Relevant Alternative, specifically whether an "arrangement" encompasses creditors not required to be given any valuable compensation for the release or cancellation of their rights under the plan, there being no "take" by those plan creditors. The point was considered in Smile Telecoms and GAS (convening hearing), albeit neither court ultimately needed to decide it. I accept the Company's submission that, in the context of a Part 26A restructuring plan, the concept of an "arrangement" cannot require some form of consideration to be provided to "out of the money" creditors. As Mr. Smith KC submitted, Part 26A provides for the sanction of a plan against the dissenting vote of a creditor class under the Court's "cram-down" jurisdiction in section 901G of the Act. Since the related statutory condition is that such a class should be "no worse off" than if the plan had not been sanctioned, if it would receive nothing in the alternative scenario, it follows that the Act envisages the compromise of their claims under a plan under which they would also receive nothing."
- 275. I do not agree with this reasoning. It does not follow from the introduction of the crossclass cram down power and the terms of Condition A that Parliament also intended to

introduce a power to extinguish claims or confiscate shares for no consideration. There is a clear conceptual difference between the way that Part 26A gives effect to the stated intention of Parliament to remove the possibility that an out of the money class of creditors or members could exercise a right of veto over a restructuring (on the one hand), and what would be an unstated and unheralded introduction of a power to confiscate rights and property (on the other). The removal of a veto is achieved under Part 26A by providing in section 901C that the court can decline to summon a meeting of a class of creditors or shareholders who have no genuine economic interest in the company; and by giving the court the power under section 901G to sanction a plan under section 901F notwithstanding that a class meeting that has been held has not voted in favour by the required 75% majority in value. It does not follow that Parliament also intended that creditors or shareholders should be liable to confiscation of their rights and property for no consideration. Richard Smith J's reasoning simply does not engage with these points or with the significance of the legislature's use of the same words of "compromise or arrangement" in Part 26A that are used in Part 26.

- 276. It should also be reiterated that a decision under section 901C to exclude creditors or shareholders from voting on the basis that they have no genuine economic interest, or to determine that Condition A is satisfied under section 901G, is one that will be taken by the court on the balance of probabilities and on the basis of opinion evidence as to what is most likely to occur if the plan is not sanctioned. That would not be a firm foundation upon which to base an expropriation of rights and property.
- 277. Further, although creditors or shareholders who are likely to be out of the money in the relevant alternative may not have the commercial leverage to contend that they should be paid very much in exchange for their rights, there is no indication in any of the legislative history or from the early Part 26A cases that requiring them to be paid a modest amount to compensate them for the extinction of their debts, or for the cancellation of their shares, would unduly impede the restructuring process.
- 278. For the reasons that I have given, I would reject this aspect of the appeal.

The other grounds of appeal

279. In light of the conclusion which I have reached in relation to the main grounds of appeal, it is not necessary to express any view on Grounds 7 and 8. These would involve a detailed review of the Judge's findings of fact and disputed issues of German law. They were not strongly relied upon by Mr. Smith KC at the hearing of the appeal, and we heard very little, if any, argument on them. I therefore propose to say no more about them either way.

Conclusion

280. I would allow the appeal and set aside the Judge's Order sanctioning the Plan. By adhering to a sequential payment of the different series of Notes, the Plan departed in a material respect and without justification, from the scheme of *pari passu* distribution of the assets of the Group to Noteholders that would have applied in the Relevant Alternative. In my judgment, the Judge erred in principle in his approach to the exercise of his discretion under sections 901F and 901G to impose the Plan on the dissenting class of 2029 Noteholders.

Sir Nicholas Patten:

281. I agree.

Lord Justice Nugee:

282. I also agree.



Neutral Citation Number: [2025] EWCA Civ 475

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 (ChD)
Mr Justice Leech
[2025] EWHC 338 (Ch)

IN THE MATTER OF THAMES WATER UTILITIES HOLDINGS LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 15/04/2025

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT LORD JUSTICE ZACAROLI

and

SIR NICHOLAS PATTEN

- - - - - - - - - - - - - - - - - - -

Between:

(1) KINGTON S.À.R.L. (2) THAMES WATER LIMITED (3) MR CHARLES MAYNARD MP - and – **Appellants**

Respondents

(1) THAMES WATER UTILITIES HOLDINGS LIMITED (2) THE MEMBERS OF AN AD HOC GROUP OF CLASS A CREDITORS

Mark Phillips KC, Tony Singla KC, Matthew Abraham, Jamil Mustafa and Imogen Beltrami (instructed by Quinn Emanuel Urquhart & Sullivan LLP) for the First Appellant, Kington S.À.R.L. appearing on behalf of an ad hoc group of Class B creditors Andrew Thornton KC and Georgina Peters (instructed by Freshfields LLP) for the Second Appellant, Thames Water Limited

William Day, Dr Riz Mokal, Rabin Kok, Niamh Davis and Lucas Jones (instructed probono by Marriott Harrison LLP) for the Third Appellant, Mr Maynard MP

Tom Smith KC, Charlotte Cooke and Andrew Shaw (instructed by **Linklaters LLP**) for the **First Respondent**

Adam Al-Attar KC and Edoardo Lupi (instructed by Akin Gump LLP) for the Second Respondent

Hearing dates: 11, 12 and 13 March 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....

Sir Julian Flaux Chancellor of the High Court, Lord Justice Zacaroli and Sir Nicholas

Patten:

1. Introduction

- 1. This is an appeal against the decision of Leech J dated 18 February 2025, approving a restructuring plan (the "Plan") under Part 26A of the Companies Act 2006 (the "2006 Act") in respect of Thames Water Utilities Holdings Limited (the "Plan Company"). Shortly after the hearing of the appeal, on 17 March 2025 we announced our decision that, subject to the amendment of the Plan in one respect relating to the release of certain claims against directors and advisers, the appeal was dismissed. These are our reasons for the decision.
- 2. At the outset, we wish to pay tribute to the judge whose extremely thorough judgment, dealing comprehensively with the numerous issues of fact and law that arose, including complex questions of valuation evidence and competition law, was delivered within an exceptionally short time-frame.
- 3. It is unacceptable that the judge was put under enormous pressure to hear the case and hand down judgment in such a compressed fashion. The judge said (at §133) that he was never given a satisfactory explanation why no application was made to Court before December 2024, or so little time built into the timetable for the Court to consider its decision. We note that the Plan Company did not accept this criticism, and it is not necessary to determine where the blame ultimately lies. On any view, however, there has been a wholesale failure by the parties to comply with the guidance given by this Court in *Re AGPS Bondco Plc* [2024] EWCA Civ 24 ("*Adler*"), at §55 and following. The financial difficulties of the Plan Company, and the urgency of the situation by the time the matter came to trial, were very real, but they hardly came as a surprise. We repeat in particular what was said in *Adler* at §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 co-operate 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."

The Thames Water Group

4. The Plan Company is a subsidiary of Thames Water Limited ("TWL"). It has no material assets of its own, but is the holding company for the Thames Water Group (the "Group"). The principal operating company of the Group, Thames Water Utilities Limited ("TWUL"), is a direct subsidiary of the Plan Company. TWUL is a water and sewerage undertaker, holding a licence for that purpose granted by the Secretary of

- State for the Environment, Food & Rural Affairs (the "SoS") pursuant to s.11 and s.14 of the Water Industry Act 1991 ("WIA 1991").
- 5. The Group's assets include a network of over 32,000 km of water mains, 109,000 km of sewers that cover London, the Thames Valley and the home counties, approximately 354 wastewater and treatment sites and 88 water treatment works. It employs approximately 8,000 people.

The existing debt structure

- 6. The Group's debt is governed by approximately 60 different loan agreements, instruments and security documents. These, and their key terms, are explained in more detail by the judge at §11 to §35. They include: a Security Trust and Intercreditor Deed (the "STID"); a Master Definitions Agreement (the "MDA"); a Common Terms Agreement (the "CTA"); and a Security Agreement.
- 7. Most of the Group's debt has been borrowed or issued by TWUL and its direct subsidiary, Thames Water Utilities Finance plc ("TW Finance").
- 8. The debt is divided, roughly, into the following groups, in order of priority ranking:
 - (1) Liquidity facilities, in the amount of £550 million, all of which are undrawn;
 - (2) Hedging agreements;
 - (3) Class A Debt, consisting of various loans totalling approximately £16 billion. Of this: £209 million, together with interest of £15 million, was due for repayment on 24 March 2025 (but this has been extended pursuant to the Plan); a further £3.552 billion matures between 19 July 2025 and 18 April 2027; and the remainder of the Class A Debt matures between 2027 and 2062;
 - (4) Class B Debt, consisting of various loans totalling approximately £1 billion, all of which matures within the next two to three years; and
 - (5) Subordinated Debt, owed by the Plan Company to TWL, of which principal of £1.98 billion and interest of £1.25 billion is outstanding, and due to mature in 2056. The Subordinated Debt also consists of four further loans, totalling £331 million, all of which are payable on demand, and three of which have term dates expiring between July 2027 and August 2028.
- 9. The Plan Company is guarantor of TWUL's and TW Finance's obligations under the Class A Debt and the Class B Debt, and has entered into a deed of contribution with TWUL and TW Finance to contribute to amounts paid by those entities towards their obligations under any debt ranking in priority to the Subordinated Debt. It is the primary obligor in respect of the Subordinated Debt.
- 10. All of the above-mentioned debt, except for the Subordinary Debt, has the benefit of the same security package over the assets of the Group, including first fixed charges over the shares in TWUL, TW Finance, the Group's land and real property, plant and machinery, credit balance in bank accounts, IP rights, shares, dividends, and book debts.

The parties and their representation

- 11. The Plan Company (and respondent to this appeal) is represented by Mr Smith KC, Ms Cooke and Mr Shaw.
- 12. The Plan is supported by an ad hoc group of holders of Class A Debt (the "Class A AHG"), represented by Mr Al-Attar KC and Mr Lupi. The Class A AHG is a respondent to the appeal.
- 13. The appellants are those who opposed the sanction of the Plan before the judge:
 - (1) An ad hoc group of holders of Class B Debt (the "Class B AHG"), represented by Mr Phillips KC, Mr Singla KC, Mr Abraham, Mr Mustafa and Ms Beltrami;
 - (2) TWL, represented by Mr Thornton KC and Ms Peters; and
 - (3) Charles Maynard MP ("**Mr Maynard**"), who was given permission to intervene by the judge, and is represented *pro bono* by Mr Day, Dr Mokal, Mr Kok, Ms Davis and Mr Jones.
- 14. We are grateful to all Counsel and those instructing them for the high quality of their written and oral submissions, prepared in exceptionally quick time.

The Group's financial difficulties

- 15. The Group has been facing serious financial difficulties for some time. The Plan Company's evidence was that these were the consequences of "operational and regulatory factors". The judge addressed this briefly at §60 to §61 of his judgment. He noted the unchallenged evidence from Mr Maynard, which referred to the payment of significant dividends by the Group, used either to distribute to equity investors or to service debt, to the fact that the Group has become highly leveraged since its privatisation, and to the unsustainably high debt-to-EBITDA levels. Mr Maynard also referred to the progressive downgrading of the Group by the credit ratings agencies "as a result of this financial mismanagement".
- 16. At §61, the judge, while expressing concern at the lack of introspection before the Court about the reasons why the Group has got itself into the current situation, commented that it is not for the Court on an application to sanction the Plan to attribute blame for this, but its focus must now be "forward-looking", in order to try to restore the Group to financial health. We agree. This appeal is not about the steps, if any, which might be taken by the Plan Company, TWUL or any other Group company in respect of past failings. It is concerned only with whether the judge was correct to conclude that the requirements of Part 26A of the 2006 Act had been satisfied in this case.
- 17. An important part of the context for the resolution of the Group's financial difficulties is that TWUL is subject to regulatory limitations on the amount it can charge to its customers, its main source of revenue, as explained by the judge at §38 of his judgment:

"Every five years OfWat sets allowable price increases and fixes performance indicators for the water companies. For each period it conducts a Price Review ("PR") and fixes an Asset Management Plan ("AMP") and Outcome Delivery Incentives

("**ODIs**"). On 31 March 2025 AMP7 (i.e. the seventh AMP since privatisation) comes to an end. OfWat has recently completed its final determination ("**FD**") in relation to PR24 (i.e. the price review for 2024) and on 1 April 2025 AMP8 (i.e. the eighth AMP since privatisation) will take effect."

- 18. At §39 to §49, the judge set out further details of this process. For present purposes, we note the following.
- 19. A key component of the Price Review is the "Regulatory Capital Value", which represents the level of capital invested that OfWat has committed to allowing the company to recover via charges to customers, in addition to its operating expenditure. The amount which TWUL is allowed to charge customers involves three components: (1) a Regulatory Capital Value "run-off" rate, which is comparable to the depreciation in the value of its assets, and is recoverable over the assumed lifetime of the assets (referred to as "slow money"); (2) a return on capital; and (3) a "fast money" allowance, which is the balance of expenditure recovered immediately, year on year, from customers.
- 20. On 11 July 2024, OfWat released the draft determination for AMP8 in which it allowed £16.9 billion of total expenditure (capital expenditure and operating expenditure), compared with the figure of £22.2 billion which TWUL had included in its most recent business plan. TWUL submitted a draft determination response on 29 August 2024, seeking a total expenditure allowance of £24.5 billion. In its final determination, however, issued on 19 December 2024, OfWat allowed only £20.5 billion.
- 21. The Plan Company's evidence was that it would be "incredibly challenging" for TWUL to deliver on its performance commitments and regulatory requirements within the total expenditure allowed in the final determination. On top of this, TWUL is liable for significant fines and penalties, including for having approved the payment of interim dividends in 2023 and 2024. These penalties are unfunded.
- 22. On 24 February 2025, TWUL announced that OfWat had been requested to refer the final determination to the CMA. The CMA has six months to reach its own determination, but this can be extended by a further six months.

The Plan in outline

- 23. The Plan Company recognises that TWUL's business is unsustainable given the high level of its debt, and the regulatory restrictions on increasing its main source of revenue. A substantial injection of new equity will in due course be required.
- 24. The Plan, however, has only a limited purpose to provide a stable platform, or 'bridge', as an interim measure to enable a further restructuring plan based on an equity raise ("RP2") to be implemented, hopefully within a period of six months. On the basis of the findings made by the judge, the enterprise value of the Group will by then be significantly less than the aggregate amount of its debt, such that in order to attract further equity investment RP2 will inevitably have to result in a reduction of the Group's debt burden.

- 25. The Plan is designed to achieve this limited purpose by extending the maturity dates on all Class A and Class B Debt and the Subordinated Debt, and by providing for a new subsidiary of TWUL to issue Super Senior Funding ("SSF") in the headline amount of £1.5 billion, with a maturity date of two years and six months, with an option to provide an additional £1.5 billion on the same terms. All holders of Class A and Class B Debt will have the right to participate in the SSF, pro rata to their respective share of the Class A or Class B Debt. The SSF will have priority over all existing Plan debt (other than certain hedging liabilities).
- 26. The appellants' objections pursued on this appeal relate principally to the cost of the SSF, and the terms on which it is to be made available. Specifically, the Class B AHG contends that certain rights conferred on the Class A Creditors, but not others, give the Class A Creditors unfair control over the design and implementation of RP2 (the "Class A Control Terms"). Mr Maynard and TWL have focused their arguments on the cost aspect.

2. The statutory framework

27. There are two statutory frameworks relevant to this appeal: Part 26A of the 2006 Act relating to restructuring plans, and the WIA 1991 and rules made under it which, among other things, modify insolvency law as it applies to a water and sewerage undertaker such as TWUL.

Part 26A

- 28. Part 26A applies where two threshold conditions are met: s.901A of the 2006 Act. 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. Condition B is that a compromise or arrangement is proposed between (in this case) the company and its creditors, the purpose of which is to eliminate, reduce or prevent, or mitigate the effects of, any of those financial difficulties. There is no doubt that these threshold conditions are met in this case.
- 29. Pursuant to s.901C the Court may order a meeting of the creditors or classes of creditors to be summoned in such manner as the Court thinks fit.
- 30. Trower J, in an order dated 17 December 2024, directed that meetings be held of seven classes of creditors, including two classes comprising Class A Creditors, one class comprising Class B Creditors, and one class consisting of the subordinated creditor (see [2024] EWHC 3310 (Ch)).
- 31. Section 901C(4) permits the Court to exclude from participation at meetings in relation to the Plan, creditors who are colloquially referred to as "out of the money". It provides:
 - "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."
- 32. The Plan Company did not in this case seek to exclude either the Class B Creditors or TWL from attending meetings to consider and vote upon the Plan.

- 33. The Court's discretion to sanction a Plan derives from section 901F(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. This is, however, subject to the power of the Court under s.901G to "cram-down" one or more classes of creditors in which the requisite majority was not obtained:
 - "(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."

The WIA 1991 and relevant rules

- 35. The SoS and OfWat are required by s.2(2) of the WIA 1991, when exercising their powers in relation to TWUL, to do so in a manner which he or it considers is best calculated:
 - "(a) to further the consumer objective;
 - (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

- (c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;
- (d) to secure that the activities authorised by the licence [of a water supply licensee or sewerage licensee] and any statutory functions imposed on it in consequence of the licence are properly carried out; and
- (e) to further the resilience objective."
- 36. The "consumer objective" is "to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services."
- 37. The "resilience objective" is:
 - "(a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour, and
 - (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting-
 - (i) appropriate long-term planning and investment by relevant undertakers, and
 - (ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources."
- 38. By s.26 of WIA 1991, there are restrictions imposed on the ability to commence insolvency proceedings in relation to a water and sewerage undertaking. It cannot be voluntarily wound up, an administrator cannot be appointed under Schedule B1 to the Insolvency Act 1986 (the "1986 Act"), and no creditor can enforce security over its property without 14 days' notice being served on the SoS and OfWat.
- 39. Instead, by s.23 of WIA 1991, the SoS or (with the SoS's consent) OfWat may apply to the Court for the making of a special administration order. Creditors can present a petition to wind up the company, but the Court cannot make a winding-up order and instead if it would otherwise have made a winding-up order shall make a special administration order.
- 40. Such an order requires that the affairs, business and property of the company are managed by a special administrator, (a) for the achievement of the purposes of the order and (b) in a manner which protects the interests of members and creditors of the company. The purposes of the order vary depending on the reason for the appointment.

If the appointment is made on the ground that the company is or is likely to be unable to pay its debts (which would be the case in respect of TWUL) then the purpose is (a) to rescue the company as a going concern, or (b) to transfer the business as a going concern to another entity or entities so as to ensure that the functions which have been vested in the company may be properly carried out. The second of these purposes applies, however, only if the special administrator thinks that it is unlikely to be possible to rescue the company as a going concern, or a transfer is likely to secure more effective performance of its functions.

- 41. The Water Industry (Special Administration) Regulations 2024 modify certain aspects of Schedule B1 to the 1986 Act. In particular, Regulation 5 disapplies paragraph 3 of Schedule B1, which requires an administrator to perform his functions in the interests of creditors, and Regulations 22 and 40(a)(iii) amend the provisions of Schedule B1 relating to the disposal of charged property. Under paragraph 71 of Schedule B1, an administrator has power to sell such property as if it was not subject to the security, on the basis that he must account to the security holder for the proceeds of sale together with "any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value." This is modified in relation to a SAR of a water and sewerage undertaking, by the replacement of "market value" with "appropriate value", which means "the best price that could be reasonably available on a sale which is consistent with the achievement of the purposes of the special administration."
- 42. The purpose and effect of these provisions is to ensure that the essential functions of water and sewerage companies continue notwithstanding the insolvency of the entity which holds the licence to carry them out. We will need to return to this point when considering Mr Maynard's arguments based on public policy.

3. The judge's judgment

- 43. The judge was required to deal with a wider array of issues than those raised on appeal (see §134-§135 and §160 of the judge's judgment). The Class B AHG objected to the sanction of the Plan on four bases. The first was that the Court had no jurisdiction to sanction the Plan because the relevant alternative was a different restructuring plan proposed by the Class B AHG, and the Class B Creditors would be better off in that event than under the Plan. The Class B Plan was abandoned shortly after the judge delivered his judgment, and it has played no part on this appeal.
- 44. The second objection by the Class B AHG was that the Plan did not warrant the extent of alteration of the rights of the dissenting creditors and gave rise to an unfair distribution of the restructuring surplus between the Class A and Class B Creditors. In particular, there was no good reason why the Class A Creditors should have the benefit of the Class A Control Terms. Before the judge it was contended that these effected a diversion of value to the Class A Creditors. That point is not pursued on appeal, but the Class B AHG maintains its contention that the Class A Control Terms render the Plan unfair and, on that basis, the judge ought not to have sanctioned it.
- 45. The third of the Class B AHG's objections was that there was a "blot" on the Plan because the Plan infringed the Chapter 1 prohibition contained in s.2(1) of the Competition Act 1998. This point is not pursued on appeal.

- 46. The fourth objection was that the wide releases granted to third parties under clause 16.1 of the Plan were not necessary for the implementation of the Plan and constituted a "blot" on the Plan. This is pursued, in a limited form, on appeal.
- 47. TWL objected to the Plan on the basis that clause 9.7 of the amended and restated STID diluted and qualified TWL's existing voting rights and/or disenfranchised TWL from participating in the voting process in relation to RP2. This is not a point pursued on appeal. TWL also objected to the disparity between the information rights of the classes of creditors under the Plan.
- 48. Mr Maynard objected to the Plan on the basis that it was not in the public interest. That was because the Plan would load an unwarranted further debt burden onto TWUL, due to the excessive costs as compared with the relevant alternative. The customers of Thames Water and the wider public, he contended, would be better served by TWUL going into a SAR.

The Relevant Alternative

- 49. The judge accepted the Plan Company's evidence that the current "liquidity runway" that is the period of time before which TWUL's liquidity problems were such that its directors would have no choice but to request that OfWat and the SoS apply for a special administration order on the basis of TWUL's insolvency ran out on 24 March 2025. For that reason, the Relevant Alternative is a SAR of TWUL (and, in tandem, an administration of the Plan Company and TW Finance). This is now common ground.
- 50. The same urgency led to the extreme expedition of the hearing of this appeal, and the need for a decision to be announced very shortly after the hearing. Although Mr Smith acknowledged that it was not possible to identify a particular date or "cliff edge" beyond which TWUL could not continue to trade without the protection of a SAR if the sanction of the Plan was not confirmed, he submitted that this would occur within a very short time, that the position was worsening day by day and that TWUL was "running on fumes" in the meantime.

The no worse off test: valuation

- 51. The parties adduced evidence as to the enterprise value of TWUL in various scenarios, in order to address the issue whether the Class B Creditors were no worse off under the Plan than in the relevant alternative. The valuations of each expert were based on three different dates: (1) the valuation date; (2) 30 September 2025, being the estimated date on which RP2 would be implemented following an equity raise; and (3) 31 July 2026, being the estimated date on which TWUL would exit a SAR, on the assumption that it entered a SAR in February 2025.
- 52. Each expert used the discounted cashflow method, and produced a low, mid and high valuation as at each date.
- 53. The Plan Company's expert, Mr Eraj Weerasinghe, identified a mid-point enterprise value of TWUL as at the valuation date of £14.729 billion (in a range from £13.674 billion to £15.844 billion). The Class B AHG's expert, Dr Dora Grunwald, identified a mid-point enterprise value as at the valuation date of, in contrast, £21.496 billion (in a range from £20.806 billion to £22.712 billion).

- 54. The judge preferred the evidence of Mr Weerasinghe over that of Dr Grunwald and adopted his mid-point valuation as at the valuation date (£14.729 billion) in determining that the Class B Creditors would be no worse off under the Plan than they would be in the relevant alternative.
- 55. It is common ground that, on the basis of this valuation, the Class B Creditors would be "out of the money" in the relevant alternative, in the sense that if a sale of TWUL's business and assets occurred within a SAR and the proceeds were distributed among creditors, the Class B Creditors would receive nothing. That is worse than the amount the Class B Creditors will receive under the Plan, viz the interest which will continue to be paid on their outstanding debt.
- 56. As we have noted, the issue to which the valuation evidence was primarily directed at trial whether the Class B Creditors would be no worse off under the Plan than in the relevant alternative is no longer in dispute.
- 57. The valuation evidence remains potentially relevant to the exercise of the discretion under s.901G of the 2006 Act. For reasons developed below, however, we uphold the judge's exercise of discretion whether or not the Class B Creditors would be out of the money in the relevant alternative. It is therefore unnecessary to resolve the questions raised by the Class B AHG's appeal against the judge's findings on valuation. With no disrespect to those who ably argued the valuation issues before us, we do not think it desirable to add to the length of this judgment by addressing them in it.
- 58. In case he was wrong on the valuation issue, and Dr Grunwald's evidence was to be preferred, the judge went on to consider whether the Class A Control Terms caused the Class B Creditors to be worse off under the Plan.

The no worse off test: Class A Control Terms

- 59. There are two aspects to the Class A Control Terms.
- 60. The first is something called the "June Release Condition" (the "JRC"). The second is additional rights to information which the Class A Creditors are said to have in the context of the implementation of RP2.

The JRC

- 61. The JRC is contained in the agreement which governs the SSF, the Super Senior Class A Issuer Borrower Loan Agreement ("IBLA"). This provides for the advance, on various pre-determined dates, of particular loans that make up the SSF. It contains numerous conditions which are required to be satisfied prior to the making of each loan. The JRC is one of those conditions, contained in clause 1.1 of the IBLA:
 - "(viii) in respect of any Loans to be made on or after 30 June 2025 (including any Additional Loans), a Supported LUA has been entered into by such date, provided that this condition shall cease to be satisfied at any time if the Supported LUA has terminated or ceases to be fully effective in accordance with its terms (unless a Recapitalisation Transaction has been implemented which is the subject of the Supported LUA) (such

condition being, the "June Release Condition") provided further that, where the Borrower is (at the relevant time) acting in good faith towards a Recapitalisation Transaction, any extension of the June Release Condition can be effected with the consent of the Super Senior Issuer and the Super Senior Security Trustee in accordance with clause [4.7(a)(iv)] of the Super Senior Issuer Intercreditor Agreement;…"

62. A "Supported LUA" means:

"a lock-up agreement in respect of a Recapitalisation Transaction which has been entered into by (i) holders of at least 66 2/3% of the Super Senior Issuer Funding (the test described in this limb (i) being the "Supported LUA Super Senior Condition"); and (ii) Class A Debt Providers holding at least 66 2/3% of the aggregate Class A Debt (not including any Super Senior Debt) (the test described in this limb (ii) being the "Supported LUA Class A Condition"), to implement such solution through a restructuring plan;..."

- 63. It was common ground that two tranches of the first £1.5 billion part of the SSF (totalling £462 million), as well as the second £1.5 billion part of the SSF, fall due after 30 June 2025. The effect of the JRC, therefore, is that these funds will not be advanced unless a lock-up agreement in respect of RP2 has been entered into by two-thirds of the SSF lenders *and* two-thirds of the Class A Lenders (unless the effect of the JRC was suspended).
- 64. The judge first rejected the Class B AHG's case on the JRC as a matter of construction. He held (at §201 to §203) that, under the existing finance documents, the issue of a Claim Form to obtain the Court's sanction to RP2 would be an Event of Default, and the Plan Company would need to seek a waiver from a majority of the Class A Creditors. The JRC which makes the drawdown of any further loan dependent on among other things approval from the majority of the Class A Creditors is the quid pro quo for the Class A Creditors waiving in advance the Event of Default constituted by RP2.
- 65. Accordingly, seen in that context, he held that the JRC does not constitute the grant of materially different rights. The Class A Creditors always had a significant element of control over RP2.
- 66. The judge further rejected the argument that the JRC empowered the Class A Creditors to "divert value" away from the Class B Creditors, and that the Class A Creditors would in fact use the JRC or any other of the Class A Control Terms within RP2 to prevent the Class B Creditors from making any recovery at all, for example by depressing the equity bids. The judge reminded himself, at §233, that the substance of the Class B AHG's case was that the Class A AHG was involved in an unlawful means conspiracy, the equivalent to "bid-rigging", but found that there was no evidence to support that allegation.

Information rights

67. The enhanced information rights to which the Class B AHG and TWL objected were primarily those contained in paragraphs 59 and 60 of Part 3 of Schedule 4 to the CTA. The judge gave careful consideration to these objections and required – at the hearing to deal with consequential matters – an amendment to the Plan to improve the rights of the Class B Creditors and TWL in this respect. Specifically, he required an amendment to be made to paragraph 59, so that the rights within it were conferred equally on the Class A and Class B Creditors and to ensure that TWL received equivalent information rights to the secured creditors in relation to the restructuring process. The amended paragraph reads as follows:

"59. Recapitalisation Transaction

In respect of any Recapitalisation Transaction:

- (a) in which Secured Creditors (or any of them) are offered the right to reinvest (either directly or indirectly) in the TWU Financing Group (by means of debt, equity or any similar instrument) or any entity that acquires any rights or assets of the TWU Financing Group (whether constituting a lender-led process or a co-investment with third party investor(s) or otherwise), each member of the TWU Financing Group shall:
- (i) in good faith, consult with the advisers to its Secured Creditors (including, without limitation, the Relevant Creditor Advisers, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge Advisers) in respect thereof on an equal and open basis relative to other *pari passu* Secured Creditors and taking into account the circumstances at the time; and
- (ii) use its reasonable efforts to engage with its Secured Creditors and their advisers (including, without limitation, the Relevant Creditor Advisers, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge Advisers) on an equal and open basis and use reasonable endeavours, taking into account the circumstances at the time, to ensure the Recapitalisation Transaction includes options for participation (including via different instruments) for all relevant Secured Creditors which will avoid material adverse capital or other economic treatment for some Secured Creditors relative to other *pari passu* Secured Creditors (the "Participation Condition"); and
- (b) each member of the TWU Financing Group shall consult with the advisers to its Secured Creditors (including, without limitation, the Relevant Creditor Advisers, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge Advisers) and commence negotiations in respect of the Supported LUA by no later than 31 March 2025;
- (c) without prejudice to the other information undertakings and obligations set out in this Agreement (including in Paragraph 60 (Engagement with Creditors) below), each member of the TWU

Financing Group shall engage with the Hedge Counterparties and their advisers on an equal and open basis with other creditors in relation to any potential amendment and/or restructuring of the Hedging Agreements in connection with such Recapitalisation Transaction; and

- (d) TWUL shall provide periodic updates on a monthly basis to the advisers to the Secured Creditors and the Subordinated Creditors (including, without limitation, the Relevant Creditor Advisers, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge Advisers) (subject to confidentiality arrangements, which are satisfactory to TWUL (acting reasonably), being in place), as to the progress of such Recapitalisation Transaction, provided that nothing in this Sub-paragraph (d) shall require TWUL to disclose commercially sensitive information that, in TWUL's opinion (acting reasonably), could prejudice the equity raise process and/or be in breach of its obligations under the UK Market Abuse Regulation.
- (e) For the purposes of this paragraph 59:

"Class B Ad Hoc Committee" means the informal ad hoc committee of certain Class B Debt Providers established prior to the Restructuring Effective Date as constituted from time to time; and

"Class B Ad Hoc Committee Advisers" means the professional advisers to the Class B Ad Hoc Committee from time to time, being at the Restructuring Effective Date, Quinn Emanuel Urquhart & Sullivan UK LLP and Sidley Austin as legal advisers and Daiwa Corporate Advisory Limited as financial advisers."

- 68. Paragraph 60 remained in its unamended form. This required the Plan Company to share with the "Relevant Creditor Advisers" (as well as the Ad Hoc Hedge Advisers) updates on key issues, including the equity raise, TWUL's liquidity and any meetings with the Government. Sub-paragraph 60(d) was the main focus of Mr Phillips' submissions on appeal on this issue. It provides as follows:
 - "(d) TWUL shall engage with the Relevant Creditor Groups and the Ad Hoc Hedge Counterparties (and/or their advisers) on a good faith basis to facilitate development of a creditor led Recapitalisation Transaction (the "Creditor Led Transaction"), including (without limitation) by:
 - (i) providing access to any relevant investor data rooms (including any virtual data rooms or other data sites made available to investors);
 - (ii) providing reasonable access to TWUL's senior management team;

- (iii) cooperating with the reasonable information requests of any of the Relevant Creditor Groups and/or the Ad Hoc Hedge Counterparties (or any of the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers on their behalf);
- (iv) cooperating in facilitating reasonable access to Ofwat, the EA and other relevant regulatory bodies or Governmental Agencies; and
- (v) ensuring that any proposal in relation to a Creditor Led Transaction will be able to be submitted as an offer in any formal equity process run by TWUL (or any of its Affiliates), it being understood that these obligations shall not fetter any of the Obligors' Directors' duties to consider and, subject to such duties, facilitate all other available options relating to the Recapitalisation Transaction or otherwise (if relevant) or TWUL's compliance with the Participation Condition."
- 69. "Relevant Creditor Groups" means the Ad Hoc Committee of certain Class A Creditors (and an informal committee of Bank creditors).
- 70. The judge rejected the Class B AHG's objections based on paragraph 60: see §242. He accepted the Plan Company's evidence that its intention was to communicate with all of the Plan Creditors throughout the restructuring plan process, and accepted that this was consistent with its obligations under the CTA, specifically by reference to paragraph 59 (even before the amendments to it which were made after the hand-down of the judge's judgment): see §243.
- 71. Various other aspects of the documentation relating to the SSF were also challenged by the Class B AHG. The judge dismissed these objections and they are not resurrected on appeal.

Discretion

- 72. Given the importance this issue has assumed on appeal, we set out this part of the judge's judgment in some detail. He addressed the question of fairness under two subheadings: (1) the horizontal comparison; and (2) a better or fairer plan.
- 73. At §245 and §246 the judge recited two reasons advanced by Counsel for the Plan Company and the Class A AHG as to why there were no issues of fairness by reference to the horizontal comparison. The first was that "[the present case] involved an interim restructuring plan which did not generate a restructuring surplus by itself but gave breathing space to enable the Plan Company to complete the equity raise and present a permanent restructuring plan..." The second was that the Class B Creditors were out of the money. At §249, he concluded that "the present case gives rise to no issue of horizontal fairness of the kind explored in *Adler* and for the two reasons given by [Counsel for the Plan Company and the Class A AHG]".
- 74. The Plan Company cited the decision of Snowden J (as he then was) in *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), [2022] 2 BCLC 62 ("*Virgin Active*") for the proposition that the views of creditors who are out of the money should be given little

weight, even though they had voted against a restructuring plan. At §249 of *Virgin Active*, Snowden J said:

"The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was 'unfair' or 'not just and equitable' to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in *DeepOcean*."

- 75. The judge rejected the Class B AHG's contention that this passage from *Virgin Active* was wrong, and that the Court must consider issues of horizontal fairness of its own accord, even if the challenge is brought by an out of the money creditor. In doing so, he noted that §249 had been approved by this Court in *Adler* and followed in two other first instance decisions: *Re Cine-UK Ltd* [2024] EWHC 2475 (Ch), per Miles J at §67 to §69; and *Re Project Lietzenburger Strasse Holdco SARL* [2024] EWHC 468 (Ch), per Richards J at §212.
- 76. The judge further held that even if the Plan could be treated as generating a restructuring surplus, all of the Plan Creditors are treated equally, because they are all entitled to participate *pari passu* in the SSF.
- 77. As to the Class B AHG's basic objection that the effect of inserting the SSF at the top of the debt structure was to push down the Class B Debt out of the money, the judge held (at §250) that this is almost always going to be the outcome of an injection of new money where the Part 26A jurisdiction is engaged. If the junior creditors are out of the money in the relevant alternative, as here, then "it is not unfair that little weight is attached to their views", citing again *Virgin Active*.
- 78. At §251, the judge referred to Snowden LJ's indication in *Adler* that there might be examples where the Court would reject a restructuring plan as unfair if new money was provided on terms more expensive than those the Company could have obtained in the market (although we note that in this part of his judgment in *Adler* Snowden LJ was addressing the elevation of existing debt where the holders of that debt opt to participate in providing new money). The judge noted at §252 that the cost of the new funding was "very, very high", given that over half of it would be used to pay for the new money and to service the existing debt, and that "both the terms of the B Plan and the immediate trading price of the Super Senior Funding suggest that TWUL might have found better terms in the market from new funders who are not exposed to the Plan Debt".
- 79. At §253, however, the judge dismissed these points as a reason for refusing to sanction the Plan. He said:

"It must be remembered that the [Transaction Support Agreement] was the product of agreement in October 2024 to

enable TWUL to continue trading until March 2025 and to access the "trapped cash" of £400 million. Further, TWUL could never have raised new super senior funding without the consent of all of the Secured Creditors and, in particular, the Class A Creditors. Indeed, that is why the Class B AHG have to apply to Court to sanction the B Plan. Finally, and most importantly, I have described the cost of the new money as a "headline price". As I explore below in the context of the public interest, I am satisfied that it is likely that the outcome of RP2 is that the Class A Creditors will have to take a significant "haircut" and that the price of the new debt will have to be borne by the Plan Creditors themselves."

- 80. At §254, the judge dealt again with the Class A Control Terms. He accepted "up to a point" the submission of the Plan Company and the Class A AHG that the Court was not required, in considering the horizontal comparison, to consider whether every provision of the Plan is fair or whether it might have been amended or omitted. He did not find it necessary, however, to consider the extent to which the Court should take out its blue pencil, because he had found that the Class B Creditors were out of the money in the relevant alternative. At §255 he concluded, "[g]iven that finding", that none of the Class A Control Terms were unfair or unreasonable.
- 81. The only one of these Terms that gave him cause for concern was paragraph 60 of Part 3 of Schedule 6 to the CTA and the imbalance of information rights to which that gave rise. After careful consideration, however, he was not satisfied that he should refuse to sanction the Plan for this reason or require the Plan Company to re-formulate paragraph 60.
- 82. The judge rejected the Class B AHG's argument that the plan was unfair because it extended the maturity date of all Class A, Class B and Subordinated Debt, whereas it was only necessary to extend the maturity dates of the debt due to mature within the six-month intended period of the Plan. He held, at §260, that given that the Class B Creditors were out of the money, the Court should not "accept a roving commission from them to decide whether the Plan is 'necessary' to give effect to an interim solution." In any event, he accepted the Plan Company's evidence that the decision was based on legal advice and was considered the best way to achieve the interim solution, and he was far from satisfied that the Class A AHG would have been able to promote an interim plan without extending the maturity dates of all of the various instruments.
- 83. Having addressed and rejected the argument that there was a blot on the plan, based on the competition law objection, the judge also rejected (at §282 and §283) the contention that the releases of third parties constituted a blot on the Plan.
- 84. Finally (having accepted that Mr Maynard had standing to appear on the application), the judge dealt with the arguments advanced on behalf of Mr Maynard that he should refuse to sanction the Plan because it was contrary to the public interest, given the high costs of the restructuring.
- 85. Mr Maynard's objections focused on the high cost of the SSF (where it was said that £443 million of the first tranche of the SSF would be repaid to the Plan Creditors in

interest and costs), whereas the same funding was said to cost £65.93 million if made available by the Government to a special administration within a SAR. The judge rejected the Plan Company's evidence that a SAR would cost between £3.35 billion and £4.01 billion, but accepted, at §293, that the costs of a SAR were likely to be equal to or more than the costs of the Plan and RP2 "on the basis that the high costs of finance under the Plan will be balanced out by the negative effects of an insolvency process."

- 86. Mr Maynard also contended that the Court could not conclude that the steep price of the Plan was worth it, that the Plan Company had failed to submit clear and cogent evidence that the equity raise would be achieved, and that it could only be achieved at the price to be paid under the Plan. The judge concluded (at §297) that in considering what degree of assurance the Court required that the sanction order would be effective, the appropriate test is whether there is more than a fanciful prospect of RP2 succeeding and, if not, whether it was desirable that the Court should give the Plan Company an opportunity to assemble the remaining pieces of the puzzle.
- 87. While acknowledging the "eye-watering" costs of finance and adviser fees, and the fact that customers of Thames Water who are struggling with their bills will be "horrified at these costs and mystified how the Thames Water Group has been able to fund them or why it has agreed to do so", he nevertheless concluded that the Plan should be sanctioned, for three reasons:
 - (1) He was not satisfied that TWUL or its customers would have to bear the finance costs of the Plan. That was not because of the regulatory limit on the amounts which TWUL could charge its customers, but because it was inevitable that as part of RP2 the Class A Creditors would have to suffer a substantial reduction in their debt. Without the Plan Company's balance sheet being adjusted in that way there would be no prospect of raising the equity on which RP2 depended. It was accordingly appropriate to treat the creditors as bearing the costs of the Plan.
 - (2) There is a public interest in facilitating the rescue of struggling companies, which he was required to balance against the public interest in the benefits to the public of a SAR, in which priority is given to the uninterrupted supply of services. He gave particular weight to this consideration, noting that a SAR would have to be funded by the Government, and there was a public policy in favour of rescuing the Group and giving the market the chance to agree a permanent restructuring plan before the Government is forced into funding a SAR.
 - (3) He also gave some weight to the fact that OfWat and the SoS did not oppose the Plan, and that the pension trustees creditors of TWUL and other Group companies supported it.

4. The grounds of appeal

- 88. The Class B AHG appeals on the following two grounds:
 - (1) The judge was wrong to conclude that the Plan was fair, in light of the Class A Creditors obtaining beneficial non-financial rights that were not provided to the B Class Creditors. The relevant rights of which complaint is made are the JRC and the information and facilitation rights given to the Class A Creditors. The Class B AHG advances the following three sub-grounds:

- (a) The judge was wrong to conclude that the case gives rise to no horizontal fairness issues because the Plan is an interim one which involves no "restructuring surplus";
- (b) The judge was wrong to conclude that no horizontal fairness issues arose because all Plan Creditors were treated equally as they could participate *pari passu* in the Super Senior Funding. This failed to take account of the valuable rights given to the Class A Creditors;
- (c) The judge was wrong both in fact and in law in holding that the plan was *fair* because the Class B Creditors were out of the money.
- (2) The judge was wrong to conclude that the releases provided in the Plan were not a "blot" on the Plan and/or unfair.
- 89. TWL appeals on the following grounds:
 - (1) The judge was wrong to conclude that, having found TWL and the Class B AHG to be out of the money in the Relevant Alternative, he did not need to consider whether the Plan was fair or appropriate to impose on dissenting creditors.
 - (2) The Judge was wrong to conclude that the Plan did not give rise to any issues of "horizontal fairness".
 - (3) Those failures meant the judge failed to conclude that the Plan was not fair and would confer unjustified benefits on the Class A Creditors.
 - (4) The judge failed to take account of the cost of the new debt provided under the Plan, and the likelihood that the Plan Company could have found bridge finance on better terms elsewhere.
- 90. Mr Maynard appeals on the following grounds:
 - (1) In circumstances where the Relevant Alternative was a special administration of TWUL, the judge should have given priority to the public interest and/or the interests of the customers over any private creditor interests.
 - (2) In deciding to sanction the Plan, the judge was wrong and, if necessary, plainly wrong:
 - (a) In concluding that the costs of finance under the Plan and the deployment of such finance did not justify withholding sanction, and/or that the costs of special administration were likely to be equal to or more than the costs of the Plan;
 - (b) In concluding that TWUL or its customers would not bear the cost of restructuring advisory fees and the costs of finance under the Plan, because creditors would bear those costs, and/or that a special administration would result in a cost to the Government, and hence customers;
 - (c) In concluding that the Court had sufficient assurance that the costs of the Plan would lead to a successful restructuring via RP2;

- (d) When considering whether the Plan Company should be given an opportunity to implement a successful restructuring and recapitalisation outside of special administration, not giving due weight to the costs of that opportunity and/or the public interest and/or the interests of customers. Accordingly, the judge erred in failing to consider, or consider adequately, whether special administration was a better route;
- (e) In failing to consider whether the conditionality, controls and initiatives built into the terms of the finance under the Plan were in the public interest and/or the interests of customers;
- (f) In failing to consider the management and governance issues arising from the Plan and RP2, and the judge erred in failing to refuse to sanction the Plan with, or remove or qualify, the releases in clause 16;
- (g) In giving weight to the (absence of a) position of the Government or OfWat; and
- (h) It was wrong to sanction the Plan in light of developments since the close of evidence at the sanction hearing, specifically that an appeal against the FD had been referred to the CMA.
- (3) The judge was wrong to determine that the Plan Company had discharged its burden of proof on all matters relevant to the decision to sanction and/or that the Plan Company had complied with its duty of utmost good candour.
- (4) There was procedural unfairness because the Plan Company did not appoint, fund and make all available information available to an independent public interest or customer advocate at the appropriate time.

5. Analysis and conclusions

Legal principles relating to the exercise of discretion to sanction a Plan

- 91. Part 26A is silent as to the approach the Court should take when exercising its discretion to sanction a Plan. The approach was left to be worked out on a case-by-case basis, building on the jurisprudence developed over the century and more of experience of schemes of arrangement, under what is now Part 26 of the 2006 Act.
- 92. This Court, in *Adler*, drew together the key first instance authorities, and certain writings of academics, that have sought to grapple with this question. We start by summarising the principles that we consider to be settled, following *Adler*.
- 93. Before doing so, however, we make four preliminary comments.
- 94. First, where Parliament has left it to the Courts to develop the approach to be taken upon sanctioning a plan, the Court's function in any case is to work out how best to exercise its discretion on the facts of the case before it and in light of the arguments advanced by the parties, guided as appropriate by such principles as have been identified in previous cases. It is not for the Court to assume the legislator's role and lay down principles of broader application. Development on a case-by-case basis is an

- inevitably slower process, but has the advantage that the principles that emerge are moulded by real-life examples.
- 95. Second, when considering the guidance offered in previous cases, it is important to recognise their limitations. Many applications to sanction a scheme or plan are uncontested, and while the views of judges experienced in this area are to be afforded great respect, they have not always been tested by adversarial argument.
- 96. Third, it is important not to divorce guidance in an earlier decision from the circumstances of that case. Restructuring plans can be used in a variety of situations and can be structured in many ways. To take three examples: they might be used (as in *Adler*) as an alternative to a formal distribution process in liquidation or administration; or (as in *Virgin Active*) as a means of restructuring a balance sheet (for example by swapping debt for equity) in order to enable the company to continue to trade as a going concern with a reduced debt burden; or (as in this case) simply as a mechanism to avoid a formal insolvency process now, so as to buy time to enable a further, substantive, restructuring to be implemented in the future.
- 97. Guidance developed in the context, say, of a distributing restructuring plan may not read across directly to a plan designed only as an interim measure.
- 98. Fourth, it was common ground that this appeal is one from an exercise of discretion and, as such, this Court will not interfere with the judge's decision unless we are 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: see, for example, *Adler* at §104.

Principles derived from Adler

- 99. Paragraph references in this section are, unless otherwise indicated, to the judgment of Snowden LJ in *Adler*, with which Nugee LJ and Sir Nicholas Patten agreed.
- 100. Where there is no cross-class cram-down, the principles established in the context of schemes of arrangement remain applicable (§115 to §117). Those were summarised by Snowden J in *Re Noble Group (No.2) Ltd* [2019] 2 BCLC 548, at §17 as follows:
 - "(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."
- 101. The same principles continue to apply within an assenting class, as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class: §128.
- 102. The first and fourth of those principles continue to apply even where the cross-class cram-down power is engaged: §119.
- 103. In any case where the cross-class cram-down power is engaged, however, the Court cannot simply apply the rationality test (i.e. the third of the above principles summarised in *Re Noble Group*) either (i) as regards voting within the dissenting class, or (ii) as regards the overall vote across different classes: §129. The logic that drives the rationality test in a scheme of arrangement that a majority of those who share materially the same rights against the debtor are in the best position to consider their own commercial interests is lacking when the question is whether to impose the plan on one or more of the classes which have *not* approved the plan by the requisite majority: §125 to §127 and §140 to §141.
- 104. Nor is it sufficient to establish that a dissenting class is no worse off under the plan than in the relevant alternative (the so-called "vertical comparator" test borrowed from CVAs). That is a necessary requirement for the exercise of the cross-class cram-down power, embodied in Condition A in s.901G(3) of the 2006 Act, but is clearly not in itself sufficient to justify the exercise of the power: §153.
- 105. It is, however, obviously appropriate to conduct some form of "horizontal comparison" in deciding whether to sanction a plan where the cross-class cram-down power is engaged: §156 to §158.
- 106. That requires the Court to examine whether the Plan provides for differences in treatment of the different classes of creditors *inter se*, and whether those differences can be justified: §159. In doing so, an obvious reference point is the treatment of the creditors in the relevant alternative. Departure from that treatment within the Plan is not, however, fatal to the plan, and nor is the exercise to be carried out merely by restating the "no worse off test": §159 to §160.
- 107. For example, where a "wind down" plan is proposed as an alternative to a formal insolvency in which the claims of creditors would rank equally for a *pari passu* distribution of the debtor's assets, as in *Adler*, the Court would normally approve a plan which replicated that *pari passu* distribution, but a departure from the principle of *pari passu* distribution could be approved, provided it was justified, in the sense that there was a good or proper reason for doing so: §165 to §166.
- 108. Of particular importance is the following passage from §160:

"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."

- 109. One example of a justification for giving a class of creditors some priority or proportionately enhanced share of the benefits is where it has provided some additional benefit or accommodation to assist the achievement of the restructuring in the interests of creditors as a whole: §167. Put another way, in considering whether there has been a fair distribution of the benefits preserved or generated by the restructuring, it may be relevant to take account of the source of those benefits: §167, endorsing the comment made in *Re Houst* [2023] 1 BCLC 729, at §31.
- 110. Other examples are where the supply of goods or services from certain creditors is essential to the continuation of the business, and thus the success of the plan, which justifies the exclusion of those creditors from impairment under the plan, and the long-standing 'salvage' principle, under which liabilities to a creditor in respect of property which is retained and used for the benefit of the insolvent estate are satisfied in full: §170 to §172.
- 111. In considering whether the allocation of assets within a plan is fair, in contrast to the approach taken in relation to a scheme of arrangement, the Court may be required to consider whether a different allocation would have been possible: §180 to §181.
- 112. One matter which was *not* directly in issue in *Adler* was the extent to which a class of creditors which would be out of the money in the relevant alternative might be entitled to share in the distribution of benefits under the plan. The Court addressed a different contention: namely, that in order to comply with the *pari passu* principle, a company that would be insolvent in the relevant alternative and promotes a restructuring plan in which there is a prospect of a return to solvency *must* provide for the compulsory cancellation or reallocation of the existing shares among creditors who would be in the money in the relevant alternative: see §244.
- 113. In rejecting that contention, Snowden LJ gave as one of his reasons (albeit *obiter* see §258) that there is no jurisdiction under Part 26A either to cancel or compulsorily transfer shares, or to extinguish debt, in both cases for no consideration. We return to this aspect of *Adler* when considering the question whether, in considering the fairness of a plan, no regard is to be had to the views or position of creditors who would be out of the money in the relevant alternative.

Issues of principle raised by the Class B AHG's and TWL's appeal

114. As we have noted above, the Class B AHG's and TWL's contention that the judge erred as a matter of law centres on what he said about the lack of any restructuring surplus

- and the relevance, in the context of the exercise of his discretion, of the Class B Creditors and TWL being out of the money.
- 115. Ultimately, we do not think that the answer to this appeal turns on these points of law. That is because even assuming these points in favour of the Class B AHG and TWL, the judge did address the Class B AHG's and TWL's objections to the Class A Control Terms, and rejected them on their merits, albeit largely in the section of his judgment dealing with the no worse off test. For the reasons developed below we consider that he was right to do so, and that his conclusions also answer the Class B AHG's objections to the exercise of discretion to sanction the Plan. Nevertheless, these points were fully argued before us and, if the Plan Company's position in relation to them is to be accepted, that would be a complete answer to the appeal without needing to consider the fairness of the Class A Control Terms.

Restructuring surplus

- 116. The judge found that there was no restructuring surplus in this case because the Plan is only an interim plan (see §249 of his judgment).
- 117. In our judgment, in doing so the judge adopted too narrow an approach to the question of restructuring surplus. As a preliminary point, we prefer the term "benefits preserved or generated by the restructuring", in place of the term "restructuring surplus", because the latter tends to suggest something of quantifiable value which exists in the restructuring that would not exist in the relevant alternative. In many cases, that will accurately describe the benefit of a restructuring over the relevant alternative, but it will not necessarily do so in every case.
- 118. An interim plan, such as the present one, is a good example. The benefit of the Plan is to buy the Plan Company the time it needs in order to effect a longer term restructuring via RP2. The reasonable assumption is that RP2 itself will preserve or generate tangible and quantifiable benefits, if only by avoiding the value destructive consequences of a SAR. What those benefits will be, and how they are to be quantified, can only be determined in the future within the context of RP2. The benefit preserved or generated by the Plan is the more intangible one of preserving TWUL as a going concern in the short to medium term to enable it to pursue the opportunity of preserving or obtaining further value within RP2.
- 119. We see no reason why, in considering the fairness of the terms of the Plan, this should not be regarded as a relevant benefit of the restructuring for the purposes of considering a horizontal comparison between the rights conferred under the Plan on different groups of creditors.

The position of out of the money creditors

- 120. At §249, the judge found that the present case gave rise to no issues of horizontal fairness, for the two reasons given by the Plan Company and the Class A AHG. One of those reasons was (see §246) that the Court had no obligation to assess the fairness of the Plan by reference to the horizontal comparison if the Class B Creditors were out of the money.
- 121. The Class B AHG and TWL contend this was wrong in principle.

- 122. It is not entirely clear that the judge's conclusion was as stark as this. Mr Smith pointed out that what the judge said at §249 was the case did not give rise to issues of horizontal fairness "of the kind explored in *Adler*", that the issue in *Adler* was that the distribution of assets did not reflect the *pari passu* principle that would have applied in the relevant alternative, and that it is common ground no issues of *that* kind arise in this case. We note, however that, at §247, the judge also rejected the Class B AHG's submission that the Court must consider issues of horizontal fairness of its own accord even where the challenge is brought by out of the money creditors.
- 123. At the hearing of the appeal, Mr Smith expressly disavowed the submission attributed to him at §246 of the judgment: he agreed that it was putting it too high to say that <u>no</u> issue of fairness can arise because the Class B Creditors are out of the money. The correct principle, he submitted, was that when considering issues of fairness, "little or no weight" is to be attached to the views or objections of the out of the money creditors.
- 124. He nevertheless maintained that a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness the fact that out of the money creditors get nothing at all counts for nothing. There is in substance little difference between that submission and the submission recorded at §246 of the judgment, which Mr Smith disavowed making.
- 125. Mr Smith accepted, in light of the comments of this Court in *Adler* as to the need for give and take in respect of *any* creditor whose rights were compromised by a plan, that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but submitted that this need be no more than *de minimis*. He maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such *de-minimis* consideration. He submitted that we are bound to reach this conclusion because of this Court's approval, in *Adler*, of Snowden J's decision in *Virgin Active*.
- 126. For the reasons which follow, we do not accept that there is such a hard-edged rule, or that *Adler* compels us to that conclusion.
- 127. The relevant circumstances in *Virgin Active* were that a group of dissenting landlords, who would have been out of the money in the relevant alternative (a formal insolvency process) objected to the restructuring plan under which shareholders, who also would have recovered nothing in an insolvency process, retained equity.
- 128. It was submitted on behalf of the company in that case that because the dissenting landlords would be out of the money in the relevant alternative, they had no rights to any assets of the company from which they could derive any benefit in the absence of the plans. They could accordingly not have any basis to complain about the willingness of the secured creditors, who would be in the money in the relevant alternative, to approve a plan under which, in return for providing new money, the shareholders retained some of their shares.
- 129. This argument was advanced in the context that the plan was designed to enable the company to return to profitability and that, if that happened, the shares in the company would increase in value.

- 130. Snowden J's analysis began with the authorities relating to schemes of arrangement, where starting with *Re Tea Corp Ltd*, *Sorsbie v Tea Corp Ltd* [1904] 1 Ch 12 ("*Tea Corp*") a practice had developed under which the assets of the scheme company were transferred to a new company to be owned by those who would have been entitled to share in the distribution of the proceeds of sale of the scheme company's assets in a formal insolvency (see §238). By that route, the creditors and shareholders who would have been out of the money in the formal insolvency of the scheme company would be left behind in its shell, and the benefits of future trading would be enjoyed by those who would have been in the money in the formal insolvency.
- 131. Snowden J then reasoned that those principles were plainly understood when Part 26A was introduced (see §243), and there was nothing in Part 26A, or the Explanatory Notes to it, that indicated that the legislature intended any different approach to be adopted by the Court to the position of creditors who were out of the money under the relevant alternative. Section 901C(3) and (4) reinforced that view, in permitting the Plan Company to exclude those without any "genuine economic interest in the company" from participating in meetings to consider and vote upon the Plan: §247.
- 132. That led Snowden J to his conclusion, at §249 quoted above, that the fact that out of the money creditors have voted against a plan "should not weigh heavily or at all in the decision of the court as to whether to exercise its power to sanction the plan and cram them down." Insofar as Snowden J was there saying that *the fact* of opposition to a plan by creditors with no genuine economic interest in the company had little or no weight, we agree. That is the logic of excluding such creditors from voting at all under s.901C.
- 133. Later in the judgment, however, it appears that Snowden J may have regarded the fact that the relevant landlords were out of the money as going further and providing a reason for discounting altogether their position when considering the allocation of benefits under the plan. At §268 and following, Snowden J explained why, on the facts in *Virgin Active* even if their objections counted for anything they were not sustainable. He did so, however, only if it had been necessary, i.e. if he was wrong to say (at §266) that "their objections as to what the Secured Creditors have agreed with the Plan Company in this respect carry no weight".
- 134. If that is taken to mean that the Court <u>cannot</u> take account of the treatment of out of the money creditors in considering the fair distribution of the benefits preserved or generated by a plan, simply because they would be out of the money in the relevant alternative, then for the reasons developed below we disagree with it.
- 135. The Plan Company contends that this was approved at §251 to §252 of *Adler*, where §249 of *Virgin Active* and the application of the principles set out in it were set out.
- 136. The starting point, in any consideration of *Adler*, is the Court's conclusion at §160 (quoted above at [74]) that when the Court is asked to subject a dissenting class to an enforced compromise of its rights for the perceived benefit of the assenting classes, it must enquire how the benefit preserved or generated by the plan is allocated among different creditor groups.
- 137. As we have already noted, the position of out of the money creditors was only addressed in *Adler* in the context of the argument that the plan in that case also wrongly departed from the *pari passu* principle because it left the shareholders with some of their equity.

- 138. In fact, this argument was comprehensively rejected at §241 and §242 of Snowden LJ's judgment in *Adler*, on the basis that the *pari passu* principle does not require shareholders to forfeit their shares, and there was no breach of that principle in circumstances where no distributions would be made under the plan to shareholders until all creditors had been paid in full.
- 139. In the paragraphs that followed, Snowden LJ addressed an "altogether more adventurous" way of putting the submissions, namely that in assessing fairness under Part 26A, only those creditors who are in the money should stand to benefit from any excess value generated over and above the amount required to repay their debts, so that the shareholders' shares should have been cancelled or transferred for no consideration.
- 140. In the passage relied on by the Plan Company, Snowden LJ was in fact setting out the submissions being advanced by Mr Smith (who appeared for the appellants in *Adler*), and which were founded on what had been said in *Virgin Active* (see §247 of *Adler*). At §255 onwards, Snowden LJ addressed those arguments and rejected them. It was, in agreement with the submissions of Ms Peters on this point, no part of the ratio of *Adler* to endorse this aspect of *Virgin Active* (which, as pointed out at §253, was not put in issue).
- 141. Further, the reasons given at §258 and following of *Adler* for rejecting Mr Smith's argument that the plan should have expropriated the shares (albeit *obiter*) undermine the hard-edged rule for which the Plan Company contends.
- 142. An important element in the conclusion that there was no power within Part 26A to extinguish claims or expropriate shares for no value was the critical difference between schemes under Part 26 and plans under Part 26A.
- 143. While it is true that it has been recognised since *Tea Corp* that a company may (through a two-stage process of a pre-packaged sale in administration and a scheme of arrangement) transfer all of its assets to a new company in which only those with a genuine economic interest in the scheme company may participate, this involves no interference with the rights against the scheme company of the creditors with no such economic interest. Those rights have at least potential value, because the sale would be carried out at a value determined by an independent officer of the Court, and the creditors or shareholders left behind would retain the necessary standing to pursue any remedies available to them in respect of the failure of the scheme company (see §268 of *Adler*).
- 144. Such safeguards would, however, be lost under Part 26A if the Court could, merely because creditors or members would have been out of the money in the relevant alternative, expropriate their claims or shares. The Court held that there was nothing in Part 26A or its legislative history which suggested Parliament intended to introduce a new power of confiscation. That was in contrast to the clear removal under Part 26A, achieved by s.901C(4), of the right of an out of the money class to *veto* a plan.
- 145. The removal of that right of veto did not abrogate the need, in order to address the rights of the out of the money creditors, for there to be a "compromise" of their rights (see §271 of *Adler*, quoting Professor Jennifer Payne in *Schemes of Arrangement*, 2nd ed, at p.319). It was noted, at §276, that the decision to exclude creditors from the ability to vote under s.901C(4) is taken on the balance of probabilities on the basis of opinion

- evidence as to what is most likely to occur, which is not a firm foundation upon which to expropriate rights and property.
- 146. Although this part of *Adler* was *obiter*, it was not challenged before us. We consider it is correct.
- 147. We note for completeness, that a number of first instance cases have cited or followed the comments in *Virgin Active* to the effect that little or no weight is to be given to the views of out of the money creditors (see, for example, *Re Houst* [2022] EWHC 1941 (Ch) per Zacaroli J (as he then was) at §27, where the point was made that little regard was to be had to the vote *in favour* of a plan by creditors who were out of the money; *Re Great Annual Savings Co Ltd* [2023] EWHC 1141 (Ch), per Adam Johnson J at §109 to §110; *Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch), per Michael Green J at §71, §74 and §107; *Re Cine-UK Ltd* [2024] EWHC 2475 (Ch), per Miles J at §69; and *Re Project Lietzenburger Straße Holdco S.à.r.L* [2024] EWHC 468 (Ch), at §211 to §215, where Richards J was prepared to follow the senior creditors' views on how the benefits of the restructuring should be shared, as the subordinated creditors were "so far out of the money").
- 148. On the other hand, in *Re Nasmyth Group Ltd* [2023] EWHC 988 (Ch) Leech J at §100 rejected the suggestion that Snowden J in *Virgin Active* had intended to lay down a rigid rule, and said that "there may be circumstances in which the out of the money creditors have a legitimate interest in opposing the Plan"; and in *Re Ambatovy Minerals Societe Anonyme* [2025] EWHC 279 (Ch), Hildyard J, having noted at §25 that the exercise of the cross-class cram-down power engages the Court much more fully in the commercial rationale of what is proposed, said, at §118 (in reliance on §160 of *Adler*) that "although what I have described as the "personal" objections of a dissenting creditor which is out of the money are to be given little weight, the general requirement to consider whether there has been a fair distribution of the restructuring surplus is to be treated as overriding and will necessarily take into account, albeit in overall terms, the treatment of the dissenting class."
- 149. As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly.
- 150. So far as this Plan is concerned, its intended benefit is to provide a bridge, to give the Plan Company and its stakeholders time to try to implement RP2. The reasonable assumption is that the Class A Creditors, at least, will stand to benefit from RP2. The benefit which the Plan is intended to provide would be lost if any of the creditors, including the Class B Creditors, were permitted to enforce their existing rights. That is because TWUL would be forced into a SAR if it were required to honour the obligation

- to pay the amounts falling due on maturity under various loans from the Class A and Class B Creditors over the next six months.
- 151. It is also an important circumstance that, while the relevant alternative is a SAR, the purpose of that SAR would at least initially be to provide a similar bridge, to explore the rescue of TWUL as a going concern. A special administrator would be able to pursue an equity raise and a restructuring of the Group's debt to seek to achieve that. The problem which the Plan proponents perceive, and wish to avoid, is the reduction in value of the Group, and thus the value that could be preserved or generated in due course by RP2, in that event.
- 152. The agreement by the Class B Creditors to the postponement of the maturity date in respect of their loans is as critical in achieving the benefit of the restructuring, over the relevant alternative, as the postponement of the maturity date in respect of the Class A Creditors' loans. Both sets of creditors contribute equally in this sense to the benefits to be preserved or generated by the Plan.
- 153. Given that the initial purpose of a SAR would likely be to provide a similar bridge, it does not seem to us to be an answer to this point that, *if there were* to be a distribution within a SAR, the Class B Creditors would be out of the money.
- 154. Importantly, the Class A and Class B Creditors would be treated in the same way within that SAR. Neither of them would receive any capital repayments on the forthcoming maturity dates of their loans, and it was common ground that neither the Class A nor Class B creditors would be paid interest accruing on their loans after the commencement of the SAR. This serves to reinforce the conclusion that the source of the benefits which the Plan is intended to provide, which includes the continued payment of interest on existing debt in the meantime, is the fact that *both* the Class A and Class B Creditors are giving up their existing rights by extending the maturity dates on their loans.
- 155. In fact, the Plan *does* involve interest being paid on both the Class A and Class B debt and both classes are invited to participate in the SSF, but Mr Smith's point was that this was as a result of benevolence by the Class A Creditors: no regard should have been given to the position of the Class B Creditors, he said, if they had received neither benefit, and similarly no consideration need be given to any other supposed unfair treatment of them under the Plan. We disagree, for the reasons already given.
- 156. Before turning to consider the substance of the objections to the Class A Control Terms, we note that one of the arguments advanced by Mr Phillips was that under s.901C(4) a "genuine economic interest in the company" does *not* mean an interest in the company *in the relevant alternative*. We do not need to determine that issue. It does not arise in this case because there was no attempt to disenfranchise any class of creditors under s.901C. Its determination is better left to a case where it arises on the facts. The question is a binary one: a creditor either does or does not have a genuine economic interest in the company. In contrast, the exercise of discretion whether to sanction a plan involves wider considerations and the fact that a creditor would be out of the money in the relevant alternative is not in itself a reason to exclude that creditor from the consideration of whether the benefits preserved or generated by the restructuring are fairly allocated among all creditors whose rights are compromised under the plan.

The JRC

- 157. The Class B AHG's principal attack was on the fact that, pursuant to the JRC, no funding under the SSF could be released after 30 June 2025 (unless that date is extended) unless holders of at least two-thirds of the Class A Debt have entered into a lock-up agreement in respect of the proposed RP2. This, it is said, effectively gives the Class A Creditors a right of veto over any future restructuring of the Group.
- 158. As we have noted above, the judge addressed this issue in the context of the "no worse off" argument. His conclusion, however, is equally relevant to the objection pursued on appeal relating to the exercise of discretion to sanction the Plan. He rejected the Class B AHG's objection in large part because the effective right of veto which the Class A Creditors were given under the JRC was not materially different from the rights they already had. That was because under the STID the launch of RP2 would constitute an event of default, and without waiver of that event of default by a majority of the Class A Creditors, they would have been entitled to put TWUL into a "Standstill", with the inevitable consequence that the directors would be required to request OfWat and the SoS to appoint special administrators.
- 159. The Class B AHG does not dispute that the Class A Creditors have such a right, but contends that this is the wrong analysis, because the presence of the JRC must be compared with the rights that the Class A Creditors would have in the relevant alternative. As we understood the argument, it is that once TWUL is in a SAR, any leverage which the Class A Creditors had pursuant to the STID, by reason of their ability to withhold waiver to an event of default, would be lost. Moreover, the decision as to what funding to obtain, and on what terms, would be for the special administrators, without any group of creditors having the right to veto the drawdown of that funding.
- 160. The first point to note is the unlikelihood that this particular right of the Class A Creditors will have any practical implications, because the JRC also requires the same lock-up to have been agreed by two-thirds of the SSF lenders. No objection is made in that respect, and rightly so, it being a reasonable condition for the lenders of the SSF to impose in respect of the drawdown of further funds in the future.
- 161. We were told by Mr Smith (and this was not challenged by the Class B AHG) that 93.29% of the Class A Creditors are participating in the SSF. Accordingly, the fact that under the JRC the drawdown of further funds is dependent on the consent of two-thirds of the Class A Creditors in addition to two-thirds of the SSF lenders, will have no practical relevance unless the proportion of 93% of the Class A Creditors who agree to enter into a lock-up in their capacity as SSF lenders is insufficient to constitute two-thirds of *all* of the Class A Creditors. It is only in those circumstances that the additional requirement to obtain the consent of the requisite majority of Class A Lenders is not academic.
- 162. The unlikelihood of that happening is an unpromising starting place for the argument that the JRC operates so unfairly to the Class B Creditors that the Court should refuse to sanction the Plan.
- 163. We are in any event unpersuaded that there is any relevant unfairness in the Class A Creditors preserving via the JRC the practical influence they have pursuant to the existing security arrangements over a future restructuring proposal. In the context of a

Plan that provides a bridge to buy time for a substantive restructuring to be implemented, it is not unfair if whatever effective veto in respect of a restructuring plan the Class A Creditors have prior to the implementation of an interim Plan is preserved within that Plan. Given the respective size of the debt, as between the Class A and Class B Creditors, irrespective of the JRC, the reality is that the Class A Creditors will have at the very least a highly influential voice in any substantive restructuring. The JRC is certainly not sufficiently unfair so as to lead to the refusal to sanction the Plan.

Information rights

- 164. We have set out the relevant parts of paragraphs 59 and 60 of Part 3 of Schedule 4 to the CTA at §67 and §68 above. The judge again addressed the information rights in the context of the "no worse off" argument, but his conclusions apply equally to the objection pursued on appeal relating to the judge's exercise of discretion to sanction the Plan.
- 165. So far as paragraph 59 was concerned, Mr Phillips suggested that the rights of a particular group of secured creditors were engaged, by that paragraph, only if an offer was made *to that particular group of creditors* under sub-paragraph (1). We disagree. In our view the "Secured Creditors" in the remaining sub-paragraphs of paragraph 59 are not limited to the group of Secured Creditors to whom an offer is made under sub-paragraph (a). Mr Phillips did not press an alternative reading, but instead focussed on the unfairness which he submitted stemmed from paragraph 60(d).
- 166. As to paragraph 60(d), we recognise, as did the judge, that it provides an additional contractual right to certain Class A Creditors. Mr Smith suggested that there was no unfairness because it related to the possibility that creditors made a "credit bid" in the context of RP2, and there was no possibility of the Class B Creditors making a credit bid. Paragraph 60(d) refers, however, to a "Creditor Led Transaction", which could include any kind of bid (not merely a credit bid) in which Class B Creditors participated with third parties.
- 167. We nevertheless do not accept that it confers an unfair advantage on the Class A Creditors.
- 168. The judge accepted the Plan Company's evidence that its intention was to communicate with all Plan Creditors throughout the restructuring plan process. That was a finding the judge was entitled to make and which we are not prepared to overturn on appeal.
- 169. More importantly, however, if the Plan Company wishes to obtain the Court's sanction to RP2, it will need to demonstrate that it has engaged with any reasonable proposals made to it, and that it has indeed communicated fairly with all of the Plan Creditors throughout the restructuring process. The implementation of RP2 will be conducted in the full glare of publicity, and the Plan Company has fair warning that it must engage fairly with, and provide sufficient information to, all stakeholders throughout the process. We reiterate the point made in §3 above, moreover, that it must do so at an early enough stage that any issues that arise can be identified, and narrowed, so that the judge before whom RP2 comes is not placed under the same intolerable pressure as Leech J was in this case.

- 170. Before the judge, the Class B AHG had objected that the SSF cost more than could otherwise be obtained, citing its own Plan B in that regard. That objection is not pursued by it on appeal. Instead, it fell primarily to Mr Maynard (supported by TWL) to advance objections based on the costs of the Plan. Those objections focus on the following amounts.
- 171. First, it is said that the cost of the SSF is approximately £443 million, comprising the following elements (as summarised by the judge at §111 to §117 of the judgment):
 - (1) The new debt will be issued at a discount of 3% to its face value, which equates to an initial cost to the Plan Company and TWUL of £45 million.
 - (2) A backstop fee of 3.5% (totalling £52.5 million) is payable to all those Plan Creditors who agreed to underwrite the new funding. The judge said that he was given no justification or rationale for this fee, or for the discount referred to in (1) above.
 - (3) The new debt carries interest at 9.75%, which amounts to £73 million for six months.
 - (4) In the event that a recapitalisation transaction is successfully implemented in the next six months, then a make-whole fee totalling £156 million is payable.
 - (5) "Early bird" consent fees were also payable in an unknown amount, although these were estimated to total £116 million in December 2024 when it was anticipated that 85% of Plan Creditors had acceded to the Transaction Support Agreement dated 25 October 2024.
- 172. Second, objection is made to the interest payable in respect of the existing debt and professional fees. The former amounts to approximately £245 million. The latter was estimated to be £210 million (consisting of £120 million already spent, and £90 million for the period of the Plan, on the basis of a "burn rate" of £15 million per month).
- 173. The grounds of appeal asserted on behalf of Mr Maynard are set out above at §90. They boil down mostly to an argument that the judge failed to take proper account of the public interest. That public interest has two aspects. First, the aggregated private interests of the customers of TWUL, including the uninterrupted provision of water and sewerage services. Second, the wider public interest which includes, for example, maintaining a clean water supply and preventing the discharge of untreated sewage into rivers. The public interest in both senses extends to the debt burden of the Group (and thus the burden imposed by the excessive costs of the new debt), because a higher debt burden may impact on the long term delivery by TWUL of public services.
- 174. Mr Day submitted that because the relevant alternative is a SAR, the question on this appeal is whether the public interest is better served by the Plan or by a SAR of TWUL. The latter, he said, is the best way of providing a bridge to a substantive restructuring to put TWUL and/or its public services on a sustainable financial footing. He put forward two bases for giving preference to the public interest in this case: first because *Adler* required it and, second, because there would otherwise be a "blot" on the Plan.

- 175. As to *Adler*, Mr Day submitted that it confirmed that the relevant alternative is key not just to the no worse off test but also to the question of fairness in the exercise of discretion under s.901F, referring to Snowden LJ's description of it in *Adler* as "the central statutory concept". Mr Day submitted that because in a SAR the interests of creditors are subordinated to public interest objectives, it was necessary for the Plan Company to justify that "those priorities" were being respected under the Plan and, if not, why not.
- 176. It is true that the relevant alternative, and the outcomes for creditors in it, is an important reference point in considering the fairness of the Plan at the sanction stage. It is a non-sequitur, however, to say that it follows that the Court is required to decide whether the public interest would be better served by a SAR than by the Plan.
- 177. The inquiry as to the fairness of the Plan, including the horizontal and vertical comparisons, is required because sanctioning a plan has the effect of imposing a compromise on dissenting creditors. The Court's involvement is save for the case where there is a "blot" on the plan (as to which see below) limited to considerations of fairness as between creditors: Was each class fairly represented at meetings? Was the majority in any class promoting interests adverse to the interests of the class? Could a member of each class reasonably approve the plan? Were dissenting creditors no worse off under the plan than in the relevant alternative? Was a dissenting class treated unfairly, for example because there was an unfair distribution of the benefits preserved or generated by the plan?
- 178. None of these considerations apply, and the Court would have no role at all, if all creditors had agreed to the transaction to be implemented via the Plan. The inability of the creditors to agree does not vest in the Court a responsibility to conduct a wider enquiry as to whether the Plan or a SAR would better serve the public interest.
- 179. Accordingly, we part company with Mr Day at the outset of his submissions: the question on this appeal is <u>not</u> whether a SAR would be better than the Plan for TWUL, its customers and the wider public interest. As the provisions of the WIA 1991 set out above §35 to §39 make clear, the SoS and OfWat are the guardians of the public interest so far as water and sewerage undertakings are concerned.
- 180. The decision to make an application to appoint special administrators rests with OfWat and the SoS. They have chosen not to make such an application. OfWat provided two letters to the Court (dated 28 January 2025 and 28 February 2025). It described its extensive engagement concerning TWUL's operational performance and financial resilience. It said that it considered that TWUL's directors were in the best position to make a decision about its solvency, and that it did not consider it was required to, or that it was appropriate to, take action to prevent a private sector restructuring in the circumstances. It also agreed with the judge that, as a result of the cap on the amounts TWUL could charge to its customers, the costs of the Plan would ultimately be borne by the creditors.
- 181. Mr Day objected that the Court ought not to defer to OfWat on the question of what is in the public interest. For the reasons already given, however, the question whether the public interest is best served by an application being made for the appointment of special administrators is one for OfWat and the SoS to consider. The mere fact that a

SAR would be the inevitable consequence of the Court refusing to sanction the Plan does not provide a reason for the Court to usurp *their* functions.

"Blot" on the Plan?

182. The concept of a "blot" on a scheme of arrangement was first used by Lindley LJ in *Re English Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at p.409. Having referred to the fact that creditors, acting on sufficient information, are better judges of what is to their commercial advantage, he said:

"I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later."

- 183. This has long been part of the settled principles applied on sanction of a scheme, as recorded in Buckley on the Companies Acts: see for example, the extract from the 15th edition (1957) of that work cited by Plowman J in *Re National Bank Ltd* [1966] 1 WLR 819 at p.829D-E. Usually, the Court in sanctioning a scheme or plan is able to conclude there is no blot without needing to elaborate on the meaning of that term.
- 184. The first reported attempt to do so appears to be that of Lloyd J in *Re Equitable Life Assurance Society* [2002] BCC 319, at p.350, where he said:

"It seems to me plain that, when Lindley LJ used that language, he was talking of some defect in a scheme which at first escaped notice, and only came to light after the meeting or meetings, and maybe not until the sanction hearing. That is clear from his words 'that had been unobserved and which was pointed out later'."

- 185. This suggestion that it only applies to something not noticed at the time has not, however, found favour in subsequent decisions. More recently, the term has been held to refer to "some technical or legal defect in the scheme, for example, that it does not work according to its own terms, or that it would infringe some mandatory provision of law": see *Re Co-Operative Bank Plc* [2017] EWHC 2269 (Ch), per Snowden J at §22. The same judge repeated that view in *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at §17, giving as an example of a blot something that would make the scheme "unlawful or in any other way inoperable".
- 186. Mr Al-Attar pointed out that 45 of the cases cited to us contained references to a "blot", but in only two of them had a blot been found to exist. The first case, *Re MB Group plc* (1989) 5 BCC 684, involved a scheme of arrangement in respect of the members of the company. The holder of a warrant (with an entitlement to subscribe for shares on certain complex terms) objected on the basis that the sanction of the scheme would breach their rights. The objection was in fact withdrawn, but Harman J said (at p.687H) that he had reached the tentative conclusion that the Court should refuse to sanction the scheme because to do so would be lending the Court's aid to the company acting in serious breach of its obligations to warrant holders.
- 187. In the second case, *Re Nasmyth Group Ltd* [2023] EWHC 988 (Ch), Leech J found that there was a "roadblock" because the company had failed to agree new "time to pay

- arrangements" with HMRC, without which the plan could not take effect in the way the company and its creditors intended.
- 188. Mr Day submitted that "blot" has been given a much broader meaning in other cases. He first relied on *Re Childcare Corp Ltd* [2017] EWHC 2201 (Ch), where Asplin J, in reciting the test to be applied on sanctioning a scheme, referred to the requirement that there be no blot as "shorthand for the residual discretion of the court". Not only was this a passing comment in a short extempore judgment in relation to an unopposed members' scheme, but Asplin J went on to say that the question of blot "generally goes to whether there is some technical flaw in the scheme as a whole."
- 189. Of more help to Mr Day is *Re BAT Industries plc* ("*BAT Industries*"), an unreported decision of Neuberger J (as he then was) dated 3 September 1998. That case concerned a members' takeover scheme. It was part of a wider restructuring which involved the company, in a step to be taken subsequent to the approval of the scheme, declaring a dividend in specie of its investments in two subsidiaries. The scheme was opposed by a number of objectors who had commenced litigation against the company in the US, claiming damages.
- 190. Counsel for the company (Mr David Richards QC as he then was) contended that the objectors had no standing to appear, and that their interests could not be taken into account. He did so on the basis that the scheme was a domestic matter between the company and its members, the purpose of which was to make the scheme binding on all members, and that in the event that all members had agreed the terms of the scheme could have been achieved by agreement in which event the objectors could raise no objection. The objectors were in fact objecting to the dividend in specie, which was not part of the scheme itself, but was something the company would do consequent upon the scheme being sanctioned. In reality, Mr Richards submitted, the objectors were attempting to get a Mareva injunction without having to give an undertaking in damages.
- 191. Neuberger J saw the force of these arguments, but held that there was nothing in the statute (then s.425(2) of the Companies Act 1985) which indicated that the power of the Court on an application to sanction a scheme is to be fettered as to whom it can hear and what it must take into account. The reference in Buckley on the Companies Acts to a blot on the scheme was not clear, but suggested to him that "while it may require exceptional circumstances, it is open to the court to take into account the legitimate concerns of third parties in relation to a proposed scheme, even if they are not members of the company." That was supported by the *MB Group* decision of Harman J. Nor was the court required to take a blinkered and uncommercial approach by ignoring the fact that the scheme was part of a larger process including the dividend in specie. If the next stage involved a step that was ultra vires or illegal, that would be a good reason to refuse to sanction the scheme.
- 192. Having said that, Neuberger J sanctioned the scheme, recognising the force of Mr Richards' points that a scheme was essentially a domestic matter between the company and its members. That was the Court's primary concern. The target of the objectors' complaint the dividend could be done without the scheme. There was nothing to suggest that the dividend was intended to deprive the objectors, or any other potential claimant, of monies they might otherwise recover following judgment. Moreover, the

- directors had formed the view that the dividend could be paid, and that view was not challenged as being dishonest or unreasonable.
- 193. Mr Day also relied on *Re Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch) ("*Halcrow Holdings*"). That case involved a members' takeover scheme. Objection was made by a member of a pension scheme (the trustee of the pension scheme being a creditor of the company), on the basis that the takeover facilitated by the scheme would leave the trustee of the pension scheme with less likelihood of recovering its deficit.
- 194. The company's counsel submitted that the Court should exercise its discretion by reference only to the interests of the shareholders, rather than creditors or employees of the company. He accepted, however, that if there were concrete evidence that the scheme would lead to the company's obligations to the pension trustee not being respected, or that the buyer's intention was to use the takeover to damage the interests of pensioners, then the Court could properly take that into account in exercising its discretion.
- 195. Vos J (as he then was) rejected the submission that the Court should have regard only to the interests of the shareholders. Having referred to *BAT Industries*, he held, at §47:
 - "The word 'blot' has the benefit of a lengthy history, but has no inherent meaning in this context. The reality is, as the authorities I have set out above made clear, that the court can, within the context of the exercise the court is undertaking, take into account matters such as the effect on a company pension scheme in deciding whether or not it is appropriate to sanction a scheme."
- 196. In concluding at §48 that there was no blot on the scheme, "in the sense that there is nothing unlawful or inappropriate about it", Vos J relied on the facts that: the scheme did not in itself affect the obligations owed to the pension trustee; there was no evidence of any malign intentions on the part of the buyer towards the group or the pension scheme; and no evidence of any underlying intention to cut the company adrift or damage the pension scheme.
- 197. Drawing the strands together from these authorities, we consider that each of Neuberger J and Vos J was correct to conclude that in some limited instances the interests of third parties may be taken into account in deciding whether there was any blot on the scheme or plan.
- 198. In considering the limits on so doing, it must, as Neuberger J recognised in *BAT Industries*, be kept in mind that a scheme or plan is essentially a domestic matter between the company and its members and/or creditors (as the case may be).
- 199. Without purporting to define its limits for all circumstances, the concept of "blot" is undoubtedly capable of covering a case where the scheme or plan contains a technical defect so that it is unworkable or incapable of achieving what was intended. It is equally capable of covering a case where the scheme or plan requires the company to take, or contemplates it taking, a step which is illegal, ultra vires, or in breach of some other obligation owed by the company, even where the obligation is owed to persons who are not members or creditors of the company. No case has found a blot to exist other than

- in such circumstances, and in both *BAT Industries* and *Halcrow Holdings*, in the absence of such circumstances the Court was not prepared to find that there was a blot.
- 200. In the present case, Mr Smith accepted that if the Plan had the effect of loading such an enormous debt burden on TWUL that it would be put in breach of its regulatory obligations as a result, that could constitute a blot.
- 201. Whatever the limits of the concept of a "blot", in the circumstances of this case it does not require the Court to undertake an enquiry as to whether a SAR would better serve the interests of the public than the Plan, or whether a SAR would achieve the resolution of the financial problems that have beset the Group at a lower cost than the Plan. We reiterate that the SoS and OfWat are charged with protecting the interests of customers and the wider public interest, and it is for them to consider whether to apply for the appointment of special administrators.
- 202. In any event, we consider the judge was correct to conclude that the costs which the Plan Company has borne, and will bear under the Plan, do not constitute a blot so as to refuse to sanction the Plan. On a proper analysis, significant elements of the headline figures which are set out at §171 and §172 above are not costs of the SSF, or costs of the Plan that would be avoided in a SAR. Moreover, the judge was entitled to conclude that the overall costs of the intended restructuring via the Plan are at least equalled by the negative financial consequences of a SAR.
- 203. TWL and Mr Maynard contend that the judge's findings as to the costs of the Plan cannot be interfered with on appeal. That is correct, so far as the amounts and the immediate purposes for which they are payable are concerned. The characterisation of these amounts, and whether they are to be regarded as a cost of the Plan, or of the SSF, or whether they are cumulatively greater than the likely negative financial impact of a SAR is another matter. As to the latter point, it is Mr Maynard who seeks to challenge the judge's finding. As to the former, it is an oversimplification to say that these are all costs of the Plan, or of the SSF, or otherwise something that would not have to be incurred in the relevant alternative.
- 204. First, as to the figure of £245 million for interest on existing debt, while the parties were agreed that in the event of a SAR such interest would not continue to be paid out of cashflow, it is nevertheless a liability which the Plan Company will incur in any event, which would be capitalised in a SAR. The liability is not caused by the Plan.
- 205. Second, of the headline figure for fees, more than half (i.e. £120 million) had already been incurred and paid. That, again, is not a cost which would be avoided in a relevant alternative. It would also be wrong to characterise this amount and the ongoing fees of £15 million per month only as costs of the Plan. They cover all the work being undertaken in trying to address the Group's financial difficulties, including work in relation to the equity raise and the preparation for and implementation of RP2, liquidity management in the meantime, and the cost of the appeal in respect of the referral of the FD to the CMA.
- 206. Third, the interest rate payable on funding from the government in a SAR, on the assumption that alternative lending could not be obtained in the market, would according to the experts be somewhere between 8.87% and 9.5%. The rate payable under the SSF, while greater, is not excessively so. The relatively high interest rate

reflects the fact that, while the lending is relatively low risk in terms of ultimate repayment, there remain commercial risks in lending to a company which may shortly end up in a SAR, where any additional SAR funding would take priority, particularly over the timing of recovery.

- 207. Fourth, as to the various other components of the pricing of the SSF (the backstop fee, the initial discount, and the make whole sum), Mr Smith pointed out that these are not only a cost of the SSF. Together, they represent the cost to the Plan Company of obtaining a number of benefits:
 - (1) The "early bird" and consent fees are payable in return for obtaining early commitment from creditors (including those who chose not to, or who could not, participate in the SSF) to the restructuring process as a whole. Without obtaining an early commitment from a substantial body of creditors, it would have been difficult for the Plan Company to embark on the restructuring process at all.
 - (2) The Plan Company required (and was permitted by a majority of Class A Creditors) access to £400 million in blocked accounts, in order to provide liquidity while it negotiated the restructuring with creditors. Mr Phillips objected that obtaining access to *its own funds* could hardly be described as a benefit being conferred by creditors on the Plan Company. That misses the point, however, that the money in blocked accounts forms a valuable element in the security package available to creditors, and that secured creditors can be expected to require something in return for giving up that element of their security.
 - (3) Under the Plan, the maturity of £2.9 billion of debt, otherwise falling due within the next six months, is deferred for two years, with no increase in interest rate or separate fee, to which lenders asked to defer maturity would normally be entitled.
 - (4) Insofar as the costs relate to the SSF, they relate to the whole £3 billion, albeit that the Plan Company has only a conditional right to drawdown the second half of this amount.
 - (5) Contrary to what the judge said at §114, he was provided with a justification for the backstop fee. The evidence of the Plan Company was that this was compensation for those creditors who were prepared to underwrite the provision of the funding. We accept that someone who agrees to underwrite the provision of funding would ordinarily expect to be compensated for doing so. Mr Thomas-Watson, who gave evidence on behalf of the Class B AHG, accepted in cross-examination that commercial parties providing such a service would not be expected to waive their fee for doing so.
- 208. The judge commented, at §252, that "the terms of the B Plan and the immediate trading price of the Super Senior Funding suggest that TWUL might have found better terms in the market from new funders who are not exposed to the Plan Debt." The B Plan is not pursued, and it was not suggested that the relevant alternative was bridge financing from another source in the market outside a SAR. As the judge noted at §253, super senior funding from another source could not have been obtained without the consent of all the secured creditors. There was in any event, as Mr Thornton fairly accepted, no evidence as to what terms are available in the market, without which the assertion that

- the costs associated with the SSF are excessive compared to what could have been obtained remains speculation.
- 209. Critically, the judge accepted that the costs associated with the SSF, the Plan and the proposed RP2 are not likely to be higher than those in the relevant alternative. The judge concluded (at §293), having heard evidence from experts for both sides as to the costs of a SAR, and its likely impact on the value of the Group's business and assets, that the costs of a SAR were likely to be "equal to or more than the costs of RP1 and RP2, on the basis that the high costs of finance under the Plan will be balanced out by the negative effects of an insolvency process".
- 210. Mr Day submitted that this finding was wrong, because it contained an obvious mathematical error: accepting the Plan Company's evidence as to the additional costs of a SAR at its highest, he said that the total cost of a six month special administration would be approximately £830 million, which was 60% of the equivalent cost of £1.388 billion under the Plan.
- 211. This, however, is not a realistic comparison: it seeks to compare the total amount of borrowing available during the first six months of the Plan on the one hand with the estimated increase in costs of running a SAR over and above the costs of implementing RP2, together with a much lower amount of borrowing within a SAR, on the other.
- 212. Moreover, it is based on the mistaken premise that the Plan Company benefits from liquidity of only £500 million under the Plan, having deducted the amount of £898 million (being the total amount said to constitute the cost of the SSF, professional fees and servicing of existing borrowing). The premise is wrong because none of the makewhole amount (£156 million), the early bird and consent fees (estimated to be £116 million), and the professional fees so far incurred (£120 million) affect the liquidity available under the SSF. So far as the make-whole fee is concerned, the assumption is that it will become due (as the price of early termination of a fixed term loan) upon the successful implementation of RP2, in which case it would be restructured within that plan. The early bird and consent fees are payable in debt, and the professional fees have already been paid out of cashflow.
- 213. Mr Day's calculation also wrongly attributes all of the costs associated with the Plan to the funding to be obtained within the first six months, whereas those costs relate to the restructuring as a whole, including all of the £3 billion of funding under the SSF. Mr Day's calculation is premised on the Plan Company receiving a loan in a SAR of only £500 million.

Further points arising from Mr Maynard's grounds of appeal

- 214. We address here points arising from Mr Maynard's grounds of appeal (enumerated at §90 above) insofar as they are not already dealt with above, and are not duplicative of points made by others.
- 215. Ground 2(b) is that the judge was wrong to conclude that TWUL or its customers would not bear the costs of the finance and advisory fees under the Plan. This does not strictly arise in view of our conclusion that TWUL is not burdened under the Plan with excessive costs over and above the cost and negative financial impact of a SAR. The judge concluded that the costs would ultimately be borne by the Class A Creditors. That

was because he accepted that in RP2 the Class A Creditors would have to take "a very substantial haircut", in order to effect the equity raise: the amount which the Class A Creditors would be required to write-off their debt, in order to restructure the Plan Company's balance sheet sufficiently to attract new equity investment in RP2, would be more than the cost of the new borrowing.

- 216. Mr Maynard objected that this was unsupported by evidence. Mr Smith submitted, however, and we agree, that it is plain common sense that no-one would be prepared to acquire equity in the Plan Company while it had a negative balance sheet. That is not a complete answer, because if the Plan Company is burdened with unnecessary cost, that may well restrict its ability to invest in infrastructure and other projects, so as to put it in breach of its regulatory obligations to the detriment of its customers and the wider public.
- 217. Whether that would be so in this case, however, is no more than speculation. As we have noted, those specifically charged with protecting the public interest OfWat and the SoS do not believe it to be the case.
- 218. Under ground 2(c) it is said that the judge was wrong to conclude that the Court had "sufficient assurance" that the costs of the Plan would lead to a successful restructuring via RP2 (see §86 and §87 above). Mr Day submitted that the judge was wrong to reject the submission made to him that in view of the costs of the Plan, it should not be sanctioned absent "clear and cogent evidence that the equity raise would be achieved and that it could only be achieved at the price paid by the Plan Company".
- 219. The judge was right to reject that submission. Before us, it was based on cases dealing with the degree of assurance the Court will require when sanctioning a scheme or plan that it is not acting in vain, for example because the scheme or plan would not be recognised in a jurisdiction where the company holds substantial assets or carries on business (for example *Re DTEK Energy BV* [2021] EWHC 1551 (Ch) at §27), or where the Court is asked to sanction a scheme or plan where a condition to it taking effect remains outstanding (for example *Re Smile Telecoms Holdings Ltd* [2021] EWHC 685 (Ch) at §53 and §56), or where the commercial effectiveness of the scheme is subject to fulfilment of some condition (see, for example, *Re Morses Club Scheme Ltd* [2023] EWHC 1365 (Ch), where the question was whether there was sufficient certainty that commercial conditions would be satisfied as to the funding of a compensation fund, from which scheme claims would be paid).
- 220. The issue in those cases was very different to the question here. The success of the Plan is not conditional on some outstanding event beyond the control of the Plan Company. Mr Day's submission in reality confuses the success of the Plan (the purpose of which is to provide a bridge to RP2) and the success of RP2 (the purpose of which is a substantive restructuring via an equity raise). While the prospect of RP2 succeeding is a relevant factor in the exercise of discretion to sanction the Plan (for example, if there were some obvious impediment to any form of substantive restructuring in the future, that might be a reason to refuse to sanction the Plan), the Court does not need to be satisfied, to any particular standard, that RP2 will succeed. There was accordingly no error in the approach taken by the judge on this issue.
- We also reject the third of Mr Maynard's grounds of appeal. Complaint is made that the judge said, during the course of the hearing, that he took certain matters "on trust"

from the Plan Company, and that he thereby reversed the burden of proof. It is correct that the Plan Company bears the burden of satisfying the Court that a plan should be sanctioned and, where necessary, the cross-class cram-down power should be exercised. We have no doubt that the judge was aware of this, and the isolated references to taking certain points on trust do not demonstrate that he failed to recognise that in his judgment. Mr Maynard also complains at the Plan Company's failure to comply with its duty of utmost candour. It is fair to say that important details on the costs incurred by the Plan Company were revealed only as a result of questioning during the hearing, and that these are matters that ought to have been provided up front. It is a long way from that, however, to the conclusion that the judge should have rejected the Plan altogether as a result of the Plan Company's failings in that regard.

222. Finally, under ground 4, Mr Maynard contends that the judge should have appointed an independent public interest or customer advocate. That is a course which is likely to be appropriate, or even necessary, where the creditors whose rights are affected by a plan or scheme are unable to represent themselves before the Court – for example because there are many of them, with little financial sophistication and without the ability to coordinate their responses. That is not the case here. The fact that it fell to an intervener – Mr Maynard – to advance arguments based on the public interest does not indicate any procedural unfairness in this case.

Conclusion

223. In all the circumstances, we consider that the judge was entitled to conclude that there is no blot on the Plan that should lead the Court to refuse its sanction.

6. Releases

- 224. The relevant provision is to be found in clause 16.1.2 of the Plan.
- 225. This provides that each Plan Party (which includes all Plan Creditors, the Plan Company and TWUL):
 - "...waives, releases and forever discharges any and all actions, proceedings, claims, damages, counterclaims, complaints, liabilities, liens, rights, demands and set-offs, whether present or future, prospective or contingent, whether in this jurisdiction or any other or under any law, of whatsoever nature and howsoever arising, whether in law or in equity, in contract (including, but not limited to, breaches or non-performances of contract), in statute or in tort (including, but not limited to, negligence and misrepresentation) or in any other manner whatsoever, breaches of statutory duty, for contribution, or for interest and/or costs and/or disbursements, whether or not for a fixed or unliquidated amount, whether filed or unfiled, whether asserted or unasserted. whether or not presently known to the parties or to the law, in each case that it ever had, may have or hereafter can, shall or may have arising out of actions, omissions or circumstances on or prior to the Transaction Effective Date against each and any Released Party whatsoever or howsoever arising (and notwithstanding any subsequent facts or information becoming

known following the Transaction Effective Date), in relation to or arising directly or indirectly out of or in connection with, the negotiation, preparation, sanction or implementation of the Plan and/or the Interim Platform Transaction (including, without limitation, the negotiation, preparation, sanction or implementation of any Transaction Documents)."

- 226. Clause 16.1.3 contains a covenant not to sue in relation to the matters released by clause 16.1.2.
- 227. The releases are given by numerous parties, including Plan Creditors, the Plan Company and TWUL.
- 228. The judge quoted the following summary of the released parties provided in the Plan Company's skeleton:
 - "(i) the same parties granting the releases; (ii) the Affiliates of: (a) the Plan Creditors, (b) the Backstop Funding Parties, (c) the Plan Creditor Funding Parties, (d) the CF Creditor Parties and (e) the Administrative Parties; (iii) the respective officers, directors, employees, executives and agents (or equivalents) of the parties referred to in sub-paragraphs (i) and (ii) above; and (iv) each Advisor (as defined in the Plan), each Affiliate of each Advisor and each of the current and former respective officers, directors, employees, executives and agents (or equivalents) of such parties..."

The Judge's conclusions

229. At §281 of his judgment, the judge did not accept that it is necessary to establish a risk of "ricochet" claims before the Court can approve the release of directors and officers of the company. He said that it is well-established that the Court may sanction the entry into a deed of release where it is necessary to give effect to the arrangement between the Plan Company and the Plan Creditors, citing *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at §25, where Snowden J said:

"In Far East Capital SA [2017] EWHC 2878 (Ch) at [14], I expressed the view that a release of claims against persons involved in the preparation, negotiation or implementation of a scheme and their legal advisers would also be within the scope of Pt 26. Such clauses can be justified by a need not to allow scheme creditors to undermine the terms of the scheme itself, and have become a regular feature of schemes. I see no difficulty arising from the inclusion of such a clause in the terms of cl.2.1(b)(ii) and (iii) in the instant case."

- 230. At §282, he concluded that the releases were not a blot on the Plan, because:
 - (1) The Class B AHG had no objection to the ratification of the Released Parties in relation to the B Plan.

- (2) The Class B AHG's objections were principally to the release not of creditors but of the officers and advisers of the Plan Company and other Group companies.
- (3) It was appropriate to release directors and officers for the reasons given by Miles J in *Re Matalan*: the Class B AHG had not advanced any case that there had been any breaches of duty, and that was not put to any of the officers in cross-examination.
- (4) He rejected the contention that there had not been full and frank disclosure, particularly about the cost of finance and all of the fees.
- (5) If the Court did not authorise the releases, there was a serious risk that the directors and officers of the Company and TWUL would face "ricochet claims", and a director might think twice about implementing the Plan unless they were given such a release.
- (6) The fact that this was an interim Plan was a reason to sanction the Plan, not the reverse. The directors were not seeking a release in advance for their conduct in relation to RP2.
- (7) He was concerned, however, at the width of the drafting of the release clause. He gave the parties permission to seek to improve on the wording at the hearing on consequential matters.
- 231. At §283, the judge noted the force of the argument that the release of claims by the Plan Company or TWUL was a different matter, since it involved those companies giving up potentially valuable assets, in the hands of a special administrator if RP2 failed. He concluded, on reflection, however, that this was not a reason to refuse to sanction the Plan altogether, but he again gave the parties permission to argue at the hearing on consequential matters whether there should be some carve-out if TWUL subsequently entered into a SAR.
- 232. In his judgment following the hearing on consequential matters, the judge decided against requiring any carve-out to be inserted into the release clause. He did so because he recognised the difficulties for the directors in continuing to carry through RP2 if they are subject to a potential claim being made by a special administrator down the line, and that the same was true for their advisers and creditors more widely. He said that it would be inconsistent with the rationale for granting releases in the first place, to include a form of wording which allows a special administrator to reopen the question of the directors' conduct later.

The grounds of appeal

- 233. The principal point taken on appeal relates to the release by TWUL or the Plan Company of any claims they may have against its officers and advisers.
- 234. The Class B AHG's ground of appeal on this point is in the following terms:

"The learned Judge erred in law and fact in that he should have found, and did not find, that the releases granted under the Plan were unnecessary for the purposes of the Plan in circumstances where it is an interim restructuring plan and therefore a blot and/or unfair."

- 235. In its skeleton argument, the Class B AHG submitted that the judge failed to appreciate that the plan was an interim plan. That was important, because if there is no RP2 and the Plan Company goes into administration and TWUL goes into a SAR, then the release would deprive the administrator of the Plan Company or the special administrator of TWUL from bringing claims against the directors and advisers.
- 236. Mr Maynard also appealed on this point. His ground of appeal (at paragraph 2(6)) is that "the Judge also erred in failing to refuse to sanction the Plan with, or remove or qualify, the releases in clause 16 thereto". The thrust of the argument in Mr Maynard's skeleton was that this deprived TWUL of a potentially valuable asset in the event that it went into a SAR.
- 237. Mr Smith KC contended that it was not open to the appellants to run the argument that the releases should not extend to claims by the Plan Company and TWUL, because this fell outside their grounds of appeal. We disagree. The grounds of both the Class B AHG and Mr Maynard are broad enough to encompass this point. So far as the Class B AHG ground of appeal is concerned, although this focuses on the judge's failure to appreciate that this is an interim plan, they explain the significance of this in their skeleton, namely that if there is no RP2, and TWUL goes into a SAR, the potential for a special administrator to investigate what has led to that position, and to pursue any claims that may exist against the directors or TWUL's advisers, is lost.

Discussion and conclusions

238. As noted above, the judge relied on *Matalan* and *Noble Group*. In each case, the judge (Miles J in *Matalan*, and Snowden J in *Noble Group*) relied in turn on what Snowden J had said in *Far East Capital* at [14]:

"The possibility of a scheme including a mechanism for the release of claims against third parties that might otherwise give rise to "ricochet" claims back against the scheme company is now well-established: see e.g. re Lehman Brothers International Europe (No.2) [2010] Bus LR 489 at paras 45-55 and 65. On the basis that such provisions simply grant a release in relation to (i) the guarantee and security obligations that support the Company's obligations under the notes, and (ii) any claims against the persons involved in the preparation, negotiation or implementation of the Scheme itself and their legal advisers, it seems to me that the inclusion of such provisions is well within the scope of Part 26 of the Companies Act. The intention to include provisions for such releases was also properly disclosed in the explanatory statement which was sent to Scheme creditors."

239. All of these cases involved releases given by *creditors* of the company, not by the company itself. The special feature of such releases is that they prevent the release of the claims by creditors against the company, which form a central part of the scheme or plan, being undermined by ricochet claims against the company in the event that the

- creditors pursued claims against directors or other third parties. There is no risk of such ricochet claims in the event that the company pursued claims against its own directors or advisers.
- 240. We accept that the risk of ricochet claims is not the only justification for the release of third parties. The overriding consideration is that releases against third parties are permitted where "necessary in order to give effect to the arrangement proposed for the disposition of debts and liabilities of the company to its own creditors": see *Re Lehman Bros (No2)* [2009] EWCA Civ 1161, [2009] Bus LR 489, per Patten LJ at §65.
- 241. The release of claims by the Plan Company or TWUL against their own officers and advisers does not in our view, however, satisfy that test. We recognise that the directors of, and advisers to, TWUL and the Plan Company are operating in highly difficult circumstances. That is true of directors and advisers in the case of many financially distressed companies. We stress that we have not been provided with any reason to conclude that there has been any breach of duty by the directors, and we recognise that the release in issue relates only to their conduct in relation to the preparation and implementation of the Plan. Nevertheless, we are not satisfied that a release of potential assets in any future insolvency proceedings of the Plan Company and TWUL, consisting of their own possible claims against directors and advisers, is justified as being necessary to enable the Plan to be implemented.
- 242. So far as the reasons given by the judge, summarised above, are concerned:
 - (1) the risk of ricochet claims does not arise, for the reasons already given;
 - (2) the fact that the B Plan contained similar releases might diminish the strength of the objection from the Class B AHG, but TWUL has other stakeholders who might be affected by such releases, particularly in the event of it going into a SAR;
 - (3) the fact that no potential breaches of duty have been identified, and nothing was put to the directors in cross-examination is no answer: none of those opposing the Plan have access to the information which would be available to a future special administrator of TWUL, and neither the Court nor the parties to a restructuring procedure can be expected to divert time and resources to investigating the possibility of such claims in the course of seeking the sanction of a proposed plan; and
 - (4) a carve-out for claims by a special administrator of TWUL or insolvency office-holder of the Plan Company is not inconsistent with the rationale for the releases in the first place as noted, that rationale does not extend to such releases.
- 243. Mr Smith KC objected that the Plan Company and TWUL could grant such releases anyway. Whether this is so was not developed in argument. In many cases, where a scheme or plan returns the company to solvency, that may well be true, in which case there would be no need for a release to be effected by a term in the scheme. It is in this context, however, that the interim nature of the Plan is of particular relevance, because the Plan Company and TWUL will remain insolvent following its implementation, and it is far from clear that either company could grant effective releases in these circumstances.

- 244. Mr Smith stressed the Plan Company's concerns at the disruption to the vital work the directors and advisers will be engaged in over the coming months, in order to implement RP2, if they are bombarded by letters from creditors asking what the Company is doing to investigate claims against the directors and advisers. He also expressed concern at the possibility of derivative claims being pursued.
- 245. We considered, in directing an amendment to the Plan as part of our Order dismissing the appeal, that these concerns were adequately answered in the circumstances of this case, and that the objections of the appellants were adequately addressed, if the Plan was modified so as to provide for an express carve-out from the releases in clause 16.1.2 and the covenant not to sue in clause 16.1.3 for any claims that might subsequently be brought by a special administrator of TWUL or an insolvency office-holder of the Plan Company. If RP2 is successful then the possibility that there may have been claims against directors or advisers in relation to the preparation and implementation of the Plan becomes for practical purposes irrelevant. The carve-out caters for the possibility that RP2 fails.



Neutral Citation Number: [2025] EWCA Civ 821

Case No: CA-2025-001239

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 (ChD)
Mr Justice Marcus Smith
[2025] EWHC 1250 (Ch)

IN THE MATTER OF PETROFAC LIMITED AND IN THE MATTER OF PETROFAC INTERNATIONAL (UAE) LLC AND IN THE MATTER OF THE COMPANIES ACT 2006

> Royal Courts of Justice Strand, London, WC2A 2LL Date: Tuesday 1 July 2025

Before:

LORD JUSTICE SNOWDEN LORD JUSTICE ZACAROLI

and

SIR CHRISTOPHER FLOYD

TD 4

Between:

(1) SAIPEM S.P.A.
(2) SAIPEM SINGAPORE PTE LTD
(3) SAMSUNG E&A CO., LTD
(4) SAMSUNG E&A (THAILAND) CO., LTD

Appellants

- and -

(1) PETROFAC LIMITED (2) PETROFAC INTERNATIONAL (UAE) LLC Respondents

Andrew Thornton KC and Jon Colclough (instructed by **Mayer Brown International LLP**) for the **Appellants**

David Allison KC, Henry Phillips, Ryan Perkins and Stefanie Wilkins (instructed by Linklaters LLP) for the Respondents

Daniel Bayfield KC and Riz Mokal (instructed by Weil, Gotshal & Manges (London) LLP) for Boundary Creek Advisors LP, FIL Investments International, Fortress Investment Group LLC, Sparta Capital Management Ltd and Mason Capital (the "Ad Hoc Group")

Hearing dates: 2, 3 and 4 June 2025

Approved Judgment

This judgment was handed down remotely at 10.00 a.m. on Tuesday 1 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Snowden, Lord Justice Zacaroli and Sir Christopher Floyd:

Introduction

- 1. This is an appeal against the decision of Marcus Smith J, sanctioning two related restructuring plans (collectively the "Plans") under Part 26A of the Companies Act 2006 ("Part 26A") in respect of two companies: Petrofac Limited ("PL") and Petrofac International (UAE) LLC ("PIUL"). Together PL and PIUL are the "Plan Companies", and with their subsidiaries they comprise the "Petrofac Group" or the "Group".
- 2. The appeal raises issues (i) as to the meaning of the "no worse off" condition for the application of the Court's discretion to impose a restructuring plan on a dissenting class or classes of creditors, and (ii) as to the appropriate allocation of the benefits of the restructuring, and the treatment of creditors who would be "out of the money" in the relevant alternative to the plan.
- 3. For the reasons set out below, although we reject the appeal on the first of those grounds, we allow the appeal on the second ground and set aside the judge's order.

The statutory framework

- 4. Part 26A applies where two conditions are met (see section 901A(1) to (3)):
 - (1) 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.
 - (2) Condition B is that (a) a compromise or arrangement is proposed between the company and its creditors, or any class of them, or 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).
- 5. Pursuant to section 901C, the Court may order a meeting of the creditors or classes of creditors to be summoned in such manner as the Court thinks fit, although by section 901C(4), the Court can exclude from participation in meetings creditors who have no "genuine economic interest in the company".
- 6. The Court's discretion to sanction a plan under Part 26A is found in section 901F(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."
- 7. By section 901G, however, the Court may sanction a plan even though one or more of the classes fails to approve it by the requisite majority:

- "(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."

The Plan Companies

- 8. PL was incorporated and registered in Jersey in 2002. Its shares are listed on the London Stock Exchange. It is the ultimate parent company of the Group, and primarily operates as a holding company.
- 9. PIUL was incorporated and registered in Sharjah, UAE, in 2008. 1% of its shares are owned by PL and 99% are owned by Petrofac International Limited, a wholly-owned subsidiary of PL.
- 10. The Group is a leading international service provider to the energy industry, with expertise in the design, construction and operation of energy facilities. It operates across 29 countries. PIUL is the Group's principal operating company.

Background to the Plans

11. The Group first encountered serious financial difficulties in 2017, when PL and others were investigated by the Serious Fraud Office ("SFO") for suspected bribery, corruption and money laundering. PL pleaded guilty to seven offences of failing to prevent bribery by associated persons, and paid a fine of £70 million. Notwithstanding an extensive corporate governance review and an overhaul of its compliance systems

- and controls, the Group's business has continued to suffer. This has been exacerbated by, among other things, the Covid pandemic and the war in Ukraine.
- 12. In November 2021 the Group completed a refinancing, comprising a US\$250 million capital raise by PL, the issue by PL of US\$600 million senior secured notes, the creation of two new bank facilities and an extension of maturity of an existing US\$50 million senior secured term loan facility.
- 13. By September 2023, it had become clear that the 2021 refinancing had not resulted in the long-term stabilisation of the Group, and it began exploring options for alleviating its financial position, out of which the Plans emerged in the latter part of 2024.

The Plan Companies' liabilities

14. The Plans compromise the liabilities of the Plan Companies to five categories of "**Plan Creditors**": (1) Senior Secured Funded Debt; (2) Shareholder Claims; (3) Director Claims; (4) PL Insurance Restitutionary Claims; and (5) claims connected to the "Clean Fuels Project".

(1) Senior Secured Funded Debt

15. PL is the borrower and issuer in respect of four English law governed financing agreements (comprising secured notes, an RCF facility, and two further loan facilities) in an aggregate amount (as at the date of the convening hearing) of approximately US\$909 million (exclusive of fees and interest), (the "Senior Secured Funded Debt"). PIUL is a guarantor in respect of the Senior Secured Funded Debt, which has the benefit of a common guarantee and security package over certain of the Group's main assets. The holders of Senior Secured Funded Debt are referred to as the "Senior Secured Funded Creditors".

(2) Shareholder Claims

- 16. These claims arise out of the investigation commenced by the SFO in 2017 and PL's subsequent guilty plea.
- 17. Certain shareholders or former shareholders have brought, or threatened to bring, claims (under the Financial Services and Markets Act 2000) alleging that PL made misleading statements and/or dishonest omissions or delays in its public disclosures, resulting in the inflation of PL's share price and losses to the relevant shareholders.
- 18. The Plan Companies deny these claims. They are at an early stage and difficult to quantify. The Plan Companies estimate, however, that, if the claims were to be established, the quantum would be potentially very high and (while the Plan Companies dispute this) has been claimed to be as high as US\$1.25 billion. This is the figure the Plan Companies have used in estimating the recovery likely to be made in respect of the Shareholder Claims in percentage terms under the Plans.

(3) Directors' Claims

19. During the SFO investigations, a number of directors and employees of the Group were interviewed and retained independent legal advisers. PL was liable to indemnify some of them for their legal fees, and voluntarily assumed liability to pay the legal fees of

others. The Plan Companies do not expect further claims of this nature, but recognise there is at least some risk in this regard. There is also a risk that former directors or employees may incur additional fees in relation to the Shareholder Claims. Albeit that the Plan Companies do not ascribe any significant value to these claims, they wished to erase any risk by including them within the Plans.

(4) PL Insurance Restitutionary Claims

20. In November 2022, the Group's D&O policy insurers purported to elect to avoid the D&O policy on the grounds of fraudulent non-disclosure and/or fraudulent misrepresentation, and asserted a claim to recover amounts paid out under the policy. PL disputes the insurers' entitlement to do so, but has included an estimated US\$6 million for actual and potential claims of this nature within the Plans.

(5) Claims connected to the Clean Fuels Project

- 21. In October 2018, certain companies in the Group entered into a project commissioned by Thai Oil Public Company Limited ("Thai Oil"), relating to an expansion to enable increased efficiency and cleaner fuel production at a refinery in Thailand (the "Clean Fuels Project"). The Group companies entered into this project as part of a consortium with companies in the Saipem group ("Saipem") and the Samsung group ("Samsung"). PL has issued an English law governed guarantee of the liabilities of its Group companies towards Thai Oil.
- 22. The Clean Fuels Project, which the consortium entered into for a fixed price, has proved disastrous. It has been beset with problems that have increased the anticipated cost. Saipem and Samsung served termination notices on Thai Oil on 23 April 2025. Thai Oil served its own termination notice the following day.
- 23. This has given rise to substantial claims by Thai Oil. Arbitration proceedings are pending to determine the extent of those claims. The liability of the joint venturers for Thai Oil's claims is joint and several, and is divided as follows: PL and PIUL as to 36%; Saipem as to 36%; and Samsung as to 32%. Saipem and Samsung, for understandable reasons, are careful not to accept in these proceedings the quantum of Thai Oil's claim. For the purposes of the Plans the exposure of the consortium to Thai Oil has been assumed to be in the region of US\$1.627 billion (recognising that it may be much more or much less). To the extent that Saipem and Samsung might be required to pay more than their identified share of the liabilities of the consortium to Thai Oil, they would have claims for a contribution or indemnity against PL and PIUL.
- 24. In addition, Saipem and Samsung have direct claims against the Plan Companies arising out of the joint venture. Samsung has a claim against PIUL of about US\$92.8 million, and Saipem and Samsung have combined claims against PL of about US\$26.7 million, giving a total of about US\$119.5 million.
- 25. All of the above claims relating to the Clean Fuels Project will be compromised under the Plans. In addition, three banks (ABN Amro, Argonaut and HSBC) have crystallised and contingent claims against PL and PIUL arising out of performance guarantees and counter-guarantees which they gave in relation to the Clean Fuels Project.

- 26. ABN Amro has claims relating to its performance guarantees and counter-guarantees of approximately US\$29.6 million. Its claims are governed by English law. They are secured and rank *pari passu* with the Senior Secured Funded Debt. These claims will be compromised under the Plans.
- 27. Argonaut has unsecured claims (not covered by margin held) of approximately US\$20 million which are also governed by English law. These claims will also be compromised under the Plans.
- 28. HSBC has an unsecured claim against PIUL of approximately US\$49.7 million (after a deduction of US\$16.5 million of cash collateral). Its claim is governed by UAE law and will not be compromised under the Plans. Instead, HSBC will enter into a bilateral arrangement under which it has agreed that its claim will be converted, on a full US\$1 for US\$1 basis, into a new senior secured term loan.

Formulation of the Plans

- 29. From about mid-2023 the Group began to explore a potential sale of certain of its business lines. In parallel, it considered a range of financing options, both by way of equity investment and by way of junior financing (i.e. subordinate to the Senior Secured Funded Debt). From late 2023 discussions also took place with the Group's secured lenders and banking group. None of these efforts resulted in any viable solution.
- 30. In the first half of 2024, the Group considered, but ultimately rejected, a Group-wide restructuring, but comprising liabilities at the level of PL alone, a break-up of the Group and a Group-wide insolvency. Thereafter, the boards of the Plan Companies decided to promote the Plans (alongside certain bilateral negotiations with other key stakeholders). In that same time period, the Group held discussions with Thai Oil and Saipem and Samsung in an effort to resolve the disputes over the Clean Fuels Project. According to the evidence of the Group's CFO, Mr Alfonso Reis e Sousa ("Mr Sousa"), the lack of engagement from Thai Oil and the "obvious delta" between the Group's position and that of Saipem and Samsung, meant that "we had no option but to consider more complex unilateral solutions i.e. whether it would be possible to compromise the Clean Fuels Project-related liabilities under the Plans".
- 31. The potential restructuring was first announced in high level terms by way of a public announcement dated 27 September 2024. There was ongoing dialogue thereafter between the Plan Companies and Saipem and Samsung, and the latter were given access to key documents.
- 32. The terms of the Plans were, however, negotiated principally between the Plan Companies and a so-called "ad hoc group" of five entities that have, or claim to represent funds that have, investments in the Senior Secured Funded Debt (the "AHG"). From about early 2024, the AHG had indicated that they would in principle be prepared to provide an investment of new money of around US\$200 million, subject to an independent appraisal of the business and conditional on a successful restructuring on agreed terms. According to Mr Sousa, "ultimately, the terms of that investment have been negotiated and agreed as part of the restructuring." The judge observed (at §53 of his judgment) that the Plans had been "long in the making, and the subject of considerable and hard-fought negotiation." Indeed, the level of the "work fee" agreed with the AHG (described in more detail below) was said to be justified by the "massive

- time and effort" of the AHG in formulating and negotiating the Plans (see §74 of the judgment).
- 33. The restructuring was formally announced on 23 December 2024. On the same date, the "Practice Statement Letter" was sent to creditors. According to Mr Sousa, shortly prior to that date, the Group made contact with Thai Oil and Saipem and Samsung to discuss its terms in further detail and to see whether there was scope to agree a consensual deal. Thereafter, Samsung and Saipem made various offers for a different restructuring, none of which were accepted.

The treatment of Plan Creditors' claims under the Plans

- 34. The treatment of the existing and contingent claims of the different groups of Plan Creditors varies under the Plans.
- 35. The Senior Secured Funded Creditors will receive, in return for the release of their existing claims, equity in the restructured Group in the form of new ordinary shares in PL ("**Ordinary Shares**") equating to about 17.5% of the post-restructuring equity. As with the existing ordinary shares in PL, those new shares will be immediately tradable securities and hence immediately realisable.
- 36. Claimants in respect of the Shareholder Claims will receive, in return for the release of their existing claims, a right to participate, *pro rata*, in a "Shareholder Claims Settlement Fund" of £1 million. Claimants in respect of the Directors' Claims and the PL Restitutionary Claims will be entitled to share, pro rata, in a similar "non-Shareholder Claims Settlement Fund" of £1 million.
- 37. In addition, claimants in all three categories will be entitled to receive, *pro rata* to their admitted claims, warrants giving an entitlement to new Ordinary Shares in PL equating to about 1.5% of the post-restructuring equity of PL in the event that its market capitalisation exceeds US\$1.35 billion and an additional 2% of the post-restructuring equity if PL's market capitalisation exceeds US\$1.95 billion ("Warrants").
- 38. ABN Amro will receive, in return for the release of its existing and contingent secured claims arising out of its provision of guarantees, new Ordinary Shares in PL in the same proportion as the holders of the Senior Secured Funded Debt, equating to between 0.44% and 0.62% of the post-restructuring equity.
- 39. Argonaut, which is unsecured, will receive, in return for the release of its existing and contingent claims, new Ordinary Shares in PL equating to about 0.2% of the post-restructuring equity.
- 40. As indicated above, HSBC's unsecured claims will not be compromised under the Plans but will be converted into a new senior secured debt instrument on a US\$1 for US\$1 basis.
- 41. Samsung's unsecured claim of US\$92.8 million against PIUL will be released under the Plans in return for a distribution of cash or new Ordinary Shares in PL equating to 110% of what it would be likely to receive in the relevant alternative (high case).
- 42. Samsung and Saipem's remaining unsecured claims against PL, together with the unsecured claims of Thai Oil itself, will be released under the Plans in return for a right

- to share in the non-Shareholder Claims Settlement Fund of £1 million and to receive a proportion of the Warrants.
- 43. Finally, and specifically in response to objections from Samsung and Saipem, Samsung was offered the opportunity together with Argonaut to participate in providing up to US\$25 million for new equity within the PIUL Plan, on the same terms as the equity investment offered to the holders of the Super Senior Funded Debt. Shortly prior to the sanction hearing, this offer was extended to include Saipem. The position of Samsung and Saipem is that they are unable to and/or do not wish to participate in subscribing for such new equity.

The relevant alternative

- 44. Before the judge, Saipem and Samsung contended that an alternative restructuring plan, on the terms of an open offer they had made to the Plan Companies, was the "relevant alternative" for the purposes of determining whether the Court has the jurisdiction under section 901G to sanction the Plans notwithstanding the existence of a dissenting class. Saipem and Samsung do not pursue this argument on appeal. Instead, it is accepted that the relevant alternative would be an insolvent liquidation of the companies in the Group, including the Plan Companies.
- 45. The judge's findings in respect of the likely distributions that Plan Creditors would receive in respect of their claims against the Plan Companies in the relevant alternative were based on a report from Teneo Financial Advisory Limited ("Teneo"), commissioned by the Plan Companies. This provided an estimated outcome for each of the creditor groups in the relevant alternative of a Group-wide liquidation on "low case" and "high case" scenarios.
- 46. According to Teneo, in the relevant alternative:
 - (1) The Senior Secured Funded Creditors and ABN Amro in respect of its secured guarantee-related claims, were likely to recover between 24.3% and 31.9% of their claims.
 - (2) Argonaut would be likely to recover between 7.0% and 9.3% of its claims.
 - (3) Samsung would be likely to recover between 6.9% and 9.3% of its claim against PIUL.
 - (4) None of the other Plan Creditors would be likely to make any recovery on their claims and would thus be "out of the money" in the relevant alternative.

Recoveries under the Plans: the Teneo Valuation Report

- 47. The Plan Companies also commissioned a valuation report from Teneo in September 2024. Teneo was instructed to prepare a (post-restructuring) valuation analysis of the enterprise value of the Group on a debt-free, cash-free going concern basis. In February 2025 Teneo reported that the post-restructuring enterprise value of the Group was between US\$1.35 billion and US\$1.7 billion.
- 48. That valuation was updated in April 2025. Teneo concluded that the enterprise value of the restructured Group on a going concern basis would be between US\$1.4 billion and

US\$1.75 billion. Teneo's valuation expressly took account of the risks associated with the delivery of the management's Business Plan post-restructuring, including in particular the Group's ability to secure guarantee lines for its ongoing contracts and future contracts.

- 49. Taking into account the post-restructuring net cash available to the Group of between US\$96 million and US\$104 million, the Teneo valuation report implied that the day one post-restructuring equity value of PL would be between US\$1.5 billion and US\$1.85 billion. That figure was agreed between the parties before us.
- 50. On the basis of that low case day one post-restructuring equity valuation of PL, the parties broadly agreed the following summary of the likely recoveries of the Plan Creditors under the Plans in respect of their Plan claims. The numbers are rounded, and where there were disagreements as to the figures, they are not relevant for the purposes of the analysis. Under the Plans, on the likely low case outcome (i.e. based on a post-restructuring equity value of US\$1.5 billion):
 - (1) The Senior Secured Funded Creditors and ABN Amro (in respect of its secured guarantee claims) would receive equity valued at US\$270.4 million: a return of about 28.8%.
 - (2) Argonaut would receive equity valued at US\$3 million: a return of 8.5%.
 - (3) Samsung (in respect of its claim against PIUL) would receive equity valued at US\$9.5 million: a return of 10.2%.
 - (4) The Shareholders, in respect of the Shareholder Claims will receive equity and cash valued at US\$23 million: a return of 1.9%.
 - (5) All other unsecured claims, including Thai Oil, Samsung and Saipem, will receive Warrants and/or cash equating to a return of 1.4%.
- 51. It is common ground that the returns described above are, in all cases, likely to be better than if the Plan Companies went into liquidation. The Senior Secured Funded Creditors, for example, would be likely to recover only 24.3% of their debt (in the low case), Samsung would be likely to recover only 9.3% in respect of its claim against PIUL, and the remaining unsecured creditors would receive (practically) nothing in a liquidation. But under the Plans they stand to recover Ordinary Shares and/or cash amounting to a slightly greater percentage of their claims.
- 52. In aggregate, therefore, all of the Plan Creditors' existing claims against the Plan Companies will be compromised in return for equity and cash in the restructured Group valued on a low case basis at US\$329 million.
- 53. Of the remaining equity in the restructured Group, and excluding fees, 67.7% will be allocated to the providers of US\$350 million "New Money" to the restructured Group (as set out below). On the basis of Teneo's low case post-restructuring equity valuation of US\$1.5 billion, this equity will be worth about US\$1 billion. It is this allocation of value to the providers of New Money that is at the heart of the second ground of appeal.

New finance

- 54. A central feature of the Plans is the provision of new financing for the restructured Group. This comprises an investment of "New Money" of US\$350 million, and the provision of a "cash back guarantee facility" of US\$80 million (the "CBG Facility").
- 55. The New Money divides into two parts: US\$131.25 million will be provided by way of loan in exchange for "New Money Notes" issued by a wholly-owned indirect Jersey subsidiary of PL, with the benefit of a guarantee and security package, and paying interest at a rate of 9.75% per annum; and US\$218.75 million which will be provided in exchange for "New Money Equity" which comprises new Ordinary Shares in PL. Both the New Money Notes and the New Money Equity will be listed and tradeable securities, and hence immediately realisable for cash on day one after the restructuring takes effect.
- 56. All of the Senior Secured Funded Creditors (and ABN Amro in respect of its secured guarantee debt) will be entitled under the Plans to participate in the provision of the New Money, *pro rata* to the amount of their existing claims. Any such participation must be split equally between New Money Notes and New Money Equity. In fact, not all of the Senior Secured Funded Creditors opted to participate in the New Money, and it will be provided as follows:
 - (1) The Senior Secured Funded Creditors will provide a total of US\$187.5 million of New Money: US\$93.75 million in return for New Money Notes and US\$93.75 million in return for New Money Equity. This New Money was underwritten by certain of the Senior Secured Funded Creditors in return for "Backstop Fees" (see below).
 - (2) Two funds represented by an entity called Nut Tree Capital Management LP ("Nut Tree") are providing a total of US\$75 million: US\$37.5 million in return for New Money Notes and US\$37.5 million in return for New Money Equity. Although, at the time Nut Tree was approached to invest in the Group it was not an existing investor, a number of funds which it represented subsequently purchased a quantity of Senior Secured Funded Debt at a price that was lower than the anticipated return on that debt in the relevant alternative.
 - (3) The remaining US\$87.5 million is being provided by various persons whose identity has not been revealed, but who include existing shareholders and directors of the Group. This investment is being provided exclusively in return for New Money Equity.
- 57. The CBG Facility involves the provision of US\$80 million to a bankruptcy remote special purpose vehicle ("SPV") to be used as collateral for certain of the Group's existing customer contracts. US\$30 million is to be provided by a member of the AHG. The remaining US\$50 million is to be provided by funds connected with Nut Tree.
- 58. The US\$80 million will be provided in return for notes issued by the SPV ("CBG Notes"). The CBG Notes pay quarterly interest in cash at 7% over the prevailing base rate. The member of the AHG and the funds connected with Nut Tree will also be issued by PL with a further US\$19.57 million in aggregate of New Money Notes, and the Nut

Tree funds will additionally be paid a fee of US\$1.25 million in cash and will receive a "contingent value rights instrument" worth US\$9.8 million.

Backstop Fees and Work Fees

59. In addition to the allocation of equity in the restructured Group in return for the provision of New Money, the Senior Secured Funded Creditors (but not ABN Amro in respect of its claim arising from the provision of guarantees) also had the opportunity to receive further equity under the Plan by way of so-called "Backstop Fees" and "Work Fees".

Backstop Fees

60. The Backstop Fees were available to those Senior Secured Funded Creditors who agreed to underwrite the provision of the US\$187.5 million of New Money by the Senior Secured Funded Creditors. The Backstop Fees were provided in the form of New Money Notes and new Ordinary Shares in PL. On the likely low value of the post-restructured Group, the Backstop Fees in relation to the provision of US\$187.5 million of New Money amounted to about US\$62.6 million. In the region of 80% of the Backstop Fees were allocated to the AHG.

Work Fees

- 61. The "Work Fees" were negotiated and agreed between the AHG and the Plan Companies shortly before the Practice Statement Letter was circulated in late December 2024. They are said to be compensation for the work undertaken by the AHG in relation to the restructuring, and for the fact that when the members of the AHG obtained access to confidential information relating to the Group they became "restricted" under applicable market abuse laws. However, the amount of the Work Fees was not calculated by reference to the actual value to the Plan Companies of the work done or the amount of time expended by members of the AHG. It was simply fixed as an agreed percentage (2.5%) of the AHG's aggregate holding of Senior Secured Funded Debt. This equalled US\$7.1 million.
- 62. If the Plans are not sanctioned, the Work Fees will be payable in cash but will rank as an unsecured claim. However, if the Plans are sanctioned, the Work Fees will be paid in equity. The evidence was that the number of new Ordinary Shares in PL that would be issued in this respect (428,705,264) was fixed in late December 2024 on the basis of a notional post-restructuring equity value of the Group of US\$351 million because the Teneo valuation report was not then available.
- 63. For reasons that were not explained, however, the number of new Ordinary Shares to be issued to the AHG in respect of the Work Fees remained the same, notwithstanding that the post-restructuring equity value of the Group was subsequently determined by Teneo to be between US\$1.5 billion and US\$1.85 billion rather than the notional US\$351 million.
- 64. This means that if the Plans are sanctioned, the number of new Ordinary Shares in PL to be issued to the AHG in respect of the Work Fees will be worth between US\$24.1 million and US\$29.9 million rather than the US\$7.1 million that was initially agreed.

This represents an increase to between 339% and 421% of the agreed value of the "work".

65. Saipem and Samsung did not contend on appeal that the increased value of the new equity in PL allocated to the AHG by means of the Work Fees should itself have led to the judge declining to sanction the Plans. However, they did submit that the way in which the Work Fees were dealt with was symptomatic of a general approach under which a disproportionate share of the benefits of the restructuring was conferred upon the providers of the New Money (including members of the AHG) under the Plans. We shall return to that issue in our consideration of Ground 2 below.

The outcome of the meetings of Plan Creditors

- 66. Pursuant to the order of Marcus Smith J made at the convening hearing, seven separate meetings were convened in respect of the PL Plan, and five separate meetings were convened in respect of the PIUL Plan.
- 67. These were, in relation to the PL Plan:
 - (1) The Senior Secured Funded Creditors (apart from those in classes (2) and (3) below). 99 creditors, holding 88.41% of the claims by value, attended. 100% voted in favour.
 - (2) The Nut Tree funds and the member of the AHG which were to subscribe for CBG Notes. 16 creditors, holding 100% of the claims, attended. 100% voted in favour.
 - (3) ABN which, constituting 100% of the class, voted in favour.
 - (4) Argonaut which, constituting 100% of the class, voted in favour.
 - (5) The Shareholder Claimants. 272 creditors, holding 99.9% of the claims attended. 99.92% of those voted in favour.
 - (6) Thai Oil, the Director Claimants and the PL Insurance Restitutionary Claimants. All voted against the Plan.
 - (7) Samsung and Saipem and PSS BV (the joint venture vehicle). All voted against the Plan.
- 68. In relation to the PIUL Plan, the meetings were:
 - (1) The Senior Secured Funded Creditors (apart from those in classes (2) and (3) below). 99 creditors, holding 88.41% of the claims by value, attended. 100% voted in favour.
 - (2) The Nut Tree funds and the member of the AHG who were to subscribe for the CBG Notes. 16 creditors, holding 100% of the claims, attended. 100% voted in favour.
 - (3) ABN which, constituting 100% of the class, voted in favour.

- (4) Argonaut which, constituting 100% of the class, voted in favour.
- (5) Thai Oil, Saipem and Samsung and PSS BV. All voted against the Plan.

The issues raised on appeal

- 69. Saipem and Samsung appeal with the permission of the judge on two grounds:
 - (1) First, that the judge was wrong to hold that even though Saipem and Samsung will be "worse off" under the Plans, they will not be "worse off" in a way that is relevant for the purposes of the statutory test under section 901G(3).
 - (2) Second, that the judge was wrong to sanction the Plans because the benefits preserved or generated by the Plans are not being fairly shared between the Plan Creditors.

Ground 1: the "no worse off" test

- 70. Section 901G(3) of the 2006 Act imposes, as a jurisdictional gateway to the sanction of a plan where there is a dissenting class, a condition ("Condition A") 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."
- 71. On the basis of the figures explained at §50 above, Saipem and Samsung accept that if regard is had solely to the amounts they can expect to recover in respect of their debts owed by the Plan Companies they are likely to be better off under the Plans than in the relevant alternative of the liquidation of the Group.
- 72. They contend, however, that in assessing whether they would be "any worse off" under the Plans than in the relevant alternative, the judge should have had regard not only to the direct monetary returns that they would make on their claims against the Plan Companies, but also to any indirect economic benefits which would accrue to them if the Group went into liquidation. In that event, Saipem and Samsung would be freed of a competitor and would stand to make substantial profits from future business which would otherwise have been taken by the Group.
- 73. Saipem's and Samsung's case was that they stood to make profits of approximately US\$340 million from such business in the relevant alternative. The judge accepted without needing to delve into the expert evidence that supported this figure that the competitive advantage which would accrue to Saipem and Samsung in the event of the liquidation of the Group was self-evidently substantially greater than the very small returns they could expect under the Plans.
- 74. The judge held, in reliance on a dictum of Trower J in *re Smile Telecom Holdings Ltd* [2021] EWHC 685 (Ch) at §30 that the "no worse off" test in section 901G(3) was exclusively concerned with the impact of a plan compared with relevant alternative on a creditor *in its capacity as a creditor*.
- 75. The judge then concluded, at §69, that the indirect benefits which Saipem and Samsung would lose if the Plans were sanctioned would have accrued to them in their capacity as creditors:

"The Saipem and Samsung Opposing Creditors contended that the indirect economic benefits of the Liquidation – namely the dissolution of the Petrofac Group – did arise in their capacity as creditors. A joint venture like the Clean Fuels Project is a risksharing endeavour, where the potential liabilities are shared amongst the joint venturers. Where the joint venturers are competitors, and one of the joint venturers cannot meet their obligations under the joint venture due to insolvency, at least the solvent joint venturers, who will shoulder additional liabilities, have the benefit of a competitor leaving the market. The Plan undercuts this balanced outcome, by compromising Saipem and Samsung's claims against the Petrofac Group, whilst permitting the Group to stay in business and compete without the burden of the joint venture liabilities. To my mind, it is difficult to say that these consequences are not suffered by Saipem and Samsung as creditors."

- 76. The judge nevertheless found that Condition A was satisfied, because the indirect benefit that would accrue to Saipem and Samsung if the Group went into liquidation "does fall out of consideration" or (as he put it) was "too remote": see §70. The judge gave four reasons. The first three essentially boiled down to the point that Condition A was a jurisdictional requirement that needed to be "as clear-cut, as binary, as possible", and that although the relative size of the benefits by comparison to the returns under the Plans were clear enough in the instant case, in another case it might be very hard to quantify the indirect economic benefits without a wide-ranging inquiry which would be better undertaken at the discretionary/fairness stage. The fourth reason essentially suggested that if wider economic consequences were to be taken into account so far as Saipem and Samsung were concerned, then the economic consequences of the Petrofac Group's liquidation (e.g. effects on employees and effects on markets) "need to be considered in the round" so as to give full weight to Part 26A's place in the "rescue culture".
- 77. For Saipem and Samsung, Mr Thornton KC contended that the judge was wrong to limit the no worse off test to the impact on creditors in their capacity as such. He submitted that the correct test was whether there was a sufficient connection between the benefits that would accrue to the creditor in the relevant alternative and the underlying debtor-creditor relationship that a plan seeks to compromise. Mr Thornton also submitted that if the judge was right to limit the no worse off test to a consideration of the impact of a plan on a creditor in its capacity as such, then he was wrong to introduce an undefined test of "falling out of consideration" or "remoteness" and was wrong on the facts to conclude that the competitive advantage that would accrue to Saipem and Samsung on the Group's liquidation was too remote to be taken into account.
- 78. For the Plan Companies, Mr Allison KC contended that the judge was right to conclude that Condition A was satisfied, albeit for a different reason. He submitted that the judge had been right to conclude that the no worse off test focuses on the impact on a creditor in its capacity as a creditor of the plan company. However, he contended by way of a respondents' notice, that the judge ought to have held that the indirect benefits of

reduced competition in the relevant alternative would not accrue to Saipem and Samsung in their capacity as creditors of the Plan Companies.

Discussion

- 79. We have no doubt that the judge was correct to find that Condition A was satisfied on the facts of this case, although our reasoning differs from that of the judge. In summary, as explained in this section, the court is required to determine the financial value which a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights which the plan offers in return for the compromise of those existing rights. The scope of that enquiry is primarily concerned with the financial value of rights of the creditor against the plan company, but where a plan compromises or releases other rights of the creditor, it extends to those other rights. In the instant case, the loss of a competitive advantage upon sanction of the Plans is clearly beyond the scope of that test.
- 80. It is appropriate first to consider the nature of the "no worse off" test.
- 81. The genesis of the no worse off test is to be found in the law relating to schemes of arrangement under Part 26 of the Companies Act 2006 ("Part 26"). The explanatory notes to Part 26A stated (at §15) that "the new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement" and (at §16) that "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."
- 82. In re T&N Ltd [2005] 2 BCLC 488, at §82, David Richards J explained that in exercising its discretion to sanction a scheme of arrangement under Part 26, where it was an alternative to a winding-up, the Court was unlikely to sanction a scheme:
 - "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."
- 83. The same idea appeared in the context of challenges to CVAs on the basis that they were unfairly prejudicial, in the guise of the "vertical comparator" test: see *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch); [2007] Bus LR 1771, per Etherton J at §75 to §81.
- 84. The provisions of Parts 26 and 26A both apply where "a compromise or arrangement is proposed between a company and (a) its creditors, or any class of them, or (b) its members or any class of them": see sections 895(1) and 901(A)(3)(a) respectively. It has also been said that for a compromise or arrangement between a company and its creditors to qualify as a scheme of arrangement under Part 26, it must be a compromise or arrangement "which deals with their rights *inter se* as debtor and creditor": see *re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161 ("Lehman Brothers") at §65.

- 85. The comparison required by section 901G(3) is between the outcome for the creditor under the "compromise or arrangement" and in the relevant alternative. This suggests that, at least as a starting point, there should be a correlation between the scope of the no worse off test and the scope of the compromise or arrangement.
- 86. That is consistent with the approach taken in some of the first cases to come before the courts under Part 26A. In *re DeepOcean 1 UK Limited* [2021] EWHC 138 (Ch) at §§34-35 ("*DeepOcean*"), Trower J stated,

"The primary question for the court when considering what will happen under a restructuring plan and comparing it with what is likely to happen in the relevant alternative, is to look at the likely financial return in each of the alternative eventualities.

Doubtless, the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt. However, the phrase used is "any worse off", which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay."

- 87. Trower J revisited this question in *Re Smile Telecom Holdings Ltd* [2021] EWHC 685 (Ch) at §30. He said that the no worse off condition,
 - "... is concerned with, and only with, those persons in their capacity as members of that class. If they might be worse off in some other capacity as a result of the sanctioning of the plan, that is capable of having an impact on the exercise of the court's discretion, but does not of itself mean that condition A is not satisfied."
- 88. Neither of these cases raised the question of indirect benefits such as those in play on this appeal. That question arose, however, in *Re Great Annual Savings* [2023] EWHC 1141 (Ch) ("*GAS*"). In that case, it was contended by HMRC that Condition A was not satisfied in relation to it. The plan company's response was to contend that the benefits of the plan to HMRC included the future tax revenues which would be collected by HMRC by reason of the fact that the company would continue to trade. Those revenues would be lost if the company was liquidated.
- 89. Adam Johnson J rejected that argument. His first reason was to point out the fallacy in the proposition that HMRC would collect less tax in the event of the company's liquidation, because the company's employees would be likely to find work elsewhere, and its present counterparties would transact replacement business elsewhere generating the same tax liabilities. His second reason, however, is of particular relevance to this appeal. At §85 of his judgment, referring to Trower J's comments in *DeepOcean*, Adam Johnson J said:

"I think the inquiry Trower J had in mind was whether the relevant class of creditors are likely to be any worse off as

regards the existing rights the plan seeks to compromise – hence his reference to "the impact of the restructuring plan on all incidents of the liability to the creditor concerned". I accept that is potentially a broad inquiry, but what it seems to involve is a comparison between the financial value which the creditor's existing rights would be likely to produce in the relevant alternative, and the value of the new or modified rights which the proposer of the plan is offering up under the terms of its proposed compromise, in return for the existing rights being extinguished."

- 90. The references in each of these dicta to a creditor's *rights* is no accident. In matters that go to jurisdiction under both Part 26 and Part 26A, the focus on *rights* rather than *interests* is fundamental. So, for example, the classes for voting purposes are defined by reference to *rights* that the scheme or plan modifies or extinguishes, and not merely to *interests* of the plan creditors that might be affected by the plan: see e.g. *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at §§30-34.
- 91. Against that background, we agree that the starting point for application of the "no worse off" test is a comparison between the value of the existing rights which a creditor has against the plan company in the relevant alternative, and the value of the new or modified rights given under the plan in exchange for the compromise of those rights.
- 92. Where a plan compromises or releases only creditors' rights against the plan company, that is also the end point. Where, however, a plan interferes with rights of creditors against third parties, the scope of the no worse off test must extend to such rights.
- 93. The most common circumstance is where creditors have the benefit of a guarantee from a third party. Where the guarantor would have a right of subrogation or indemnity against the plan company, then the plan can require the creditor to give up its claim against the guarantor to avoid "ricochet" claims being brought against the company by the guarantor. The rationale is that such claims would undermine the essential compromise of the company's liabilities to its creditors. That was clearly explained by Patten LJ in *Lehman Brothers* at §§62-65 where he indicated that the rights which can be released or re-organised under a scheme are not limited to those enjoyed by scheme creditors but can include rights against third parties related to and essential for the operation of the scheme.
- 94. Since the guarantor in such a case is not a party to the scheme or plan and hence unable to enforce a release contained in it, such releases are conventionally achieved through the appointment under the terms of the scheme or plan of an attorney for the creditors who is authorised to enter into a deed of release of the creditors' rights against the guarantor.
- 95. Claims against guarantors are obviously closely connected to the debtor-creditor relationship between company and creditor, not least because if the guarantor pays under the guarantee, it will be subrogated to the claims of the creditor. It is also possible for the terms of a plan to go beyond this, and in an appropriate case to require plan creditors to release other types of claims that they might have against a third party. An example canvassed in argument was that if a plan company sought to compromise the claims of the holders of debt instruments, the creditors might bring claims in negligence

for the unrecovered balance against the financial advisers who had advised them to acquire the instruments in the first place. The financial advisers might in turn seek a contribution or indemnity from the plan company on the basis that they relied on misleading financial information published by the plan company.

- 96. Such claims against third parties are difficult to characterise as an incident of the debtor-creditor relationship between plan company and plan creditor. In our judgment, it is nevertheless a relevant consideration in applying the no worse off test under s.901G(3) that a creditor is being required by the terms of a plan to release such a claim against a third party, where that claim would be retained in the relevant alternative. Hence, we prefer the test we have set out at §79 above.
- 97. An approach which focusses on the valuation of rights affected by the plan is also preferable, in our judgment, to some form of remoteness test as adopted by the judge. There is no basis in the wording of the statute for such an approach, and the judge did not explain how a concept of remoteness would be applied to decide what would fall "in" for consideration and what would fall "out".
- 98. We do, however, agree with the judge that any broader prejudice that a creditor contends it would suffer as a consequence of a plan being sanctioned which is not encompassed in the valuation of its rights, goes to the issue of discretion.
- 99. Mr Thornton accepted that a creditor who happened to operate in the same market as the insolvent debtor could not claim to be worse off under a plan because of the loss of a competitive advantage that would accrue to it merely by the insolvent debtor ceasing to operate in the same market. He said, however, that the judge was correct to find that the special circumstance that Saipem and Samsung were in a joint venture with the Plan Companies in relation to the Clean Fuels Project made all the difference.
- 100. The reason advanced by the judge, at §69, as to why this was a consequence suffered by Saipem and Samsung in their capacity as creditors was because the joint venture between them and the Plan Companies provided what the judge described as "a balanced outcome" between (1) the detriment that on the liquidation of one of the joint venturers, the others would be liable for the failed company's share of the liabilities to Thai Oil and (2) the advantage that in that event the others would have the benefit of the failed company leaving the market. The judge said that the Plans undercut that balanced outcome by compromising Saipem and Samsung's claims against the Plan Companies, but permitting the Plan Companies to stay in business and compete without the burden of the joint venture liabilities.
- 101. That approach, however, appears to us to do no more than describe the commercial position and interests that Saipem and Samsung would have as joint venturers and competitors if the Plans were not sanctioned, and those that they would have if the Plans were sanctioned. Whilst the judge correctly identified the adverse effect that the Plans would have on Saipem and Samsung's rights to seek contribution from the Plan Companies in relation to the Thai Oil joint venture, the other aspect of his "balanced outcome" was not referrable to any rights that Saipem and Samsung had that would be required to be compromised under the Plans. Specifically, in spite of being challenged to do so in argument, Mr Thornton could not point to any rights that Saipem or Samsung had under the joint venture (or otherwise) to compel the Plan Companies to cease trading in competition with them in any particular situation.

102. We therefore dismiss the appeal on Ground 1.

Ground 2: fairness and discretion

- 103. The headline complaint of Saipem and Samsung under Ground 2 is that the benefits of the Plans are not being fairly shared with them. They contend that the judge did not approach the question of fairness in the right way and that he based his exercise of discretion to sanction the Plans on a number of errors of principle and fact.
- 104. The main objection of Saipem and Samsung in this respect centres on the allocation of equity in the restructured Group in return for the provision of New Money. They contend that the benefits preserved or generated by the Plans were largely the result of the compromise of the secured and unsecured claims against the Plan Companies, and were reflected in a very substantially increased value of the equity in PL as parent of the restructured Group. However, a disproportionate majority of that equity was allocated under the Plans in return for the provision of New Money rather than to the creditors whose claims were compromised.
- 105. Saipem and Samsung contend that the judge wrongly thought that this was a fair allocation of the benefits of the restructuring because he wrongly thought that the New Money was high risk and that the return to the providers of the New Money was "competitive". They say that, properly understood, the New Money is not high risk because it will be provided to a profitable Group which will be relieved of its debt burden by the Plans, and the evidence does not in fact show that the terms for the provision of the New Money are the result of any competitive testing of the market for such finance.

The fair allocation of the benefits of the restructuring

- 106. This is the third case under Part 26A to come before the Court of Appeal. The other two were *Re AGPS Bondco Plc* [2024] EWCA Civ 24 (commonly referred to as "*Adler*") and, more recently, *Kington S.a.r.l. v Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475 ("*Thames Water*").
- 107. Thames Water emphasised (at §94) that Part 26A is a developing jurisdiction, in which the approach to be adopted to sanctioning a plan is to be developed on a case-by-case basis. There are, however, several common themes that have been identified. The most relevant to the instant case is what has been called "the fair allocation of the benefits preserved or generated by the restructuring".
- 108. That concept can be traced back to the judgments of Trower J in *DeepOcean* at §63 and Zacaroli J in *re Houst Limited* [2023] 1 BCLC 729 ("*Houst*") at §29. In *Adler*, after referring to those judgments, and making the point that satisfaction of the "no worse off" test in section 901G(3) is a necessary, but not sufficient, condition for the exercise of the cross-class cram down power, Snowden LJ said this at §\$160-161,
 - "160. ... 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) at §49 and suggested that the essential question for the court is whether any class of creditor is getting "too good a deal (too much unfair value)"."
- 109. As Snowden LJ pointed out at §§162-163, *Adler* was a relatively straightforward case in terms of carrying out the inquiry into the fair allocation of the benefits of the restructuring, because all of the plan creditors would have been unsecured and would have ranked equally in the relevant alternative of a formal insolvency. The plan in *Adler* also did not envisage a continuation of the business of the group as a going concern but was simply designed to achieve a more advantageous realisation and distribution of the assets in a wind-down process controlled by the management than would have been the case in a formal insolvency. Snowden LJ noted that the inquiry might be more difficult where plan creditors had different priority rankings of secured and unsecured debts, or where the plan envisaged a complex restructuring of debts in order to continue trading.
- 110. Two of the issues that have been raised in such cases include the extent to which a class of creditors which would be "out of the money" in the relevant alternative should be entitled to share in the distribution of the benefits of the restructuring, and the extent to which a plan can reward the providers of new money.

Treatment of out of the money creditors

- 111. As the Court of Appeal noted in *Thames Water* at §112, the treatment of creditors who would have been out of the money in the relevant alternative was not directly in issue in *Adler*, where all of the plan creditors would have ranked *pari passu* in a distribution of assets in the relevant alternative. But it was addressed in *Thames Water*, albeit in the context of a plan with limited scope.
- 112. The plan in *Thames Water* sought only to provide the company with breathing space (or a "bridge") to enable to it to formulate a full-scale restructuring of its debt. This was achieved by extending the maturity date of its financial indebtedness. The relevant alternative was a special administration regime, in which a special administrator would likely have sought to impose a similar bridge, while seeking either to rescue the company as a going concern via a restructuring of its debt, or sell the business and assets as a going concern.

- 113. The position of the out of the money creditors was raised and addressed by the Court in response to an argument advanced by counsel for the plan company that was summarised at §§124-125 as follows,
 - "124. [Mr Smith KC, counsel for the plan company] maintained that a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness the fact that out of the money creditors get nothing at all counts for nothing...
 - 125. Mr Smith accepted, in light of the comments of this Court in *Adler* as to the need for give and take in respect of any creditor whose rights were compromised by a plan, that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but submitted that this need be no more than *de minimis*. He maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such *de minimis* consideration. He submitted that we are bound to reach this conclusion because of this Court's approval, in *Adler*, of Snowden J's decision in *re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) ("*Virgin Active*")."
- 114. The Court of Appeal in *Thames Water* squarely rejected that submission. The Court not only held, at §140, that it was no part of the ratio of *Adler* to endorse the aspects of *Virgin Active* upon which the plan company had relied, but it also expressly disapproved those aspects and explained why the plan company's argument was not right as a matter of principle.
- 115. At §133 the Court of Appeal referred to the particular statement in *Virgin Active* at §266 upon which reliance had been placed, and continued, at §134,

"If that is taken to mean that the Court cannot take account of the treatment of out of the money creditors in considering the fair distribution of the benefits preserved or generated by a plan, simply because they would be out of the money in the relevant alternative, then – for the reasons developed below – we disagree with it."

116. The Court of Appeal then set out its reasoning at §§142-148 and concluded, at §149, as follows:

"As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly."

117. That was a clear rejection of the argument based upon *Virgin Active*. It should also not be read as an indication that in most cases an out of the money class can fairly be excluded from the benefits of a restructuring and need only be given a *de minimis* amount necessary to satisfy the jurisdictional requirement that the plan should amount to a "compromise or arrangement".

The provision of new money

- 118. The continuation of a business as a going concern will often depend upon the company being able to access new funding. From first principles, new money which is made available to a post-restructured company can be analysed in various ways, depending on the circumstances. In some cases, the purpose of the restructuring is to remove sufficient of the company's debt burden, so that it is better able to access new funding at more advantageous rates in the market. In such a case, the new money does not in itself form part of the plan.
- 119. In other cases, such as the instant case, the restructuring itself includes new money being committed so that it is available to the restructured company immediately following sanction of the plan. If the new money is provided from independent third parties following a competitive process in the market, then the proper analysis is that the returns for the providers of new money are simply a cost of the restructuring. It is also well established that those providing new money to facilitate a plan in such circumstances should be entitled to receive full repayment of that money under a plan in priority to pre-existing plan creditors: see *Adler* at §168.
- 120. A similar analysis applies, in our view, where existing creditors of the company are invited to participate in lending the new money. If the returns to such creditors are equivalent to what it would cost the company to obtain the funding in the market, the provision of new money should be regarded primarily as a cost of, as opposed to part of the benefit arising from, the restructuring.
- 121. If, however, the returns offered to those providing new money are such that it costs materially in excess of that which could be obtained in the market, and existing creditors are invited to participate in the new money, then the excess cost is better analysed as a benefit conferred by the restructuring.
- 122. Since it is the plan company that seeks the exercise of the Court's discretion under section 901G, the burden of showing that the returns on new money are either equivalent to that which could be obtained in the market (and hence not a benefit of the restructuring), or justifying the fair allocation of those benefits must rest with the plan company.

123. That analysis is consistent with the comments of Snowden LJ in *Adler* at §169 in relation to the possibility that returns on new money might be structured by way of an elevated return on plan creditors' existing claims:

"It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money."

124. Mr Allison accepted that in a case where there was "egregiously priced money" the fact that it was offered to all would not be enough to save the plan. He submitted, however, that there would need to be careful consideration of whether certain creditors had reasons why they could not participate.

The Plan Companies' arguments

- 125. Against this background, Mr Allison submitted that three key principles could be distilled from the authorities.
- 126. First, he submitted that the "obvious reference point" for assessing the fairness of a plan is the treatment of creditors in the relevant alternative. This is undoubtedly correct. But it is only a starting point. The fairness of the treatment of dissenting classes of creditors under a plan requires more than simply deciding whether they would be out of the money in the relevant alternative.
- 127. Mr Allison sought to bolster this proposition by reference to *Virgin Active*. However, as we have explained, insofar as that case addressed the position of out of the money creditors as a matter of principle, it must be read in light of *Thames Water*, particularly at §134. It is also relevant to note that *Virgin Active* was one of the earliest decisions in this developing area. The complexities involved in the exercise of the cross-class cram down power have become more apparent in the numerous cases decided since then.
- 128. To that end, we should explain further why we do not accept the basic premise of the argument, recorded in §124 of *Thames Water*, and in essence sought to be resurrected by Mr Allison, that "a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan". That assertion and its corollary that the creditors who would be "in the money" in the relevant alternative are the economic owners of the business and entitled for that reason alone to all of the benefits created by a plan contains a *non sequitur*, the fallacy of which is readily apparent on the facts of the instant case.
- 129. In many cases, such as the instant case, the relevant alternative is an insolvent liquidation of the plan company. In that scenario the plan company would be unable to pay its debts to its creditors and would be forced to cease to trade. The business of the

- company as a going concern would be lost, and neither it, nor its value, would be realised for the benefit of, or belong to, any group of creditors.
- 130. In these circumstances, absent recourse to Part 26 or Part 26A, if a class of creditors who would expect to receive a distribution from the realisation of assets in the liquidation wished to obtain the additional benefit of the preservation of the company itself and the value of its business as a going concern, free of the claims of the other creditors, they would have to negotiate with the company and with the classes of out of the money creditors for the latter to give up their claims. That would inevitably require a genuine commercial compromise by all parties.
- 131. Prior to the enactment of Part 26A, a scheme of arrangement under Part 26 provided a means by which such a negotiated deal could be implemented without having to get unanimity among all affected creditors. But the terms of the deal would have to be good enough to attract a sufficient assenting majority in each of the classes of creditors, including those who would have been out of the money in the liquidation alternative. As was made clear by the legislative history to which reference was made in Adler at §259 to §270, the primary purpose of the introduction of the cross-class cram down power under Part 26A was to allow the Court, in an appropriate case, to override the absence of assent in each class and thereby to prevent any one or more classes of creditors from exercising an unjustified right of veto. The cross-class cram down power was not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring. The Court's discretion to refuse to sanction a plan would in such circumstances clearly be engaged (c.f. the Explanatory Notes to Part 26A, at §192, where it is pointed out that the Court may refuse to sanction a plan, even if the section 901G conditions are met, if it would not be just and equitable to do so).
- 132. Mr Allison's second submission was that the fairness of a plan will be assessed by reference to its purpose, citing *Thames Water* at §§117-118, §149 and §153. Specifically, he submitted that a different approach is justified where the plan is designed merely to provide a "bridge" (as in *Thames Water*) from where it is designed to implement a comprehensive balance sheet restructuring (as in this case).
- 133. In *Thames Water*, the Court of Appeal relied on the fact that the plan was intended only to provide a bridge as one of the reasons why regard should be had to the position of the out of the money creditors. The Court was careful, however, to say nothing about when it might be appropriate to have regard to their position if the plan had a different purpose, such as a comprehensive balance sheet restructuring.
- 134. While we agree, therefore, that the purpose of the plan is one of the factors to be taken into account, there is nothing in *Thames Water* which supports the proposition that the impact on the out of the money creditors should carry no or even little weight in the case of a plan designed to implement a comprehensive restructuring of the company's balance sheet.
- 135. Mr Allison's third submission was that if the plan company requires an injection of new money, then it might be fair for the new money providers to receive an enhanced share of the benefits of the restructuring.

136. We have dealt with the provision of new money as a matter of principle above. As we have said, we accept that those providing new money to facilitate a restructuring can properly expect to be repaid that money in priority to the existing indebtedness of the company. That also clearly applies to the return on the new money, insofar as that return reflects the price for new money that would be obtainable in a competitive market. But whether, and if so, to what extent, the providers of new money should also be entitled to share – above and beyond market rates for such funding – in the benefits generated by the restructuring is dependent on the facts of each case and is the key issue in this appeal, to which we now turn.

The benefits of the restructuring and the returns on the New Money

- 137. As the Teneo valuation report makes clear, the value to be preserved or generated by the restructuring of the Group is likely, on the low case, to amount to about US\$1.25 billion, i.e. the difference between the day one value of the equity in the restructured Group as a going concern (US\$1.5 billion) and the US\$250 million that would be realised for the assets of the Group in the relevant alternative of a liquidation.
- 138. That likely preservation or generation of value is contributed to by the write-off of US\$900 million of Senior Secured Funded Debt, the write-off of unsecured debt in an unknown amount but estimated to be in the region of US\$3 billion (of which more than US\$1.6 billion is assumed to be due to Thai Oil), and the provision of the New Money to the restructured Group.
- 139. As we have indicated above, the return to all of the Plan Creditors for the write-off of their existing claims against the Plan Companies is equity and cash valued on a low case basis at US\$329 million, and (excluding the Backstop Fees and the Work Fees), the providers of US\$350 million New Money will be allocated 67.7% of the new equity in the restructured Group, with a value of about US\$1 billion.
- 140. There are numerous ways in which this return on the New Money can be presented. In closing argument the Plan Companies provided a table which shows that the overall return upon the investment of all of the New Money (US\$350 million), the CBG Facility (US\$80 million), and a small amount which it is envisaged will be raised from retail investors and a third party (US\$14 million) would be US\$939,343.036. That equates to a return of 211.7% on the sums invested.
- 141. So far as the participating Senior Secured Funded Creditors are concerned, the table indicates that for an investment of US\$187.5 million of New Money, they will receive equity and debt with a value of approximately US\$500.2 million. This represents a return of 266.8% (on the likely low case outcome).
- 142. As Mr Perkins, who explained the table at the hearing of the appeal on behalf of the Plan Companies, acknowledged, this shows a blended return including both the issue of New Money Notes and New Money Equity. The returns identified within the table referable to the former are lower (reflecting the lower risk of debt, particularly secured debt, and the fact that the primary return, a coupon of 9.75%, is not included within the table at all). It follows that the return on the equity investment is significantly higher.

The judge's conclusions on the pricing and risk of the New Money

- 143. The judge addressed the nature of the pricing and risk attaching to the New Money in a number of places in his judgment, and in the context of a variety of different arguments.
- 144. He heard evidence from Mr Sousa and from Mr Samuel Read ("Mr Read"), a partner at Mason Capital, a member of the AHG.
- 145. At §54, in a section of the judgment dealing with the relevant alternative, the judge found the financial position of the Group to be "precarious in the extreme. Not only are there stresses in the upstream (the supply chain to Petrofac), so too are there stresses in the downstream (the markets Petrofac serves)." At this point, the judge appears to have been commenting on the Group in its current, pre-restructuring, state, although his comments about the stresses in the market had broader application.
- 146. At §56, also dealing with the relevant alternative, the judge addressed the question whether if the Plans failed there would likely be an alternative plan in the form of "Plan B", put forward by Saipem and Samsung, which involved among other things a cash payment of US\$25 million to them. In this context, the judge made a variety of points. These included a statement that, "This is a high risk restructuring, and the rewards to the providers of New Money are considerable. But I consider this to be reflective of risk, not a gouging of a company that is going bust".
- 147. The judge did not elaborate further on this statement, but it would seem that a key point for the judge in this section of his analysis, dealing with whether a "Plan B" was a viable alternative, was that some of the providers of New Money had no existing exposure to the Group, so there was nothing beyond the return they expected to gain to tie them to the Plans. In this respect the judge also referred to the evidence that further concessions that eroded the returns that the AHG had negotiated under the Plans would not be forthcoming. In evidence, Mr Read, on behalf of the AHG, firmly rejected the proposition that a tweaking of the Plans was possible. That was corroborated by Mr Sousa's evidence. He referred to a letter written by Nut Tree which said that they were not willing to consent to any changes to terms "that would transfer value from them or from their prospective value to other parties." Mr Sousa also said that he did not believe the Plan Companies would be able to obtain the new money required on the basis of the alternative restructuring put forward by Saipem and Samsung.
- 148. At §75, in considering an objection to the Work Fees, the judge noted that although the Work Fees appeared to be high, that was because the AHG had elected to take them in equity rather than cash. The point of the Plans, he said, was that the equity would increase in value if the Group was successful if the Plans was sanctioned. But, he said, "the Plan is not risk-free. It is perfectly possible for the Group to fail, and if it does so, the Work Fee will be rather less than it presently appears."
- 149. Finally, at §89, in considering the fair allocation of the benefits of the restructuring, the judge addressed directly the justification for the allocation of equity. His conclusions, at §89(i), in relation to those contributing New Money who were not also existing holders of debt are important, and we set them out in full (emphasis in the original):

- "... They have no prior involvement in the Petrofac Group, and the Group does not owe them anything. They have nothing to claim, and so nothing to lose. They choose to involve themselves by injecting US\$226m of New Money: but only if the Plan is sanctioned, and as has been seen, I have accepted that the Plan sits at the very cusp of providing an acceptable return to these investors. I have accepted Mr Sousa's evidence that Plan B would not be accepted by these new investors. The notion that a new investor, choosing to inject US\$226m, should thereby receive a "haircut" of 59% is absurd. But this is the substance of the point made by the Saipem and Samsung Opposing Creditors ... Obviously these investors must receive a return and – given the risks – that return is going to be substantial. It is not the job of courts to re-write commercial agreements and to impose a price on markets save in the most exceptional of cases. Here, the furthest a court can go, is to say that the reward is disproportionate and so unfair. I decline to reach this conclusion in this instance:
- a) This is a significant cash injection (US\$226m) into an organisation that would otherwise fail and go into Liquidation. I see nothing disproportionate in a return of 211%.
- b) I was impressed by the evidence of Mr Sousa. I am satisfied that this return is a competitive one. This is demonstrated by the fact that even a marginal shift from the Plan to Plan B will result in these investors walking away, and the Relevant Alternative of Liquidation obtaining.
- c) The secured creditors had the option of injecting New Money. Some took that option, some did not. If the returns on the injection of New Money were disproportionate in favour of the investor, one would expect greater take up and/or opposition to the Plan."
- 150. We shall return to this analysis in greater detail after reviewing the evidence. However, we would observe at once that in the body of this paragraph and in sub-paragraph (b), the judge appears to have elided two different questions. The first question was whether the AHG, or the new investors which they had enlisted to provide New Money under the Plans, would have been prepared to agree to a reduction in those agreed terms in order to accommodate an alternative "Plan B" put forward by Saipem and Samsung. That is not the same as the question of whether the terms which had been agreed for the provision of New Money were equivalent to the terms that could have been obtained in the market.

The evidence

151. In assessing whether the returns on the New Money are in excess of those that could be obtained in the market, it is critical to appreciate that the New Money is only being committed conditional upon the sanction of the Plans and completion of the restructuring, and will be invested in the restructured Group. As we will explore in

greater detail below, much of the evidence from the Plan Companies seeking to justify the cost of the New Money relied on the difficulties in obtaining funding from the market in the very different context of considering alternatives to the proposed Plans, i.e. obtaining funding for the insolvent Group. What matters, however, is what price could be obtained in the market for new debt and/or equity funding in the restructured Group, once it was freed of virtually all of its debt.

- 152. A reasonable starting point in considering the price at which New Money might be obtained in such circumstances is the value ascribed to the post-restructuring Group by an independent expert. As we have already noted, the valuation report prepared by Teneo ascribes an equity value to the restructured Group of approximately US\$1.5 billion to US\$1.85 billion.
- 153. As Mr Allison and Mr Bayfield KC stressed, there is no absolute correlation between the enterprise or equity valuation of the Group and the price at which investors in the market may be prepared to invest in debt or equity issued by the Group. Investors will have regard to other factors such as their own perception of the risks facing the Group's business and wider market conditions. It is, however, an obvious starting point, particularly where as here the valuation is presented to Plan Creditors as a justification for why they should approve the Plan, and the New Money Debt and New Money Equity is to be listed and hence represents immediately realisable value in the hands of the investors upon implementation of the Plan.
- 154. The Explanatory Statement (at page 191) presented the valuation as "an assessment of the enterprise value of the Group as at a valuation date of 9 January 2025, on the basis that the Restructuring is implemented and the Group's business is able to continue operating in accordance with the Business Plan". The Explanatory Statement then provided an analysis of the recoveries of Plan Creditors in liquidation "compared with the value of the Entitlements of Plan Creditors in the Restructuring (on the basis of the Going Concern Valuation)". This assumed, among other things, that the Tranche 1 Warrants (but not the Tranche 2 Warrants) become exercisable "which is consistent with the conclusions of the Going Concern Valuation".
- 155. The boards of the Plan Companies recommended to Plan Creditors (at page 129 of the Explanatory Statement) that they vote in favour of the Plan because the benefits to the Plan Companies will in turn benefit the Plan Creditors "not least as they are expected to be no worse off with respect to their recoveries" if the Plans were sanctioned.
- 156. The Explanatory Statement contained, as is usual, a detailed list of risk factors (at part 7). Nowhere in the Explanatory Statement is it suggested, however, that the risks of the business failing are such that, notwithstanding the Group is relieved of virtually all of its debt (totalling nearly US\$4 billion), there is any real or significant risk that Plan Creditors will not do better under the Plans than under the relevant alternative. That, however, is so only if the equity value of the restructured Group is at, or at least not much less then, the likely low value ascribed to it in the valuation report.
- 157. As Mr Colclough, who presented this part of the case on behalf of Saipem and Samsung, submitted, if the New Money Equity and New Money Debt were as risky as the Plan Companies now contend, then the picture as presented to Plan Creditors in the Explanatory Statement was at best incomplete and at worst misleading.

- 158. Mr Allison relied on numerous passages in the Explanatory Statement, and in the evidence of Mr Sousa, which he said highlighted the risky nature of the Group's business.
- 159. He submitted that the business is a "contract business", without significant property (including intellectual property) assets. Mr Sousa's evidence was that it relies on contracts and its relationship with clients in its core geographies to succeed and survive. In Teneo's report on the relevant alternative, Thai Oil is given as an example of a contract going badly wrong, with liabilities that present an "existential threat" to the Group's viability as a going concern. The Explanatory Statement stated that should any of the Group's relatively small number of contracts prove less profitable than forecast, that could have a significant adverse impact on the Group's profitability.
- 160. Mr Allison also pointed to passages in the Explanatory Statement referring to specific geopolitical risks in the Middle East and North Africa region, which accounted for 26% of the Group's consolidated revenues for the year ended 31 December 2023. Some of the countries in that area have experienced prolonged periods of political, social and economic upheaval. If such disturbances were to occur or escalate in countries in which the Group operates, that may have a material adverse effect on the Group's business and financial position. These factors underscore the vulnerabilities inherent in operating within volatile geopolitical landscapes.
- 161. The difficulty with this submission is that all of these risk factors were taken into account in the Teneo valuation report. It is correct, as Mr Allison submitted, that Teneo identified a number of assumptions which underpinned their discounted cashflow analysis, and that these included significant growth in the business, and that management anticipated the Group E&C segment would generate more than 80% of its revenue from unsecured contracts by 2027 (albeit that one-third of this was already committed under a framework agreement with one client, TenneT). Mr Allison also pointed to the "Limiting Conditions" set out at page 28 of the valuation report, in which Teneo stated their assumptions that management's forecasts are reasonable and achievable subject to the successful implementation of the restructuring (although they also noted that if the Group tracked to its financial forecast in the business plan, its future cash flows would be further de-risked supporting a higher valuation).
- 162. However, on the following page 29 of the valuation report, Teneo stated:

"throughout our discussions and our review of the Business Plan, we have identified and documented the key risks associated with the forecasts, which are then reflected in our assessment of the discount rate estimates and sensitivity analysis as part of the income approach (DCF analysis) and in our selection of the multiple range as part of the market approach corroboration."

163. At page 30 of the report, the following also appeared:

"WACC: Our concluded WACC range of 21.0% to 24.0% reflects the execution risk in the Business Plan that is predicated on the Group's ability to secure guarantee lines. It also captures the potential risks of operating as a high-growth business with a significant proportion of unsecured contracts over the forecast

period. It further captures the customer concentration risk with ADNOC and TenneT representing c.70% of the total E&C revenue over the forecast period."

- 164. In short, as would be expected of competent valuers, the key risks associated with the Group's business, and its ability to meet its forecasts and business plan, were taken into account by Teneo in arriving at its conclusions on valuation. Notwithstanding those risks, Teneo concluded that the Group would have a post-restructuring equity value of approximately US\$1.5 billion to US\$1.85 billion.
- 165. Although, as we have noted, there is no absolute correlation between an independent expert's conclusion as to the equity value of the Group and the price at which investors in the market might be prepared to invest in return for debt or equity, the fact that Teneo has arrived at such a large valuation in this case is, at the very least, something which calls for an explanation, rooted in credible evidence, as to why the Plans should give what appears to be an immediate three-fold or even higher return on the New Money.
- 166. The most obvious way of demonstrating this would be evidence from a market expert as to the range of prices that debt or equity might have been obtained by the restructured Group. The Plan Companies, however, adduced no such evidence.
- 167. Another way would be evidence of market testing. The Plan Companies' evidence of the steps taken to raise finance is found mainly in Mr Sousa's witness statements, supplemented in part by Mr Read's evidence. Mr Allison and Mr Bayfield between them took us to the parts of that evidence which they contended addressed this issue.
- 168. Although Mr Sousa refers to the extensive negotiations with the New Money providers, to his belief that they pushed these providers "as far as we could", to "the challenges we have faced in getting funding" (see for example §10.12 of his first witness statement), and (in cross-examination) to his belief that the new debt and equity had some considerable risk to them, he did not give any evidence at least any sufficiently clear evidence that the Group or its advisors carried out any market testing to ascertain at what cost the Group was likely to be able to raise funds in the market, once its balance sheet was cleansed of all debt pursuant to the restructuring.
- 169. In his first witness statement (at §2.38) Mr Sousa describes the efforts made in the twelve months following December 2023 to explore "potential balance sheet and operational solutions ... including new financing". While these were not limited to a potential sale of the Group or parts of it, but included provision of new money (see §6.1 of Mr Sousa's fourth statement), it is clear that these were *not* addressing the question of investing in the post-restructured Group. That is evident, for example, from §2.31.3 where in explaining why such offers of equity investment that were made could not be taken forward Mr Sousa said "each expression of interest that we received was conditional on a comprehensive restructuring to deleverage the balance sheet and remove impediments to equity value, such as by effecting a compromise of the Shareholder Claims".
- 170. Mr Sousa also exhibited to his fourth statement Powerpoint slides summarising the work of an investment bank (Lazard) engaged by the Group. Nothing in these, however, demonstrates any attempt to ascertain at what price investment in the restructured Group might be obtained. Lazard's engagement was stated to be in relation

to a potential sale of all or substantially of PL and potential equity capital raising options.

- 171. At §2.33 of his first statement, Mr Sousa outlined the difficulties encountered by the Group based on feedback from potential investors and advisors. These included the number of historical liabilities, which meant that parties that expressed any interest in the Group were only prepared to consider it on the basis that there was considerable deleveraging. At §10.15.2, in a part of his statement explaining the challenges in attracting investment, Mr Sousa referred to an attempt at a further capital raise being thwarted for the reasons he had referred to in §2.33. Mr Sousa returned to this in his fourth statement where, at §6.4, he referred to the extensive outreach process undertaken by three investment banks, including Lazard, seeking "every form of investment". Again, however, one of the reasons given for such offers as were received in this process being unacceptable was that they were conditional on the completion of the restructuring. It is apparent from this that the Group were *not* seeking to test the market for investing in the post-restructured Group. Similarly, at §2.43, Mr Sousa refers to the lack of interest from its consortium of 21 banks, because the Group's balance sheet was heavily leveraged.
- 172. In other parts of his evidence, Mr Sousa emphasised that there had been hard-fought negotiations with the AHG, and with Nut Tree, over the terms on which the New Money would be invested. No doubt the members of the AHG were focused on obtaining the best value they could from the restructuring. It is also clear from Mr Read's evidence (see §50 of his witness statement) that he viewed the restructuring as founded on the principle that the Senior Secured Funded Creditors, who alone stood to obtain any material recovery in the relevant alternative, were converting their claims to equity and being incentivised to participate in the New Money by being offered attractive potential recoveries. Mr Read said,

"From my perspective, it would make little commercial sense to allocate more value to unsecured creditors like Saipem and Samsung, who would receive no or *de minimis* recoveries under the Relevant Alternative and who are contributing no new financing or support of the Group as part of the Restructuring."

That evidence has clear echoes of the mistaken approach to out of the money creditors that was rejected in *Thames Water* (above). However, it does not go far, if at all, in demonstrating what terms could be obtained for new financing in the market by the restructured Group, with a clean balance sheet shorn of all liabilities.

- 173. The same observation can be made in respect of the evidence from Mr Sousa and Mr Read that Nut Tree, when asked for its views on the alternative plans put forward by Saipem and Samsung after the Plans had been proposed, insisted that it would not countenance any modification of the deal it had negotiated in December 2024. Nut Tree was well placed to take a hard line in negotiations, since by reason of the low price at which it had acquired its investment in the Senior Secured Funded Debt it stood to make at least some profit even if the Plans failed. This provides no insight into the terms on which new money might have been obtained in the market.
- 174. The Plan Companies also relied on the fact that not all Senior Secured Funded Creditors were willing to participate (as confirmed by the evidence of Mr Read, in particular).

They ask, rhetorically, if the return on the New Money was so disproportionately high, why did they not all participate? That is a legitimate point. It only goes so far, however, when set against the fact that nothing is known as to the reasons why the relevant secured creditors chose not to participate.

- 175. Mr Read (at §36 of his statement) gave his opinion why he considered "some investors may not be prepared to participate in the New Money", emphasising the risks to the Group going forward, including the fact that the operational re-organisation which is an integral aspect of the restructuring would not be completed for some time. This speculation does not fill the evidential gap as to why those who did not take up the opportunity did not do so. We have also already observed that these risks were factored into the equity valuation by Teneo.
- 176. Mr Sousa did provide some evidence of the reason why two of the five members of the AHG did not participate in the Backstop Agreement. At §10.27.2 of his first statement he said this was because of the "Group's difficulty in attracting new capital and building consensus between its many and varied stakeholders". While this may be relevant to the additional risk which is assumed by someone backstopping the equity raise at an early stage in the process, it is difficult to see why either of these factors would have an impact on the price at which investment could be obtained by the restructured Group.

Discussion

- 177. With that evidence in mind, we turn to the judge's reasons for dismissing the objections based on the price of the New Money. There are two key passages in his judgment.
- 178. The first is at §89(i), where the judge said that "obviously" the providers of New Money who were not existing creditors of the Group "must receive a return and given the risks that return is going to be substantial". He then expanded upon that at §89(i)(a) (quoted at §150 above), where he said that such creditors were making a cash injection of US\$226 million "into an organisation that would otherwise fail and go into liquidation. I see nothing disproportionate in a return of 211%". This, in our judgment, addresses the wrong question, focussing as it does on the pre-restructuring risks faced by the Group. As we have noted at §152 above, the correct question is the cost at which new money could be raised by the Group on day one *after* the restructuring and *conditional upon* the sanction of the Plans which would remove the existing liabilities from the Plan Companies' balance sheets and hence avoid liquidation.
- 179. The second is at §56(i), where the judge said that the rewards for the New Money were "considerable", but he considered this to be reflective of risk. That, too, appears to make the same error. The judge began the paragraph with the comment that "this is a high-risk restructuring". We do not think the judge intended by this to refer to the riskiness of the business, and thus investments by way of the New Money, post-restructuring. Neither that, nor his assessment at §54 that the financial position of the Petrofac Group was "precarious in the extreme" would make sense in relation to the post-restructured Group: the latter, in particular, is not a description which could be applied to the Group once cleansed of all its liabilities.
- 180. For the reasons we have set out above, we consider that Teneo's equity valuation of the restructured Group is an important factor in considering whether the price of the New Money was excessive. It begged an obvious question, one which required cogent

- evidence either by way of expert evidence or by evidence of the market having been tested to explain why allocating the lion's share (approximately US\$1 billion on the low case) of the value preserved or realised by the restructuring (approximately US\$1.25 billion, also on the low case) to the providers of New Money was a fair reflection of the cost at which funding could be obtained in the market.
- 181. This is not, however, an analysis which the judge undertook. He made no reference to Teneo's equity valuation of the restructured Group. Its relevance was not factored into his consideration. Specifically, he did not consider whether the question it begged was answered by any evidence as to the price at which new money might have been raised by the restructured Group in the market.
- 182. Mr Allison pointed to the fact that Saipem and Samsung did not themselves provide any evidence to challenge the Plan Companies' evidence that they believed the New Money had been procured on the best terms available. He referred to *Thames Water* (at §208) where this Court took into account, against the opposing creditors, the absence of any evidence as to what terms super senior funding could have been obtained in the market "without which the assertion that the costs associated with the [funding] are excessive compared with what could be obtained remains speculation."
- 183. As we have said, the burden of establishing that a plan is fair, so as to justify the exercise of the Court's discretion to sanction a plan notwithstanding the presence of a dissenting class or classes, rests squarely on the plan company. Whether it has discharged that burden is a question of fact to be determined on the specific facts of the case. Where, as here, the Plan Companies' own evidence in the form of the valuation of the equity in the restructured Group begs clear questions, then there is a burden on the Plan Companies to provide evidence to meet those questions.
- 184. In addition to these points, it is also revealing to stand back, as Mr Thornton and Mr Colclough urged us to do, and to look at the wider picture. The Plans were negotiated between the AHG and the Plan Companies in 2024. The terms by which over two-thirds of the new equity in the Group was to be provided to the providers of New Money, including Nut Tree, and to members of the AHG by way of Work Fees, were agreed in December 2024 before Teneo's valuation report was available. The basis for that agreement was described in the passage at §6.3 of the Explanatory Statement (and reflected in Mr Sousa's evidence), addressing how the equity allocation for the Work Fees was initially arrived at using a notional post-restructuring equity valuation of US\$351 million:

"As the Going Concern Valuation was still in the process of being prepared at the date of the Practice Statement Letter, the US\$351 million post-Restructuring equity value was not intended to represent the post-Restructuring equity valuation of the Group. Rather, it was used as a common reference point, reflecting the price at which the various new investors were willing to acquire new equity and a reference to which new equity allocations could be calculated." (emphasis added)

185. The clear impression given by this passage is that the allocations of new equity to the providers of New Money were set in stone by late December 2024, before Teneo's valuation report was prepared, and there was no evidence that they were revisited

thereafter. Instead, the Plans were persisted in, even though, on the basis of Teneo's subsequent equity valuation report, the equity rights to be conferred on the AHG for Work Fees and the providers of New Money turned out to be significantly more valuable than they would have appeared in the context of the notional equity value used to calculate their allocations of equity in December 2024.

- 186. This is significant. Keeping the same allocation of equity entitlements as between existing creditors, even when it later transpires that the valuation of the restructured company is substantially higher, might not be of such concern because it could be said that what matters is the entitlement of such creditors *relative to each other*. That is not so, however, where the increase in the valuation results in an increase in the value of the rights granted to the providers of new money in absolute terms. That is because these fall to be benchmarked against the market, and not measured against the entitlements of other stakeholders. If as the evidence here suggests the increase is such that the price becomes disproportionate to the price at which equivalent finance could have been obtained in the market, then for the reasons that we have explained, it becomes a benefit, not a cost, of the restructuring, the allocation of which needs to be specifically justified. These matters cried out for an explanation in the instant case, but none was given, the Plan Companies called no expert evidence as to market terms, and their evidence of market testing was wholly inadequate for the reasons given above.
- 187. In these circumstances, we consider that the judge's key statements that the New Money was provided on "competitive" terms that were not disproportionate cannot stand. Given the fact that the issue of equity in return for New Money represented the allocation of over two-thirds of the value preserved or generated by the restructuring, this was plainly a material error that vitiated the judge's exercise of discretion to sanction the Plans against the dissent of Saipem and Samsung. The judge also did not then go on to consider whether such allocation of the benefits of the restructuring was fair or justified on the correct basis.
- 188. It is not an answer to these objections to say that Saipem and Samsung were (belatedly) offered an opportunity, in relation to Samsung's claim against PIUL, to participate in the New Money on the same terms. This might have been a commercial solution to prevent objections being pursued by Saipem and Samsung, but it does not answer the underlying problems we have identified. Moreover, as Mr Allison explained in argument, this offer was made in relation to the PIUL Plan, where Samsung has a claim of around US\$90 million but was not made in respect of the much larger claims compromised under the PL Plan.
- 189. It is also not clear to us that the unfairness inherent in the fact that providers of New Money are being given an excessive return is cured by offering the same opportunity to all creditors, but only at a further cost to them. There may be many and varied reasons why creditors are not prepared to make the further investment required in order to participate in that opportunity (irrespective of whether they are *unable* to do so, which Mr Allison accepted would be a relevant consideration). The fact that they do not wish to do so may well not be a reason for depriving them of a share in the benefits of the restructuring to which they would otherwise be entitled. We did not hear full argument on this point, and we do not need to resolve it in view of our earlier conclusions.

- 190. Having determined to set aside the judge's exercise of discretion, the question arises whether it is appropriate for us to re-exercise the discretion. We do not, however, consider that it is appropriate to do so on the basis of the evidence before us.
- 191. As we have observed (see above at §131), the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders. Our conclusion that the Plan Companies have failed to justify the returns granted in respect of the New Money as a cost of the restructuring means that the formulation of the Plans and such negotiation as there may have been between the different classes of creditors has taken place on a false premise. It has failed to address at all the appropriate allocation of such part of the return on the New Money that constitutes a benefit preserved or generated by the restructuring. Moreover, the absence of evidence as to the price at which equivalent funding for the restructured Group could have been obtained in the market means that we could only speculate as to what part of the return on the New Money should be regarded as a benefit of the restructuring, the fair allocation of which falls to be considered.

Other objections to the sanction of the Plans

- 192. Mr Thornton raised further objections to the sanction of the Plans under Ground 2. These related mainly to alleged unfairness as between the treatment of Saipem and Samsung on the one hand and other creditors who sit equally with, or below, them in the capital structure. He referred specifically to HSBC, to HMRC and to liabilities in respect of a different project carried out by the Group with a Lithuanian company. He also referred to the Plan Companies' failure to engage with the offers made by Saipem and Samsung.
- 193. Our conclusion on the principal objection raised by Saipem and Samsung to the Plans under Ground 2 means that it is unnecessary to consider these other objections. We need say no more than that, had these objections stood alone, we would not have been persuaded to interfere with the judge's exercise of discretion to sanction the Plans.

Conclusion

194. For the reasons set out above, we will allow the appeal on Ground 2 and set aside the judge's order sanctioning the Plans.

SUPERIOR COURT

(Commercial Division)

CANADA PROVINCE OF QUÉBEC DISTRICT OF TERREBONNE

No.: 700-11-022385-241

DATE: November 17, 2025

BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36 OF:

THE LION ELECTRIC COMPANY

-and-

LION ELECTRIC FINANCE CANADA INC.

-and-

LION ELECTRIC VEHICLE FINANCE CANADA INC.

-and-

LION ELECTRIC HOLDING USA INC.

-and-

NORTHERN GENESIS ACQUISITION CORP.

-and-

THE LION ELECTRIC CO. USA INC.

-and-

LION ELECTRIC MANUFACTURING USA INC.

-and-

LION ELECTRIC FINANCE USA INC.

Debtors/Applicants

-and-

DELOITTE RESTRUCTURING INC.

Monitor

-and-

ADAM B. MULHALL

-and-

RAYMOND CHABOT GRANT THORNTON S.E.N.C.R.L.

-and-

FINANCIÈRE BANQUE NATIONALE INC.

B. RILEY SECURITIES, INC.

BARCLAYS CAPITAL CANADA INC.

BMO NESBITT BURNS INC.

VALEURS MOBILIÈRES DESJARDINS INC.

ROTH CANADA INC.

VALEURS MOBILIÈRES BANQUE LAURENTIENNE INC.

RAYMOND JAMES LTÉE

-and-

The NEW YORK PLAINTIFF¹

-and-

The DELAWARE PLAINTIFFS²

Objecting Parties

-and-

MARC BÉDARD et al.

Impleaded Parties/Respondents

JUDGMENT

ON

APPLICATION FOR THE ISSUANCE OF AN APPROVAL AND REVERSE VESTING ORDER (SEQ. 55) AND APPROVAL OF PARAGRAPHS 61 AND 62 OF THE RECTIFIED APPROVAL AND REVERSE VESTING ORDER DATED JUNE 6, 2025 (Sections 9, 10, 11, 11.02(2), 11.03 and 36 of the Companies' Creditors Arrangement Act)³

¹ As defined hereafter.

² Ibid

³ Les juges de la Cour supérieure doivent soumettre leurs projets de jugement au Service de traduction, mais en raison de contraintes techniques et opérationnelles, une traduction du présent jugement ne peut être jointe immédiatement et sans délai conformément à l'article 10 de la Charte de la langue française. La traduction a été demandée le 14 novembre 2025. Vu le délai annoncé pour sa livraison

OVERVIEW

[1] Pursuant to an agreement between the parties, the *Approval and Reverse Vesting Order* rendered by this Court on May 22, 2025,⁴ included at paragraphs 61 and 62 directors and officers releases (the "**D&O Release**") which contained a carve-out of the "Class Action Claims"⁵ (the "**Carve-out**"), involving:

- Adam B. Mulhall (the "Mulhall Class Action Plaintiff" or "Mr. Mulhall") in his capacity as a former shareholder of Lion Electric as plaintiff in the *Mulhall v. Bédard et al.* class action bearing court no. 500-06-001366-257⁶ (the "Mulhall Class Action");
- Alex Bouchard-A, as lead plaintiff (the "New York Plaintiff") in the securities class action Jaar v. Northern Genesis Acquisition Corp. et al., case number 24-cv-02155, in the U.S. District Court, Southern District of New York (the "New York Action"); and
- Ahuva Shachter, Michael Smith, Douglas Neujahr, and Denish Bhavsar (the "Delaware Plaintiffs" and, collectively with the New York Plaintiff, the "U.S. Plaintiffs") who have asserted claims in the action captioned *Shachter et al. v. Robertson et al.*, in case C.A. No. 2023-1112-MTZ in the Court of Chancery of the State of Delaware (the "Delaware Action", and, together with the New York Action, the "U.S. Actions" or "U.S. Claims")⁷.

[2] Prior to the presentation of the Debtors' Application for the issuance of an approval and reverse vesting order dated May 15, 2025 (the "RVO Application"), Mr. Mulhall and the Mulhall Class Action Co-defendants⁸ had filed Notices of objection contesting the Lion Group's attempt to obtain the D&O Release in favour of all their present and former

et considérant les enjeux d'affaires importants propres à la présente affaire soulevant des enjeux d'insolvabilité, le Tribunal estime que de retarder la signature du présent jugement dans l'attente de la version traduite entraînerait un retard préjudiciable à l'intérêt public tout en causant un inconvénient sérieux aux parties au présent litige qui ont droit à la finalité. La Traduction suivra.

⁴ Rectified on June 6, 2025 (2025 QCCS 1806) (the "RVO").

⁵ "Class Action Claims" is defined at paragraph 61 of the RVO.

⁶ On May 5, 2025, the Court issued the following Order (2025 QCCS 1883):

^[8] **ORDERS** that the Stay of Proceedings ordered by this Court in the context of the CCAA Proceedings in respect of the Debtors' Directors and Officers is temporarily lifted, for the sole purpose of allowing, *nunc pro tunc*, the Petitioner, Adam B. Mulhall, to file the Authorization Application, Exhibit **R-4**, as of February 21, 2025, against, *inter alia*, the Directors and Officers named as respondents in the Authorization Application, and further **ORDERS** that the Stay of Proceedings shall thereafter be immediately reinstated following the *nunc pro tunc* relief granted herein, such that any and all actions and Proceedings (as defined in the Initial Order) as against the Directors and Officers, including in relation to the Authorization Application, shall not continue and shall remain subject to the Stay of Proceedings so long as such Stay of Proceedings remains in effect;

⁷ The Mulhall Class Action Plaintiff together with the U.S. Plaintiffs are referred to collectively as the "Class Action Plaintiffs".

⁸ As defined hereafter.

directors and officers, which would be opposable to them (the "Proposed D&O Release").

- [3] Also voicing their objections to the Proposed D&O Release were the following defendants to the Mulhall Class Action, other than the 14 co-defendants being former and present directors and officers⁹ that stood to benefit from the Proposed D&O Release:
 - National Bank Financial Inc., B. Riley Securities Inc., Barclays Capital Canada Inc., BMO Nesbitt Burns Inc., Desjardins Securities Inc., Laurentian Bank Securities Inc., Raymond James Ltd. and Roth Canada Inc., in their capacity as former underwriters of Lion Electric (collectively, the "Underwriters"); and
 - Raymond Chabot Grant Thornton, S.E.N.C.R.L., in its capacity as former auditor
 of Lion Electric (the "Auditors", together with the Underwriters, the "Mulhall Class
 Action Co-defendants").
- [4] At that time, as a result of the objections raised by Mr. Mulhall, the Mulhall Class Action Co-defendants¹⁰ and the U.S. Plaintiffs (collectively the "**Objections**") and in order to avoid any delay in the Court's approval of the Transactions contemplated in the RVO Application and in the closing thereof, the Lion Group¹¹ agreed to postpone the dispute on the Objections. It was resolved to include the following *caveat* with respect to the Proposed D&O Release to be included as part of the RVO to be rendered by the Court (the "**D&O Release** *Caveat*"):
 - [61] [...] the determination of whether the foregoing release or any other release should be ordered in respect of the Class Action Claims will be adjudicated by this Court at a subsequent hearing [...].
 - [62] such claim shall be a released Claim (except for the Class Action Claims, until the court's final decision as to whether or not they should be released, pursuant to paragraph [61] of this Order) [...].
- [5] The Lion Group is now seeking as part of a re-rectified RVO an order from this Court dismissing the Objections¹² of the Class Action Plaintiffs together with the Underwriters and the Auditors (collectively the "Class Action Parties") while confirming the Proposed D&O Release requested initially without the Carve-out and the D&O Release Caveat (the

⁹ Marc Bédard, Richard Coulombe, Yannick Poulin, Nicolas Brunet, Brian Pern, Pierre Larochelle, Latasha Akoma, Sheila Colleen Bair, Ann L. Payne, Dane L. Parker, Pierre-Olivier Perras, Michel Ringuet, Lorenzo Roccia and Pierre Wilkie, are all current or former officers and directors of any or all of the Debtors (the "Mulhall D&Os").

¹⁰ Henceforth, the Mulhall Class Action Plaintiff together with the Mulhall Class Action Co-defendants shall be referred to collectively as the "**Mulhall Action Parties**".

¹¹ The Lion Group refers to The Lion Electric Company ("Lion Electric"), Lion Electric Finance Canada Inc., Lion Electric Vehicle Finance Canada Inc., Lion Electric Holding USA Inc., Northern Genesis Acquisition Corp., The Lion Electric Co. USA Inc., Lion Electric Manufacturing USA Inc. and Lion Electric Finance USA Inc. (collectively, the "Lion Group" or the "Applicants")

¹² As defined hereafter.

"Full D&O Release"). In other words, henceforth, the Full D&O Release would also be opposable to the Class Action Parties and protect the Mulhall D&Os among others.

- [6] Pursuant to paragraph 1(c) of the RVO Application, the Applicants announced as follows the *Releases* they were seeking to form part of the RVO:
 - 1(c) <u>Releases</u>. The release (the "**Releases**") of all present and future claims and liabilities against the Lion Group's present and former directors and officers (the "**D&Os**") for which they may be liable for any act, omission or representations in their capacity as D&Os of the Applicants, with the exception of claims for fraud or willful misconduct, claims that are not permitted to be released pursuant to section 5.1(2) of the CCAA and claims that are covered by any insurance policy of the Lion Group (only to the extent of any such available insurance);
- [7] However, notwithstanding the foregoing announcement, the proposed draft Approval and Reverse Vesting Order submitted to the Court's appreciation by the Applicants contained a far broader wording aiming to cover, to all intents and purposes, everything under the sun and more.
- [8] Prior to the RVO having been issued by this Court, the overly broad proposed wording sought by the Lion Group was somewhat curtailed on May 20, 2025, with the Objections filed by the Class Action Parties who opposed the Lion Group's request to include a third-party release of all D&Os upon the closing of the Transactions¹³ contemplated in the Subscription Agreement¹⁴ that was to be approved by the Court with the proposed draft RVO.
- [9] The grounds of the Objections are essentially the following:
 - (a) the Full D&O Release is not rationally connected to the purpose of the Lion Group's restructuring;
 - (b) the Full D&O Release is not fair or reasonable, and is overly broad;
 - (c) the restructuring can and has succeeded without the Full D&O Release;
 - (d) the Full D&O Release does not benefit any of the Debtors or their creditors, generally;
 - (e) the Full D&O Release is contrary, inter alia, to sections 5.1(2) and (3) CCAA;
 - (f) the creditors or other interested parties do not have sufficient knowledge as to the existence, nature, and effect of the Full D&O Release.

¹³ As defined hereafter.

¹⁴ *Ibid*.

[10] Counsel for the Applicants argued that all present and former D&Os—and even deemed D&Os—should be released mainly on the basis of:

- their continued contribution and support to the Applicants' restructuring efforts, both prior to and/or after the commencement of the CCAA proceedings;
- the Full D&O Release sought is in line with other releases that are routinely granted in numerous CCAA proceedings, and have become common place;
- the Monitor's recommendation that the relief sought in the RVO Application (including the Full D&O Release) should be recognized and accepted by the Court;
- The Class Action Parties being to all intents and purposes, equity holders (as opposed to creditors) do not have the legal standing to oppose the Full D&O Release; and
- The Class Action Parties cannot rely on the provisions of section 5.1(2) CCAA that
 only apply to creditors (as opposed to equity holders) for post-filing claims against the
 directors only.
- [11] The principal issues to be determined by this Court, as more fully addressed hereafter, are as follows:
 - (a) Is it fair and reasonable to grant the Full D&O Release sought by the Applicants without the Carve-out despite the Objections of the Class Action Parties?
 - (b) Did the Applicants meet the *Nexus Test* involving the Lydian Factors?
 - (c) Should the Class Action Parties¹⁵—representing shareholders of Lion Electric be considered and treated as equity holders as opposed to creditors of the Debtors—thus precluding them from asserting their Objections to the Full D&O Release? Can they validly rely upon the provisions of sections 5.1(2) and (3) *CCAA* to maintain the Carve-out?
- [12] For the reasons that follow, the Court is of the view that the Objections of Mr. Mulhall, the Mulhall Action Co-defendants and of the U.S. Plaintiffs should prevail and that the Carve-out found at paragraph 61 of the RVO should remain after removing the D&O Release *Caveat* in paragraphs 61 and 62 of the RVO.

1. THE CONTEXT

1.1 The Lion Group's restructuring

[13] In 2023 and 2024, the Lion Group conducted a formal strategic review process to explore, review and evaluate a broad range of strategic alternatives focused on ensuring its financial liquidity, which strategic alternatives included possible debt or equity

¹⁵ Representing shareholders of Lion Electric save for the Underwriters and the Auditors.

financing, asset sales, workforce reductions or other restructuring measures (the "Pre-Filing Strategic Process").

- [14] As part of the Pre-Filing Strategic Process, the Lion Group implemented a series of cost reduction measures, as well as liquidity enhancement measures, while it sought to identify opportunities that would allow it to raise financing in order to continue to meet its ongoing obligations and to operate in the normal course.
- [15] In this context, on July 7, 2024, the Lion Group engaged National Bank Financial ("NBF") as its financial advisor in an effort to pursue, on a confidential basis, a solicitation process (the "NBF Pre-Filing Solicitation Process") with a view to securing one or more transaction(s) that would allow the strengthening of the Lion Group's financial position. Although the NBF Pre-filing Solicitation Process raised interest, no satisfactory offer was received by the Lion Group in the context thereof.
- [16] On December 17, 2024, as the Lion Group's principal loan obligations came to maturity, the Lion Group determined that it would be in its best interest and that of its creditors and other stakeholders to commence proceedings (the "CCAA Proceedings") under the Companies' Creditors Arrangement Act (the "CCAA" or the "Act") with a view to pursuing a public sale and investment solicitation process (the "SISP") with the assistance, once again, of NBF, but this time under the supervision of the Superior Court of Québec (Commercial Division) and its appointed monitor, Deloitte Restructuring Inc. (the "Monitor").
- [17] At that time, the Lion Group reported outstanding indebtedness (as at September 30, 2024) in the amount of US\$499,765,196, on a consolidated basis, with a secured indebtedness of approximately US\$216,076,804.17.
- [18] In order to fund the costs associated with the CCAA Proceedings and the SISP, the Lion Group entered into an Interim Financing Term Sheet (as amended, the "DIP Term Sheet") with the National Bank of Canada, Fédération des Caisses Desjardins du Québec and Bank of Montreal (the "Interim Lenders") pursuant to which the Lion Group was given access to interim financing of up to US\$17,000,000 (the "Interim Financing"). The DIP Term Sheet and a corresponding super-priority DIP charge in an amount of US\$20,400,000 were approved by the Court as part of the CCAA Proceedings.
- [19] Following the January 7, 2025, launch of the SISP, after multiple challenges encountered during the SISP, including on April 30, 2025, when the Québec government announced that it would ultimately *not* be providing any further funding or investment and that it would not be in a position to provide any certainty with respect to the continuity of the PETS¹⁶ subsidies¹⁷, the Lion Group, against all odds, was finally able to conclude a Subscription Agreement (the "Subscription Agreement") which, if approved by the

¹⁶ PETS: Programme d'électrification du transport scolaire.

¹⁷ The transaction involving the Québec government financial support that was to be submitted to the Court's approval had to be abandoned.

Court, was to allow the preservation of a portion of the Lion Group's business operations as a going concern, and, ultimately, the preservation of certain jobs in Québec.

- [20] On May 22, 2025, the Court issued the RVO approving the Subscription Agreement and the transactions contemplated thereunder (the "**Transactions**") which was rectified on June 6, 2025, to enable its recognition in concurrent proceedings in the United States of America
- [21] At the hearing on the RVO Application, the Court was informed that the Interim Lenders, which are the Applicants' principal secured creditors, were consulted throughout the SISP and supported the Court's approval of the Subscription Agreement and the implementation of the Transactions.
- [22] All in all, the restructuring process turned out to be very disappointing with the unexpected withdrawal of the financial support of the Québec government on April 30, 2025, which would have ensured a far greater portion of the Lion Group's business operations continuing as a going concern. Ultimately, the realization proceeds were insufficient to even cover in full the Interim Financing; therefore, all amounts that were due to creditors ranking behind the Interim Lenders, including the beneficiaries of the KERP Charge, the Financial Advisor Charge and the Directors' and Officers' Indemnification and Charge could not be satisfied¹⁸.
- [23] Needless to say, under that scenario, the secured creditors were to lose significantly, with the unsecured creditors not expecting any distribution whatsoever.
- [24] Other than the Objections of the Class Action Parties, no one else opposed the Court issuing the RVO with the Proposed D&O Release, hence the addition of the Carve-out.

1.2 The Mulhall Class Action

- [25] As previously mentioned, the Mulhall Class Action involves 14 defending Mulhall D&Os¹⁹ as well as the Underwriters and the Auditors. None of the Debtors are parties of the Mulhall Class Action.
- [26] The Court, having partially lifted the Stay of proceedings²⁰ to enable formal filing of the Application to authorize the Mulhall Class Action (the "**Mulhall Application**"), it is not up to this Court to analyze and consider its merits to determine whether the Objections filed by the Mulhall Action Parties are serious for the purposes hereof.

¹⁸ The Fifth Report of the Monitor dated May 15, 2025, par. 62.

¹⁹ The evidence adduced at the hearing did not enable the Court to identify which of the 14 defendants were the present directors or officers of the Lion Group.

²⁰ Paragraph 20 of the Second Amended and Restated Initial Order of February 14, 2025 ("**ARIO**") (2025 QCCS 585); also *supra*, note 5.

[27] On a *prima facie* basis, the Mulhall Application raises several serious and reasonably well-supported allegations of the Mulhall D&Os' misconduct, whether rooted in gross negligence and/or fraud²¹. Specifically, by way of firsthand statements from former Lion Electric employees, all of whom are apparently corroborated, Mr. Mulhall essentially alleged that:

- The Mulhall D&Os knew or deliberately avoided knowing that Lion Electric's production capacity was unrealistic, which translated into unachievable projections²²;
- The Mulhall D&Os knew or deliberately avoided knowing that Lion Electric's sale pipeline was significantly artificially inflated²³;
- The Mulhall D&Os knew or deliberately avoided knowing that fake customers were advertised to the investing public²⁴;
- The Mulhall D&Os knew or deliberately avoided knowing that Lion Electric's fleet was plagued with such extensive issues that key customers either ceased doing business with the Company or decreased their orders²⁵.
- [28] Acting on behalf of the Mulhall Class Action proposed group, Mr. Mulhall is seeking damages from the Mulhall D&Os as well as from the Underwriters and Auditors on a solidary basis.
- [29] Should the Court confirm the Full D&O Release sought by the Applicants, Mr. Mulhall would no longer be able to proceed against the Mulhall D&Os, leaving his recourse against the Underwriters and the Auditors.
- [30] Under such a turn of events, the Underwriters and Auditors would be precluded from exercising any recursory or subrogatory recourses against any of the Mulhall D&Os once released by this Court. This explains why the Underwriters and Auditors are contesting the Court granting the Full D&O Release, which would result in their being the sole defendants to the Mulhall Class Action without any means to exercise recursory or subrogatory recourses against any of the Mulhall D&Os, if necessary.

1.3 The New York Action and the New York Plaintiff

[31] The New York Plaintiff is the lead plaintiff in the New York Action, asserting claims against the following defendants: Northern Genesis Acquisition Corp. ("**Northern Genesis**"), Ian Robertson, Paul Dalglish, Michael Hoffman, Ken Manget, Brad Sparkes,

²¹ Mulhall Application, par. 73 to 111.

²² *Ibid.*, par. 92-94.

²³ *Ibid.*, par. 99-105.

²⁴ *Ibid.*, par. 110.

²⁵ *Ibid.*, par. 73-90.

Robert Schaefer, (legacy) Lion Electric Company, Marc Bédard (former and current CEO), and Nicolas Brunet (former CFO)²⁶ (collectively the "**New York Defendants**").

- [32] The New York Action alleges that, based in material part on grossly inflated forecasts for production and sales, Lion Electric secured a business combination with Applicant, Northern Genesis, a "blank check company"—i.e., a special purpose vehicle used essentially to effect capital stock exchanges and allow securities of Lion Electric to be publicly traded.
- [33] The New York Action alleges that, as Lion Electric failed to meet false sales forecasts on which investors based their decision to support the business combination and to exchange their shares in Northern Genesis into shares of Lion Electric pursuant to the terms of the applicable business combination agreement, the price of Lion Electric's stock fell far below the prices that Northern Genesis shareholders had paid before the transaction and the value of the Lion Electric stock that the transaction used for its exchange ratio, creating the loss alleged for those shareholders.
- [34] The New York Action is based on, and alleges, *inter alia*, violations of the Securities Exchange Act of 1934, a federal law of the United States of America which, among other things, established the Securities and Exchange Commission and regulates the secondary market for securities²⁷.
- [35] Incidentally, this Court had already dealt with and rendered orders involving the *Securities Exchange Act of 1934* in the present instance, as appears namely from paragraphs 74 and 75 of the *Amended and Restated Initial Order* rendered on February 14, 2025 (the "**ARIO**")²⁸:
 - [74] ORDERS that any decision by the Debtors to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "Securities Filings") that may be required by any federal, state, provincial or other law respecting securities or capital markets in Canada or in the United States, or by the rules and regulations of a stock exchange, including, without limitation, the Securities Act (Québec) and comparable statutes enacted by other provinces of Canada, Securities Act 1933 (United States) and the Securities Exchange Act of 1934 (United States) and comparable statutes enacted by individual states of the United States, the rules and regulations of the Autorité des marchés financiers (Québec) and other Canadian securities regulatory authorities, and the U.S. Securities and Exchange Commission, the TSX Company Manual, the NYSE Listed Company Manual and any other rules, regulations and policies of the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE) (collectively, the "Securities Provisions"), is hereby authorized, provided that nothing in this paragraph shall prohibit any

²⁶ US-1.

²⁷ US-2.

²⁸ 2025 QCCS 585.

securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of the Debtors failing to make any Securities Filings required by the Securities Provisions.

[75] ORDERS that none of the Directors, Officers, employees, and other representatives of the Debtors nor the Monitory and its directors, officers, employees and representatives shall have any personal liability for any failure by the Debtors to make any Securities Filings required by the Securities Provisions during the Stay Period, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have against the Directors, Officers, employees and other representatives of the Debtors of a nature described in section 11.1 (2) of the CCAA as a consequence of such failure by the Debtors. For greater certainty, nothing in this order is intended to or shall encroach on the jurisdiction of any securities regulatory authorities (the "Regulators") in the matter of regulating the conduct of market participants and to issue cease trade orders if and when required pursuant to applicable securities law. Further, nothing in this Order shall constitute or be construed as an admission by the Regulators that the Court has jurisdiction over matters that are within the exclusive jurisdiction of the Regulators under the Securities Provisions.

[36] On August 28, 2025, by letter from Ms. Leah Heifetz-Li of the Rosen Law Firm, the New York Plaintiff, through his American attorneys, advised the Applicants, the Monitor, and the Service List (as defined in the ARIO) of his objection to the Proposed D&O Release²⁹. A formal Notice of Objection was filed by Canadian counsel on September 3, 2025, which was modified on September 9, 2025.

1.4 The Delaware Action and the Delaware Plaintiffs

- [37] The Delaware Action reveals that the Delaware Plaintiffs are former public stockholders of Northern Genesis, which is a Delaware corporation.
- [38] As previously mentioned, the Delaware Action also alleges that Northern Genesis was a publicly traded special purpose acquisition company.
- [39] The Delaware Action mentions that pursuant to an investment agreement, the Delaware Plaintiffs had a right to redeem their Northern Genesis shares and receive a refund of their original investment (US\$10 per share) if Northern Genesis were to enter into a merger agreement.
- [40] The Delaware Action alleges that certain former directors of Northern Genesis were financially incentivized to push a merger through even if it was a bad deal for Northern Genesis' public stockholders. These directors, along with the "sponsor" of

²⁹ US-3.

Northern Genesis, invested over US\$8.8 million in Northern Genesis in exchange for "Private Placement Warrants" and "Founders Shares".

- [41] These Founders Shares, unlike the public shares, did not have any redemption rights and thus would be worth nothing if a merger did not happen.
- [42] Therefore, to preserve the value of their Founders Shares and Private Placement Warrants, these former directors of Northern Genesis worked hard to convince the corporation's public stockholders to support the eventual merger and to forego their redemption rights by publishing a proxy that made material misrepresentations and omitted key information that was necessary for Northern Genesis' public stockholders to make an informed decision on the merger.
- [43] In reliance on the alleged misleading proxy, Northern Genesis stockholders voted in favour of the merger.
- [44] On May 6, 2021, Northern Genesis completed a business combination with Lion Electric, after which Northern Genesis became a wholly owned subsidiary of Lion Electric.
- [45] Following this business combination, the Delaware Plaintiffs' shares were converted into Lion Electric shares and the Delaware Plaintiffs are now Lion Electric stockholders.
- [46] As a result, virtually all, including the Delaware Plaintiffs, were holding a stock worth US\$1.37 per share as of March 8, 2024 (the last trading day before the Delaware Action was filed), instead of having redeemed and getting back their original US\$10 investment. In short, Northern Genesis stockholders that continued to hold their Northern Genesis (and now Lion Electric) shares claim to have suffered massive damages.
- [47] The Delaware Plaintiffs asserted claims against certain former directors of Northern Genesis as well as Lion Electric and Messrs. Marc Bédard and Nicolas Brunet (collectively the "**Delaware Defendants**," and together with the New York Defendants, the "**U.S. Defendants**") in the Delaware Action pending in the United States before the Court of Chancery of the State of Delaware.
- [48] In the Delaware Action, the Delaware Plaintiffs allege that the Northern Genesis directors breached their fiduciary duties by making materially false statements and misleading statements that the Delaware Plaintiffs relied on in determining whether to exchange their Northern Genesis shares for Lion Electric shares³⁰.
- [49] The Lion Electric Defendants,³¹ who were responsible for preparing and providing the proxy Lion Electric projections, had legal and contractual obligations to ensure that

³⁰ US-4.

³¹ Lion Electric, Marc Bédard (former and current CEO) and Nicolas Brunet (former CFO).

the proxy did not "include any untrue statement of a material fact or omit to state any material fact," as set forth in Article 7.02 of the Merger Agreement³².

[50] In the end, the proxy relied upon by the Delaware Plaintiffs was false and misleading and contained material omissions about Lion Electric.

[51] On August 27, 2025, by letter from Ms. Christine M. Mackintosh of the law firm Grant & Eisenhofer P. A., the Delaware Plaintiffs advised the Applicants, the Monitor, and the Service List of their objection to the Proposed D&O Release. A formal Notice of Objection was filed by Canadian counsel on September 3, 2025, and subsequently modified on September 9, 2025.

2. QUESTIONS AT ISSUE

- [52] The issues to be determined by this Court, as addressed hereafter, are as follows:
 - Should this Court grant the Full D&O Release in favour of the Released Parties?
 - Did the Applicants meet the *Nexus Test*³³ with the use of the *Lydian Factors*³⁴?
 - Being a component of the RVO, does the Full D&O Release meet the requirements of section 36 CCAA?
 - Are the Class Action Parties acting as holders of equity claims thus precluding them from objecting to the Full D&O Release sought by the Applicants?
 - Is the Full D&O Release subject to the exception of section 5.1(2) CCAA?
 - What about the Insured Claim exception?

3. ANALYSIS

3.1 The Applicable Principles

- [53] It is important to bear in mind that even though the RVO was already issued and the Transactions contemplated therein completed, this case is nevertheless linked to the Debtors' RVO Application.
- [54] Section 36 *CCAA* provides that a debtor company may not sell or otherwise dispose of its assets outside the ordinary course of business unless authorized to do so by a court. Section 36(3) *CCAA* sets out a non-exhaustive list of the factors the Court may consider in determining whether to approve a sale, including:

³² Verified Class Action Complaint (S-4), par. 79.

³³ As defined hereafter.

³⁴ As defined hereafter.

a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

- b) whether the Monitor approved the process leading to the proposed sale or disposition;
- c) whether the Monitor filed with the Court a report stating that, in their opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- d) the extent to which the creditors were consulted;
- e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [55] On May 22, 2025, save and except for the opposition of the Attorney General of Canada regarding the intentions of the Debtors to incorporate in the proposed RVO provisions dealing with the WEPPA³⁵ as well as the Objections related to the proposed D&O Release, the Court was satisfied that the criteria of section 36 *CCAA* had been met and, consequently, approved the Transactions—with the Carve-out (and the *Caveat*) and after carving out as well any reference to the WEPPA—that were successfully completed shortly thereafter on May 23, 2025³⁶.
- [56] In assessing the effects of the proposed Transactions on stakeholders, the Court had to "look at the creditors as a whole (i.e., generally) and to the objecting creditors (specifically) and see if rights were compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights."³⁷
- [57] The general position voiced by the Class Action Parties was that it was not equitable for restructuring proceedings to change the relationship among creditors in ways that do not directly involve the Debtors. The *CCAA* is intended to facilitate compromises between insolvent companies and their creditors; it is not intended to alter the relationship among the creditors themselves³⁸.
- [58] The Court shares that view.
- [59] Although the Court found that the RVO with the Carve-out provision met at the time the requirements of s. 36 *CCAA*, the Court nevertheless finds that, for the reasons

³⁵ Wage Earner Protection Program Act, S.C. 2005, c. 47 ("WEPPA").

³⁶ As evidenced with the Certificate of the Monitor filed on May 23, 2025 (Seq. 59).

³⁷ Skeena Cellulose Inc. v. Clear Creek Contracting Ltd. (Skeena), 2003 BCCA 344, par. 59.

³⁸ Stelco Inc., Re (Stelco), 2005 CanLII 41379 (ON SC), par. 7.

that follow, the RVO with the Full D&O Release fails to respect the provisions of s. 36(3)(e):

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

[...]

- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; [...]
- [60] Of greater importance, while third-party releases have become common in *CCAA* sale transactions³⁹, they are not and should not be granted as of right. As Immer J. cautioned in *Xebec*, "it is not sufficient to simply acknowledge that it is common practice in *CCAA* proceedings to grant releases. A more principled approach is required"⁴⁰.
- [61] The Court also shares that view.
- [62] The Court must scrutinize the proposed Full D&O Release in light of the criteria set out recently in *Blackrock*⁴¹ (drawing from the Ontario decisions in *Lydian*⁴² and *Harte Golde*⁴³). The goal is to determine, at a minimum, whether the third-party releases are "reasonably connected to the proposed restructuring.⁴⁴"
- [63] Relying on *Blackrock*, the Court is to consider the following Lydian Factors:
 - a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
 - b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
 - c) whether the plan could succeed without the releases;
 - d) whether the parties being released were contributing to the plan; and
 - e) whether the release benefited the Applicants as well as the creditors generally. 45

³⁹ Re Nelson Education Ltd., 2015 ONSC 5557, par. 48-49; Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.) (Former XBC), 2023 QCCS 4975, par. 88.

⁴⁰ FormerXBC, supra, note 39, par. 67.

⁴¹ Arrangement relatif à Blackrock Metals Inc. (Blackrock), 2022 QCCS 2828, par. 130.

⁴² Lydian International Limited (Re) (Lydian), 2020 ONSC 4006.

⁴³ Harte Gold Corp. (Re) (Harte Gold), 2022 ONSC 653.

⁴⁴ Metcalfe & Mansfield Alternative Investments II Corp., (Re) (Metcalfe), 2008 ONCA 587, par. 43; Société industrielle de décolletage et d'outillage (SIDO) Itée (Arrangement relatif à), 2010 QCCA 403, par. 37, Lydian, supra, note 42, par. 53; Delta 9 Cannabis Inc. (Re), (Delta), 2025 ABKB 52.

⁴⁵ Blackrock, supra, note 41, par. 130.

[the "Lydian Factors"]

[64] Earlier in *Metcalfe*⁴⁶, the Court of Appeal of Ontario presented criterion d) under a somewhat more precise light, namely that *the parties* [the D&Os] *who are to have claims against them released are contributing in a tangible and realistic way to the Plan*:

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record: (a) The parties to be released are necessary and essential to the restructuring of the debtor; (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it; (c) the Plan cannot succeed without the releases; (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[Emphasis added]

[65] Therefore, third-party releases must be justified as part of the compromise or arrangement between the debtors and its creditors:

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.⁴⁷

[Emphasis added]

- [66] The exercise of applying the Lydian Factors to a given situation is known as the *Nexus Test*⁴⁸, where the main objective is to determine the connexity between the third-party releases sought and the outcome of the *CCAA* compromise or arrangement. With the passing years, the discretion was broadened to cover "liquidating CCAAs⁴⁹".
- [67] The determination of the level of connexity between a proposed release and the outcome of the arrangement or compromise is even more relevant when the release aims to quash litigation between third parties:

Having said that, CCAA proceedings are often not the correct venue to settle outstanding litigation. Where third-party releases have the effect of quashing litigation, practitioners must consider whether the releases being sought are

⁴⁶ Metcalfe, supra, note 44, par. 71.

⁴⁷ Metcalfe, supra, note 44, par. 70.

⁴⁸ L. Morin et A. Mojtahedi, Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act, 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, page 4/40; *Metcalfe*, *supra*, note 44, par. 70.

⁴⁹ 9354-9186 Québec inc. v. Callidus Capital Corp. (Callidus), 2020 SCC 10.

essential to a debtor's restructuring, the merits of the potential claims that are being released and the position of affected parties.⁵⁰

- [68] All the Lydian Factors need not to be met in any given case, as they are not cumulative. Some factors may assume greater weight in one case than another.⁵¹
- [69] The Court believes that third-party releases should be granted in exchange for a meaningful contribution to the restructuring process of the debtor.⁵²
- [70] Although *Metcalfe* was dealing with a plan of arrangement incorporating third-party releases—therefore hinged on the vote of the creditors—evidence of a meaningful contribution is even more important in the context of RVOs, where creditors are not called upon to vote on a plan of arrangement, as they can only voice their objections at the hearing on an application to issue an RVO.
- [71] Be that as it may, in all circumstances, a debtor seeking third-party releases bears the burden of establishing that said third-party releases meet the *Nexus Test* and, more particularly, that they are justified in the context of the restructuring.⁵³
- [72] In the presence of the Objections filed by the Class Action Parties, the Court must also consider the quality of the claims they wish to maintain with the Carve-out:
 - [29] In this case, I would add an additional factor to these factors, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.⁵⁴
- [73] While the Court does not have to make an exhaustive assessment of the merits of the Class Action Plaintiffs' claims against the defending D&Os in the three Class Actions, said claims must nevertheless appear serious and founded on a *prima facie* basis. Therefore, the more serious and well founded the Class Action Parties' claims appear on a *prima facie* basis, the more the Court will be inclined to carve out those claims from the Full D&O Release. Conversely, if those claims appear fragile or speculative at best, the

⁵⁰ C. J. Hunter et V. A. Allen, Please Release Me: The Evolution of Releases in Restructuring Proceedings, 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13553, page 14/32.

⁵¹ Re Green Relief Inc. (Green Relief), 2020 ONSC 6837, par. 28.

⁵² Metcalfe, supra, note 44, par. 32:

^[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

For a supersymptotic formula in the supersymptotic formula in t

⁵⁴ Green Relief, supra, note 51, par. 29; Delta, supra, note 44, par. 31; L. Morin et A. Mojtahedi, Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act, 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, page 4/40.

probabilities that the Court should approve the Full D&O Release without the Carve-out will increase:

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described [sic] this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

[Emphasis added]

- [74] All in all, third-party releases are the exception, not the rule. Where not necessary to the restructuring, they should not be approved *blindly and systematically*⁵⁶, especially on the basis that in the past, several judges granted third-party releases in similar CCAA proceedings.⁵⁷
- [75] With all due respect, referring to or relying on previous precedents is not sufficient nor necessarily binding on the application judge.
- [76] Each application to issue third-party releases—especially in the context of RVOs—must be assessed and considered in light of the relevant facts specific to the case at hand, not upon mere allegations.
- [77] After all, the goal is to determine, at a minimum, whether the releases are "reasonably connected to the proposed restructuring."⁵⁸ In other words, the Court must assess the role and the importance of the third-party releases in the proposed transaction to be approved via an RVO, and question whether the proposed releases are sufficiently connected to the restructuring objectives of the debtor.

⁵⁵ Green Relief, supra, note 51, par. 30.

⁵⁶ Blackrock, supra, note 41 par. 129.

⁵⁷ Allen-Vanguard Corporation (Re) ("Allen-Vanguard"), 2011 ONSC 5017, par. 60-61; Canwest, supra, note 53, par. 29.

Metcalfe, supra, note 44, par. 43; Société industrielle de décolletage et d'outillage (SIDO) Itée (Arrangement relatif à), 2010 QCCA 403, par. 37; Lydian, supra, note 42, par. 53; Delta, supra, note 44, par. 116-124.

[78] The Court shares the views of authors Luc Morin (now at the Superior Court) and Arad Mojtahedi, concerning third-party releases benefiting D&Os:

To those who suggest that releases in favour of D&O are akin to a reward for them simply abiding by their fiduciary care and maintenance duties, we would point to the CCAA court's wide discretion in granting such releases. Releases ought to be linked to a substantive contribution to the successful restructuring of the debtor company from the D&O that goes beyond their typical exercise of fiduciary care and maintenance duties. Directors and officers are also usually uniquely positioned to assist a successful restructuring.

In the end, not all D&O are created equal: depending on their contribution to the successful restructuring of the business, some D&O could benefit from a third-party release, while others might not. Mere respect for their fiduciary care and standard duties should not be sufficient for D&O to obtain a court-issued third-party release. For that kind of contribution, D&O, who by the very nature of their functions have access to privileged information allowing them to appropriately gauge their risk and protect themselves ab initio, should rely on their D&O insurance policy. It is our view that court-issued releases should serve as an incentive to D&O to go beyond the exercise of their fiduciary care and maintenance duties, ultimately to the benefit of all stakeholders involved. As with all third-party releases, those in favour of D&O must be rationally connected to the purpose of the restructuring and provided in exchange for a meaningful contribution toward its achievement.⁵⁹

[Emphasis added]

3.2 Paragraphs 61 and 62 of the RVO

[79] For a better understanding, it is relevant and useful to reproduce *in extenso* paragraphs 61 and 62 of the RVO that deal with the D&O Release, the *Released Parties*, the *Released Claims*, the *Class Action Claims* and the *Insured Claim*:

[61] **ORDERS** that effective upon the issuance of the Monitor's Certificate, <u>all present and former directors and officers of the Debtors</u>, as well as all Persons deemed to be a present or former director or officer of the Debtors as a result of its management or supervision of the management of the business and affairs of the Debtors (collectively, the "Released Parties") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever, whether direct or indirect, known or unknown, absolute or contingent,

MORIN, LUC and ARAD MOJTAHEDI, "Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act," 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, p. 15.

accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not vet due, in law or equity, whether based in statute or otherwise and whether based in whole or in part on any act or omission, obligation, transaction, offer, investment proposal, dealing or any declaration under the Business Corporations Act (Québec), or on any other occurrence existing or taking place prior to the commencement of the CCAA Proceedings or the issuance of the Monitor's Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Debtors or their assets, business or affairs, or prior dealings with the Debtors, wherever or however conducted or governed. the administration and/or management of the Debtors and these proceedings (collectively, the "Released Claims"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties and are not vested nor transferred to Excluded Cos or to any other entity and are extinguished, provided, however, that nothing in this paragraph shall waive, discharge, release, cancel or bar (i) (A) any claim against the Released Parties arising from fraud or willful misconduct, nor any claim against the Released Parties that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or (B) any Insured Claim (as defined below), and (ii) the Class Action Claims (as defined below), provided that the determination of whether the foregoing release or any other release should be ordered in respect of the Class Action Claims will be adjudicated by this Court at a subsequent hearing. For purposes of this paragraph, the "Class Action Claims" mean any claims (including the right of any person to bring recursory claims, claims for contribution and indemnity, subrogated claims, or other third party claims) against the Released Parties arising from (i) the verified amended class action complaint dated March 11, 2024 filed by Ahuya Schachter, Michael Smith, Douglas Neuiahr, Samhita Gera, and Denish Bhavsar against Ian Robertson, Ken Manget, Christopher Jarratt, Michael Hoffman, Paul Dalglish, Brad Sparkes, Robert Schaefer, Mark Bedard, Nicolas Brunet, and The Lion Electric Company before the Court of Chancery of the State of Delaware in matter C.A. No. 2023-1112-MTZ. (ii) the amended class action complaint for violation of the federal securities laws dated August 27, 2024 filed by Jacques Jaar against Northern Genesis Acquisition Corp., Ian Robertson, Paul Dalglish, Michael Hoffman, Ken Manget, Brad Sparkes. Robert Schaefer, The Lion Electric Company, Marc Bedard, and Nicolas Brunet before United States District Court Southern District of New York in matter 1:24cv-02155-JLR), and (iii) the motion for the authorization to institute a class action claim and for leave to institute an action in damages pursuant to the Securities Act (Québec) instituted by Adam B. Mulhall (as the plaintiff representative on behalf of the envisioned class to be covered) and filed with the Superior Court of Québec, District of Montréal (Class Action Division) bearing court number 500-06-001366-257, dated February 21, 2025.

[62] **ORDERS** that, notwithstanding anything to the contrary contained in paragraph [61] of this Order or elsewhere, <u>any Released Claims that are covered by any insurance policy of the Debtors and only to the extent of any such available insurance</u> (each, an "**Insured Claim**"), <u>shall not be waived, discharged, released, cancelled or barred by this Order,</u> and any Person having an Insured Claim shall be entitled to recovery in respect of such Insured Claim but solely from, and to the extent of, the proceeds of the applicable insurance policies available in respect of

such claim, and Persons with Insured Claims shall have no right to, and shall not, directly or indirectly, seek any recovery in respect thereof from the Debtors or the Released Parties, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable insurance policies. For greater clarity, (i) if no insurance is available to cover a Released Claim, such claim shall be a Released Claim (except for the Class Action Claims, until the court's final decision as to whether or not they should be released, pursuant to paragraph [61] of this Order), and (ii) any claims that may be subject to recovery under any insurance policies shall be deemed not to be vested nor transferred to the Excluded Cos. or to any other entity.

[Emphasis added]

- [80] The Court cannot ignore the breadth of the definition of the *Released Parties* that unusually purports to apply to *persons* <u>deemed to be</u> a present or former director or officer of the Debtors as a result of its management or supervision of the management of the business and affairs of the Debtors. Needless to say, the net cast by the Debtors is purposely very wide, yet vague, to cover additional persons who are not directors or officers but that may be "deemed to be."
- [81] Expect hours of litigation in view to determine exactly who is really "deemed to be".
- [82] We are far from the *puny* definition of "*Releases*" offered at paragraph 1c) of the RVO Application⁶⁰.
- [83] It is obvious that the proposed definition of "Released Claims" if approved by the Court, would cover the claims of the Class Action Plaintiffs against the D&Os defending such actions. This definition also aims to protect the D&Os against any recursory or subrogatory claims by the Underwriters or the Auditors.
- [84] With the advent of RVOs that are becoming increasingly popular to dispose of shares and/or to realize assets of a debtor company without having to resort to the vote of their creditors in the context of a formal compromise or arrangement, debtors (and creditors at times) are increasingly pushing the envelope, as evidenced by the overly broad and unusual definition of *Released Parties*. It is up to the judge called upon to approve an RVO to be particularly vigilant, as the true intentions of the debtor company who took the time to prepare the overly broad and purposely vague definition are not always obvious to the stakeholders, whose rights and recourses may be compromised as a result thereof, especially since applications to approve an RVO are often filed on a somewhat urgent basis to close the deal with a short lead time afforded to the creditors. Moreover, under such circumstances that are becoming increasingly popular, several of the exhibits invoked in support of the application are filed under seal and not disclosed to the creditors and stakeholders.

⁶⁰ See paragraph 6 above.

3.3 THE POSITION OF THE PARTIES

[85] The Mulhall Class Action Plaintiff and the U.S. Plaintiffs essentially voiced the same arguments given that they all intend to pursue their respective actions, rights and recourses against the D&Os called upon to defend the three Class Actions.

[86] In their view, the Debtors are seeking to permanently remove the Carve-out from the Full D&O Release, thereby effectively unfairly compromising their interests as "defrauded" shareholders while insulating the very individuals responsible for the Debtors' demise.

3.3.1 The Mulhall Class Action

- [87] The fourteen Mulhall D&Os together with the Underwriters and the Auditors are named as defendants in the Mulhall Application of February 21, 2025⁶¹.
- [88] The Mulhall Application asserts claims against the Mulhall D&Os, the Underwriters, and the Auditors, on a solidary basis.
- [89] Incidentally, the Applicants never disclosed the identity and the current standing of the *Released Parties*—including the "deemed" directors and officers—that stand to benefit from their Full D&O Release.
- [90] First and foremost, Mr. Mulhall as well as the Underwriters and Auditors, argued that the Applicants failed to prove and convince that the participation of the Mulhall D&Os was essential to the envisioned restructuring via the Transactions that were approved with the RVO.
- [91] As Plaintiff, Mr. Mulhall's arguments can be summarized as follows:
 - The Mulhall Class Action asserts causes of action under the Securities Act⁶² (the "Securities Act") and article 1457 of the Civil Code of Québec, (the "CCQ") based on alleged misrepresentations to shareholders;
 - the Mulhall Class Action does not name any of the Applicants/Debtors as defendants;
 - The Mulhall Class Action rests upon the alleged misconduct of the Mulhall D&Os—and of the Underwriters and Auditors—rooted in their gross negligence and/or fraud as for more than three years, investors were allegedly misled into believing that the Lion Electric vehicles were high-performing and that its production capacity matched its expanding sales pipeline; nothing was further from the truth, as Lion

⁶¹ Bearing court file no. 500-06-001366-257.

⁶² CQLR c V-1.1.

Electric consistently fell significantly short of its maximum production capacity⁶³ and inflated its sales pipeline by recording artificial sales, thereby boosting reported figures by approximately 94%;

- One of the principal tenets of insolvency law is to encourage entrepreneurial risk-taking by providing a fresh start for honest but unfortunate debtors whose business ventures did not pan out; it is not meant to allow debtors—or third parties—to "defraud" shareholders and then be absolved through the reorganization process:
- There is no practical reason to grant the Full D&O Release sought by the Debtors;
- In addition to the lack of any pragmatic reason to grant the Full D&O Release, there is no equitable reason to do so;
- In fact, the RVO was approved and successfully completed—and 9543-1799
 Québec Inc. (i.e., ResidualCo) was constituted—all without the third-party Full D&O Release presently sought by the Debtors;
- While financiers may be willing to overlook past misconduct, "defrauded" shareholders should not be made to subsidize the Debtors' reorganization by surrendering their rights against the non-debtor Mulhall D&Os; in other words, this Court should not permit accountability to be swept aside under the guise of supposed expedience and convenience.⁶⁴

3.3.2 The Underwriters

- [92] Pursuant to certain Underwriting Agreements⁶⁵, the Underwriters acted as agents, bookrunners, and underwriters in connection with two distributions of Lion Electric's shares in 2022⁶⁶.
- [93] The Underwriters are essentially blamed for having certified two prospectuses containing misrepresentations allegedly made by Lion Electric and the Mulhall D&Os—which they deny. While the Mulhall Class Action Plaintiff asserts a statutory cause of action against the Underwriters, the faults alleged in the Mulhall Application relate mainly to the statements, representations, and communications issued by Lion Electric and the conduct of the Mulhall D&Os.
- [94] Pursuant to the Underwriting Agreements⁶⁷, the Underwriters are entitled to claim indemnity from Lion Electric in connection with the Mulhall Class Action (the "**Contractual Indemnity**"). Even if the Underwriters also hold potential indemnity claims against Lion

⁶³ Apparently 63% short.

⁶⁴ Mulhall's Petitioner/Objecting Party's Plan of Argument, par. 1-7.

⁶⁵ **U-2**

⁶⁶ Underwriters' Notice of Objection, par. 4.

⁶⁷ U-2.

Electric, counsel for the Underwriters advised the Court that their clients were not relying on this category of claims for the purpose of their present objections, the whole without prejudice to their ability to assert such claims in the future. Therefore, for the purposes hereof, the Underwriters do not depend on their Contractual Indemnity against Lion Electric.

- [95] In any event, the Court is only called upon to rule on the Full D&O Release with or without the Carve-out found at paragraphs 61 and 62 of the RVO dealing with the *Released Parties* as opposed to the Debtors.
- [96] To the extent the Underwriters may be found liable under the statutory scheme or under the CCQ, they also hold potential recursory claims against any of the Mulhall D&Os.
- [97] The Full D&O Release currently drafted and sought by the Applicants purports to release all such claims and potential claims of the Underwriters, ⁶⁸ while forcing them to defend the Mulhall Class Action—alone with the Auditors—in the absence of the Mulhall D&Os while denying them any recursory recourses against the latter.
- [98] The Underwriters argued that the Full D&O Release sought by the Debtors should not be approved for the following reasons:
 - The wording of the Full D&O Release is extremely broad, purporting to cover all manner of claims against an evenly broad yet vague definition of current and former D&Os, irrespective of each D&O's potential role in the CCAA process; moreover, the Applicants decided that the claims against any of the D&Os would not even be vested in ResidualCos, but entirely extinguished;
 - The Full D&O Release is contrary to the provisions of s. 5.1(2)(b) *CCAA*, which prevents such type of release in favour of the directors under the present circumstances; while the Superior Court has recently permitted directors' releases under s. 5.1(2)(b) *CCAA* in *Nemaska*⁶⁹ and *Taiga*⁷⁰, these cases do not properly reflect the text, intent, or objectives of the *CCAA*; on proper reading, s. 5.1(2)(b) *CCAA* prohibits directors' releases for pre-filing conduct based on alleged securities misrepresentations;
 - Even if D&O releases are permissible under the CCAA—depending on the prevailing circumstances—it should not be permitted in the present case; the Full D&O Release sought by the Applicants does not meet the Nexus Test to satisfy the Lydian Factors regarding third-party releases; in fact, the Full D&O Release

⁶⁸ Underwriters' Outline of argument opposing Applicants' Application for Approval and Vesting Order, par. 4.

⁶⁹ Arrangement relatif à NMX Residual Assets Inc. (Nemaska), 2025 QCCS 1205 (Leave to appeal referred to a panel of the Court, 500-09-700374-259 (2025 QCCA 680); leave to appeal deemed unnecessary, as it is a *de Plano* appeal (2025 QCCA 1365)).

⁷⁰ Lacerte c. Bruneau (Taiga), 2025 QCCS 1853.

sought by the Applicants threatens to extinguish the Underwriters'—and the Auditors'—recursory or indemnity claims against the Mulhall D&Os without any connection whatsoever with the restructuring objectives of the present CCAA proceedings; the Full D&O Release was never and is still not necessary to achieve the Applicants' restructuring objectives; indeed, the Applicants were able to finalize and close the Transactions contemplated in the RVO without the Full D&O Release being approved without the Carve-out:

- Finally, the CCAA should not be used to rearrange relationships between non-debtor stakeholders unless the restructuring really requires it; in the present case, the Full D&O Release aims to compromise the Underwriters' recursory claims against the Mulhall D&Os and expose the Underwriters to greater risks in the Mulhall Class Action; by contrast, the Mulhall Class Action Plaintiff would retain remedies against the Underwriters—and the Auditors—for the alleged faults of the Mulhall D&Os; it is fundamentally unfair and inequitable to reshape the litigation landscape between third parties in such a manner without a pressing restructuring objective.⁷¹

[99] Counsel for the Underwriters pointed out that the Mulhall Class Action is not a theoretical future claim; it was filed after the Second Amended and Restated Initial Order was issued on February 14, 2025, with the permission of this Court. Therefore, the parties and the Court have all the information they need to craft a solution which ensures that the interaction between the Full D&O Release, the Mulhall Class Action, and the Underwriters' recursory and subrogatory claims is fair and knowable in advance. Such a solution needs not to—and does not—interfere with the Applicants' restructuring, which has now been completed successfully.

[100] The Underwriters proposed that the appropriate D&O Release should be maintained with the Carve-out of the Class Action Claims in its entirety. This would permit the Mulhall Class Action to proceed and permit the Underwriters to assert all their recourses in respect of the same. At the very least, the D&O Release should specify that the releases do not affect the ability of the Underwriters to claim contribution from the Mulhall D&Os in the Mulhall Class Action.

[101] Should the Court not uphold the Underwriters' proposed course of action described above, in the alternative, the Court should declare that any future recovery in the Mulhall Class Action (should it proceed past authorization) be limited only to the portion of the damages potentially attributable to the liability of the Underwriters—as opposed to the solidary condemnation sought by Mr. Mulhall—as will be eventually determined by the Court on the merits.

⁷¹ Underwriters' Outline of argument opposing Applicants' Application for Approval and Vesting Order, par. 6-8.

3.3.3 The Auditors

[102] While the Underwriters are blamed for having assisted Lion Electric and the Mulhall D&Os with the two distributions of Lion Electric's shares in 2022 without having verified the veracity and completeness of the information found in the prospectuses, the Auditors' liability stems from their role in certifying financial and accounting documents—allegedly containing false misleading and fraudulent misrepresentations—without respecting the applicable professional standards of diligence of auditors.

[103] The Auditors argued without any admissions whatsoever that, for the purposes hereof, the allegations of the Mulhall Class Action relating to the Mulhall D&Os had to be held to be true and that, *prima facie*, said allegations appeared sufficiently serious to warrant the Carve-out that should also benefit the Auditors.

[104] As to the other arguments justifying maintaining the Carve-out in place, counsel for the Auditors essentially echoed the other Class Action Parties' submissions. Therefore, it will not be necessary to reiterate the same herein.

3.3.4 The Court's assessment of the Mulhall Class Action

[105] Without expressing any opinion on the merits of the Mulhall Class Action pursuant to the Mulhall Application, the Court shares the view of counsel for the Auditors that, taken as to be true on a *prima facie* basis, the allegations made in the Mulhall Application with respect to the Mulhall D&Os are serious enough to warrant the Court's finding that, *prima facie*, the Mulhall Application does not appear to be frivolous, far from it.

[106] Removing the Carve-out provisions as proposed by counsel for the Applicants would yield unfair and inequitable results whereby, on the one hand, Mr. Mulhall and the group of shareholders that he purports to represent would be deprived of their rights and recourses against the Mulhall D&Os personally and, on the other hand, the Underwriters and the Auditors would end up having to defend alone the Mulhall Class Action essentially based on the conduct—or the alleged misconduct—of the Mulhall D&Os without any further recursory, subrogatory or indemnity recourses against them.

3.3.5 The New York Action and the Delaware Action

[107] Without neglecting the seriousness of their arguments put forward at the hearing, counsels for the U.S. Plaintiffs essentially reiterated, *mutatis mutandis*, the grounds of objection and contestation argued by the Mulhall Class Parties relating to the Mulhall Class Action, to the extent that they did not constitute any waiver or renunciation of the U.S. Plaintiffs' rights and recourses.

[108] In particular, the U.S. Plaintiffs concurred with the notion—as denounced by the other Class Action parties but which this Court is currently incited to adopt by the Applicants—that this Court should not mechanically apply precedents of specious

applicability, and resort to "path dependency" where prior decisions "are cited as principled authority without revisiting their underlying reasons."⁷²

[109] The present restructuring, which ended, in essence and most unfortunately, as nothing more than a hasty liquidation process culminating in a realization qualified as "famélique" by counsel for the Interim Lenders, harbours none of the attributes of a successful rehabilitation that would warrant the exceptional relief sought at this stage with respect to the Full D&O Release.

[110] Counsel for the U.S. Plaintiffs also pointed out that there is a glaring need for the Court to, at best, remain mindful of and committed to the restrictions set out in the *CCAA*⁷³ and, ought to, in any event, refrain from granting relief that it is manifestly not "appropriate in the circumstances" which circumstances are wholly distinguishable from the precedents relied upon by the Applicants.

[111] Counsel added that, the cornerstone teaching of the Supreme Court's decision in *Callidus*⁷⁵ is that the *CCAA* (and the BIA) must not be invoked in furtherance of improper or unnecessary purposes—that the Court's discretion under the *CCAA* "advances the basic fairness that 'permeates Canadian insolvency law and practice'", which fairness is breached "when only some face the risks, while others actually benefit from the situation."⁷⁶ In other words, "Callidus ultimately affirms that the legitimacy of the process depends not just on what courts can do, but on how insolvency tools are deployed and for what purpose."⁷⁷

3.3.5.1 The Court's assessment of the New York Action

[112] As previously mentioned, according to the *Amended Class Action Complaint for Violation of the Federal Securities Laws* dated August 27, 2024⁷⁸, the New York Plaintiff is the lead plaintiff in the New York Action, asserting claims against the New York Defendants, including *inter alia*, the Debtors Northern Genesis and Lion Electric as well as Marc Bedard (CEO and founder of Lion Electric), and Nicolas Brunet (CFO of Lion Electric).

[113] The New York Action alleges that, based in material part on grossly inflated forecasts for production and sales, Applicant Lion Electric secured a business combination with Applicant, Northern Genesis, a "blank check company"—i.e., a special

M Peihani, "Rethinking the Case for Reverse Vesting Orders" in Canadian Insolvency Law (August 19, 2025), U B C Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=5397828 or http://dx.doi.org/10.2139/ssrn.5397828, page 20-21 [Peihani].

⁷³ Section 11 CCAA.

⁷⁴ Ibid.

⁷⁵ Callidus, supra, note 49.

⁷⁶ Callidus, supra, note 49, par. 75 citing Janis P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" page 27.

⁷⁷ Peihani, supra, note 72, page 8.

⁷⁸ US-1.

purpose vehicle used essentially to effect capital stock exchanges and allow securities of Lion Electric to be publicly traded.

- [114] As per the New York Action, as Lion Electric failed to meet their false sales forecasts on which investors based their decision to support the business combination and to exchange their shares in Northern Genesis into shares of Lion Electric pursuant to the terms of the applicable business combination agreement, the price of Lion Electric's stock fell far below the prices that Northern Genesis shareholders had paid before the transaction and the value of the Lion Electric stock that the transaction used for its exchange ratio, creating the loss alleged for those shareholders.
- [115] The New York Action is based on, and alleges, inter alia, violations of the Securities Exchange Act of 1934⁷⁹, a federal law of the United States of America which, among other things, established the Securities and Exchange Commission and regulates the secondary market for securities⁸⁰. The New York Action does not rest on Canadian statutes and legislation.
- [116] On August 28, 2025, the New York Plaintiff, through his American attorneys, advised the Applicants, the Monitor, and the Service List (as defined in the ARIO) of his objections to the Full D&O Release⁸¹.
- [117] The Court finds that the allegations of the Amended Class Action Complaint for Violation of the Federal Securities Laws (Jury Trial Demanded) dated August 27, 202482, taken to be true are. prima facie, sufficiently serious to be considered by the Court for the purposes hereof.

3.3.5.2 The Court's assessment of the Delaware Action

[118] Pursuant to the Verified Amended Class Action Complaint dated March 11, 202483, the Delaware Plaintiffs alleged that:

- the Delaware Plaintiffs are former public stockholders of Debtor Northern Genesis, which is a Delaware corporation that was a publicly traded special purpose acquisition company;
- pursuant to an investment agreement, the Delaware Plaintiffs had a right to redeem their Northern Genesis shares and receive a refund of their original investment (US\$10 per share) if Northern Genesis were to enter into a merger agreement;

⁷⁹ US-2.

⁸⁰ *Ibid*.

⁸¹ US-3.

⁸² US-1. 83 US-4.

- certain former directors of Northern Genesis were financially incentivized to push a merger through even if it was a bad deal for Northern Genesis' public stockholders. These directors, along with the "sponsor" of Northern Genesis, invested over US\$8.8 million in Northern Genesis in exchange for "Private Placement Warrants" and "Founders Shares⁸⁴":

- these Founders Shares, unlike the public shares, did not have any redemption rights and thus would be worth nothing if a merger did not happen;
- therefore, to preserve the value of their Founders Shares and Private Placement Warrants, these former directors of Northern Genesis worked hard to convince the corporation's public stockholders to support the eventual merger and to forego their redemption rights by publishing a proxy that made material misrepresentations and omitted key information that was necessary for Northern Genesis' public stockholders to make an informed decision on the merger;
- in reliance on this misleading proxy, Northern Genesis stockholders voted in favour of the merger;
- on May 6, 2021, Northern Genesis completed a business combination with Lion Electric, after which Northern Genesis became a wholly owned subsidiary of Lion Electric;
- following this business combination, the Delaware Plaintiffs' shares were converted into Lion Electric shares and the Delaware Plaintiffs are now Lion Electric stockholders;
- as a result, virtually all, including the Delaware Plaintiffs, are now holding a stock worth US\$1.37 per share as of March 8, 2024 (the last trading day before the Delaware Action was filed), instead of having redeemed and getting back their original US\$10 investment; in short, Northern Genesis stockholders that continued to hold their Northern Genesis (and now Lion Electric) shares have suffered massive damages;
- the Northern Genesis directors were aided and abetted by Defendants Lion Electric, Marc Bédard⁸⁵ and Nicolas Brunet⁸⁶, who breached their fiduciary duties by making materially false statements and misleading statements that the

The Founders are Defendants Robertson, Dalglish, Hoffman, Manget, Sparkes, and Schaefer. The Founders Shares—unlike the public shares—did not have any redemption rights and thus would be worth *nothing* if a deal did not close. To preserve the value of their Founders Shares and Private Placement Warrants, the NGA Director Defendants worked hard to convince NGA's public stockholders to support the Merger and to forego their redemption rights by publishing a proxy that made material misrepresentations and omitted key information that was necessary for NGA's public stockholders to make an informed decision on the Merger. —U.S. Plaintiffs Notice of Objection, par 20-23.

⁸⁵ Lion Electric CEO and founder.

⁸⁶ Lion Electric Executive Vice-President and CFO.

Delaware Plaintiffs relied on in determining whether to exchange their Northern Genesis shares for Lion Electric shares;

- the Lion Electric Defendants⁸⁷ had legal and contractual obligations to ensure that the proxy statement to secure stockholder approval did not include any untrue statement of a material fact or omit to state any material fact.
- [119] On August 27, 2025, the Delaware Plaintiffs, through their American attorneys, advised the Applicants, the Monitor, and the Service List of their objection to the Full D&O Release⁸⁸.
- [120] The Delaware Class Action is essentially similar to the New York Action, with almost the same Defendants, including the three Lion Electric Defendants and similar causes of action.
- [121] The Court reaches the same conclusion for the Delaware Action than the one expressed at paragraph 117 above concerning the *prima facie* seriousness of the New York Action.
- [122] Applying the test of *Green Relief*⁸⁹, the Court is satisfied with the quality of the claims the U.S. Plaintiffs wish to maintain with the Carve-out.
- [123] In conclusion and without expressing any opinion whatsoever on their merits and chances of success, the Mulhall Class Action and the U.S. Actions offer on a *prima facie* basis, serious arguments vis-à-vis their respective defendants and more particularly, the defendants falling in the overbroad definition of *Released Parties*, namely *all present and former directors and officers of the Debtors, as well as <u>all Persons deemed</u> to be a present or former director or officer of the Debtors as a result of its management or supervision of the management of the business and affairs of the Debtors.*
- [124] Moreover, the U.S. Defendants—in both U.S. Actions—are not being sued for liabilities they face under provincial, federal or territorial statutes; they are not being sued for any liability *qua* director under these statutes; they did not resign in the vicinity of insolvency; and there is no relation whatsoever between the U.S. Claims, the Full D&O Release sought, and the restructuring of the Lion Group.

⁸⁷ Lion Electric, Marc Bédard as CEO and founder and Nicolas Brunet as Executive Vice-President and CFO are collectively referred to as the "**Lion Electric Defendants**".

[∞] US-5

⁸⁹ Green Relief, supra, note 51, par. 29-30.

3.3.6 The Applicants

[125] As at September 30, 2024, the Lion Group had reported outstanding indebtedness in the amount of US\$499,765,196, on a consolidated basis, with a secured indebtedness of approximately US\$216,076,804.17⁹⁰.

[126] Counsel for the Applicants placed significant emphasis on the pre-filing and post-filing restructuring efforts of their clients, whom they refer to as the Lion Group. These efforts sought to raise much-needed capital to maintain their operations. It ultimately culminated with very disappointing results, as the Interim Lenders were not even able to recover their entire Interim Financing, also leaving in a lurch the parties benefiting from the KERP Charge, the Financial Advisor Charge and the Directors' and Officers' Indemnification and Charge who will not receive any money or be able to rely on the same. Even the secured creditors incurred significant losses without forgetting the unsecured creditors who are entitled to nothing.

[127] As a matter of interest, at paragraph 11(a) of Applicants' Supplemental Memorandum of Arguments of September 1, 2025 (the "SMOA"), while identifying all the parties to the Mulhall Class Action, counsel referred tersely to the Mulhall D&Os as follows:

11 (a) certain of the Lion Group's (former) directors and officers;

[128] The Court draws from the foregoing that certain of the Mulhall D&Os are *former* directors and officers of the Lion Group and that with the use of the words "*certain of the*", they only represent a portion of the unidentified D&Os or "*deemed D&Os*" forming part of the Applicants' definition of *Released Parties* in the RVO.

[129] The Applicants' SMOA also contains several comments and allegations that are tantamount to a form of defence to the merits of the Mulhall Application. Again, it is not up to this Court to ponder the merits of the Mulhall Class Action or of the Mulhall Application. In any event, the Court already found on a *prima facie* basis that the Mulhall Application contemplates a serious recourse against the Mulhall D&Os, *inter alia*.

[130] As a preliminary comment, counsel for the Applicants pointed out that only the Mulhall Action Parties filed their Objections properly, alluding to the failure of the U.S. Plaintiffs to properly notify their own objections to the Full D&O Release⁹¹.

[131] Despite having been duly advised of the Lion Group's RVO Application seeking the approval of their proposed D&O Release and advised of the hearing of September 3, 2025, Applicants' counsel argued that no party other than Mulhall Action Parties had properly notified their grounds of opposition to the proposed D&O Release, thus disqualifying the U.S. Plaintiffs' Objections.

⁹⁰ Applicants' SMOA (Application of the D&O Release to Class Action Claims), par. 5-6.

⁹¹ Footnote 9 (page 8) of the Applicants' SMOA.

- [132] With all due respect, the Court disagrees.
- [133] Despite the filing of their formal Notice of Objection on September 3, 2025, only a few days before the hearing, the Court found that the U.S. Plaintiffs, via their respective U.S. counsel, clearly voiced their objections prior to the RVO being issued. In fact, the U.S. Actions were specifically included at the outset and are clearly covered by the Carve-out.
- [134] As previously mentioned, on August 27, 2025, the Delaware Plaintiffs, through their U.S. counsels, advised the Applicants, the Monitor, and the Service List of their objections to the proposed D&O Release⁹². On August 28, 2025, the New York Plaintiff, through his U.S. counsels, advised the Applicants, the Monitor, and the Service List of his objections to the proposed D&O Release⁹³.
- [135] Therefore, it is wrong for the Applicants to write in their SMOA on September 1, 2025, that "no party other than Mr. Mulhall and the Mulhall Action Co-defendants has informed undersigned counsel of any objection to the D&O Release, or to its application to the 'Class Action Claims' (as defined below), despite having received a formal request from the Lion Group for the D&O Release and notice of the September 3, 2025, hearing."
- [136] The Court finds that the U.S. Plaintiffs validly notified their Objections to the Court, the Debtors, the Monitor and to the Service List in due course and in a timely manner. They also appointed Québec counsel to represent them and argue on their behalf at the present hearing.
- [137] Moreover, if the U.S. Plaintiffs' Objections were never properly introduced in the Court record, how can one explain that the U.S. Actions were specifically included in the Carve-out from the outset, i.e., at the same time as the Mulhall Class Action, the whole with the consent of the Applicants' counsel?
- [138] The Applicants cannot subsequently claim surprise or foul play.
- [139] As to the reasons justifying the Court's approval of the Full D&O Release (without the Carve-out), counsel's arguments can be categorized as follows:
 - 1- As a general principle, the Court's broad powers enable granting third party releases, especially in favour of D&Os
 - 2- The *Nexus Test* was successfully met with the Lydian Factors considered in relation to the Full D&O Release:
 - (A) The Full D&O Release is rationally connected to the purpose of the Lion Group's restructuring;

⁹² US-5.

⁹³ US-3.

(B) The D&Os have contributed to the Lion Group's restructuring efforts;

- (C) The Full D&O Release is fair, reasonable and not overly broad with respect to:
 - the identity of the Released Parties
 - the scope of the Released Claims
 - the exceptions of sections 5.1(2) and 5.1(3) CCAA
 - the channelling of claims to the insurance proceeds with the Insured Claim exception
- (D) The Lion Group's restructuring could not have succeeded without the Full D&O Release;
- (E) The Full D&O Release benefits the Lion Group as well as its creditors generally; and
- (F) All creditors and contractual counterparties have sufficient knowledge of the nature and effect of the Full D&O Release.
- 3- The Mulhall Action Parties—and the U.S. Plaintiffs—are not entitled to object to the Full D&O Release sought by the Applicants, as they are not legally qualified to oppose the same:
 - (A) The claims or potential claims of the Mulhall Action Parties—and of the U.S. Parties—are *equity claims* as opposed to creditors' claims;
 - (B) The Class Action Parties—including the U.S. Plaintiffs—do not have the required juridical interest to oppose the Full D&O Release;
 - (C) The Class Action Parties cannot rely on the exception of section 5.1(2) *CCAA* to oppose the Full D&O Release; and
 - (D) The Class Action Parties cannot rely on section 5.1(3) *CCAA* to oppose the Full D&O Release.
- [140] The following exceptions to the *Released Claims* found in the Full D&O Release offer sufficient protection for rights and recourses against the *Released Parties* from all present and future claims and liabilities for which they may be liable for any act, omission or representations in their capacity as D&Os—or "deemed D&Os"—of the Applicants without the necessity of keeping the Carve-out, namely
 - (i) Any claims for fraud or willful misconduct;
 - (ii) Any claims that are not permitted to be released pursuant to section 5.1(2) CCAA; and

(iii) Any claims that are covered by any insurance policy of the Lion Group (only to the extent of any such available insurance).⁹⁴

4. **DISCUSSION**

[141] As a preliminary comment, the Court reiterates and insists upon the fact that D&Os or third-party releases in *CCAA* proceedings are not the norm, they are the exception⁹⁵. They cannot be requested or sought systematically, but only in exceptional circumstances⁹⁶. Thus, third-party releases "must be justified as part of the compromise or arrangement between the debtors and its creditors."⁹⁷

[142] In the absence of a compromise or of an arrangement to be submitted to the vote of the creditors, the Court should be more stringent on the evidence required to release third parties, especially when the scope of the proposed releases is challenged, as is the case herein.

[143] In *Proposition de Brunswick Health Group Inc.*, Immer J. appropriately cited Professor Sarra as follows:

[57] Professor Sarra proposes this extensive list of considerations to be examined:

[...]

Is the court satisfied that <u>any requested releases in favour of the debtor's directors</u>, <u>officers and third parties under the RVO do not inappropriately shield them from claims</u> and meet the tests articulated by the courts? Is the court satisfied that the RVO approach is not being used to achieve third-party releases without creditors being asked to vote on the issue?⁹⁸

[Emphasis added]

[144] The onus to justify the issuance of third-party releases rests upon the party who seeks such a special relief, with probative evidence supporting, *inter alia*, a <u>meaningful contribution</u> to the restructuring process of the debtor⁹⁹ by each of the third parties in question. A third party who did not offer a <u>meaningful contribution</u> cannot benefit from the releases simply on account of their association with others who actually offered such a meaningful contribution. The probative evidence necessarily involves the identification of each person who is called upon to benefit from the proposed release and proof of the <u>meaningful role</u> they each played in the restructuring process.

⁹⁴ RVO Application, par. 85.

⁹⁵ Allen-Vanguard, supra, note 57, par. 60-61.

⁹⁶ Canwest, supra, note 53, par. 29; Blackrock, supra, note 41, par.129.

⁹⁷ Metcalfe, supra, note 44, par. 70.

⁹⁸ Proposition de Brunswick Health Group Inc. (Brunswick Health), 2023 QCCS 4643, par. 57.

⁹⁹ *Ibid.*, par 32.

[145] In the words of authors Luc Morin (now a Superior Court Justice) and Arad Mojtahedi, "not all D&O are created equal: depending on their contribution to the successful restructuring of the business, some D&O could benefit from a third-party release, while others might not." 100

- [146] A cautious and measured approach is warranted given the risk of depriving a stakeholder of a valid recourse by broadening the scope of a release to third-party D&Os who otherwise should be held accountable for their conduct before the Courts.
- [147] This explains why the Courts are increasingly reluctant to grand overbroad releases in favour of third-party D&Os without proceeding beforehand, *inter alia*, to a structured analysis guided by well-established principles (i.e., the Lydian Factors) to ascertain that the releases to be granted as the case may be, are limited to what is strictly required in the specific context of each case (i.e., the *Nexus Test*).¹⁰¹
- [148] However, the "meaningful contribution" is not necessarily dependent on a positive outcome of the restructuring process, as triggering CCAA proceedings does not always ensure a successful outcome. Third parties who have nevertheless contributed meaningfully to the restructuring efforts should not necessarily be discounted upon an unexpected negative or adverse outcome.
- [149] With all due respect, as further discussed hereafter, the Applicants failed to satisfy this essential condition—a *meaningful contribution*—among others, preferring to maintain purposely an opaque shroud on the identity of all the persons (the *Released Parties*) standing to benefit of their proposed Full D&O Release let alone introducing into evidence their respective *meaningful contribution*.

4.1 The Court's broad powers to grant releases in favour of Directors and Officers

[150] According to the Applicants, the *Released Claims* covered by the proposed Full D&O Release are rationally connected to their restructuring and to the present CCAA proceedings, particularly as:

- (a) the *Released Parties* have been, and some of them will continue to remain instrumental to the implementation of the Revised Transactions and, more generally, to the Applicants' ongoing restructuring efforts;
- (b) the Full D&O Release will ultimately have the effect of diminishing claims against the *Released Parties*, which, in turn, will diminish any indemnification claims by the *Released Parties* against the Applicants that

MORIN, LUC and ARAD MOJTAHEDI, "Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act," 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, p. 15.

¹⁰¹ Tacora Resources Inc. (Re) (Tacora), 2024 ONSC 4436, par. 10-11; Chesswood, supra, note 53, par, 55.

are secured by the *Directors' and Officers' Indemnification and Charge*¹⁰², which ultimately benefits the Applicants and their stakeholders;¹⁰³

(c) each of the *Released Parties* has participated, contributed and/or supported the Applicants' restructuring efforts, both prior to and/or after the commencement of the CCAA Proceedings, without any remuneration for several of them¹⁰⁴.

[151] The Court respectfully disagrees.

[152] The CCAA does not contain any provision authorizing explicitly the granting of third-party releases with the exception found at s. 5.1(2) CCAA dealing with directors only (not officers) in the context of an arrangement or a compromise. Rather, it does not prevent submitting to the vote of creditors in the context of a compromise or an arrangement releases in favour of directors for certain pre-filing claims more fully described in s. 5.1 CCAA.

[153] However, s. 11¹⁰⁵ *CCAA*, which grants broad discretion to the Courts, was interpreted to enable judges to grant third-party releases—subject to the s.5.1(2) exception - provided that the latter be justified in light of the facts and the circumstances specific to each case and that such releases be necessary to the successful completion of the arrangement or compromise.

[154] Moreover, as previously mentioned, in cases where objections or oppositions have been raised against the proposed third-party releases, the judge must also assess whether the objectors' claims are legitimate and appear sufficiently serious and well founded on a *prima facie* basis¹⁰⁶.

[155] The Court has already determined that the claims of the U.S. Plaintiffs and of the Mulhall Class Action Plaintiff are *prima facie* legitimate and serious and that it is not up to this Court to determine the outcome of these cases on their respective merits. The role of this Court is to determine whether the allegations of the three Class Actions are sufficiently serious to warrant maintaining their main argument that the Carve-out should be maintained¹⁰⁷.

¹⁰² As defined in paragraph 43 of the ARIO (2025 QCCS 585).

¹⁰³ *Ibid.*, par. 86.

¹⁰⁴ *Ibid.*, par 87.

^{105 11.} Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

¹⁰⁶ Green Relief, supra, note 51, par. 29-30; Delta, supra, note 44, par. 31.

¹⁰⁷ Arrangement relatif à 9424-9356 Québec inc. (Québécor), 2021 QCCS 5319, par. 65 (leaves to appeal dismissed by the Court of Appeal (2022 QCCA 549) and the Supreme Court of Canada (2023 CanLII 57194 (C.S.C.)).

[156] Releases with broad wording aiming to encompass every possible situation other than *willful misconduct and gross negligence* are excessive and should be avoided:

[30] The full releases sought in conclusions 5 and 8 of the Motion quoted hereinabove and granted in other instances by other members of the judiciary are, in the opinion of the undersigned, and with great respect, excessive.

[...]

[32] The terms of the releases now sought in conclusions 5 and 8 above essentially discharge all liability (except for gross negligence and willful misconduct) which would include liability arising in factual circumstances in the course of the administration not put before the Court regarding parties not necessarily before the Court. This appears to the undersigned as the antithesis of the judicial process.

[33] Not only is the process unfair and unjust to anyone who might have a claim, but it seems excessive given the existing protection. [...]¹⁰⁸

[Emphasis added]

- [157] Even if the comments of Schrager J. in *Aveos* involved a release in favour of the Monitor and of the Chief Restructuring Officer, the same reasoning applies to D&Os.
- [158] Given the seriousness and the severity of the allegations in the three Class Actions on a *prima facie* basis, full hearings on the merits should be held in those three Class Actions¹⁰⁹ to shed light on the actual conduct—or misconduct—of the D&Os defending therein¹¹⁰.
- [159] Even if they deny liability at this juncture, the Underwriters and Auditors as the Mulhall Class Action Co-defendants rightfully argued that the allegations of the Mulhall Application raised serious allegations specific to the Mulhall D&Os.
- [160] These allegations, as serious as they may be, must be considered nevertheless, by the judge, who will hear the Mulhall Application seeking the authorization to proceed with the Mulhall Class Action. At this early juncture, to prevent holding such a hearing by issuing the proposed Full D&O Release without the Carve-out sought by the Applicants would yield an unjust and unfair outcome by shielding the Mulhall D&Os from the judicial scrutiny of their actions and conduct.

¹⁰⁸ Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à) (Aveos), 2013 QCCS 5924.

¹⁰⁹ If the Mulhall Application is authorized.

¹¹⁰ Québécor, supra, note 107, par. 69, 79-80 and 88; Arrangement relatif à DavidsTea inc. (Davids Tea), 2023 QCCS 1141, par 22-25.

4.2 The Full D&O Release with the *Released Claims* in favour of the *Released Parties* is not rationally connected to the purpose of the restructuring nor necessary for it

[161] Contrary to the Applicants' contention, the claims to be released, i.e., the Class Action Claims, are not rationally related to the purpose of the Debtors' restructuring plan.¹¹¹

[162] The Applicants themselves—as well as the Monitor—acknowledged that the proposed Full D&O Release was not a condition precedent for the RVO and was not necessary to conclude the Transactions contemplated in the RVO. This condition was determined and is exacted solely by the Applicants, not for the benefit of the purchasers but for the sole benefit of all their D&Os whoever they may be. The Applicants argued that the "D&Os cannot be denied their request for a release once the Applicants' restructuring has essentially been completed on the basis that such restructuring (or the Transactions contemplated thereunder) can succeed without the D&O Releases being granted" The Applicants—not the D&Os—also argued that this would encourage future D&Os to take a more aggressive approach, and "compel future D&Os to require that such a condition be included in the transaction documents." 113

[163] In effect, the Applicants argued that if third-party releases are denied when or if they are deemed not necessary, there is a significant risk that D&Os will engage in tactical brinkmanship to manufacture necessity in the future. Counsel for the Underwriters invited the Court, rightfully so, to approach this counterfactual argument with great caution.

[164] Section 18.6 (1)¹¹⁴ *CCAA* stipulates that any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings. The obligation of acting in good faith also rests upon the D&Os—and the Applicants seeking to act on their behalf—especially if they intend to seek the benefits of third-party releases.

[165] In any event, contrary to *Green Relief*¹¹⁵, *Harte Gold*¹¹⁶, and *Tacora Resources*¹¹⁷, the Full D&O Release will not have the effect of diminishing indemnification claims by the *Released Parties* against the "*Directors' and Officers' Indemnification and Charge*"¹¹⁸, thereby resulting in a larger pool of cash available to satisfy creditor claims.

[166] The realization proceeds were not even sufficient to satisfy, in its entirety, the \$17M Interim Financing, let alone the subsequent priority charges and claims.

¹¹¹ Debtors' MOL, par 92-93.

¹¹² Applicants' SMOA, par. 61 and 66.

¹¹³ Applicants' SMOA, par. 59.

¹¹⁴ **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

¹¹⁵ Green Relief, supra, note 51, par. 51.

¹¹⁶ Harte Gold, supra, note 43, par. 81 and 85.

¹¹⁷ *Tacora, supra,* note 101, par. 25(e).

¹¹⁸ Detailed in the ARIO (2025 QCCS 585), par. 42-44.

[167] Moreover, the *Directors'* and *Officers'* Indemnification and Charge totalling US\$1.9M¹¹⁹ specifically applies to "claims relating to any obligations or liabilities [...] which have accrued by reason of or in relation to their respective capacities as directors or officers of the Debtors after the Effective Time," i.e., December 18, 2024¹²⁰.

- [168] The three Class Actions relate to the conduct of the defending D&Os *before* the Effective Time. Therefore, therefore, the defending D&Os could not even rely on the said Charge for indemnification purposes.
- [169] While the Court recognizes the policy objective behind incentivizing directors and officers to participate in the restructuring efforts in exchange for a liability release, ¹²¹ a release *rationally connected to the purpose of the restructuring or necessary for it* must logically relate and be limited to those very same efforts. A release that would go beyond those efforts is necessarily no longer rationally connected or related to the restructuring and should not be approved.
- [170] With all due respect, it is unrealistic to contemplate and misleading to argue that the Full D&O Release without the Carve-out will benefit the restructuring efforts and the mass of creditors by preventing any potential indemnity claim of the D&Os against the "Directors' and Officers' Indemnification and Charge," which evidences that the Applicants are grasping at straws to prevent, at all costs, the Class Action Parties from exercising their rights and recourses against the defending D&Os to the three Class Actions.
- [171] The rational connection factor is particularly important when the proposed release contributes directly to one of the main objectives of the *CCAA*, namely, to maximize the realization proceeds for the benefit of the creditors ¹²², which is unfortunately not the case herein.
- [172] In the present instance, the D&O Release—be it the Full D&O Release or otherwise—is not rationally connected to the Applicants' proposed restructuring. Yet, the Applicants continue to seek the Full D&O Release months after the Transactions contemplated in the RVO have been finalized successfully. If the Full D&O Release had been an essential and necessary component to the Transactions contemplated in the RVO, those Transactions would have not been completed until the present judgment.
- [173] Put simply, the Full D&O Release has always been a "want" by the Applicants seeking to act on behalf of their unidentified *Released Parties* rather than an essential "need."

¹¹⁹ Reduced from US\$2.5M initially.

¹²⁰ Section 11.51(1) CCAA stipulates expressly that such a charge secures the obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

¹²¹ Applicants' MOL, par. 95-96.

Arrangement relatif à Xebec Adsorption Inc. (Xebec), 2023 QCCS 268, par. 5(e); Acerus Pharmaceuticals Corporation (Re) (Acerus), 2023 ONSC 3314, par. 38.

[174] The Applicants' main position boils down to the argument that D&O releases in the context of RVOs are customary, and that, in the present instance, the D&Os have "earned" their release as *Released Parties*.

- [175] Unfortunately for the Applicants—and the defending D&Os to the three Class Actions—that is not the proper test.
- [176] In order to impair the rights and recourses of the Class Actions Plaintiffs as well as those of the Auditors and Underwriters seeking potential contribution and indemnity against the defending Mulhall D&Os, the Applicants had to demonstrate that the Full D&O Release was necessary if not essential to the positive outcome of the proposed restructuring, and that the D&Os demonstrated a strong and meaningful commitment to the result that was achieved.
- [177] They have not. If some or all of the D&Os meeting the definition of *Released Parties* made a meaningful contribution to the restructuring outcome, credible evidence was not presented.
- [178] Even worse, the Applicants never even attempted to identify precisely the proposed *Released Parties*, including the "deemed" directors and officers falling under that definition, preferring to adopt purposely a totally vague approach despite the reproaches made at the hearing by the counsel for the Class Action Parties.

4.3 Were the parties to be released from claims (i.e., the Released Parties) necessary and essential to the restructuring of the Debtors?

- [179] The Court must answer that question in the negative.
- [180] Again, other than the absence of any attempts to identify the *Released Parties*, there was limited and clearly insufficient evidence of the D&Os actual and meaningful involvement in the Applicants' restructuring process other than vague general allegations.
- [181] In the present instance, there was minimal admissible evidence adduced of the directors' contributions to the Debtors' restructuring. None of the directors have sworn affidavits, and the statements put forward by the Applicants and the Monitor were tantamount to bare assertions with no material facts.
- [182] All in all, the Applicants have not put forward enough relevant information to justify the exceptionally broad—and vague—Full D&O Release they now seek on behalf of their unidentified D&Os.
- [183] Surprisingly, they were clearly reluctant to provide further evidence in that regard despite complaints of counsels for the Class Action Parties to that effect, with the support of relevant jurisprudence pointing to the need to do so.

[184] Reflecting the tone of the Monitor's Fifth Report of May 15, 2025 (the "Report"), with respect to the proposed Full D&O Release, during his cross-examination, the Monitor's representative carefully avoided expressly identifying any of the D&Os forming part of the proposed *Released Parties*. Asked if he knew their names, the witness responded that he had been provided with a list by the Applicants without sharing the same with anyone, including the Court under the pretext that he doubted that the list represented in an exhaustive manner all the D&Os that would benefit from the Full D&O Release.

[185] Moreover, in the Report, the Monitor's recommendation to the Court with respect to the Full D&O Release was terse at best and quite telling:

114. (ii) The D&O Release is in line with other releases previously granted in favour of directors and officers of companies subject to CCAA proceedings;

[186] The Applicants—and the Monitor—could not ignore the importance and the relevance of the information sought by the Class Action Parties' counsel with respect to the identity of the D&Os to be released and their respective contributing involvement in the context of the restructuring process.

[187] The prevailing strategy was, obviously, to prioritize vagueness in order to ensure all D&Os and "deemed" D&Os would be released by relying—if not over-relying—on inapplicable precedents given the special set of facts and circumstances of the case at hand.

[188] The following comments of authors Morin and Mojtahedi could not reflect in a better manner the Court's opinion on the notion of *meaningful contribution* of D&Os seeking to benefit from releases in the context of *CCAA* restructurings:

Mere respect for their fiduciary care and standard duties should not be sufficient for D&O to obtain a court-issued third-party release. For that kind of contribution, D&O, who by the very nature of their functions have access to privileged information allowing them to appropriately gauge their risk and protect themselves ab initio, should rely on their D&O insurance policy. It is our view that court-issued releases should serve as an incentive to D&O to go beyond the exercise of their fiduciary care and maintenance duties, ultimately to the benefit of all stakeholders involved. As with all third-party releases, those in favour of D&O must be rationally connected to the purpose of the restructuring and provided in exchange for a meaningful contribution toward its achievement. 123

[Emphasis added]

MORIN, LUC and ARAD MOJTAHEDI, "Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act," 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544, p. 15; see also: Hy Bloom inc. c. Banque Nationale du Canada, 2010 QCCS 737, par. 73.

[189] Relying mainly of allegedly similar precedents was neither sufficient nor compelling to influence the Court's decision.

[190] With all due respect, the Applicants' strategy failed completely for lack of relevant and necessary evidence to convince the Court that the Carve-Out should be removed from the D&O Release, on the contrary.

4.4 Have the D&Os to be released contributed to the plan?

[191] In their SMOA, the arguments of counsel for the Applicants can be summarized as follows:

- 55. The D&Os's collective actions and efforts both prior to and after the commencement of the CCAA Proceedings ultimately led to the execution of the Subscription Agreement and to the implementation of the Transactions, which allowed for the continuity of the Applicants' core business operations in Québec.
- 56. The D&Os have <u>clearly contributed</u> time, energy and resources to achieve this outcome. The D&Os efforts <u>certainly go beyond</u> that, which is expected of directors and officers.

[Emphasis added]

- [192] The Court does not doubt for an instant that some of the D&Os to form part of the *Released Parties* may have contributed to the restructuring efforts despite the dismal results. Unfortunately, the evidence as to who exactly contributed what, in a meaningful manner, was absent, seemingly on purpose.
- [193] Qui trop étreint, mal embrasse. Grasp all, lose all.
- [194] As previously mentioned, the Applicants did not put forward enough information to justify the exceptionally broad release they seek on behalf of their D&Os and "<u>deemed</u>" D&Os.
- [195] In the Court's opinion, the Applicants were rooting, first and foremost, on vagueness, which was permeable throughout their evidence. This vagueness was also reflected in their overly broad definition of *Released Parties*, with their novel notion of "deemed" D&Os, the latter being a perfect recipe for hours of unnecessary litigation.

4.5 The Full D&O Release does not benefit the Applicants and, in fact, harms the stakeholders generally

[196] The Full D&O Release threatens substantial prejudice to the three Class Actions Plaintiffs as well as the Underwriters and Auditors, with very limited benefit to the Applicants, if any.

[197] Moreover, the Full D&O Release does not benefit the creditors generally, as it purports to reduce, without justification, the actions for recovery of creditors (i.e., the Class Action Parties who have suffered losses and damages because of the Applicants' insolvency) against third parties, namely the defending D&Os as opposed to none of the Applicants.

[198] In a context where not even the secured creditors, including the Interim Lenders, will be paid in full, 124 there is no logical reason to deprive creditors of their claims against third parties—and not against the Applicants and their assets—which could, hopefully, increase the minimal recovery they could achieve as a result of this mitigated restructuring.

[199] The Court believes that the present goal of the Applicants with the Full D&O Release is to rearrange the litigation landscape vis-à-vis third parties in a manner that is unconnected to the Debtors' restructuring objectives.

4.6 Could the plan (i.e., the restructuring herein via a RVO) succeed without the Full D&O Release?

[200] The restructuring may be said to have notionally "succeeded" in that a going-concern sale of the Applicants' remaining business was achieved, albeit only by dint of a Subscription Agreement entered into with an extant holder of the 2023 Non-Convertible Debentures (represented by Groupe Mach Inc., the principal shareholder of the purchaser), which held, *inter alia*, a first-ranking security interest in the Innovation Center and equipment in the Battery Plant, ¹²⁵ aided by an investment by the provincial government therein.

[201] Be that as it may, it is manifest that the restructuring "succeeded" without any consideration for the existence, nature, scope or court approval of the Full D&O Release with or without the Carve-out.

4.7 Creditors or other interested parties do not have sufficient knowledge as to the existence, nature and effect of the Full D&O Release

[202] The Applicants filed for protection under the *CCAA* in December 2024. Less than a year later on May 15, 2025—with a Notice of presentation for May 16, 2025¹²⁶—they were seeking—on an urgent basis—the approval of the Transactions with, *inter alia*, overbroad releases of virtually all claims against their present and former directors and officers—and even their "*deemed*" directors and officers—without providing for sufficient opportunity and notice to the creditors—which included a broad constituency of public

¹²⁴ Testimony of Jean-François Nadon given on May 21, 2025, Exhibit **R-6**, page 68.

¹²⁵ First Report of the Monitor to the Court, December 17, 2024, page 9.

¹²⁶ Due to the oppositions voiced at the hearing of May 16, 2025, the same was continued to May 21 and 22, ending with the Carve-out.

shareholders—to assess their possible recourses, protect their rights, and take appropriate legal action.

[203] Notice of the Application *per se* is not at issue here; what was unwarranted was for the Applicants to ask the Court to issue releases and injunctions against the legitimate prosecution of judicial rights in a context where this Court was asked to grant relief on an urgent basis, while creditors sat on the sidelines, the whole by virtue of the promise that the Applicants would emerge with a successful restructuring.

[204] The Applicants were given the opportunity—under their own timelines and conditions—to restructure. However, the Court is still in the dark as to the precise contours of the releases it is being asked to grant with such a broad yet vague definition of the *Released Parties*.

[205] Here, the Applicants were seeking the exceptional remedy of a pre-emptive third-party release without giving the Class Action Parties, in particular, even the minimal benefit of qualifying their eligibility for such a broad release. The Court understands that the Carve-out was added by necessity as a result of the Objections raised by the Class Action Parties prior to the presentation of the RVO Application.

[206] As Koehnen J. found in *Green Relief*:

[...] If the court is being asked to release claims, it is helpful to know what is being released. [...] 127

[207] Especially since the Applicants are stressing the importance and usefulness of the beneficial exception of "any claims for fraud or willful misconduct", this Court would add:

And who exactly stands to be released from what in that regard?

[208] On the one hand, the Applicants led the Court to believe that the Class Action Parties should be satisfied with the "any claims for fraud or willful misconduct" exception already found in the Full D&O Release. Yet, on the other hand, they argued that the same Class Action Parties could not avail themselves of that exception due to their status as equity holders.

4.8 The other arguments of the Applicants

[209] Besides arguing that the Mulhall Action Parties did not meet the *Nexus Test* with the use of the Lydian Factors, the Applicants also claimed that neither Mr. Mulhall nor the Mulhall Action Co-defendants were entitled or legally qualified to oppose the Full D&O Release with the following arguments:

¹²⁷ Green Relief, supra, note 48, par. 30.

A- The Claims or Potential Claims of the Mulhall Class Action Parties were *Equity Claims*

- B- The Class Action Claimants¹²⁸ as holders of *Equity Claims* do not have the required juridical interest to oppose the Full D&O Release
- C- The Class Action Claimants cannot rely on Section 5.1(2) CCAA to Oppose the Full D&O Release
- D- The Class Action Claimants Cannot Rely on Section 5.1(3) CCAA to Oppose the Full D&O Release

[210] While not recognizing the legitimacy of the Objections voiced by the U.S. Plaintiffs, the Applicants pointed out that their submissions regarding the Mulhall Class Action Parties nevertheless applied equally to the U.S. Plaintiffs and that the proposed Full D&O Release should apply to all three Class Action Claims. Therefore, henceforth, unless specifically mentioned, all references to the Mulhall Class Action Parties shall equally apply to the U.S. Plaintiffs insofar as the Applicants are concerned.

[211] The Applicants' first two arguments should be dealt with together.

4.8.1 The Claims or Potential Claims of the Mulhall Action Parties are *Equity Claims*

4.8.2 The Class Action Claimants as holders of *Equity Claims* do not have the required juridical interest to oppose the D&O Release

[212] As a first step to the analysis as to whether or not the Mulhall Action Parties are legally entitled to oppose the Full D&O Release, the Applicants argued that it was important to proceed with a qualification of their respective claims or potential claims, in accordance with the relevant provisions of the *CCAA*, as it is well recognized in insolvency proceedings that the qualification of certain claims will afford different treatment to their holders.

[213] For instance, it is well recognized that holders of *equity claims* will not be entitled to vote on a proposal or on a plan or receive any payment from a debtor company in the context of insolvency proceedings, so long all of their secured and unsecured creditors have been paid in full, based on sections 6(8) and 22.1 *CCAA*, and on the applicable jurisprudence.

¹²⁸ Even if they initially considered that the U.S. Plaintiffs were disqualified for having failed to notify their Objections in due course, the Applicants suddenly seemed to broaden their approach with the use of the Class Action Claimants, which would represent collectively the Mulhall Action Parties together with the U.S. Plaintiffs. The Court understands that the expression Class Action Claimants used by the Applicants' counsel in their SMOA also means Class Action Parties used in the present judgment.

[214] The nature of debt and equity investments is fundamentally different, such that their treatment is equally fundamentally different in the context of insolvency proceedings¹²⁹.

- [215] However, it is important to consider the context applicable to the case at hand.
- [216] In what appears to be a last-ditch effort to persuade the Court to abrogate the Mulhall Class Action Plaintiff and putative class members' rights to sue the Mulhall D&Os—without forgetting the U.S. Plaintiffs—the Applicants argued that they are all first and foremost aggrieved shareholders who should be considered and treated as equity claim holders. As such, Class Action Parties are essentially trying to "circumvent the provisions of the CCAA" and obtain "special treatment" as opposed to the other creditors of the Debtors¹³⁰.
- [217] But what "special treatment" will they enjoy?
- [218] With all due respect, this argument misconstrues the actual position of the Class Action Parties.
- [219] Contrary to the Applicants' contentions, the "aggrieved shareholders" are not seeking to preserve their right to "pursue the D&Os personally for acts or omissions of the Applicants [i.e., the Debtors]". 131 Rather, the "aggrieved shareholders" seek to preserve their right to pursue **direct** and **independent** claims against **non-**Debtors, i.e., the defending D&Os to the Class Actions, for violations of their own obligations under the Securities Act and the CCQ or under U.S. legislation. Because the shareholders' claims are brought against non-Debtors, in forums distinct from the present CCAA proceedings, it cannot credibly be said that they are attempting to obtain a "special treatment" vis-à-vis the Debtors and their creditors.
- [220] This is even more obvious given that none of the unsecured creditors and existing shareholders will recover any money from the proceeds of the Transactions authorized by the RVO. Even the *Directors' and Officers' Indemnification and Charge* in the amount of US\$1.9M¹³² is worthless given the absence of any funding available.
- [221] The Applicants' position with respect to the alleged lack of juridical interest of the Class Action Claimants—including the U.S. Plaintiffs—does not resist scrutiny.
- [222] The Court shares the view of the Underwriters' counsel that even equity claimants have legal standing to oppose transactions under the *CCAA* depending on the circumstances.

¹²⁹ Sino-Forest Corporation (Re) (Sino-Forest), 2012 ONSC 4377, par. 23-24.

¹³⁰ Applicants' MOL, par. 137 and 167; Applicants' SMOA, par 81.

¹³¹ Applicants' MOL, par. 167.

¹³² Reduced in the ARIO from US\$2.5M.

[223] A close look at the circumstances is warranted if not crucial.

[224] There is no rule or principle in insolvency law that equity claimants are barred from objecting to a transaction that directly affects their interests like in the present instance. Section 6(8)¹³³ *CCAA* simply provides that non-equity claims must be paid before equity claims. The *CCAA* does not empower the Applicants to compromise the legitimate legal interests of third parties merely because their financial claims against them as Debtors would be characterized as equity claims. While shareholders are pushed to the bottom rung in terms of financial recovery, they are nevertheless stakeholders who maintain a basic entitlement to protect their critical interests, especially when their rights are challenged or placed at risk like in the present instance.

[225] The Court is particularly mindful that the claims asserted by the Class Action Parties—who are all third parties vis-à-vis the Applicants—cannot be discarded as equity claims because they are not claims against the Applicants or their assets. In particular, the Underwriters who are also third parties vis-à-vis the Applicants wish to preserve their recursory or subrogatory claims against the D&Os, who are also third parties vis-à-vis the Applicants.

[226] The Court understands that the Underwriters are not presently asserting a claim—be it provable or equity—to the assets of the Applicants' estates nor are the U.S. Plaintiffs. In any event, on a purely practical basis, any such recourse against the Debtors who, by the way, still benefit from the Stay of proceedings¹³⁴ would be totally futile in the absence of any assets or moneys to recover. Again, even the beneficiaries of the *Directors' and Officers' Indemnification and Charge* cannot realistically rely on the same to get any relief whatsoever from the Debtors

[227] Nowhere does the *CCAA* or the *Bankruptcy and Insolvency Act* refer to "equity claims" as between two third parties to the debtor. In any event, such an approach would not fit within the scheme of Canadian insolvency legislation and policy.

[228] As Farley J. observed in *Stelco*, the *CCAA* deals with <u>arrangements between</u> a company and its creditors: "There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company." 135

[229] The Court also shares the view of the Underwriters that there is no basis in the statutory scheme to discard, dismiss, or subordinate claims between third parties on the basis that they are equity claims vis-à-vis an insolvent company. Equity claims against a debtor are compromised in CCAA proceedings to prevent shareholders from depleting

¹³³ **6 (8)** No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

¹³⁴ Paragraph 18 of the ARIO (2025 QCCS 585).

¹³⁵ Stelco, supra, note 38, par. 7.

the assets available to creditors.¹³⁶ Shareholders cannot expect to maintain a financial interest in a company where creditors are not being paid in full.¹³⁷ Equity claims are therefore subordinated to keep shareholders away from the negotiating table while the claims of other creditors are being sorted out.¹³⁸

[230] The subordination of equity claims is only appropriate to the extent that the equity claim is a financial claim made against the assets of the debtor. It should not serve to bar legitimate stakeholders from raising objections to their treatment under the *CCAA* plan or the like.

[231] With all due respect, the Applicants are unreasonable and push the envelope too far when they argue that the Class Action Parties are equity claimants that have no juridical interest in the present proceedings. Following this logic, a *CCAA* debtor could obtain wide-ranging forms of relief against shareholders or other stakeholders, who would be precluded from raising their legitimate concerns against third parties.

[232] All in all, the three Class Actions against the defending D&Os do not threaten to deplete the assets available to creditors of the Debtors as alluded to by their counsel. The Class Action Parties never sought a seat at the negotiating table, nor did they attempt to disrupt the underlying RVO Transactions. Indeed, the RVO Transactions have already been negotiated, signed, approved, and closed. The restructuring has essentially been completed. A modification to the scope of the D&O Release by maintaining the Carve-out will not affect the commercial result of the RVO Transactions. The Class Action Parties merely seek to maintain the *status quo* in the present non-Debtor litigations between third parties and ensure that the RVO—in its final approved form—will not needlessly extinguish their potential claims against the defending D&Os forming part of the *Released Parties*.

[233] In other words, the Applicants are conflating, if not, confusing the factual background applicable herein. The Class Actions Plaintiffs, as shareholders of Lion Electric, are not attempting to assert their shareholders' rights and recourses against the realization proceeds of the Debtors' assets—or against their remaining assets, if any—under the *CCAA*. On the contrary, they are once again only attempting to preserve their distinct rights and recourses in damages against non-Debtors, i.e., former and current defending D&Os of the Lion Group. Moreover, the Mulhall Class Action is not even directed at any of the Debtors.

[234] With respect to the U.S. Claims, although Lion Electric and Northern Genesis are among the defendants in the New York Action and only Lion Electric has to defend in the Delaware Action, the U.S. Plaintiffs are not seeking the lift of the Stay against those specific Debtors. Moreover, the present D&O Release with the Carve-out—which is at the

¹³⁶ Sino-Forest Corporation (Re (Sino-Forest), 2012 ONCA 816.

¹³⁷ *Ibid.*, par. 30.

¹³⁸ U.S. Steel (Re), (U.S. Steel) 2016 ONCA 662, par. 96.

centre of the present debate—does not purport to affect directly or prejudice the rights of the Debtors or their assets.

- [235] The U.S. Plaintiffs like the Mulhall Class Action Parties are simply attempting to protect their distinct personal recourses against the U.S. Defendants under U.S. Statutes, which have nothing to do with the Transactions approved by the RVO.
- [236] The U.S. Plaintiffs were compelled to intervene to ensure that the final wording of the Full D&O Release—especially in light of the overly broad definition of the *Released Parties*—will not serve ultimately to bar them from proceeding against all the U.S. Defendants other than Northern Genesis and Lion Electric. The overly broad and vague definition of the *Released Parties* with *deemed* directors and officers could be used to thwart the U.S. Actions.
- [237] Strangely, counsel for the Applicants never attempted to alleviate the legitimate concerns of the U.S. Plaintiffs in that regard, preferring to invoke their lack of legal standing due to their alleged failure to file proper Objections in due course, like Mr. Mulhall, the Underwriters and the Auditors did. In any event, the Court has already dealt with and discarded this irrelevant issue. Moreover, the Applicants agreed to include the U.S. Actions in the Carve-out at the time.
- [238] That being said, the U.S. Plaintiffs are well justified to be concerned and preoccupied with the overly broad and clearly vague scope of the Full D&O Release and its potential adverse impact on the U.S. Actions should it be approved without the Carveout.
- [239] As previously mentioned, the Applicants wrongly argued that the various claims or potential claims against the D&Os threaten the Applicants' assets because the D&Os will seek indemnity from the Applicants. At paragraphs 46 and 63 of their SMOA, the Applicants erroneously claim that, to all intents and purposes, the D&O Release with the Carve-out is expected to diminish, in turn, any indemnification claims which the D&Os could have against the Applicants, but for the D&O Release. Put simply, the Applicants argued that if the D&Os are protected from suit with the Full D&O Release, they will not seek indemnity from the Applicants and more assets will be available to the estates of the Debtors.
- [240] The Court already determined that such an assertion was wrong and misleading.
- [241] The Debtors and their creditors do not stand to suffer any prejudice whatsoever should D&Os decide to seek indemnity from the Debtors' assets, as there is nothing to collect or distribute.
- [242] Moreover, any indemnity claim, which the D&Os called to defend the Class Actions may seek to bring against the Applicants would be an *equity claim*. Indeed, where an individual is sued by a shareholder who subsequently asserts a contractual indemnity claim against the debtor company, the indemnity claim resulting from the shareholder's

claim is indeed an *equity claim* vis-à-vis the debtor company. Thus, it is wrong for the Applicants to argue—on behalf of the unidentified D&Os forming part of the *Released Parties*—that their eventual indemnity claims could deplete the assets of the Debtors' estates to the prejudice of the other creditors. Then and only then, their indemnity claims against the Applicants' assets would constitute *equity claims* which, in any event, would be subordinated.

[243] In conclusion, regardless of the equity claim argument, on the practical basis, any indemnity claim that could be eventually filed by D&Os against the Debtors would be futile, as firstly, the *Directors' and Officers' Indemnification and Charge*—which would not cover such a claim to start with—is completely unfunded failing which their equity claim would rank after the unsecured creditors who are not expected to receive any money from the Transactions approved with the RVO. Moreover, the aforesaid Charge does not even secure pre-filing claims against D&Os.

[244] The Court finds that the Class Action Parties have the juridical standing to voice their Objections to the Full D&O Release.

4.8.3 The Class Action Claimants cannot rely on section 5.1(2) CCAA to oppose the Full D&O Release

[245] In their *Petitioner/Objecting Party's Plan of Argument*, counsel for Mr. Mulhall argued that, in an attempt to muddy the waters, the Applicants focused on the exception provided by subsection 5.1(2) *CCAA* ("**s. 5.1 (2)**"). In short, the Applicants' position is that the Class Action Parties cannot rely upon the exception of s. 5.1(2) to oppose the Full D&O Release.¹⁴⁰

[246] The Applicants admitted that "at first glance," the release language appears "broad," ¹⁴¹ but argued that, upon further scrutiny, its scope is actually narrow. With all due respect, this contention could not be further from reality. Should the Court grant the Full D&O Release requested by the Applicants, the Full D&O Release would have the effect of shielding the D&Os from liability and prosecution for misrepresentations which occurred years before the Debtors were in the vicinity of insolvency and/or being insolvent, thereby eradicating the only recourse available to aggrieved shareholders.

[247] The Applicants' insistence and surprising emphasis on this particular argument betrayed their unsuccessful attempt to isolate the s. 5.1 (2) exception, as the only mean available to the Class Action Parties to validly and effectively oppose the Full D&O Release. This strategy was undoubtedly dictated by precedents submitted by their counsel where the s. 5.1(2) exception was, to all intents and purposes, the only one

¹³⁹ Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (Innovation), 2011 ONSC 5018, par. 52-61, (leave to appeal denied 2012 ONCA 10).

¹⁴⁰ Applicants' MOL, par. 125-135 and 140-161.

¹⁴¹ Applicants' MOL, par. 104 and SMOA, par. 57.

considered in those cases. Unfortunately, the cited cases are of no assistance to the Applicants, as it will be discussed further hereafter.

[248] Counsel for Mr. Mulhall pointed out that such an argument was misguided. Indeed, having failed to meet their burden of proof to justify the inclusion of a non-essential, publicly offensive, third-party Full D&O Release, the Applicants are attempting to pigeonhole the present debate to the applicability and scope of the exception under s. 5.1(2), thereby effectively attempting to reverse the burden of proof onto the Class Action Parties.

[249] The Court shares the point of view of Mr. Mulhall's counsel.

[250] Be that as it may, the Applicants contended that the Class Action Parties were not able to invoke the provisions of s. 5.1(2) in support of their Objections to the Full D&O Release on the grounds that as equity holders, they were not "creditors" within the purview of section 5.1(2) and that their Class Actions are based on pre-filing equity claims contrary to the findings in *Allen-Vanguard*¹⁴² cited with approbation in the recent decisions of *Nemaska*¹⁴³ and *Taiga*¹⁴⁴.

[251] The Court, having already determined that the Class Action Parties have the legal standing to assert their Objections, the question at issue is whether s. 5.1(2) actually prohibits the release of directors (and *deemed* directors) called upon to defend the Mulhall Class Action and the U.S. Actions based on the facts and causes of action—with allegations of misrepresentations made by directors and wrongful or oppressive conduct on their part against the Class Action Plaintiffs—invoked in great detail in each of the three Class Action proceedings.

[252] In the present instance, none of the Class Action Parties are restricted to the exception of section 5.1(2) CCAA. It bears pointing out that the s. 5.1(2) exception is not the only mean available to the Class Action Parties to justify maintaining the Carve-out provisions, but one of three exceptions expressly provided in the D&O Release—the others being for (i) claims arising from fraud and/or willful misconduct nor any claim against the *Released Parties* that is not permitted to be released pursuant to section 5.1(2) of the *CCAA*, (ii) Insured Claims¹⁴⁵, and more importantly, (iii) Class Action Claims¹⁴⁶ (linked to the Carve-out).

[253] The foregoing eliminates one of the most important hurdles that negatively impacted the jurisprudential precedents relied upon by the Applicants with respect to the s. 5.1(2) exception, since, to all intents and purposes, none of the cited cases contained

¹⁴² Allen-Vanguard, supra, note 57.

¹⁴³ Nemaska, supra, note 69.

¹⁴⁴ Taiga, supra, note 70.

¹⁴⁵ As defined in the D&O Release.

¹⁴⁶ *Ibid*.

exceptions other the s. 5.1(2), including, *inter alia*, a class action carve-out similar to the one agreed upon by the parties herein.¹⁴⁷

[254] But there is more.

[255] In support of their position on the s. 5.1(2) exception, counsel for the Applicants notably directed the Court to three alleged key decisions in their view, namely *Allen-Vanguard*¹⁴⁸, *Nemaska*¹⁴⁹ and *Taiga*¹⁵⁰. However, the alleged key factual elements of those cases are highly distinguishable from the case at bar and, respectfully, are of no assistance to the Applicants.

[256] This being said, although the Court respectfully disagrees with the position put forward by the Applicants regarding their interpretation of the s. 5.1(2) exception that the latter would only apply to contractual creditors (as opposed to shareholders holding equity claims) for their claims against directors based on their post-filing misrepresentations or wrongful or oppressive conduct, the Court does not intend to and will not rely on the s. 5.1(2) exception to dismiss the Application of the Debtors and maintain the Carve-out in the RVO.

[257] However, given the emphasis placed by the Applicants with respect to the s. 5.1(2) exception not being useful to maintain the Carve-out herein, it is opportune to delve more fully into this issue to explain the inapplicability of those precedents to the case at bar.

[258] In *Allen-Vanguard*, a transaction containing a third-party release was approved and sanctioned by the Campbell J. of the Ontario Superior Court of Justice by way of a sanction order.¹⁵¹ The *only* exception provided in that release was for "*any claim of the kind referred to in s. 5.1(2) CCAA*."¹⁵² Importantly, in *Allen-Vanguard*, the third-party release was part of the plan of arrangement submitted to the creditors who voted favourably (100%), hence the sanction order issued subsequently by the Court¹⁵³. Moreover, the class action plaintiffs who had not initiated their recourse by then had not opposed the issuance of the sanction order.¹⁵⁴

[259] Unlike the present matter, in *Allen-Vanguard*, it was only *after* the sanction order was rendered that the class action plaintiffs sought an order confirming that the claims arising from their class actions (there were two) were not released because they fell within the ambit of the *only* exception provided in the third-party release, i.e., s. 5.1(2). This factual background is wholly distinguishable from the case at hand.

¹⁴⁷ Applicants' MOL, footnotes 28 and 36 and Applicants' SMOA, footnote 36.

¹⁴⁸Allen-Vanguard, supra, note 57

¹⁴⁹ Nemaska, supra, note 69.

¹⁵⁰ *Taiga, supra,* note 70.

¹⁵¹ Allen-Vanguard, supra, note 57, par. 3.

¹⁵² *Ibid*, par. 27.

¹⁵³ *Ibid*, par. 7.

¹⁵⁴ *Ibid*, par. 62.

[260] Moreover, in *Allen-Vanguard*, failure to sanction the transaction with the third-party release entailed the liquidation of the company. The third-party release was also an integral part of the transaction to be approved, it could not be carved out without placing the transaction and the company in jeopardy. The judge also noted that the directors were integral to the Plan's success. Finally, no one opposed the issuance of the sanction order.

[261] In the present instance, the U.S. Plaintiffs initiated their legal proceedings prior to the present *CCAA* proceedings, on March 11, 2024,¹⁵⁵ for the Delaware Action and on August 27, 2024,¹⁵⁶ for the New York Action.

[262] With respect to the Mulhall Class Action, as previously mentioned, prior to the RVO, the Court temporarily lifted the Stay to enable the proper filing of the Mulhall Application¹⁵⁷.

[263] The Class Action Parties all opposed to the Full D&O Release prior to the RVO; hence the agreed upon Carve-out to allow the immediate completion of the Transactions contemplated in the RVO without ruling immediately on the removal of the Carve-out.

[264] As a matter of fact, in *Allen-Vanguard*, the judge pointed out that *perhaps the better* practice would have been to advise the Court of the issue and "carve" it out of the Plan, which is exactly what the Class Actions Parties did herein:

[59] The Sanction Order in this case by its terms provided the release of the claims now sought to be pursued. By the terms of the Sanction Order, the only reasonable expectation of stakeholders would be that, unless specifically authorized by the Order, any claim against directors would be barred. Potential claims against directors were not assigned to class plaintiffs nor was direction sought by any party about the effect of s. 5.1 prior to the issuance of the Order. Given the issue now before the Court and the disagreement of the parties, perhaps the better practice would have been to advise the Court of the issue and "carve" it out of the Plan. 158

[Emphasis added]

[265] Finally, *Allen-Vanguard* was rendered more than 20 years ago and the judge acknowledged that there was no precedent for the interpretive exercise he lent himself to when trying to decipher the meaning and scope of section 5.1 $CCAA^{159}$; he did not have the benefit of the useful framework imposed by the Supreme Court in $Callidus^{160}$ and $Groupe\ SM^{161}$, nor did he resort to parliamentary debates.

¹⁵⁵ S-4.

¹⁵⁶ **S-1**.

¹⁵⁷ 2025 QCCS 1883.

¹⁵⁸ Allen-Vanguard, supra, note 57, par. 59.

¹⁵⁹ *Ibid.*, par. 77.

¹⁶⁰ Callidus, supra, note 49.

¹⁶¹ Montréal (City) v. Deloitte Restructuring Inc. (Groupe SM), 2021 SCC 53.

[266] The relief sought before the judge was not only supported by a majority of stakeholders who found it warranted, but the judge also noted that there was clear evidence that the directors had an integral role in the success of the plan that was approved by all.

[267] In the present instance, (i) there was no formal support from a majority of stakeholders¹⁶²—no stakeholders were present at the hearing to voice any support—(2) there was no plan to vote on; (3) there was no compelling evidence of any meaningful contribution by any of the unidentified *Released Parties* to a non-existing plan or to the restructuring efforts; and (4) the Court was being asked to essentially use its discretion to replace the democratic rights of creditors and express a "vote" in their stead. All of this, in a context where the only evidence, indeed *all* of the evidence of the stakeholders' position on the relief sought, was, in fact, one of vehement opposition rather than support.

[268] All in all, in *Allen-Vanguard*, the judge was not asked to go as far as this Court is being asked to venture, in that the releases sought at the time were only in favour of directors.

[269] Despite recent cases suggesting the opposite, counsel for the Underwriters submitted that, in the context of an arrangement or a compromise, the proper statutory interpretation of 5.1(2)(b) also prohibits the release of claims against directors for securities misrepresentation made prior to the Initial Order. In other words, the exception could cover pre-filing claims of shareholders as creditors vis-à-vis directors being non-debtor third party as opposed to being restricted to post-filing contractual creditor claims to the exclusion of shareholders' claims. In their view, the recent cases holding otherwise cited and relied upon by the Applicants were wrongly decided, at least insofar as they may be of assistance to the Applicants' arguments herein.

[270] Simply stated, contrary to the assertions of the Applicants' counsel with respect to the Class Action Parties, the exception found in s. 5.1(2)(b) could extend to shareholders' claims against directors, especially in the context of directors' misrepresentations or oppressive conduct made pre-filing. The arguments made in that regard were compelling.

[271] In any event, assuming that s. 5.1(2) exception was not available to the Class Action Parties—which is not necessarily the case—the Full D&O Release, which nevertheless requires this Court's approval, can be granted or denied under other provisions of the actual D&O Release and of the *CCAA*. Therefore, whether the exception of s. 5.1(2) applies or not to the case at bar is not relevant, as the Court disposes of other avenues to deal with the Full D&O Release.

[272] Be that as it may, a close reading of sections 5.1(1) and 5.1(2) CCAA is nevertheless in order:

¹⁶² Since no vote took place on a plan of arrangement.

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise <u>of claims against</u> <u>directors of the company that arose before the commencement of proceedings under this Act</u> and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations. ¹⁶³

- (2) A provision for the compromise of claims against directors may not include claims that (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors. 164

[Emphasis added]

[273] S. 5.1(2) constitutes an exception to s. 5.1(1), which provides that a compromise or an arrangement may include *claims against directors* of the debtor company that arose before the *CCAA* filing and that relate to statutory obligations of the company for which the directors (not the officers) may be held liable.

[274] Any reference in s. 5.1(2)(b) to *claims against directors* who may not be released should be read in conjunction with s. 5.1(1), which refers to pre-filing claims in a very specific context.

[275] The issue in the present instance is whether the allegations of statutory securities misrepresentations found in the Mulhall Application and in the U.S. Actions constitute prima facie "allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors" pursuant to s. 5.1(2)(b). In order to apply s. 5.1(2)(b), the Court must consider the words of the Act read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁶⁵

[276] In fact, what was contemplated by Parliament when enacting s. 5.1 CCAA in 1997?

[277] The Debates of the House of Commons and of the Senate clearly, repeatedly and unequivocally demonstrate that the intent of the legislator when enacting s. 5.1 *CCAA* was to obviate the directors' "incentive to resign from the boards of the companies they serve at times of financial instability or impending insolvency" by "include[ing] provisions

^{163 5.1 (1)} La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

^{164 5.1 (2)} La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

¹⁶⁵ Rizzo & Rizzo Shoes Ltd. (Re), (Rizzo) 1998 CanLII 837 (SCC), par. 21.

for compromising claims against directors relating to obligations which are imposed on them by statute." ¹⁶⁶

- [278] This legislation was partially in response to the issues raised at the time with the company Canadian Airlines, as Parliament sought to eliminate the risk that "the director can resign before insolvency, thereby avoiding liabilities that a director of a bankrupt company faces under various federal, provincial and territorial statutes." ¹⁶⁷
- [279] With respect to the U.S. Defendants, they are not being sued for liabilities they face under provincial, federal or territorial statutes; they are not being sued for any liability *qua* director under these statutes; they did not resign in the vicinity of insolvency or as a result of the insolvency proceedings; and there is no relation whatsoever between the U.S. Claims, the Full D&O Release sought, and the Lion Group restructuring.
- [280] Clearly, the alternatively broad and then restrictive interpretation of s. 5.1 *CCAA* as a whole proposed by the Applicants, even if superficially premised on *Allen-Vanguard*, is contrary to the clear intent of the legislator. To the extent that s. 5.1 *CCAA* is within the purview of that which this Court should be examining in the first place—which is not the case—the precedents cited by the Applicants are of no relevance here.
- [281] Be that as it may, the Court finds that, *prima facie*, the allegations of securities misrepresentation made in the Mulhall Application and in the U.S. Actions are inherently *allegations of misrepresentations* within the meaning of s. 5.1(2) b).
- [282] However, recent case law on s. 5.1(2)(b)—*Nemaska* and *Taiga*—has generally held that there is no prohibition on releases of such claims because shareholders are not "creditors" within the meaning of the *CCAA*, and that s. 5.1(2) only applies to post-filing misrepresentations by directors to "creditors" only. ¹⁶⁸ A misrepresentation by directors to shareholders would, therefore, not be a misrepresentation made by directors to creditors falling under the s. 5.1(2)(b) exception, be it pre-filing or post-filing misrepresentations.
- [283] The Court respectfully begs to differ of opinion on that interpretation for the following reasons.
- [284] It is necessary to consider the French-language version of the *CCAA*. Unlike the English-language version, the French-language version of s. 5.1(2) is not divided into subsections 5.1(2)(a) and (b) and does not use the phrase "misrepresentations made by directors to creditors." It merely states [réclamations] fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Debates of the Senate, Official Report, 2nd Session, 35th Parliament, vol 136, no 70 (February 12, 1997), p 1516.

Debates of the Senate, Official Report, 2nd Session, 35th Parliament, vol 136, no 69 (February 11, 1997), p 1494.

¹⁶⁸ *Nemaska, supra,* note 69, par. 56, 65-66; *Taiga, supra,* note 70, par. 110-115.

[285] In French, the word "misrepresentations" is not qualified or constrained by the words "to creditors."

[286] With no disrespect intended, the Court is of the view that even in English, s. 5.1(2)(b) is not intended to create such a restrictive category. The provision carves out claims that are based on allegations of misrepresentation "made by directors to creditors or of wrongful or oppressive conduct by directors." The category of "wrongful or oppressive conduct by directors" is broad and is not constrained to wrongful or oppressive conduct by directors "toward creditors" as opposed to shareholders. In fact, although not exclusively, generally, most oppression remedy recourses are brought to Court by minority shareholders claiming to be the victims of oppression due to the wrongful or oppressive conduct of director(s), which may include misrepresentations.

[287] All in all, s. 5.1 and the s. 5.1(2) exception are intended to strike a balance: on the one hand, to protect directors who remain involved in the governance of a distressed business after the initial order and, on the other hand, to ensure that insolvency statutes do not become the refuge of unscrupulous directors seeking to escape the consequences of their actions.

[288] As the Court of Appeal for Ontario observed in *Dofasco*¹⁶⁹, it would be contrary to public policy to permit management to use insolvency to escape the consequences of their misrepresentations:

[54] [...] L. W. Houlden and C. H. Morawetz, the editors of *the 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192, are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, **prior to the insolvency**, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. **The same considerations do not apply to individual officers**. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements, which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.¹⁷⁰

[Emphasis added]

[289] While shareholders as equity claimants vis-à-vis a debtor company may not be entitled to recover from an insolvent estate in the same manner as other creditors, it would be contrary to public policy to permit unscrupulous directors to lure pre-filing prospective investors (i.e., shareholders and prospective shareholders) with misrepresentations only to obtain a release through the *CCAA*. This is captured in both the French-language

¹⁶⁹ NBD Bank, Canada v. Dofasco Inc. (Dofasco), 1999 CanLII 3826 (ON CA).

¹⁷⁰ *Dofasco*, *supra*, note 169, par. 54.

version of s. 5.1(2), and the open-ended phrase "or of wrongful or oppressive conduct by directors" in English.

[290] Simply branding a claimant as a shareholder is not sufficient nor conclusive. It is crucial to determine what the release sought by the debtor is for or what claims the proposed release purports to cover. In the present instance, the claims of the Class Action Parties are mainly personal claims in damages against non-debtor third parties, namely certain current or former directors and officers (and *deemed* directors and officers) of the Lion Group. The Carve-out does not aim at any of the Debtors or their assets nor does it affect any of their rights and recourses. In fact, the Debtors still continue to benefit from the Stay of proceedings ordered earlier in their favour¹⁷¹.

[291] Similarly, there is no basis in the text of the *CCAA* to conclude that s. 5.1(2) applies exclusively to post-filing claims. Nothing in the text of s. 5.1(2) establishes such a constraint. On the contrary, s. 5.1(2) establishes an exception to s. 5.1(1), which provides that a compromise or an arrangement "may include in its terms provision for the compromise of claims against directors of the company that arose <u>before the commencement of proceedings under this Act...</u>" [Emphasis added]. If s. 5.1(1) permits a release of pre-filing claims in a compromise or an arrangement in a specific and limited context, there is no reason to conclude that the s. 5.1(2) exception is necessarily limited to post-filing claims. While s. 5.1(1) is permissive and expressly permits the release of certain pre-filing claims, there is nothing in the text of the Act to suggest that the exception at s. 5.1(2)(b) only applies to post-filing claims.

[292] Counsel for the U.S. Plaintiffs also pointed out that, in their respectful opinion, the reasoning in *Allen-Vanguard* was flawed in that it was betrayed by one crucially problematic syllogism, seemingly endorsed by the Applicants.

[293] The Applicants contended that:

... only "post-filing claims" of "creditors" against the "directors" of a debtor company cannot be released in accordance with Section 5.1(2) of the CCAA, as it would be inconsistent with the scheme of the CCAA to allow claims to proceed against the debtor company's directors for acts and omissions that they did in the name of the company, *prior* to the Initial Order.¹⁷²

[294] Yes, s. 5.1(2) explicitly refers to "claims", but there is more.

[295] According to the Applicants themselves, the word "claim" in s. 5.1(2) corresponds to any indebtedness, liability or obligation of any kind that would be a provable "claim" within the meaning of section 2 of the Bankruptcy and Insolvency Act:

116. First, the term "claim" is defined in section 2 of the CCAA as follows:

¹⁷¹ Paragraph 18 of the ARIO (2025 QCCS 585).

¹⁷² Applicants' SMOA, par 91.

"any indebtedness, liability or obligation of any kind that would be a provable claim within the meaning of section 2 of the Bankruptcy and Insolvency Act."

117. Second, the terms "provable claim," "claim provable" and "claim provable in bankruptcy" are defined as follows in section 2 of the Bankruptcy and Insolvency Act (the "BIA"), and such definition makes it clear that the only persons who may assert a "provable claim," a "claim provable" or "claim provable in bankruptcy" are "creditors" (as opposed to shareholders or other holders of equity claims):

"any claim or liability provable in proceedings under this Act by a creditor" 173

[Emphasis added]

[296] While emphasizing that a provable claim can only be one asserted by the holder of a debt or a creditor holding a provable claim (as opposed to an equity holder or a person asserting an *equity claim*), the Applicants ignored that, by definition, a provable claim is not a post-filing claim, as it is established at "the date of commencement of insolvency proceedings."¹⁷⁴

[297] Quite apart from the fact that in *Allen-Vanguard*, the judge found that, "in most cases" (not always), the obligations referred to in s. 5.1(2) will "be a post-filing obligation¹⁷⁵," it is, with all due respect, incongruous to simultaneously contend that the notion of "claims" in s. 5.1(1) and s. 5.1(2) must be a provable claim for purposes of restrictively defining the nature of the claim depending on the identity of the person asserting it (i.e., a creditor or a shareholder), but not when it comes to adhering to its temporal features (pre-filing or post-filing).

[298] While the reasoning in *Allen-Vanguard* has become influential, it is nevertheless difficult to reconcile with the text of s. 5.1(2). In particular, there is no legislative basis for the judge's conclusion that "in most cases" a director's personal undertaking to a creditor "is a post-filing obligation." In fact, directors will rarely make post-filing contractual arrangements with creditors in a *CCAA* context with a monitor appointed and as such, the judge focused heavily on contractual personal interactions between directors and creditors post-filing.

[299] Respectfully, the requirement that directors' misrepresentations be based on a close and direct relationship with a creditor (and not with a shareholder or a prospective shareholder) has no legal basis or justification. These elements, although not present in the text of the *CCAA* provision and not justified in the *Allen-Vanguard*'s decision, have somehow persisted in the jurisprudence since 2011.

¹⁷³ *Ibid.*, par 116-117.

¹⁷⁴ *Groupe SM*, *supra*, note 161, par. 109.

¹⁷⁵ Allen-Vanguard, supra, note 57, par. 74.

[300] However, the judge further found that "in this context," s. 5.1(2) may yet still "include a shareholder.¹⁷⁶" This further illustrates that the hazardous task assumed by the Applicants to rely on the interpretation proposed by *Allen-Vanguard* that was made at the time without the aid of applicable precedents and any tools of statutory interpretation.

- [301] This only illustrates that the *ratio* in *Allen-Vanguard* is, at its core, not a useful precedent to rely upon in the present instance, at the very least.
- [302] Finally, it should be noted that the very scope of the exceptions contemplated in s. 5.1(2) is at odds with the theory that they could only refer to post-filing claims. The notion that directors (or even officers) could likely engage in oppressive conduct or make misrepresentations post-filing in the context of a *CCAA* process—while admittedly not impossible—is so divorced from the realm of probability as to be not only incongruous, but it is also simply improbable that the legislator would purposely carve out an exception for such trifles: *de minimis non curat lex*.
- [303] Respectfully, the Applicants' further reliance on the recent *Nemaska* and *Taiga* decisions who cited *Allen-Vanguard* with approbation to support their opinion that s. 5.1(2) only aims to cover post-filing claims of creditors as opposed to equity holders or shareholders, did not convince this Court of their merits for the purposes hereof.
- [304] While in *Nemaska* and *Taiga*, the judges relied on and endorsed the reasoning of *Allen-Vanguard* insofar as the scope of s. 5.1(2) b) is restricted to post-filing claims of creditors against directors' misrepresentations to the exclusion of shareholders asserting equity claims, respectfully, the Court is not convinced that such a restrictive interpretation of the s. 5.1(2) exception is called for.
- [305] In any event, first and foremost, the factual backdrops of these two recent decisions can be distinguished from the facts in the present case.
- [306] In *Nemaska*¹⁷⁷, a RVO containing a third-party release was proposed and sanctioned on October 15, 2020.¹⁷⁸ The *only* exception provided in the third-party release was for "any claim against the directors that is not permitted to be released pursuant to s. 5.1(2) of the CCAA.

^{176 [74]} What in my view is consistent with the decisions in the three cases mentioned and in the Québec case Papiers Gaspésia 2006 QCCS 1460 (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released. [Emphasis added]

¹⁷⁷ Nemaska, supra, note 69.

¹⁷⁸ Nemaska, supra, note 69, par. 2.

[307] The judge was called upon to consider a shareholder action (the "**Shenker Action**") against an insolvent mining company. The Shenker Action included various claims and causes of action, including a shareholder misrepresentation claim against D&Os. Relying upon the earlier approval of the RVO, the D&Os sought to enforce the release contained therein that would have extinguished the Shenker Action against them. Shenker opposed the D&Os claiming that their case fell within the s. 5.1(2) exception of the RVO.

[308] In *Nemaska*, the s. 5.1(2) exception was raised months after the transaction approved via a RVO was closed and after the Shenker Action was filed against the debtors' directors and officers therein¹⁷⁹. The judge was then tasked with determining whether the claims arising from the Shenker Action (filed *after* the closing of the transaction) were barred by the D&O release, or whether they fell under the *only* exception provided therein, i.e., s. 5.1(2). It is for that reason that the *Nemaska* decision focused on the applicability of s. 5.1(2).

[309] The Court noted that in *Nemaska*, the judge reviewed the sanction order rendered five years prior by the supervising judge and: (i) emphasized that the latter considered the impact of a refusal to include a D&O release in the RVO, which was an essential component of the transaction contemplated at the time¹⁸⁰; and (ii) highlighted that the supervising judge decided to leave the proposed release language as is "*pour diverses raisons propres à la situation en cause*."¹⁸¹

[310] No similar impact or reasons exist here.

[311] The judge also adopted the reasoning in *Allen-Vanguard*, *c*oncluding that s. 5.1(2) applied only to contractual creditors as opposed to equity holders, and generally applied to the directors' misrepresentations or oppressive conduct against creditors after the initial order (post-filing), not those before it (pre-filing)¹⁸².

[312] However, in *Nemaska*, in issuing the RVO with the s.5.1(2) exception, the supervising judge stated that, in his view, this exception adequately protected shareholders vis-à-vis the D&Os:

[106] Le Tribunal est d'avis que cette exception protège adéquatement les actionnaires à l'égard des administrateurs et dirigeants des Débitrices et il n'y a pas lieu d'élaborer davantage sur ce sujet. 183

[313] Given the very particular circumstances of that case, the judge concluded that he was not bound by the supervising judge's comment, as it did not constitute *res judicata*,

¹⁷⁹ Nemaska, supra, note 69, par. 9.

¹⁸⁰ Nemaska, supra, note 69, par. 36.

¹⁸¹ Nemaska, supra, note 69, par. 83.

¹⁸² *Nemaska*, *supra*, note 69, par. 56, 65-66.

¹⁸³ Arrangement relatif à Nemaska Lithium inc, 2020 QCCS 3218.

adding that using the word "shareholder" could not create a right that does not exist to start with 184.

- [314] Be that as it may, it is important to point out that the judge was guided by several other facts more fully set out in his judgment that explained and justified his conclusion that Shenker did not benefit from the s. 5.1(2) exception found in the RVO.
- [315] With all due respect for the opinion to the contrary, in *Nemaska*, the circumstances and facts considered by the judge are totally distinguishable from those in the present case.
- [316] The Court is not in a position to accept the Applicants' invitation to adopt the same reasoning, echoing the reasoning in *Allen-Vanguard* that s. 5.1(2)(b) is necessarily limited to claims of contractual creditors (and not shareholders) against directors for their post-filing misrepresentations or their post-filing wrongful or oppressive conduct.
- [317] With all due respect, the Court does not believe that the scope of s. 5.1(2) exception should be interpreted in such a narrow and restrictive manner.
- [318] The Court comes to the same conclusion with respect to the *Taiga* decision.
- [319] In *Taiga*¹⁸⁵, the judge similarly adopted the reasoning in *Nemaska* and in *Allen-Vanguard*.
- [320] In *Taiga*, a class action plaintiff sought to amend his application for authorization to name additional directors of Taiga Motors. The directors sought to enforce the terms of a previously court-approved release under the *CCAA*, which the plaintiffs resisted on the basis of the exception found at s. 5.1(2)¹⁸⁶. The judge adopted the entirety of the analysis in *Nemaska*, echoing *Allen-Vanguard*, and upheld the D&O releases. The judge also considered the French and English versions of s. 5.1(2), concluding that read as a whole, they indicated that s. 5.1(2) covered only post-filing misrepresentations or representations made to creditors as opposed to equity holders. However, the different wording found in the French-language version was not openly addressed.
- [321] With all due respect, considerable caution is required. The decision in *Allen-Vanguard*, upon which *Nemaska* and *Taiga* are based, appears to lack analytical depth, and appears to have been motivated in large part by the fact that the plaintiffs had failed to object in a timely manner to the proposed release and that all creditors had voted in favour of a plan that incorporated the sole s. 5.1(2) exception.

¹⁸⁴ *Nemaska, supra,* note 69, par. 89-90.

¹⁸⁵ *Taiga, supra,* note 70.

¹⁸⁶ The release also excluded *fraud and willful misconduct*, which the judge found inapplicable in light of the lack of evidence.

[322] That is clearly not the case here. The Underwriters, along with the other affected parties to the Mulhall Application, and the U.S. Plaintiffs have strenuously objected to the Full D&O Releases throughout these proceedings, prompting the addition of the Carve-out at the opportune time.

- [323] In the present instance, the RVO was sanctioned by the Court with the Carve-out in favour of the Class Action Claims subject to determining the legality and appropriateness of the Carve-out at a later date.
- [324] Additionally, although the class action plaintiff in *Nemaska* raised allegations of wrongful and/or oppressive conduct, the judge concluded that these allegations were not substantiated and amounted to conjecture.
- [325] In Taiga, the evidence did not satisfy the judge as well that the exceptions of *fraud* and *willful misconduct* of the D&Os had been met in a convincing manner.
- [326] Again, this is not the case here, as appears from the Mulhall Application, Mr. Mulhall's allegations are *prima facie* serious and supported by significant probative evidence. The same finding applies to the U.S. Actions.
- [327] Finally, none of the other additional cases cited by the Applicants are relevant to this Court's analysis, as their circumstances differ vastly from the case at hand, making them distinguishable and of no practical assistance herein, for instance:
 - In Taiga Motors, ¹⁸⁷ Collier J. highlighted that "in the Monitor's opinion, the requested releases form an important part of the RVO transaction, since Taiga's directors and officers may be called upon to assist with the future conduct of the business" ¹⁸⁸; in the present instance, the Monitor did not opine that the D&O Release was "an important part of the RVO" (in fact, the Monitor provided evidence to the contrary) nor that all D&Os may be called upon to assist in the future conduct of Lion Electric's business;
 - In FormerXBC¹⁸⁹, the Court noted that it was "difficult [...] to see who could be harmed" by the third-party release, since a settlement approved previously by the Court released the class action claims in consideration of a payment of \$5M financed by Xebec's insurer¹⁹⁰;
 - In Harte Gold¹⁹¹, the Court specifically emphasized that it was "unaware of any outstanding director claims or liabilities against the directors and officers" as a

¹⁸⁷ Taiga Motors Corporation et Deloitte Restructuring Inc., (Taiga Motors) 2024 QCCS 4319.

¹⁸⁸ *Ibid*, *supra*, note 187, par. 25.

¹⁸⁹ FormerXBC, supra, note 39.

¹⁹⁰ *Ibid.*, *supra*, note 39, par. 58-59.

¹⁹¹ Harte Gold, supra, note 43, par. 83.

result of which "the Release is not expected to materially prejudice any stakeholders," which is clearly not the case here 192;

- In Cirque du Soleil¹⁹³, the Court held that at this stage, without a hearing on the merit of the defamation claims, it could only characterize the individual defendants' behaviour as unjustified or abusive "ce qui permet de retenir l'exclusion prévue au paragraphe 5.1(2) de la LACC et passer à la prochaine étape, soit l'audition au mérite de la Réclamation en diffamation contre les 4 Individus-défendeurs". 194

[328] In conclusion, the Court is of the opinion that the Class Action Parties who are all objecting to the Full D&O Release are not, for the purposes hereof, presently asserting equity claims against any of the Debtors or against their assets. As previously mentioned, given the overly broad and yet vague definition of *Released Parties* and of *Released Claims* in the D&O Release, they were obliged to intervene to assert and protect as creditors against third-party non-Debtors, their personal and direct recourses in damages against them due to their alleged misrepresentations for which they may be found liable, not against the Debtors.

[329] Given the *prima facie* serious nature of the allegations of misrepresentations made against the defending D&Os in the three Class Actions, the Court believes that the Class Action Parties could reasonably rely on the s. 5.1(2)(b) exception to oppose the Full D&O Release insofar as the directors and former directors are concerned. However, in light of the conflicting interpretation of the s. 5.1(2)(b) exception and the fact that the *Nemaska* decision will be heard by the Court of Appeal¹⁹⁵, it is not necessary to rest the Court's judgment on that specific controversial exception.

[330] Hopefully, in *Nemaska*, the Court of Appeal will be in position to clarify the scope of the 5.1(2)(b) *CCAA* exception.

4.8.4 The Class Action Claimants Cannot Rely on Section 5.1(3) CCAA to Oppose the Full D&O Release

[331] Section 5.1(3) CCAA reads as follows:

5.1(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. 196

¹⁹² *Ibid*.

¹⁹³ Arrangement relatif à 9424-9356 Québec Inc. (Cirque du soleil), 2021 QCCS 5319 (Leave to appeal dismissed, 2022 QCCA 549).

¹⁹⁴ Cirque du soleil, supra, note 193, par. 79.

¹⁹⁵ 2025 QCCA 1365.

¹⁹⁶ **5.1 (3)** Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

[332] S. 5.1(3) affirms the Court's residual discretion to deny third-party releases in favour of directors if a compromise of claims against directors would be unfair or unreasonable in the circumstances.

- [333] Applicants' counsel argued that, as was the case in s. 5.1(2), the exception or limitation set out in s. 5.1(3) *clearly* referred to "*claims*" thereby excluding "*equity claims*" against "directors", as was previously discussed.
- [334] Counsel also pointed out that in *Allen-Vanguard*, *Nemaska* and *Taiga*, none of the judges chose to deny the D&O releases sought on the basis that it would be unfair or unreasonable to grant such releases pursuant to s.5.1(3).
- [335] The Court respectfully takes issue with this affirmation.
- [336] Firstly, s. 5.1(3) does not contain any of the exceptions or limitations alluded to by the Applicants' counsel. Its provisions grant discretion to the Court if the compromise to be approved would not be fair and reasonable insofar as directors are concerned.
- [337] Secondly, in *Nemaska*, the judge actually considered s. 5.1 (3) but concluded that while the discretion conferred upon the Court under that section allowed a potential injustice to be remedied by refusing to sanction a compromise if it was not fair and reasonable, the specific circumstances of his case did not warrant such an exercise of his discretion¹⁹⁷.
- [338] Indeed, applied to the case at bar, s. 5.1(3) grants discretion to the Court to decide whether it would be fair and reasonable to approve a compromise involving directors via the Full D&O Release, thus impacting if not depriving the claims and potential claims of the Class Actions Parties against the defending directors.
- [339] What is "fair and reasonable" must be assessed as part of the Court's analysis with the assistance of the Lydian Factors (the Nexus Test).
- [340] The judicial discretion in applying s. 5.1(3) is very wide, permitting the Court to "pick and choose among the directors and further that any individual claim may be segmented so that it may be partially exempted." 198.
- [341] Unfortunately for the Applicants—and the directors and the *deemed* directors, they sought to be shielded from the three Class Actions—not only they failed the *Nexus Test* for the reasons more fully stated previously, but, more importantly, they also failed, if not, purposely refrained from identifying any of the D&Os (or the *deemed* D&Os) who would have actually participated in a meaningful manner to the restructuring efforts, if any.

¹⁹⁷ Nemaska, supra, note 69, par. 72.

¹⁹⁸ Re BlueStar Battery Systems International (BlueStar), 2000 CanLII 22678 (ON SC), par. 16.

[342] All in all, the Court is satisfied, if not strongly convinced that the facts and circumstances of the present case warrant and justify that the Court exercises its judicial discretion under s. 5.1(3). Therefore, the Court finds that it would be unfair and unreasonable to compromise the claims and potential claims of the Class Action Parties by approving the Full D&O Release without the Carve-out insofar as the directors and former directors of the Lion Group are concerned.

- [343] Approving the Full D&O Release in order to rearrange the litigation landscape between non-debtor stakeholders (i.e., the Class Action Parties), while no pressing *CCAA* objective demands it would be unfair and unreasonable within the purview of s. 5.1(3) *CCAA*.
- [344] Given the Court's determination that the Carve-out must remain based on the Court's judicial discretion conferred by s. 5.1(3) CCAA, it is not necessary to address the exception relating to "any claims for fraud or willful misconduct" found in the Full D&O Release.
- [345] The Court has already determined that the numerous allegations found in the three Class Action proceedings concerning the alleged misrepresentations and maneuvers of the defending D&Os were serious *prima facie*. These allegations may possibly lead the trial judges to find on the merits fraudulent or willful misconduct and/or wrongful or oppressive conduct on the part of the defending D&Os or misrepresentations generating their liability.
- [346] At this juncture, it is not necessary to conduct a detailed and exhaustive analysis of the allegations found in the three Class Action proceedings. *Prima facie*, the allegations are sufficiently serious to warrant granting the remedy sought by the Class Action Parties.
- [347] While the Court's findings pursuant to s. 5.1(3) CCAA only apply to and concern the directors (and possibly the "deemed" directors) of the Lion Group, the overall compelling evidence leads the Court to exercise its judicial discretion under s. 11 CCAA with respect to the officers and "deemed" officers defined as Released Parties in the Full D&O Release. If removing the Carve-out from the D&O Release insofar as the directors (and "deemed" directors) are concerned would be unfair and unreasonable, the Court finds that it is only appropriate to reach the same conclusion with respect to the officers and "deemed" officers of the Lion Group whoever they may be.
- [348] Therefore, the Carve-out must and shall, therefore, remain intact.

4.8.5 The Insured Claim exclusion

[349] The Applicants argued that without the Carve-out of the Class Action Claims—which should be removed by the Court—the other exclusions found in the Full D&O Release were sufficient to adequately protect the rights of the Class Action Parties, *inter alia*:

(i) claims against the *Released Parties* arising out of fraud or willful misconduct or any claim against the *Released Parties* that are not permitted to be released pursuant to section 5.1(2) of the *CCAA* ¹⁹⁹(the "**First Exclusion**"); or (iii) claims against the *Released Parties* that are covered by any insurance policy of the Lion Group (to the extent of any such available insurance) (the "**Insured Claim Exclusion**").

[350] As such, Applicants claimed that holders of claims against the *Released Parties* falling within those two exclusions would not be adversely affected by the Full D&O Release. Yet, the Applicants have insisted that the Class Action Parties could not avail themselves of the First Exclusion given their alleged status of equity claimants. In any event, reliance on the future adjudication of s. 5.1(2) *CCAA* exception invites uncertainty at best, especially with some case law ruling that this exclusion does not apply to shareholders and only covers post-filing claims.

- [351] What about the Insured Claim Exclusion?
- [352] For ease of reference, paragraph 62 of the RVO reads as follows:

[62] ORDERS that, notwithstanding anything to the contrary contained in paragraph [61] of this Order or elsewhere, any Released Claims that are covered by any insurance policy of the Debtors and only to the extent of any such available insurance (each, an "Insured Claim"), shall not be waived, discharged, released, cancelled or barred by this Order, and any Person having an Insured Claim shall be entitled to recovery in respect of such Insured Claim but solely from, and to the extent of, the proceeds of the applicable insurance policies available in respect of such claim, and Persons with Insured Claims shall have no right to, and shall not, directly or indirectly, seek any recovery in respect thereof from the Debtors or the Released Parties, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable insurance policies. For greater clarity, (i) if no insurance is available to cover a Released Claim, such claim shall be a Released Claim (except for the Class Action Claims, until the court's final decision as to whether or not they should be released, pursuant to paragraph [61] of this Order), and (ii) any claims that may be subject to recovery under any insurance policies shall be deemed not to be vested nor transferred to the Excluded Cos. or to any other entity.

[353] The Applicants very briefly addressed as follows the Insured Claim Exclusion in their MOL, claiming that it purports to channel the claims to insurance proceeds to the benefit of claimants²⁰⁰:

With respect to the exclusion of claims that are covered by insurance policies, the Applicants wish to highlight that such "channelling" of claims was made further to discussions with parties involved, including the Monitor, and as requested by certain counsels to the Class Action Claimants, there are multiple precedents

¹⁹⁹ This exclusion is found customarily in similar release orders.

²⁰⁰ Applicants' MOL, par. 104 (d).

where claims against D&Os were "channelled" to insurance proceeds, whether in the context of a *CCAA* plan of compromise or arrangement, ²⁰¹ in a CBCA plan, ²⁰² in an approval and vesting orders ²⁰³ or approval or in approval reverse vesting orders. ²⁰⁴

[354] Just because the proposed release language was approved in the past by the Courts in other instances does not mean that it will or should necessarily be approved in every case that follows²⁰⁵. Whether third-party releases like the one sought herein have been approved in previous cases is irrelevant. It rather depends on whether the Debtors have met their burden in the present instance.

[355] Again, each case must be determined and assessed based on its own merits and its own set of circumstances.

[356] In any event, the evidence adduced at the hearing did not reveal the existence of an agreement between the parties regarding this particular exclusion, on the contrary.

[357] According to Mulhall's counsel, to the extent the D&O insurance policies covered by the Insurance Claim Exclusion—which are wasting policies—are eroded—a fact that has not been disclosed by the Applicants—they offer limited respite to aggrieved shareholders.²⁰⁶

[358] Moreover, the definition of *Insured Claim* (i.e., "any Released Claims that are covered by any insurance policy of the Debtors") is unclear and open to interpretation. As it stands, all Released Claims "covered" by an insurance policy are *Insured Claims*. But what constitutes a covered claim? Must the insurer confirm coverage? If denied, does the *Insured Claim* revert back to a released one? These questions remained unanswered.

In the Matter of a Plan of Compromise or Arrangement of Guestlogix Inc. et al., Plan of Compromise and Arrangement dated July 29, 2016, Court File No. CV-16-11281-00 CL (ONSC), at para. 6.2; In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Plan of Compromise and Reorganization dated December 3, 2012, Court File No. CV-12-9667-00 CL, at section 7.2 (j); and In the Matter of a Plan of Compromise or Arrangement of Skylink Aviation Inc., Plan of Compromise and Arrangement dated Aril 18, 2013, Court File No. 13-1003300-CL, at section 7.1(b).

²⁰² In the Matter of a Proposed Arrangement of Concordia International Corp. et al., Amended Plan of Arrangement dated June 26, 2018, Court File No. CV-17-584836-00 CL, at section 7.4.

²⁰³ In the Matter of the Companies' Creditors Arrangement Act in Elevation Gold Mining Corporation et al., Approval and Vesting Order granted on December 17, 2024, Court File No. S-245121 (BCSC), at para. 14.

²⁰⁴ Green Relief Inc. (Re), Approval and Vesting Order granted November 9, 2020 (ONSC), Court File No. CV-20-00639217-00 CL, at para. 24; In the Matter of the Companies' Creditors Arrangement Act in Delta 9 Cannabis Inc., Approval and Reverse Vesting Order, Court File No. 2401-09688 (ABKB), at para. 29; In the Matter of the Companies' Creditors Arrangement Act in Atlas Global Brands Inc., Approval and Reverse Vesting Order, Court File No. CV-24-00722386-00 CL (ONSC), at para. 33.

²⁰⁵ *Tacora*, *supra*, note 101, par. 20.

²⁰⁶ Mulhall Plan of Argument, par. 60. To date, the Debtors' counsel has not disclosed the extent to which the D&O insurance policies have been depleted, should it be the case.

[359] The proposed wording of paragraph 62, like the wording of paragraph 61 with respect to the *Released Parties*, *inter alia*, invites further litigation instead of preventing the same as much as possible. It certainly offers no certainty to the Class Action Parties.

[360] Considering the above, the Court finds that the Insured Claim Exclusion does not provide adequate protection to the Class Action Parties and, therefore, it does not justify the removal of the Carve-out from the Full D&O Release.

[361] For greater certainty, the Court shall specify that any of the limitations or restrictions found in paragraph 62 of the RVO with respect to any Insured Claim shall not apply to nor shall it be raised against the Class Action Claims of paragraph 61.

5. **CONCLUSION**

[362] The Court finds that it is appropriate, fair and reasonable to maintain the Carveout in the RVO with the following modifications:

[61] **ORDERS** that effective upon the issuance of the Monitor's Certificate, all present and former directors and officers of the Debtors, as well as all Persons deemed to be a present or former director or officer of the Debtors as a result of its management or supervision of the management of the business and affairs of the Debtors (collectively, the "Released Parties") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity, whether based in statute or otherwise and whether based in whole or in part on any act or omission, obligation, transaction, offer, investment proposal, dealing or any declaration under the Business Corporations Act (Québec), or on any other occurrence existing or taking place prior to the commencement of the CCAA Proceedings or the issuance of the Monitor's Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Debtors or their assets, business or affairs, or prior dealings with the Debtors, wherever or however conducted or governed. the administration and/or management of the Debtors and these proceedings (collectively, the "Released Claims"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties and are not vested nor transferred to Excluded Cos or to any other entity and are extinguished, provided, however, that nothing in this paragraph shall waive, discharge, release, cancel or bar (i) (A) any claim against the Released Parties arising from fraud or willful misconduct, nor any claim against the Released Parties that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or (B) any Insured Claim (as defined below), and (ii) the Class Action Claims (as defined below), provided that the determination of

whether the foregoing release or any other release should be ordered in respect of the Class Action Claims will be adjudicated by this Court at a subsequent hearing. For purposes of this paragraph, the "Class Action Claims" mean any claims (including the right of any person to bring recursory claims, claims for contribution and indemnity, subrogated claims, or other third party claims) against the Released Parties arising from (i) the verified amended class action complaint dated March 11, 2024 filed by Ahuva Schachter, Michael Smith, Douglas Neujahr, Samhita Gera, and Denish Bhavsar against Ian Robertson, Ken Manget, Christopher Jarratt, Michael Hoffman, Paul Dalglish, Brad Sparkes, Robert Schaefer, Mark Bedard, Nicolas Brunet, and The Lion Electric Company before the Court of Chancery of the State of Delaware in matter C.A. No. 2023-1112-MTZ, (ii) the amended class action complaint for violation of the federal securities laws dated August 27, 2024 filed by Jacques Jaar against Northern Genesis Acquisition Corp., Ian Robertson, Paul Dalglish, Michael Hoffman, Ken Manget, Brad Sparkes, Robert Schaefer, The Lion Electric Company, Marc Bedard, and Nicolas Brunet before the United States District Court Southern District of New York in matter 1:24-cv-02155-JLR), and (iii) the motion for the authorization to institute a class action claim and for leave to institute an action in damages pursuant to the Securities Act (Québec) instituted by Adam B. Mulhall (as the plaintiff representative on behalf of the envisioned class to be covered) and filed with the Superior Court of Québec, District of Montréal (Class Action Division) bearing court number 500-06-001366-257, dated February 21, 2025.

[62] ORDERS that, notwithstanding anything to the contrary contained in paragraph [61] of this Order or elsewhere, any Released Claims that are covered by any insurance policy of the Debtors and only to the extent of any such available insurance (each, an "Insured Claim"), shall not be waived, discharged, released, cancelled or barred by this Order, and any Person having an Insured Claim shall be entitled to recovery in respect of such Insured Claim but solely from, and to the extent of, the proceeds of the applicable insurance policies available in respect of such claim, and Persons with Insured Claims shall have no right to, and shall not, directly or indirectly, seek any recovery in respect thereof from the Debtors or the Released Parties, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable insurance policies. For greater clarity, (i) if no insurance is available to cover a Released Claim, such claim shall be a Released Claim (except for the Class Action Claims, until the Court's final decision as to whether or not they should be released, pursuant to paragraph [61] of this Order, which shall not be adversely affected in any manner whatsoever by the limitations and restrictions found in this paragraph 62, and (ii) any claims that may be subject to recovery under any insurance policies shall be deemed not to be vested nor transferred to the Excluded Cos. or to any other entity.

[363] It will also be necessary to harmonize paragraph 63 of the RVO which reads as follows:

[63] **ORDERS** and **DECLARES** that the commencement or prosecution, whether directly, indirectly, derivatively, or otherwise of any Released Claim against the D&Os or their respective successors and assigns is permanently enjoined and barred.

[364] It shall read as follows:

[63] Subject to and without affecting in any manner whatsoever the Class Action Claims forming part of the exclusions found at paragraphs [61] and [62] above and the rights and recourses resulting therefrom, ORDERS and DECLARES that the commencement or prosecution, whether directly, indirectly, derivatively, or otherwise of any Released Claim against the D&Os or their respective successors and assigns is permanently enjoined and barred.

[365] With respect to the request to order the provisional execution of the present judgment notwithstanding any appeal and without the necessity to furnish any security thereon, the Court believes that in the present particular context, where the Full D&O Release has nothing to do with the restructuring that was, in any event, completed somewhat successfully, it is warranted to issue such an order, as the Class Action Parties stand to suffer greater prejudice should they continue to be prevented unnecessarily from exercising their rights and recourses against third parties who are not the Debtors herein.

[366] Finally, as to the judicial costs, given that under the present circumstances, the Debtors have no financial resources to satisfy the judicial costs that should normally be awarded to the various objectors, the Court shall order that each party assume their own judicial costs.

FOR THOSE REASONS, THE COURT:

- [367] **DISMISSES** the Applicants' Application to release and discharge the Released Parties of the Class Action Claims (as these terms are defined in paragraph 61 of the *Rectified Approval and Reverse Vesting Order* rendered on June 6, 2025);
- [368] **MAINTAINS** the Notice of Objection by the Petitioner Adam B. Mulhall to Debtors' Application for the Issuance of an Approval and Reverse Vesting Order dated May 20, 2025;
- [369] **MAINTAINS** the *Amended Notice of Objection by the U.S. Plaintiffs* dated September 9, 2025;
- [370] **MAINTAINS** the *Avis d'opposition de Raymond Chabot Grant Thornton* dated May 20, 2025;
- [371] **MAINTAINS** the Amended Notice of Objection of the Underwriters of Objection National Bank Financial Inc., B. Riley Securities Inc., Barclays Capital Canada Inc., BMO Nesbitt Burns Inc., Desjardins Securities Inc., Laurentian Bank Securities Inc., Raymond James Ltd., and Roth Canada Inc. dated August 28, 2025;
- [372] **DECLARES** and **ORDERS** that the D&O Release language be amended, *nunc* pro tunc, to remove the stricken portion below of paragraphs 61 and 62 of the Rectified

Approval and Reverse Vesting Order of June 6, 2025 and modify paragraphs [62] and [63] accordingly:

[61] **ORDERS** that effective upon the issuance of the Monitor's Certificate, all present and former directors and officers of the Debtors, as well as all Persons deemed to be a present or former director or officer of the Debtors as a result of its management or supervision of the management of the business and affairs of the Debtors (collectively, the "Released Parties") shall be deemed to be forever irrevocably released and discharged from any and all present and future claims whatsoever (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity, whether based in statute or otherwise and whether based in whole or in part on any act or omission, obligation, transaction, offer, investment proposal, dealing or any declaration under the Business Corporations Act (Québec), or on any other occurrence existing or taking place prior to the commencement of the CCAA Proceedings or the issuance of the Monitor's Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, in respect of the Debtors or their assets, business or affairs, or prior dealings with the Debtors, wherever or however conducted or governed. the administration and/or management of the Debtors and these proceedings (collectively, the "Released Claims"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties and are not vested nor transferred to Excluded Cos or to any other entity and are extinguished, provided, however, that nothing in this paragraph shall waive, discharge, release, cancel or bar (i) (A) any claim against the Released Parties arising from fraud or willful misconduct, nor any claim against the Released Parties that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or (B) any Insured Claim (as defined below), and (ii) the Class Action Claims (as defined below), [...]. For purposes of this paragraph, the "Class Action Claims" mean any claims (including the right of any person to bring recursory claims, claims for contribution and indemnity, subrogated claims, or other third party claims) against the Released Parties arising from (i) the verified amended class action complaint dated March 11, 2024 filed by Ahuva Schachter, Michael Smith, Douglas Neujahr, Samhita Gera, and Denish Bhavsar against Ian Robertson, Ken Manget, Christopher Jarratt, Michael Hoffman, Paul Dalglish, Brad Sparkes, Robert Schaefer, Mark Bedard, Nicolas Brunet, and The Lion Electric Company before the Court of Chancery of the State of Delaware in matter C.A. No. 2023-1112-MTZ, (ii) the amended class action complaint for violation of the federal securities laws dated August 27, 2024 filed by Jacques Jaar against Northern Genesis Acquisition Corp., Ian Robertson, Paul Dalglish, Michael Hoffman, Ken Manget, Brad Sparkes, Robert Schaefer, The Lion Electric Company, Marc Bedard, and Nicolas Brunet before the United States District Court Southern District of New York in matter 1:24-cv-02155-JLR), and (iii) the motion for the authorization to institute a class action claim and for leave to institute an

action in damages pursuant to the *Securities Act* (Québec) instituted by Adam B. Mulhall (as the plaintiff representative on behalf of the envisioned class to be covered) and filed with the Superior Court of Québec, District of Montréal (Class Action Division) bearing court number 500-06-001366-257, dated February 21, 2025.

[62] ORDERS that, notwithstanding anything to the contrary contained in paragraph [61] of this Order or elsewhere, any Released Claims that are covered by any insurance policy of the Debtors and only to the extent of any such available insurance (each, an "Insured Claim"), shall not be waived, discharged, released, cancelled or barred by this Order, and any Person having an Insured Claim shall be entitled to recovery in respect of such Insured Claim but solely from, and to the extent of, the proceeds of the applicable insurance policies available in respect of such claim, and Persons with Insured Claims shall have no right to, and shall not, directly or indirectly, seek any recovery in respect thereof from the Debtors or the Released Parties, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable insurance policies. For greater clarity, (i) if no insurance is available to cover a Released Claim, such claim shall be a Released Claim (except for the Class Action Claims [...] pursuant to paragraph [61] of this Order, which shall not be adversely affected in any manner whatsoever by the limitations and restrictions found in this paragraph 62, and (ii) any claims that may be subject to recovery under any insurance policies shall be deemed not to be vested nor transferred to the Excluded Cos. or to any other entity.

[63] <u>Subject to and without affecting in any manner whatsoever, the Class Action Claims forming part of the exclusions found at paragraphs [61] and [62] above and the rights and recourses resulting therefrom, **ORDERS** and **DECLARES** that the commencement or prosecution, whether directly, indirectly, derivatively, or otherwise of any Released Claim against the D&Os or their respective successors and assigns is permanently enjoined and barred.</u>

[373] **ISSUES** a Re-Rectified Approval and Reverse Vesting Order, which contains paragraphs [61], [62] and [63], as reproduced above;

[374] **ORDERS** that the Stay of Proceedings in respect of the Debtors' Directors and Officers previously ordered by this Court in the context of the present CCAA Proceedings at paragraph 20 of the Second Amended and Restated Initial Order of February 14, 2025,²⁰⁷ is hereby lifted for the sole purpose of allowing the Class Action Parties to proceed with their Class Action Claims against the Directors and Officers of the Debtors more fully named as respondents or as defendants in the three Class Action Claims more fully detailed in paragraph 370 above;

[375] **ORDERS** the provisional execution of the present judgment notwithstanding any appeal and without the necessity to furnish any security thereon;

²⁰⁷ 2025 QCCS 585.

[376] **THE WHOLE** with each party assuming their own legal costs.

MICHEL A. PINSONNAULT, J.S.C.

M^{tre} Stéphanie Lapierre M^{tre} Danny Duy Vu M^{tre} Aniko Pelland-Éthier Stikeman Elliott LLP Attorneys for the Debtors/Applicants

M^{tre} Jean Legault *Lavery, De Billy s.e.n.c.r.l.*Attorneys for the Monitor Deloitte Restructuring Inc.

M^{tre} Nicholas Chine Stein & Stein Inc. M^{tre} Emilie-Béatrice Kokmanian Scott+Scott Avocats Attorneys for Adam B. Mulhall

M^{tre} Julie Himo M^{tre} Alexandre Angle Société d'avocats Torys s.e.n.c.r.l.

Attorneys for the Underwriters National Bank Financial Inc., B. Riley Securities Inc., Barclays Capital Canada Inc., BMO Nesbitt Burns Inc., Desjardins Securities Inc., Laurentian Bank Securities Inc., Raymond James Ltd., and Roth Canada Inc.

M^{tre} Éric Préfontaine Mme Catherine Saya (stagiaire) Osler, Hoskin & Harcourt, S. E. N. C. R. L./s.r.l. Attorneys for Raymond Chabot Grant Thornton s.e.n.c.r.l.

M^{tre} Ari Yan Sorek M^{tre} Justin Reiter *Fishman Flanz Meland Paquin s.e.n.c.r.l.* Attorneys for the U.S. Plaintiffs

Hearing dates: September 3 and 10, 2025

Court of King's Bench of Alberta

Citation: Cleo Energy Corp (Re), 2025 ABKB 621

Date: 20251110 **Docket:** B301 163430 **Registry:** Calgary

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLEO ENERGY CORP.

Corrected judgment: A corrigendum was issued on November 10, 2025; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of the Honourable Justice Colin C.J. Feasby

I. Introduction

- [1] Reverse Vesting Orders ("RVOs") burst on to the scene in 2019. Since then, RVOs have gone from "extraordinary to ordinary." The present application by the Receiver of Cleo Energy Corp. ("Cleo") for approval of an RVO involves what before 2019 would likely have been a standard oil and gas transaction implemented through a *Companies' Creditors Arrangement*, RSC 1985, c C-36 ("*CCAA*") plan or a traditional approval and vesting order ("AVO"). The present application raises two questions relevant to insolvency and restructuring practice in the oil and gas industry and a third question of broader application.
- [2] The first question that must be decided is if the RVO structure is necessary in the present case. *Harte Gold (Re)*, 2022 ONSC 653, the leading RVO case, held that an RVO must be necessary. The Receiver asserts that the proposed RVO transaction is necessary because it is

¹ Victor Olusegun, "The Journey of Reverse Vesting Orders from 'Extraordinary' to Ordinary: Is it Time for Parliamentary Intervention?" (2024) 22 Annual Review of Insolvency Law 16.

more efficient than alternative transaction structures and it is required by the purchaser. The second question that must be decided is whether the RVO structure may be used to shed liability for cure costs relating to unpaid royalties owing pursuant to Crown petroleum and natural gas leases. The third question, raised by Employment and Social Development Canada ("Employment Canada"), concerns potential adverse consequences for employees who made Wage Earner Protection Program ("WEPP") claims because of use of the RVO structure.

II. The Cleo Energy Corp. Receivership Proposal

- [3] Cleo is a private oil and gas company that owned and operated assets in East Central Alberta. Cleo filed a Notice of Intention to Make a Proposal ("NOI") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") on December 8, 2024. During the NOI proceedings, some of Cleo's assets were sold through a sales and investment solicitation process. However, not all Cleo's assets were sold within six months of Cleo filing the NOI. So, to avoid a deemed bankruptcy pursuant to s 50.4(8) of the *BIA*, uCapital uLoan Solutions Inc. (the "Interim Financier") applied for and was granted a receivership order on June 2, 2025. Alvarez & Marsal Canada Inc. was appointed as receiver (the "Receiver").
- [4] The Receiver conducted what it called a remarketing process to sell the Cleo assets that were not sold in the sales and investment solicitation process conducted during the NOI proceedings. The remarketing process engaged with 37 potential interested parties of which 11 signed non-disclosure agreements to gain access to the virtual data room. Eight non-binding bids resulted from the remarketing process. The receiver selected 2698902 Alberta Corporation (the "Purchaser") as the successful bidder.
- [5] The Receiver proposes that the transaction be effected by way of an RVO. The proposed RVO contemplates the creation of ResidualCo that will take on assets, liabilities, and contracts that the Purchaser does not want. Cleo, which will be acquired by the Purchaser, will retain, among other things, "the Retained Contracts, the Title and Operating Documents, Petroleum and Natural Gas Rights...."
- [6] The Receiver stated in its First Report that the RVO structure is "essential to maximize value...." The Receiver explained that "[b]y using an RVO, the Purchaser can avoid seeking AER approval for multiple licence transfers, a process that could be lengthy and introduce additional risk and cost to the Transaction and deplete the remaining cash on hand for distribution to creditors." Further, the Receiver reported that "[t]he Purchaser has advised the Receiver that it is only prepared to proceed with a reverse vesting transaction, rather than a traditional asset purchase, as this structure allows for the efficient transfer of applicable licences and contracts." The Receiver stated that it "considers the Purchase Price being paid to reflect:
 - (i) the importance and value of the time it would take to undertake the additional steps required by the AER under a traditional asset sale/vesting order transaction; and
 - (ii) the value attributable to certain of Cleo's attributes which may be preserved.
- [7] Despite offering this opinion, the Receiver gave no estimate of the time it would take to complete AER licence transfers or any explanation of what "attributes" of Cleo that would be preserved or why such attributes might have value sufficient to justify proceeding by way of

- RVO. Presumably, if the Receiver is prepared to offer an opinion to the Court concerning the purchase price and the "value of time" required to effect licence transfers, it must have conducted some analysis to support that opinion. There is no support for the Receiver's opinion to be found in either its First Report or Supplement to the First Report.
- [8] The Receiver asserts that alternatives to the proposed RVO "would in all likelihood result in material environmental liabilities and abandonment and reclamation obligations being transferred to the OWA." Again, no evidence or analysis was offered to substantiate this claim other than to point out that other bids contemplated environmental liabilities being assumed by the OWA.
- [9] The proposed RVO provides that Cleo will retain Crown mineral leases with the liabilities for unpaid royalties and rent being transferred to ResidualCo. As I will explain, this is a departure from the usual insolvency and restructuring treatment of executory contracts.

III. Reverse Vesting Orders ("RVOs")

- [10] Courts often say that a RVO is an "extraordinary" remedy: see, for example, *British Columbia v Peakhill Capital Inc*, 2024 BCCA 246 at para 32. Courts also say this about injunctions: see, for example, *Unifor, Local 707A v Suncor Energy Inc*, 2018 ABCA 75 at para 8. This is not helpful and needs to stop. Using the adjective "extraordinary" to describe something indicates it is unusual or remarkable. A conclusion that something is extraordinary is a product of observation, not legal analysis. As I said in *R v TGB*, 2023 ABKB 526 at para 5, "[e]mphasizing the extraordinary nature of a remedy, its rarity, or that it is a last resort says nothing about the legal test to be applied; instead, it encourages the trial judge to close her mind to the availability of the remedy." A bigger problem with saying that RVOs are extraordinary is that it is not true. RVOs are now a common way for insolvency and restructuring matters to be resolved. I refuse to subscribe to the polite fiction that RVOs are extraordinary in 2025.
- [11] Justice Penny's framework in *Harte Gold* at para 38 for analyzing if an RVO should be granted has been adopted widely, including by the Alberta Court of King's Bench: see, for example, *Delta 9 Cannabis Inc (Re)*, 2025 ABKB 52 at para 61 and *Long Run Exploration Ltd (Re)*, 2024 ABKB 710 at para 18. Justice Penny in *Harte Gold* explained that before an RVO is granted, a court must consider four questions:
 - (a) Why is the RVO necessary in this case?
 - (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
 - (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
 - (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?
- [12] Penny J in *Harte Gold* at para 38 also observed that an RVO should not be approved just because "it may be more convenient or beneficial for the purchaser."
- [13] Justice Marion in **Delta 9** at paras 61-62 explained other criteria that may be considered by a court before granting an RVO, but for the present case I will focus on the **Harte Gold**

factors as that is how all the interested parties framed their submissions. And, further, I will address only the two *Harte Gold* factors that were disputed by the parties.

IV. Should the Receiver's Application to Approve the Cleo RVO be Granted?A. Is the RVO Structure Necessary in this Case?

- [14] An important preliminary question is whether the necessity criterion should be taken seriously. The RVO criteria from *Harte Gold* are a recent judicial invention; the ink is not yet dry. Outside the cannabis industry, which is arguably a special case, RVOs are often used in restructurings where previously *CCAA* plans or AVOs would have been used. Though the RVO cases have repeatedly affirmed the necessity criterion, the proliferation of RVOs and what courts have found to constitute necessity suggests that a lower standard is being applied. The analysis that follows takes the caselaw at face value and proceeds on the basis that necessary means necessary. With that said, appellate guidance on the question of whether an RVO must be necessary before it may be approved would be of great assistance to lower courts and insolvency and restructuring professionals.
- [15] Justice Simard, shortly before his appointment to the bench, and his co-authors compared AVO transactions with RVO transactions with a focus on the oil and gas industry in Chris Simard, et al, "Restructuring and Insolvency Deals in the Oil Patch: Recent Trends and Developments" (2022) 60 Alberta Law Review 363 at 388-92. An AVO, they explained, "allows for the removal of the *assets* from the debtor's insolvent estate." A shortcoming of a standard AVO is that it does not "allow for the purchase and sale of attributes of the debtor company that are *not* assets."
- [16] The traditional way for non-asset attributes to be conveyed in insolvency proceedings is via a plan under the *CCAA* or a proposal pursuant to the *BIA*. Both *CCAA* plans and *BIA* proposals provide creditors the right to vote and a claims process. Justice Simard explained at 389, "a court-approved Plan can, in essence, deliver to a third party the ownership of a debtor company that has been 'cleansed' of all creditor claims but that still retains all its assets, along with all inherent corporate attributes that are not assets (such as tax attributes and regulatory licences)." An RVO delivers the benefits of a *CCAA* plan or *BIA* proposal without the messiness and expense associated with creditor democracy: see, Daniel Alievsky, "Reverse Vesting Orders: Did We Forget About Creditor Democracy?" (2023) 12:7 IIC-ART 143 at 149.
- [17] The Receiver has identified one reason why an RVO structure must be used in the present case to avoid the transfer of licences issued by the Alberta Energy Regulator ("AER"). The Receiver asserts that the transfer of licences will take time and cost money which, in turn, will create more risk and reduce the return to Cleo creditors. The Receiver also states that the Purchaser made proceeding by RVO a condition of its offer. I agree with Mr. Alievsky who contends at 152 that "courts should compel parties to explain why and on what evidentiary basis they assert the RVO is not just economically advantageous to its stakeholders, but also better than any alternative." Where it is claimed that there is an obstacle to proceeding using alternative structures such as the cost, risk, and delay of licence transfers, that must be substantiated.
- [18] The proposed transaction could be completed by way of a *CCAA* plan. Proceeding by way of a *CCAA* plan would allow Cleo to avoid the licence transfer problem that it has identified. But proceeding by way of a *CCAA* plan would mean that Cleo would have to deal with the

inconvenience and expense of affording creditors their statutory rights under the *CCAA* when there will be no recovery for most creditors. I note that neither the Receiver's First Report nor its Supplement to the First Report offers any reasons why a *CCAA* plan is not feasible. Nevertheless, I will consider the Receiver's contention that the transfer of licences necessitates use of an RVO structure.

[19] The cost, delay, and risk associated with the transfer of licences has been found to justify the use of an RVO structure. For example, the non-transferability of licences in the cannabis industry has been a significant factor driving the increased use of RVOs: *Atlas Global Brands Inc*, 2024 ONSC 5570 at para 36; *Delta 9* at para 69. But the transfer of licences has also been used to justify RVOs in the mining industry and the oil and gas industry where licences are transferrable: see, for example, *Harte Gold* and *Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp (Re)*, 2025 ABKB 30 at para 32. Justice Penny in *Harte Gold* at para 71 explained:

The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

- [20] Justice Penny later noted at para 73 that these were "<u>material risks</u>, delays, and costs" [emphasis added]. Presumably the applicant provided him with evidence to substantiate the materiality of risks, delays, and costs associated with the licence transfers.
- [21] The problem in the present case is that delays, risks, and costs associated with the transfer of AER licences are asserted but not proved. Sometimes in Commercial List matters, the Court will accept assertions made by insolvency and restructuring professionals who serve as Monitors, Trustees, and Receivers. But I cannot do so here because the claim runs contrary to common sense.
- [22] Oil and gas licence transfers are an everyday part of business in the oilpatch. Part of the AER's job is to process licence transfers. While it is true that parties sometimes structure transactions as share deals or, in the context of insolvency, use *CCAA* plans to avoid the hassle and expense of licence transfers that does not mean that avoidance of licence transfers is always necessary. If the Receiver claims that the burdens associated with licence transfers necessitate that this transaction use an RVO structure, those claims must be substantiated.
- [23] To be clear, I am not saying that the Court requires sworn testimony from the Receiver. Rather, I mean that the Receiver's report should show that the Receiver has done the work to determine what the delays, risks, and costs associated with licence transfers are likely to be. For example, instead of asserting that there will be delays, costs, and risks associated with the licence transfers, the Receiver should specify what delays, costs, and risks are apprehended and why the Receiver believes those concerns to be genuine and material. Put differently, the Receiver must provide backup to justify its conclusion respecting the materiality of the risks, delays, and costs associated with the required licence transfers.

- [24] I accept that it is possible that the cost of AER licence transfers may be material to the proposed transaction given that much of the deal consideration is comprised of assumed liabilities that would otherwise be transferred to the Orphan Well Association ("OWA"). But for me to reach such a conclusion, the Receiver must provide an estimate of the costs associated with the AER licence transfers and a reasoned explanation why the estimated amount is material to the proposed transaction.
- [25] The fact that the Purchaser requires that the proposed transaction proceed by way of an RVO does not move me. Purchasers always demand what is most favourable from their perspective. The Purchaser has agreed to acquire Cleo's assets for a substantial consideration which includes cash and assumed environmental liabilities. The Court must assume that the Purchaser will behave rationally. Under the circumstances, if an RVO is not available as a deal structure, the economically rational thing for the Purchaser to do is not to walk away but to negotiate a reduction of the purchase price by the amount that it estimates it will have to pay to effect the licence transfers. Perhaps there are other factors, such as tax, that might affect the price the Purchaser is prepared to pay but that is not clear from anything before the Court. The bottom line is that there is no cogent explanation offered by the Receiver as to what the financial impact is of using structures other than the proposed RVO. Assertions that the transaction must be an RVO are not enough to establish that it is necessary.

B. Is Any Stakeholder Worse Off Under the RVO Structure?

i. Viable Alternative?

- [26] Harte Gold requires the Court to consider if any stakeholder is worse off under the RVO structure than they would have been under any other viable alternative. The Receiver submits that there are no viable alternatives to the proposed transaction. The Receiver says that the proposed transaction is the only bid received in the remarketing process that would not result in properties being transferred to the OWA. The Receiver further submits that "[a]ny proceeds derived from these hypothetical alternative transactions would not result in proceeds going to satisfy Alberta Energy's alleged cure costs. Instead, the proceeds would be paid to the OWA...."
- [27] The Receiver's argument attacks a straw man. The viable alternative is not one of the seven rejected bids; it is a differently structured transaction with the successful bidder. As I noted before, the Court must assume that the Purchaser will act in an economically rational way. The viable alternative to the current RVO structure that absolves the Purchaser of responsibility for paying Alberta Energy cure costs is an RVO where the Purchaser is required to pay cure costs. That means that the Purchaser would take on a liability of \$150,000 that it is not under the current structure. A rational economic actor would not walk away; it would reduce the purchase price by a corresponding amount. I note that even with a \$150,000 reduction in purchase price, the Purchaser would still have the highest bid.
- [28] Since I have found that the Receiver has not established that an RVO is necessary, it is appropriate to also consider if there is a non-RVO viable alternative. The difficulty with this is that the Receiver has constructed a binary choice between the proposed RVO and the seven unsuccessful bids. Given value that the Purchaser has offered under the proposed RVO structure, it is possible, that a restructured version of the transaction without using the RVO mechanism would still be preferable to the seven other bids. The failure of the Receiver to engage with this possibility leaves the Court unable to assess whether there is a non-RVO viable alternative.

ii. Crown Lease Cure Costs

- [29] Cleo owes Alberta \$170,000 in unpaid royalties and \$70,000 in unpaid rent in respect of its Mineral Leases. Of the total \$240,000 owing by Cleo to Alberta, \$90,000 is post-filing debt which the Receiver has confirmed will be paid. The RVO contemplates that "Crown Liabilities," which is the \$150,000 pre-filing debt for unpaid royalties and rent, will be vested in ResidualCo while the Mineral Leases will remain in Cleo. The RVO allows Cleo to retain the Mineral Leases without paying the arrears to Alberta.
- [30] Most oil and gas rights in the province are owned by Alberta. From time to time, Alberta conducts public sale processes where oil and gas companies may bid for Crown oil and gas rights. After a sale, Alberta Energy will issue the successful bidder a petroleum and natural gas lease which is sometimes called a PNG Lease or Mineral Lease. A Mineral Lease grants the lessee the right to drill for, and recover, oil and gas within the leased area. A Mineral Lease does not grant mineral ownership to the lessee; Alberta remains the owner. In exchange, the lessee is required to pay royalties and rent to Alberta.
- [31] Tracy Wadson, Alberta's Director, Royalty Operations swore an affidavit describing how Alberta Energy approaches the transfer of Mineral Leases in insolvency matters as follows:

Upon sale of an insolvent's Mineral Leases (in an asset sale, not a share purchase arrangement), the receiver or trustee requests that Alberta Energy transfer those Mineral Leases to the name of the purchaser.

Under s 18(2) of the [*Mines and Minerals*] Act [RSA 2000, c M-17], and, in particular, s 5(1)(g) of the *Crown Minerals Registration Regulation*, AR 264/1997 (the **Regulation**"), the Minister (through Alberta Energy) is authorized to refuse the transfer of a Crown agreement.

Alberta Energy requires payment of cure costs (i.e. the Crown Liabilities – the monetary defaults under the Mineral Lease) before it will transfer Mineral Leases to the purchaser (the "**Transfer Requirement**").

Alberta Energy routinely enforces the Transfer Requirement in insolvency asset transactions and, based on my experience, both industry and receivers/trustees are aware of the Transfer Requirement.

- [32] Ms. Wadson's affidavit did not speak to Alberta Energy's approach when a debtor is restructured pursuant to a *CCAA* plan. She did, however, explain that Alberta Energy's standard approach when royalties and rent are not paid is to issue a Notice of Default as a first step toward cancelling the relevant Mineral Lease. Presumably this means that where a debtor retains Mineral Leases under a *CCAA* plan, Alberta Energy requires payment of royalty and rental arrears to maintain the Mineral Leases going forward.
- [33] Cleo's Mineral Leases are what are sometimes called executory contracts because there are ongoing obligations: *Kary Investment Corporation v. Tremblay*, 2005 ABCA 273 at paras 19-20. Receivers have the power to adopt or reject executory contracts: Frank Bennett, *Bennett on Receiverships*, 4th ed, (Toronto: Thomson Reuters, 2021) at 557-65; *Spyglass Resources Corp v Bonavista Energy Corporation*, 2017 ABQB 504 at para 67. Executory contracts that are rejected give rise to claims that may be proved in the receivership process: *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 at para 44. Receivers adopt executory contracts when they help to maximize value for creditors. This occurs when the executory contract is advantageous or

essential to a restructuring business and will make the business more attractive to a potential purchaser. When a receiver adopts an executory contract, monetary defaults in respect the executory contract must be cured: Simard et al, "Restructuring and Insolvency Deals in the Oil Patch" at 373. Put differently, if a receiver decides to keep a contract, it must keep both the benefits and the burdens of the contract.

- [34] The treatment of executory contracts in the *CCAA* context is similar. Where a debtor company is restructured and an executory contract is retained, the counterparty may demand payment of cure costs as a condition of ongoing performance. Where a *CCAA* plan calls for the assignment of an executory contract, *CCAA* s 11.3(4) precludes a court from making an assignment order "unless it is satisfied that all monetary defaults in relation to the agreement ... will be remedied on or before the day fixed by the Court."
- [35] I must pause here to address the question of fairness. Is the payment of cure costs to Alberta Energy fair to the Purchaser and to creditors of Cleo? Yes, it is. The reason that the Purchaser is buying Cleo is because it has Crown oil and gas rights and, in turn, that is why consideration is flowing to creditors. The only reason that Cleo has oil and gas rights is because it has the Mineral Leases. There is nothing unfair about requiring the Purchaser to pay cure costs to maintain the Mineral Leases.
- [36] The present application is the second time in the last two months before this Court where a restructuring entity sought to retain the benefit of an executory contract while absolving itself of the responsibility to remedy monetary defaults through the device of an RVO. In *AlphaBow Energy Ltd (Re)*, 2025 ABKB 550, many months after the approval of an RVO, the applicant sought to amend the RVO to retain a contract with a third party for the purchase of carbon dioxide while shedding liabilities associated with the contract. Justice Johnston observed at para 52 that that the applicant had disclaimed the contract in the first instance because it hoped to negotiate a new contract that would avoid payment of cure costs. Justice Johnston declined to exercise her discretion to permit the amendment of the RVO to permit the applicant to retain the contract while shedding the associated liabilities.
- [37] Though the Receiver did not provide any cases where courts have approved RVOs where the receiver or purchaser is not required to pay cure costs for retained contracts, I note that it has occurred: see, for example, *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para 31. The language used by Justice Penny in *Acerus* suggests, however, that parties whose contracts were retained in that case were allowed to choose to perform or terminate the contracts where cure costs are not paid. He explains at para 31 that the RVO "does not require FGC to cure pre-filing arrears under the Retained Contracts," and that such parties "have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so." This is quite different than what is proposed in the present case. I also note that despite the precedent in *Acerus*, RVOs continue to require the payment of cure costs: see, for example, *Razor Energy Corp* at para 60.
- [38] I remain open to the possibility that there may be cases where an RVO that provides for the retaining contracts without a corresponding obligation to pay cure costs can be justified, but this is not one of them. The payment of cure costs to Alberta Energy is a reasonable price for the Purchaser to pay to get the ongoing value of the Mineral Leases and it will cause a justified decrease in the value to be received by the creditors of Cleo on their claims.

[39] The use of RVOs to allow contracts to be retained without payment of cure costs alters the incentive structure around insolvency. Moreover, allowing contracts to be retained without payment of cure costs is a curtailment of the principle of freedom of contract beyond what is normal in insolvency proceedings. These are matters that demand consideration by appellate courts and legislators.

iii. Potential Clawback of WEPP Payments

- [40] Employment Canada appeared at the application to advise the Court of potential adverse consequences of the RVO for former employees. Employment Canada, however, maintained that it was not taking a position on the appropriateness of the RVO.
- [41] Employment Canada advised the Court that pursuant to the *Wage Earner Protection Payment Act*, S.C. 2005, c. 47 ("*WEPPA*") former employees of Cleo who had received payments pursuant to WEPP could have their payments clawed back if the RVO is approved.
- [42] WEPPA s 5 outlines the eligibility criteria for employees whose former employer is in receivership. The key requirements are that "the former employer is subject to a receivership" and that "the individual is owed eligible wages by the former employer."
- [43] Employment Canada submits:

Should the RVO be granted, the liabilities related to unpaid wages of the former employees of Cleo would be transferred to ResidualCo. Equally, Cleo would emerge from the receivership proceedings and continue to carry on its business operations as a viable corporation.

Following the issuance of the RVO, the eligibility criteria under s. 5(1)(b)(ii) and 5(1)(c) of the WEPPA would no longer be met and, the objective of the WEPP would equally be undermined. As a result, this would likely affect the former employees' entitlement to WEPP benefits and lead to an overpayment of program benefits, which would be subject to recovery.

- [44] Employment Canada further states that whether the conditions for eligibility are met is within the exclusive discretion of the Minister responsible for *WEPPA*, subject to an appeal before the Canada Industrial Relations Board, which, in turn, is subject to judicial review under the exclusive jurisdiction of the Federal Court of Appeal.
- [45] Employment Canada's submission is, in essence, a warning that following the approval of the Cleo RVO, payments to former employees of Cleo may be clawed back followed by a warning that this Court has no say in the matter. I beg to differ. Justice Collier in *Arrangement relatif à Former Gestion Inc*, 2024 QCCS 3645 at para 34 dispensed with a similar argument by Employment Canada as follows:

[T]he relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant.

[46] I agree. WEPP exists to protect employees from the adverse consequences of the insolvency of their employer. Terminated employees have no control over how insolvency and restructuring transactions are structured after their termination. Terminated employees who have

received WEPPs payment and have no inkling of the possibility of a clawback may have used the money to pay for groceries or rent. A choice to clawback payments made to terminated employees of an insolvent corporation because of subsequent events beyond their control would be to the immense discredit of the Minister and, I would hope, be swiftly reversed by the Canada Industrial Relations Board or the Federal Court of Appeal.

V. Conclusion

[47] The Receiver's application is dismissed without prejudice to its ability to apply again for approval of the proposed transaction with additional supporting material and/or for a restructured transaction.

Heard on the 17th day of October, 2025 with additional written submissions received on the 22nd and 24th of October.

Dated at the City of Calgary, Alberta this 28th day of October, 2025.

Colin C.J. Feasby J.C.K.B.A.

Appearances:

Sam Gabor and Tom Cumming, Gowling WLG (Canada) LLP for Cleo Energy Corp.

James Reid and Pavin Takhar, Miller Thomson LLP for the Proposal Trustee, Alvarez & Marsal

Melissa N. Burkett, Alberta Justice for Alberta Energy

Daniel Segal, Department of Justice Canada for Employment and Social Development Canada

George Wong, for the Alberta Energy Regulator

Ryan Zahara, MLT Aikins, for the Orphan Well Association _____

Corrigendum of the Reasons for Decision of The Honourable Justice Colin C.J. Feasby

A change was made to the list of lawyers who appeared in this case.