Neutral Citation Number: [2024] EWCA Civ 24

Case No: CA-2023-000914

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 23 January 2024

Before :

LORD JUSTICE NUGEE
LORD JUSTICE SNOWDEN
and
SIR NICHOLAS PATTEN

- -

IN THE MATTER OF AGPS BONDCO PLC

Between :

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

- -

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

Hearing dates: 23-25 October 2023

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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.

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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.

<u>The Facts in outline</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Consent Solicitation

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

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

The Issuer Substitution

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

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

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

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

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

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

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

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

The Plan

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

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

The convening hearing

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

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

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

The BCG Report

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

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

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

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

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

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

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

The Plan Meetings

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

The sanction hearing

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

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

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

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

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

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

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

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

Timing issues

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

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

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

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

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

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

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

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

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

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

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

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

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

The Judgment

The law

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

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

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

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

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

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

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

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

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

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

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

The Issuer Substitution

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

"*No worse off*"

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

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

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

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

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

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

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

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

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

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

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

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

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

> providing guarantees and securities and their shares will also be pledged as Transaction Security.
>
> 279. Furthermore, section 7 of the Explanatory Statement summarises the Transaction Security which the Group intends to provide under the Intercreditor Agreement. It expressly states that: "Any asset which can be provided as security will be provided as transaction security, subject to the restrictions set forth in this section." There is no suggestion that the Group intends to exclude from the Transaction Security any of the Group's assets unless it is unable to do so, and this was not put to Mr. Trozzi.
>
> 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.

<u>The arguments on appeal</u>

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

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

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

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

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

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

The law

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

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

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

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

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

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

Class composition

109. The basic principle in relation to class composition under Part 26 is that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 *per* Bowen LJ. As David Richards J indicated in his convening judgment in Telewest Communications plc (No.1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752 at [37], the application of this test requires an exercise of judgment on the facts of each case. The authorities show that a broad

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discretion to sanction: cross-class cram down

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

146. The other point Trower J addressed in [58]-[61] was not, as Adam Johnson J mistakenly thought in <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 Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch) but have since been adopted in the context of Part 26 and Part 26A. The vertical comparison involves a comparison of the position of the particular class of creditors in question under the restructuring proposal with the position of that same class in the relevant alternative. The horizontal comparison compares the position of the class in question with the position of other creditors or classes of creditors (or members) if the restructuring goes ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

31. In considering whether there has been a fair distribution of the benefits of the restructuring, it may be relevant to take account of the source of the benefits to be received under the restructuring, for example whether they come from the assets of the Company or from third parties willing to support the restructuring: see DeepOcean, at [64]."

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

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

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

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 Virgin Active).

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.

166. 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 provided that there is a good reason or proper basis for that departure (or, as Trower J said in DeepOcean and Zacaroli J said in Houst, 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 Houst at [31], referring to what Trower J had said in DeepOcean 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 ED&F Man 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. Virgin Atlantic Airways at [63]-[67] and Virgin Active 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 Lundy Granite, ex parte Heavan (1871) LR 6 Ch App 462 and Oak Pits Colliery (1882) 21 ChD 322, explained by Lord Hoffmann in Toshoku Finance UK plc [2002] 1 WLR 671, and further considered by this court in Jervis v Pillar Denton [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 Telewest approach to the assenting 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 Amicus Finance 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 assenting classes. In that regard, the decision is entirely consistent with my analysis in [121]-[128] above. I therefore do not consider that Amicus Finance 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. New Look 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 cram-down 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 Lehman Brothers (International) Europe (in administration) No.4 [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 after 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 Hawk 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."

224. 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 must 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 Virgin Active. 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 Tea Corporation Limited [1904] 1 Ch 12 ("Tea Corporation"), Bluebrook and Noble Group. 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 legal 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 could 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-the-money' (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 Virgin Active 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 Virgin Active, 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 Virgin Active 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 Virgin Active, 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 Tea Corporation and Bluebrook: 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 pre-emption 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 Virgin Atlantic Airways [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 Re PizzaExpress Financing 2 plc [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 Re Prezzo Investco Limited [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 cross-class 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.