Neutral Citation Number: [2021] EWHC 138 (Ch)

Case No: CR-2020-004470
CR-2020-004473
CR-2020-004475

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMPANIES COURT (Ch)**

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 28/01/2021

**Before** :

**MR JUSTICE TROWER**

- - - - - - - - - - - - - - - - - - - - -

**IN THE MATTER OF DEEPOCEAN I UK LIMITED**
**AND IN THE MATTER OF DEEPOCEAN SUBSEA CABLES LIMITED**
**AND IN THE MATTER OF ENSHORE SUBSEA LIMITED**

**AND IN THE MATTER OF THE COMPANIES ACT 2006**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Tom Smith QC and Ms Charlotte Cooke** (instructed by **Kirkland & Ellis International LLP**) for the **Applicant Companies**
**Mr Jeremy Goldring QC and Mr Ryan Perkins** (instructed by **Norton Rose Fulbright LLP**) for the **Original Locked-Up Lenders**

Hearing dates: Wednesday 13 January 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.............................

THE HONOURABLE MR JUSTICE TROWER

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be Thursday 28 January 2021 at 10am**

**Mr Justice Trower :**

1. These are my reasons for the order I made on 13 January 2021 sanctioning pursuant to section 901F of the Companies Act 2006 (the "2006 Act") a restructuring plan in respect of three companies in the DeepOcean group (the "Plan Companies"). The form of the restructuring plan for each of the Plan Companies is contained in a single composite document (the "Restructuring Plan").

2. On 15 December 2020, I made an order pursuant to section 901C of the 2006 Act, giving liberty to each Plan Company to convene meetings of its respective Plan Creditors for the purposes of considering and if thought fit approving the Restructuring Plan.

3. The judgment given at the end of that hearing (the "convening judgment") is reported under neutral citation number [2020] EWHC 3549 (Ch), and I shall assume that the reader is familiar with it. I shall adopt the abbreviations that I used, and I will not repeat the description of the background which I gave in the convening judgment.

4. Section 901F of the 2006 Act is contained in the newly enacted Part 26A of the 2006 Act (inserted by Schedule 9 of the Corporate Insolvency and Governance Act 2020 ("CIGA")). It provides that the court has jurisdiction to sanction a compromise or arrangement in the form of a restructuring plan if a number representing 75% in value of the class of creditors present and voting at the meeting summoned under section 901C votes in favour of the plan. Unlike a scheme of arrangement under Part 26 of the 2006 Act, there is no requirement for a majority by number.

5. In the present case, the Restructuring Plan was agreed by the statutory majority in value at each of the meetings summoned by DO1 and ES and at the meeting of Secured Creditors summoned by DSC. The Restructuring Plan was not, however, agreed by the statutory majority in value at the meeting of the Other Plan Creditors summoned by DSC. At that meeting the Restructuring Plan was only approved by a number representing 64.6% in value of DSC's Other Plan Creditors, which did not therefore meet the statutory threshold. To this extent the requirements for sanction under section 901F are not satisfied.

6. However, section 901F(1) is subject to section 901G of the 2006 Act (see section 901F(2)). By section 901G it is provided that:

> "(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."

7. This means that the court also has jurisdiction to sanction a restructuring plan if the further requirements of section 901G (in the form of conditions A and B) are met. I

briefly alluded to these section 901G conditions A and B in paragraphs 25 and 26 of the convening judgment. They are described in section 901G of the 2006 Act as follows:

> "(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."

8. Section 901G therefore introduces a procedure by which a dissenting class can be bound by a restructuring plan. In the Explanatory Notes to CIGA, this is called "cross-class cram down". It follows from the very nature of the court's powers under section 901G that, while a number of the matters which the court is required to consider are the same as the familiar questions which arise on any application to sanction a scheme of arrangement under Part 26 of the 2006 Act, additional questions arise where the cross-class cram down provisions are engaged and sought to be relied on. As I will explain, these differences include matters going to the court's discretion.

9. The essential elements of the Plan Companies' creditor constituencies and the reasons underpinning the financial underperformance of the CL&T Group are described in the convening judgment; there have been no material developments since. Likewise, the essential elements of the Restructuring Plan itself are summarised in paragraphs 13 to 18 of the convening judgment and have not changed in any material particular. I should, however, explain what has occurred since the convening hearing and the impact that such events may have had on the correct approach to the application for sanction.

10. The first relevant event is that, on 16 December 2020 (i.e. the day following the convening hearing), a copy of the document incorporating the Restructuring Plan, the explanatory statement and the notice convening the Plan meetings was made available to Plan Creditors on the plan website. A notice was also circulated to all Plan Creditors known to the Plan Companies as at the date of the order. I am satisfied that the taking of these steps meant that the Plan meetings were summoned in accordance with the convening order.

11. Secondly, immediately before the Plan meetings were held, DO1 reached a commercial arrangement with the UK Landlord Creditor for the purpose of enabling companies within the DeepOcean Group to continue to store certain equipment at the relevant premises while a potential sale of those assets is explored. This agreement involved another company within the DeepOcean Group (DeepOcean Norway AS

("AS")) making payment of the outstanding amounts owed to the UK Landlord Creditor pursuant to the terms of the lease.

12. The third relevant development also took place immediately before the Plan meetings. DO1 reached an accommodation with its two UK Vessel Owner Creditors, one of which, Havila Chartering AS, appeared by counsel at the convening hearing. They were placed in a different class to DO1's Other Plan Creditors because of their rights of ownership in relation to the vessels leased to DO1 and the benefit of the guarantees provided to them by BV.

13. These arrangements involved the payment by AS to the owner of the Maersk Connector of amounts including the outstanding hire on the vessel, together with the amount of plan consideration to which the owner would become entitled under the Restructuring Plan, in exchange for the owner's agreement to vote in favour of the Restructuring Plan and to withdraw bankruptcy proceedings issued against BV in the Netherlands. The owner was also entitled to take ownership of certain specific assets mobilised or previously deployed on the vessel. The owner assigned to AS its rights to receive plan consideration under the Restructuring Plan.

14. A similar arrangement was reached with the owner of the Havila Phoenix. In this instance the amounts paid by AS were the amount of plan consideration to which the owner would become entitled under the Restructuring Plan together with an amount equal to its excluded claims in connection with the Moray Firth project that I referred to in paragraph 11 of the convening judgment. There was also an agreement for the transfer to the owner of title to certain specific assets and equipment stored on the vessel. The owner also agreed to discontinue arbitration proceedings pursuant to the relevant charter contract and guarantee given by BV.

15. The agreements reached with the UK Landlord Creditor and the UK Vessel Owner Creditors were only concluded on the day of (or the day before) the Plan meetings. An announcement giving details of these agreements was made by way of update to the explanatory statement circularised to all Plan Creditors at 9:30 am on 6 January 2021. This announcement was also referred to at the Plan meetings themselves.

16. It is self-evident that Other Plan Creditors had very little time to consider whether or not these developments had any impact on their consideration of the merits of the Plan Companies' proposals. However no Plan Creditor complained at the Plan meetings (or has done so subsequently) that they were disadvantaged by the late notice of these agreements. In any event the benefits received by the UK Landlord Creditor and the UK Vessel Owner Creditors under these agreements were funded by AS, which is not a Plan Company and had no impact on the amounts which Other Plan Creditors were entitled to receive under the Restructuring Plan.

17. As to the statutory requirements for the Plan meetings themselves, each of them was held on 6 January 2021 in accordance with the terms of the convening order. The results were as follows:

i) At the four Plan meetings summoned in relation to DO1, the Restructuring Plan was agreed unanimously by all five of the DO1 Secured Creditors with claims totalling c.£92,555,837, by both of the UK Vessel Owner Creditors with claims totalling £66,807,942 and by the single UK Landlord Creditor with a claim for £178,500. It was also agreed unanimously at the DO1 Other Plan Creditors meeting, by 14 creditors with claims totalling £59,767.

ii) At the two Plan meetings summoned in relation to ES, the Restructuring Plan was agreed unanimously by all five of the ES Secured Creditors (also with claims totalling c.£92,555,837). 33 of the ES Other Plan Creditors present and voting with claims totalling £2,612,176 voted in favour of the Restructuring Plan and four with claims totalling £259,735 voted against. The majority by value in favour at the ES Other Plan Creditors meeting was therefore 91%.

iii) At the two Plan meetings summoned in relation to DSC, the Restructuring Plan was agreed unanimously by all five of the DSC Secured Creditors (also with claims totalling c.£92,555,837). 14 of the 17 DSC Other Plan Creditors present and voting with claims totalling £707,272 voted in favour of the Restructuring Plan and three with claims totalling £386,867 voted against. The majority by value in favour at the DSC Other Plan Creditors meeting was therefore 64.6%.

18. It follows that the statutory majorities were achieved at each of the Plan meetings apart from the DSC Other Plan Creditors' meeting, where a majority voted in favour but there was insufficient support to satisfy the requirements of section 901F(1). There is no evidence as to why any of the Plan Creditors who voted against the Restructuring Plan took the course that they did. No Plan Creditor informed either the court or the Plan Companies of any aspect of the Restructuring Plan which it contended was unfair or should otherwise cause the court to refuse sanction.

19. It is also important to consider turnout where not all creditors in a class voted. This is relevant to the way in which the court is required to exercise its discretion. In the present case this issue relates only to the three Other Plan Creditors meetings.

i) At the DO1 Other Plan Creditors meeting, the number of DO1 Other Plan Creditors who were present in person or by proxy represented 14 out of 44 of the known DO1 Other Plan Creditors, a turnout by number of 31.8%.

ii) At the ES Other Plan Creditors meeting, the turnout by number was 37 out of 128 of the known ES Other Plan Creditors the number of ES Other Plan Creditors who were present in person or by proxy amounted to £2.85 million of which £2.6 million voted in favour. The turnout by number was 37 out of 128 of the known ES Other Plan Creditors (33 of whom voted in favour and 4 of whom voted against). It follows that 28.9% by number of the ES Other Plan Creditors participated at the plan meeting and 71.1% did not.

iii) The total value of the claims of all DSC Other Plan Creditors was c.£1.4 million of which c.£1.1 million were present in person or by proxy. It follows that the percentage in value of the known DSC Other Plan Creditors who participated by voting either for or against the Restructuring Plan was just under 75%. The turnout by number was 17 out of 48 of the known DSC Other Plan Creditors, (14 of whom voted in favour and 3 of whom voted against). It follows that 35.4% by number of the DSC Other Plan Creditors participated at the meeting and 64.6% did not.

20. In *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch), Snowden J followed the established approach in respect of a Part 26 scheme of arrangement when determining whether or not to sanction a restructuring plan under Part 26A where section 901G was not engaged. He said this, at paras [51] and [52]:

> "[51] *The principles which the court regularly applies to the exercise of its discretion to sanction a scheme of arrangement under Part 26 CA 2006 were summarised by David Richards J in Re Telewest Communications plc (No. 2) [2005] BCC 36 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 Ltd [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 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 s 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'.*"

*[52] In Re Noble Group Limited [2018] EWHC 3092 (Ch) at [17] I paraphrased those requirements as a four-stage test as follows:*

i) *the court must consider whether the provisions of the statute have been complied with;*

ii) *the court must consider whether the class was fairly represented by the meeting, and whether the majority was coercing the minority in order to promote interests which are adverse to the class that they purported to represent;*

iii) *the court must consider whether the scheme was a fair scheme which a creditor could reasonably approve; and*

iv) *the court must consider whether there is any "blot" or defect in the scheme."*

21. For reasons that I will develop shortly, it seems to me that a slightly different approach is required on an application to sanction a Part 26A restructuring plan where the applicant seeks to rely on the provisions of section 901G. However, several aspects of the approach remain applicable, the first of which is whether the terms of the statute have been complied with.

22. As to this, the starting point is whether the Plan Companies are companies within the meaning of Part 26A and whether the court has jurisdiction under the recast Judgments Regulation. For the reasons that I gave in paragraphs 36 to 38 of the convening judgment I am satisfied that both of these requirements are met. The Plan Companies are incorporated in England and Wales and are liable to be wound up under the Insolvency Act 1986 ("IA 1986") while, even if the recast Judgments Regulation prima facie applies so as to require EU domiciled Plan Creditors to be sued in the place of their domicile, Article 8 operates so as to give this court jurisdiction.

23. The second question relates to those parts of section 901A(1) which provide that the provisions of Part 26A apply where conditions A and B are met in relation to a company. I described these conditions in paragraphs 39 and 40 of the convening judgement. They are defined in sections 901A(2) and 901A(3) of the 2006 Act and it is worth setting them out in full:

> "(2) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
>
> (3) Condition B is that –
>
> (a) a compromise or arrangement is proposed between the company and
>
> > (i) its creditors, or any class of them,
> >
> > … and

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

24. I concluded at the convening hearing that conditions A and B are met in this case. While paragraph 10 of the Practice Statement indicates that it is open to a creditor to seek to reopen this issue at the sanction stage, I do not consider that it is appropriate for the court to do so where it has reached a reasoned decision on the point (as I did in paragraphs 39 to 49 of the convening judgment) and no party seeks to argue that the conclusion reached at the convening stage was wrong.

25. In my view, it is also appropriate to take a similar approach to questions of class constitution. This is what is contemplated by paragraph 10 of the Practice Statement and is consistent with the view generally taken in the context of a Part 26 scheme of arrangement: see per Snowden J *In Re Global Garden Products Italy SpA* [2017] BCC 637 at [43]-[44]. I gave full reasons for my conclusions on class in the convening judgment, there have been no material developments since the convening hearing and neither the Plan Companies nor the court have been notified of any further issues that any interested party wishes to have considered at this hearing. In the absence of argument by any Plan Creditor that my decision on class was incorrect, I do not think that it is appropriate for the court to revisit the issue of class constitution at this stage.

26. The next issue which arises is whether the terms of the convening order have been complied with. As I have already explained, I am satisfied that the Plan meetings were summoned in accordance with that order. I am also satisfied from the Chairman's report that the way in which the meetings were held complied with the procedural aspects of that order. The explanatory statement was full and comprehensive. I have considered its form, which appears to me to be satisfactory. No creditor has suggested that it fails to give Plan Creditors all the information they might reasonably require, and I have not identified any material respect in which it might be thought to be deficient.

27. It can be seen from the voting figures described earlier in this judgment that the statutory majorities were achieved at each of the plan meetings apart from the meeting attended by the DSC Other Plan Creditors. To that extent the requirements of the statute have been complied with. However, because the statutory majorities were not met at the meeting of DSC Other Plan Creditors the provisions of section 901G must be satisfied and the relevant conditions A and B must be met in order for the court to have jurisdiction to sanction the DSC Restructuring Plan.

28. As I have already explained, condition A is that, if the restructuring plan is 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" (i.e. "*whatever the Court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned*": see sections 901G(3) and 901G(4)). Condition B is that the restructuring plan must have been approved by at least one class of creditors who would have a genuine economic interest in the company in the relevant alternative (section 901G(5)).

29. I should say something about the relevant alternative. Identifying what would be most likely to occur in relation to the company if the plan were not to be sanctioned is similar to the exercise of identifying the appropriate comparator for class purposes in the context of a Part 26 scheme of arrangement: as to which see e.g. *Re Telewest Telecommunications Plc* [2004] B.C.C. 342, 351; *Re the British Aviation Insurance Co Ltd* [2006] BCC 14 at [82] and [88] and *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) at [74].

30. It is also an exercise which the court may be called on to carry out when applying a "vertical" comparison for the purposes of an unfair prejudice challenge to a company voluntary arrangement under section 6 of IA 1986. As Norris J explained in *Discovery (Northampton) Limited v Debenhams Retail Limited* [2020] BCC 9 at [12]:

> "The authorities identify two useful heuristics for assessing whether a CVA is "unfairly prejudicial" under s.6(l)(a). The first is commonly called "the vertical comparator". It compares the projected outcome of the CVA with the projected outcome of a realistically available alternative process, and sets a "lower bound" below which a CVA cannot go: see *Re T&N Ltd* [2004] EWHC 2361 (Ch) at [82] per David Richards J and *Prudential Assurance Co v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch); [2007] B.C.C. 500 at [75]–[81] per Etherton J."

31. There may be cases in which identification of the relevant alternative is difficult and questions of some complexity will arise as to the financial consequences of that counter-factual for some or all of the plan creditors. I do not think that this is such a case.

32. DSC has established that there are two possible scenarios which might apply in the event that the Restructuring Plan is not sanctioned. The first is the Group Liquidation Scenario and the second is the CL&T Group Insolvency Scenario. In the convening judgment, I concluded that the second of these two scenarios is the most likely eventuality if the Restructuring Plan does not come into effect. The evidence established that the remaining members of the DeepOcean Group were no longer prepared to support the CL&T Group with additional funding and were more likely to allow its members to enter formal insolvency proceedings (the CL&T Group Insolvency Scenario) than they were to permit the Group as a whole to collapse into formal liquidation.

33. There have been no developments since the convening hearing which have caused me to change my mind on this aspect of the case. It follows that the CL&T Group Insolvency Scenario is the relevant alternative for the purposes of section 901G.

34. The consequence of this is that it is necessary for me to be satisfied that, if the Restructuring Plan were to be sanctioned, none of the members of the dissenting class (i.e. the DSC Other Plan Creditors) would be any worse off than they would be in the event of the CL&T Group Insolvency Scenario. The primary question for the court when considering what will happen under a restructuring plan and comparing it with what is likely to happen in the relevant alternative, is to look at the likely financial return in each of the alternative eventualities.

35. Doubtless, the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt.

However, the phrase used is "any worse off", which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay.

36. In the present case, the position on this aspect of the matter is relatively straightforward. A comparison of the return which all of the DSC Other Plan Creditors would make in the CL&T Group Insolvency Scenario with the return that they are likely to receive if the Restructuring Plan is sanctioned establishes not just that no member of the dissenting class would be any worse off, but also that each of them would clearly be better off.

37. The evidence for this is contained in the comprehensive entity priority model or EPM prepared by A&M, which shows that the only creditors of DSC who have any prospect of making a return in the CL&T Group Insolvency Scenario are the Secured Creditors. The DSC Other Plan Creditors would not receive any dividend on their claims (nor indeed would they receive any dividend in the Group Liquidation Scenario). None of the creditors who voted against the restructuring plan have informed the Plan Companies or the court, whether through oral submissions or in writing, that they disagree with this conclusion, and I did not identify any inherent flaws in what has been described and explained in the EPM.

38. By comparison, the consideration payable under the Restructuring Plan offers an increase on the zero return forecast for the DSC Other Plan Creditors in the CL&T Group Insolvency Scenario of approximately 4%. This return will be funded by other members of the DeepOcean Group for whom there is some advantage in avoiding a formal insolvency of any Plan Company in order to minimise disruption to the wider business. There appear to be no other considerations which go into an assessment of whether any member of the dissenting class would be worse off under the Restructuring Plan than they would be in the event of the CL&T Group Insolvency Scenario. I am satisfied from this evidence that condition A is satisfied.

39. As to condition B, the Restructuring Plan has been agreed by the meeting of DSC Secured Creditors, who were the only other class of creditors for whom there was a plan meeting held in respect of DSC. I must, therefore, be satisfied that this class of creditor "*would receive a payment, or have a genuine economic interest in the company* [i.e. DSC] *in the event of the relevant alternative* [i.e. the CL&T Group Insolvency Scenario].*"*

40. The evidence establishes that condition B is also met. The EPM demonstrates that each DSC Secured Creditor would make a small recovery out of the charged assets to be realised in an insolvency of DSC, which would be one of the consequences of the CL&T Group Insolvency Scenario. It follows that each would have a genuine economic interest in DSC in the event of the relevant alternative. Each DSC Secured Creditor would also make a return from the assets of other members of the DeepOcean Group in that eventuality, although whether that by itself would be sufficient to satisfy condition B is not a point that I have to decide.

41. While there may be some cross-class cram down cases in which there is artificiality in the creation of classes to ensure that the requirements of the section 901G condition B are satisfied, there is no sign of that in the present case. It is clear that the two DSC

classes were properly constituted. But where the possibility of artificiality only becomes apparent when the section 901G power is sought to be exercised at the sanction stage, that may be a ground on which the court will be prepared to revisit the conclusion that it reached on classes at the convening hearing.

42. It also follows from these conclusions that the provisions of the statute have been complied with. This does not, however, mean that the court is required to sanction the Restructuring Plan. As is made clear by the use of the word "may" in section 901F(1), the court has a discretion, a point that is emphasised by the Explanatory Notes to CIGA, when explaining the intended approach, both where section 901G is engaged, and where it is not:

> "[190] Section 901F says that if 75% or more in value of creditors (or class of creditors) … present and voting either in person or by proxy at the meeting agreed to a restructuring plan, then an application may be made to the court to sanction the plan. Drawing on well-established principles in schemes of arrangement, the court has absolute discretion over whether to refuse to sanction a plan even though the necessary procedural requirements have been met. This may be, for example, because a plan is not just and equitable."
>
> …
>
> "[192] as with section 901F, the court will still have an absolute discretion whether or not to sanction a restructuring plan, and may refuse sanction on the grounds that it would not be just and equitable to do so, even if the conditions in section 901G have been met."

43. I did not have the advantage of submissions from any of those Plan Creditors who voted against approval of the Restructuring Plan. None of them appeared either to explain the approach they say I should adopt in exercising my discretion, or to identify those aspects of the Plan Companies' proposals which might point towards a refusal to sanction it. However, I am very grateful to Mr Smith QC, who appeared for the Plan Companies, and Mr Goldring QC, who appeared for the Original Locked-up Lenders (save for one that is no longer party to the Facilities Agreement as Lender and no longer party to the Lock-up Agreement), for the comprehensive nature of their submissions on the considerations that it is appropriate for me to take into account.

44. The words of the statute give little guidance on the factors that are relevant when the court is exercising its discretion to sanction a restructuring plan. But I think that, even where section 901G is in play, the approach the court adopts when sanctioning a scheme of arrangement under Part 26 of the 2006 Act, or a restructuring plan under Part 26A where the provisions of section 901G are not relied on (as to which see *Virgin Atlantic*), is the right starting point. I have outlined them earlier in this judgment.

45. In a section 901G case there are, however, some necessary differences from the *National Bank* / *Telewest* test, and in particular the important phrase "*but at the same time the court will be slow to differ from the meeting*". The reason for this is that, where a dissenting class has not agreed the compromise or arrangement by the statutory majority and a cross-class cram down is being sought, the legislative intent

is that it may well be appropriate for the court to exercise its power to differ from the dissenting class meeting if conditions A and B are satisfied.

46. By its very nature, the power to be exercised under section 901G contemplates that the court can override the wishes of a class meeting. True it is that the court will be overriding the views of a class by sanctioning a plan that has not been agreed by the statutory majority, rather than by refusing to sanction a scheme that has, but, even so, a reluctance to differ from the meeting cannot have the same place in the court's approach to sanctioning a restructuring plan to which section 901G applies that it has on an application to sanction a scheme of arrangement under Part 26.

47. In characterising the court's power in this way, it is relevant to bear in mind that the power to override the decision of a dissenting class is capable of being exercised whether the value of the votes cast against the proposed plan is 26% or 100%. In the present case, a bare majority of those present and voting at the DSC Other Plan Creditor meeting voted in favour - it is just that the majority was insufficient to comply with the requirements of section 901F.

48. This legislative intent is emphasised by the way in which the Explanatory Notes are expressed (as to which see above). They indicate that an applicant company will have a fair wind behind it if it seeks an order sanctioning a restructuring plan notwithstanding a dissenting class where the section 901G conditions A and B are met. Paragraph 192 is drafted in a way which suggests that, where that is the case, the court will focus on the negative question of whether a refusal to sanction is appropriate on the grounds that the restructuring plan is not just and equitable. The draftsman's focus was not on the more positive question of why justice and equity point to the plan being sanctioned.

49. On one view this is a small distinction, not least because no court will sanction a plan which it does not consider to be just and equitable. However, I think it reflects a recognition that, all other things being equal, satisfaction of conditions A and B is capable of justifying an override of the views of a dissenting class. This is not surprising in light of the fact that the court must have been satisfied already (a) that the purpose of the plan is to eliminate, reduce or prevent or mitigate the effect of financial difficulties that are affecting or may affect a company's ability to carry on business as a going concern (section 901A) and (b) that members of that class will be no worse off than they would be in the relevant alternative (section 901G(3)). So, to that extent their rights will have been varied by the plan in a manner which, objectively speaking, can only be neutral or better for them in its impact.

50. Mr Goldring submitted that Part 26A represents an incremental development in available techniques for restructuring a company's indebtedness which can in practice achieve a similar effect to the binding of a dissenting class. He submitted that the court should approach the exercise of its discretion where a cross-class cram down is sought, having regard to the principles described in *Re Tea Corp* [1904] 1 Ch 12 and drew my attention to the many subsequent cases such as *Re British & Commonwealth Holdings plc (No 3)* [1992] 1 WLR 672; *Re Maxwell Communications Corp (No 2)* [1993] 1 WLR 1402; *Re MyTravel* [2005] 1 WLR 2365; *Re Bluebrook Ltd* [2010] BCC 209; *Re Noble Group Ltd* [2019] BCC 349; and *Re Swissport Fuelling Ltd* [2020] EWHC 3413 (Ch) in which the court has considered and discussed various forms of restructuring mechanism where junior creditors are excluded from the

scheme because they are "out of the money" and have no economic interest in the company.

51. One aspect of this incremental development is that Part 26A has introduced an ability to bind a dissenting class where they have an economic interest in the company and are not therefore out of the money in the relevant alternative. However, where the evidence is that the members of the dissenting class are out of the money in the relevant alternative, and that their exclusion would in any event have been achievable if a Part 26 scheme had been proposed, it seems to me that their receipt of any benefits under the terms of the proposed Restructuring Plan means that they are unlikely to have been treated in a manner that is not just and equitable. Indeed, in such a case, section 901C(4) means that it may not have been necessary for such creditors to be summoned to a class meeting in the first place.

52. In the present case, the benefits to be received under the terms of the Restructuring Plan by all of the Other Plan Creditors (including in particular the members of the DSC Other Plan Creditor dissenting class) are to be provided by DeepOcean group entities other than the Plan Companies. This factor, combined with the fact that the DSC Other Plan Creditors are out of the money in the relevant alternative is in my view a powerful pointer towards sanctioning the Restructuring Plan by use of the power under section 901G.

53. Furthermore, I think that the overall support for the Plan Companies' proposals together with the question of whether the Plan Creditors were fairly represented at their respective Plan meetings remain material questions, whether or not section 901G is engaged. They inform the court as to the weight to be given both to the views of the class meetings which have agreed the restructuring plan and the views of the dissenting class.

54. Thus a low turnout at a meeting which has agreed a scheme or a restructuring plan is capable of undermining the conclusion that the vote was representative, particularly where creditors were unable to engage rather than chose not do so: *Re Osiris Insurance Ltd* [1991] 1 BCLC 182, 189 and *Re Cape Plc* [2006] EWHC 1446 (Ch) at [21]-[26]. Likewise it seems to me that a low turnout at a dissenting class meeting may also affect the question of how much weight is to be given to the fact that more than 25% of those present in person or by proxy voted against when section 901G is engaged.

55. In the present case, there was a 100% turnout at the meetings other than those for the three classes of Other Plan Creditors, but the turnout at those three meetings was relatively low (being between 25% and 32% of all known members of each class) anyway by comparison to what can normally be expected at meetings comprised of finance creditors. However, the Other Plan Creditors were primarily trade creditors such as suppliers in respect of whom a lower turnout is not particularly surprising. There is nothing to suggest that any Plan Creditor has been unable to engage by participating at the relevant Plan meeting, as opposed to simply choosing not to do so.

56. Although it seems to me that a higher turnout of DeepOcean group suppliers and trade creditors is to be expected than the turnout which occurred in cases such as *Re Instant Cash Loans* [2019] EWHC 2795 EWHC (Ch) (where turnouts of only 4% and 11% were achieved), that is what in fact happened. Having regard to the nature of their

claims, and the fact that more than 60% of all Other Plan Creditors at each of the three meetings had claims for less than £5,000, I accept Mr Smith's submission that there is no reason to think that the votes at any of the Other Plan Creditor meetings were not representative of their class.

57. I also accept Mr Smith's submission that there is no evidence that any creditor at any of the Plan meetings for any of the three Plan Companies was influenced in the way it cast its vote by any collateral interest. Likewise, there is no evidence that the consideration of the matter by Plan Creditors was not carried out by any of them other than honestly and in good faith with a view to the interests of the class which they were empowered to bind.

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 (although there is a possibility that the starting point might be different for the ES Other Plan Creditors as the EPM disclosed a small recovery if the relevant alternative were to be the Group Liquidation Scenario rather than the CL&T Group Insolvency Scenario). 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.

62. The next discretionary factor that may apply in section 901G cases relates to the relative treatment of creditors under the proposals and has much in common with what has come to be called the "horizontal comparison" that the court will often carry out when considering an unfair challenge to a company voluntary arrangement. It is the second of the two heuristics referred to by Norris J in the *Debenhams* case at [12] (in a passage immediately following the citation I set out earlier in this judgment). It compares the treatment of creditors under the CVA inter se. As Norris J said: "whilst

there is no prohibition on differential treatment, any differential treatment must be justified".

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.

64. In the present case, the difference in treatment of DSC Secured Creditors and DSC Other Plan Creditors is obvious, but it is plain that differential treatment is justified because of the secured nature of the DSC Secured Creditor claims. Furthermore, it seems to me that the fact that the DSC Other Plan Creditors were out of the money in the event of the relevant alternative, and that the benefits they receive from the Restructuring Plan are derived from sources other than DSC, means that a horizontal comparison is of much less significance than might otherwise be the case. There are no assets from which they would derive benefit in the absence of the Restructuring Plan and it is difficult to identify any legal basis on which they can complain about the choice made by the other members of the DeepOcean group to apportion the contribution they make to the Restructuring Plan is such manner as they see fit.

65. The other category of DSC creditors who have been treated differently from the DSC Other Plan Creditors are DSC's excluded creditors. I explained the reasons for their exclusion in the convening judgment and why it was that I was satisfied that the Plan Companies had good commercial reasons for taking that course. Although there was some creditor correspondence earlier in the proceedings which complained about the way in which the Plan Companies had gone about choosing those creditors whose rights were to be varied by the Restructuring Plan and those whose right were not, the points made were not pursued at the sanction hearing and did not in any event seem to me to give rise to any reasoned objection.

66. The last discretionary factor is whether there is anything in the formulation of the Restructuring Plan which causes concern as to how it will operate in practice as a mechanism for varying creditor rights and effecting a distribution of the available assets. No Plan Creditor has identified any such concern, none has been drawn to my attention by the Plan Companies and none has occurred to me. I am satisfied that, in that sense, there is no blot on the Restructuring Plan.

67. The final matter of which I am required to be satisfied is whether the Restructuring Plan is likely to be substantially effective in relevant jurisdictions outside England and Wales. This is the same question that arises on any application to sanction a scheme of arrangement under Part 26 (*Re Magyar Telecom BV* [2014] BCC 448 at [16]), and I can see no reason why the same principles should not apply on an application to sanction a restructuring plan under Part 26A.

68. In light of the agreements that have been reached with the UK Vessel Owner Creditors, it is no longer necessary for the Plan Companies to demonstrate that the Restructuring Plans are more likely than not to be recognised in the Netherlands as the

jurisdiction in which BV is incorporated. The Plan Companies' expert evidence to that effect is therefore no longer required. There is no suggestion that it is necessary for the Restructuring Plans to be recognised in any other jurisdiction in order for them to have substantial effect.

69. In these circumstances, I was satisfied at the hearing held on 13 January 2021 that it was appropriate to sanction the Restructuring Plans, and I made an order to that effect.