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Case No: CR-2023-005266

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/02/2024

Before:

MR JUSTICE MICHAEL GREEN

IN THE MATTER OF CB&I UK LTD

AND IN THE MATTER OF THE COMPANIES ACT 2006

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David Allison KC, Clara Johnson, Ryan Perkins, Stefanie Wilkins (instructed by **Kirkland & Ellis International LLP**) for CB&I UK Limited

Mark Arnold KC and **Charlotte Cooke** (instructed by **Linklaters LLP**) for Crédit Agricole Corporate and Investment Bank

Daniel Bayfield KC and **Jon Colclough** (instructed by **Weil, Gotshal & Manges (London) LLP**) for an ad hoc group of supporting creditors

Felicity Toube KC, Tom Sprange KC, Matthew Abraham and **Jamil Mustafa** (instructed by **King & Spalding International LLP**) for Refinería de Cartagena S.A.S.

Hearing dates: 8, 9, 12, 13, 14 & 15 February 2024
Draft judgment circulated: 23 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 27 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Mr Justice Michael Green:

INTRODUCTION

1. I have heard a six day trial, including four days of factual and expert evidence, plus two days of judicial pre-reading, in relation to the application by CB&I UK Limited (the "**Plan Company**") for the Court's sanction of its restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006 (the "**CA 2006**"). The Plan Company seeks to use the cross-class cram down power in s.901G of the CA 2006 because two of the seven classes of creditors did not approve the Plan at their class meetings. One of those dissenting creditors is Refinería de Cartagena S.A.S. ("**Reficar**"), a Colombian company, which has an interest-bearing debt against the Plan Company of approx. US$1.3 billion arising out of an ICC Arbitration Award dated 2 June 2023 and it has vigorously opposed the Plan. That debt will effectively be extinguished by the Plan and there will be a minimal amount paid to Reficar in order to pass the jurisdictional thresholds in Part 26A of the CA 2006.

2. At the start of the hearing I had a lot of sympathy for Reficar and the position it was in. It seemed as though the Plan Company, which is part of the McDermott Group (the "**Group**"), a huge international engineering, procurement and construction ("**EPC**") group providing services to the oil, gas and energy sector, had negotiated with its secured creditors without reference to Reficar and had agreed the Plan that would extend the maturities on the secured debt, remove Reficar's debt from the balance sheet but leave other unsecured creditors and the equity in the Group whole. This brought into sharp focus the full force of the cross-class cram down power where it is being used against an "*out of the money*" creditor. Reficar opposed the Plan on a number of grounds, including whether the Plan Company could satisfy the jurisdictional "*no worse off*" test in s.901G of the CA 2006 and whether it would be a fair exercise of discretion to sanction such a plan. I will deal with these points below.

3. However in extraordinary developments through the course of the trial, the state of without prejudice negotiations between the parties became apparent to me, seemingly because all parties wanted me to know that there had been such negotiations going on to resolve the dispute. There are contested chronologies going back to the summer of last year, but on 7 December 2023, the Group had made an open offer to Reficar to issue it with US$50 million of preference shares in the ultimate parent of the Group, McDermott International, Ltd ("**MIL**"), a Bermudian company. There was no open response from Reficar but apparently without prejudice negotiations ensued, with term sheets going backwards and forwards, but no agreement was reached before the start of the trial.

4. There are two parallel restructuring plans for the Group in the Netherlands (the "**WHOA Plans**") promulgated by two Dutch companies within the Group, McDermott International Holdings B.V. ("**MIH**") and Lealand Finance Company B.V. ("**LFC**"). The purpose of the WHOA Plans is to ensure that the Plan is binding and effective on the creditors of MIH and LFC. Both the Plan and the WHOA Plans are inter-dependent, so that there needs to be approval of both for each Plan to take effect. It is clear that under Dutch law, Reficar will have to be allocated equity in MIH in consideration for the release of its debt claim against MIH (the Plan Company and MIH are the two joint and several debtors of Reficar pursuant to the Arbitration award). A Restructuring Expert has been appointed by the Dutch Court to facilitate negotiations between the

parties to reach a consensual deal. Reficar did not want equity in MIH and so the discussions both here and in the Netherlands have been about equity interests in MIL, effectively the Group as a whole. The position was reached that the Dutch Restructuring Expert formulated a proposal which involved the allocation of US$75 million of preference shares in MIL to Reficar, and these would be convertible into ordinary shares representing 19.9% of the ordinary share capital of MIL.

5. Building on that proposal, over the weekend during the trial on Saturday 10 February 2024, the Group, through its solicitors, Kirkland & Ellis International LLP, made an open offer along the same lines as the Restructuring Expert had recommended. This was supported by the represented secured creditors of the Group, who hold the majority of the equity in MIL. The offer was essentially what Reficar had been asking and negotiating for. Reficar itself had sought to introduce evidence of the negotiations into the proceedings via one of its witnesses on the morning of Monday 12 February 2024.

6. Reficar raised a query about protection from future dilution and the Group accepted that point and put forward a revised offer in the morning of 13 February 2024, the fourth day of the trial. I was informed that the board of Reficar (it is a public company, 88.49% owned by the Republic of Colombia) would meet at 8.30pm UK time that evening.

7. In accordance with the agreed trial timetable, at 9am on Wednesday 14 February 2024, the parties served and filed their written closing submissions. I had urged the parties to limit their written closing submissions so far as possible to matters not dealt with in the opening skeleton arguments and principally to deal with the witness evidence that had been heard and any other developments. The Plan Company's written closings were 46 pages and did largely avoid repetition with the skeleton argument. Likewise the supporting creditors' written closings. Reficar, by contrast, filed written closings of 260 pages including detailed annexes. As I will explain later, its case had changed markedly from its opening skeleton argument but it was clear that it was intending to maintain its wholesale opposition to the sanctioning of the Plan. There was however virtually no mention of the negotiations and/or any decision of its board as to whether it was going to accept the offer made by the Group, and as proposed by the Dutch Restructuring Expert. Given the time, it was impossible for the Plan Company, and me, to read and digest the written submissions before the oral closing submissions began at 10.30am on the same day.

8. Mr David Allison KC, leading Ms Clara Johnson, Mr Ryan Perkins and Ms Stefanie Wilkins, on behalf of the Plan Company, had most of the day for their closing submissions. He said that they had not heard whether the Reficar board had approved the deal and they were assuming that it had not. At no point during the day did anyone on Reficar's side indicate the outcome of the board meeting or whether there was a settlement that would avoid the need to complete the trial with two days of closing argument. Mr Allison KC rightly referred to this as extraordinary. Mr Daniel Bayfield KC, leading Mr Jon Colclough, on behalf of the ad-hoc group of secured creditors (the "**AHG**") submitted in his short closing arguments that we were in the very unusual situation of the negotiations between the parties being played out in real time before the Court, and that if the deal on the table was not accepted by Reficar, then it could not possibly succeed in its arguments on the Relevant Alternative (as defined in s.901G(4) of the CA 2006), because this was dependent on showing that a deal could easily be done between the Group, its stakeholders and Reficar following the failure of the Plan.

9. On the final day of the trial, Thursday 15 February 2024, there was a bizarre twist that almost completely derailed Reficar's position. Before Ms Felicity Toube KC, who was appearing together with Mr Tom Sprange KC, Mr Matthew Abraham and Mr Jamil Mustafa for Reficar, began her closing submissions, a letter had been sent by her instructing solicitors, King & Spalding International LLP, which can best be described as a holding response to the offer made on 13 February 2024. After explaining that the Reficar board has certain public law duties in Colombia requiring it to carry out due diligence on any transaction involving public funds, they said that the board had not rejected the 13 February 2024 offer but that it needed to carry out more due diligence. Two specific points were identified and they said that a further board meeting would be convened "*as soon as practicable*" for the purpose of addressing the outstanding due diligence issues. Needless to say the letter was met with some anger on the other side and the AHG's lawyers, Weil, Gotshal & Manges (London) LLP, expressed their displeasure in a letter sent at lunchtime in which they said that the response from Reficar was "*completely unacceptable*" and that it showed that the Reficar Relevant Alternative was "*fanciful*".

10. Ms Toube KC proceeded with her closing submissions, though markedly not pressing what had originally been Reficar's Relevant Alternative – a consensual deal with Reficar and a new plan – but focusing on other Relevant Alternatives that she said had emerged from the evidence of the supporting creditors. Then during the lunch adjournment a letter was received from the Dutch Restructuring Expert, who is a partner in Freshfields Bruckhaus Deringer LLP in Amsterdam, addressed to the parties but with specific authorisation for it to be disclosed to me. In the letter, the Restructuring Expert said that he would be putting forward his recommendation for a settlement between the parties in relation to the "**MIH WHOA Plan**" and that he would then seek the sanction of the Dutch Court. His proposal is in all material respects the same as the 13 February 2024 offer made by the Group to Reficar consisting of the grant of preferred shares in MIL, convertible into non-voting ordinary shares of 19.9% of MIL's ordinary share capital. What was made clear in the letter was that if Reficar accepted this proposal and therefore the MIH WHOA Plan, it would get the 19.9% of MIL's ordinary share capital; whereas if it did not, and continued to oppose the Plan and the MIH WHOA Plan, Reficar would instead receive a smaller shareholding of 10.9% of MIL's ordinary share capital. In other words, Reficar, as a minimum, would get 10.9% of MIL's ordinary share capital, assuming both the Plan and the MIH WHOA Plan are sanctioned; but if it agreed the deal and thereby allowed the Plan and the MIH WHOA Plan to be sanctioned without opposition, it would get 10% more, at 19.9% of the ordinary share capital. It is difficult to understand why Reficar would not agree to such a deal.

11. Ms Toube KC recognised the significance of this. She asked for an adjournment of the balance of her submissions to await the outcome of the MIH WHOA Plan and to wait and see what might happen in the Netherlands. However, Mr Allison KC told me that the timeline showed that the MIH WHOA Plan was due to go before the Dutch Court on 5 March 2024, with judgment expected on 12 March 2024. For reasons that will become apparent when I explain the facts in more detail, there is a crucial date on 27 March 2024 when the Group potentially becomes liable in respect of a US$2.2 billion cash collateralisation obligation and it therefore needs to know some time before then if the Plan is going to be sanctioned or not, and whether that date would be extended, as it would be under the Plan. It would also not be a good use of Court resources to adjourn, so I declined to do so. I indicated to Ms Toube KC that her client should be

concentrating on accepting the deal that was on the table which is what it had wanted rather than thinking about what might tactically seem to be to its advantage.

12. So Ms Toube KC continued with her oral submissions, but it was obvious that both the existence of the still unaccepted offer of 19.9% of MIL's ordinary share capital and the Restructuring Expert's letter recommending the offer to the Dutch creditors and Court, with a minimum guaranteed equity of 10.9%, had pulled the rug from under her feet. She accepted that she could not argue that 19.9% of MIL's ordinary share capital was not a fair distribution to Reficar from the restructuring surplus; and she struggled to maintain that 10.9% would not also be a fair distribution. She therefore had no real argument on discretion. She concentrated on the suggested further Relevant Alternatives that she said had emerged from the evidence, but that was fairly thin material upon which to challenge the Relevant Alternative put forward by the Plan Company together with the valuation from Grant Thornton showing that Reficar was wholly out of the money.

13. As I write this judgment, I have heard nothing further from Reficar as to whether it has accepted the deal on the table. I therefore have to assume that it continues to oppose the Plan. I have however received a copy of the Dutch Restructuring Expert's letter dated 16 February 2024 to MIH with his recommendations in relation to the MIH WHOA Plan and the deal offered to Reficar. He has concluded that the MIH WHOA Plan is fair and reasonable to all the creditors, including Reficar and provides a materially better outcome than insolvency. Specifically in relation to Reficar he states that even if it does not accept the 19.9% of MIL's ordinary share capital, it would still be materially better off with the 10.9% than in an insolvency. Furthermore he states that if the MIH WHOA Plan succeeds, Reficar could receive approx. US$900 million. Accordingly he recommended that creditors vote in favour of the MIH WHOA Plan.

14. On 20 February 2024, I received a letter from Reficar's solicitors dated 19 February 2024 referring to the Restructuring Expert's letter concerning the MIH WHOA Plan. The letter informed me that Reficar's board were performing the due diligence required by Colombian law and were due to meet on Friday 23 February 2024, in time for the deadline imposed by the Restructuring Expert of 25 February 2024 for creditors to respond to the MIH WHOA Plan. The letter did not state whether Reficar would be in a position to make a decision by then as to whether it will support the MIH WHOA Plan and accept the deal recommended by the Restructuring Expert.

15. The situation is unfortunate and frustrating and I am not prepared to wait any longer for Reficar to make a decision one way or the other. I of course need to be satisfied from the evidence before me that there is jurisdiction to sanction the Plan, that the Plan Company has proved that it has satisfied the requisite conditions, in particular Condition A in s.901G(3) of the CA 2006 – the *no worse off* test – and that I should exercise my discretion in favour of the Plan. For the reasons I set out below, I am so satisfied, and I will be sanctioning the Plan.

16. In the light of the events described above, I consider that it is not necessary for me to indulge Reficar by dealing with every single point it sought to raise in opposition to the Plan. Most of those points have been severely undermined by its refusal to agree the deal that it has sought and by the position in the Netherlands which means that Reficar will receive either 10.9% or 19.9% of MIL's ordinary share capital depending on whether it finally agrees to accept the offer and the Plans.

17. This judgment will therefore be much shorter and less detailed than I would have expected after hearing a six day trial. It seems to me difficult to justify delaying the result and using Court resources to provide a long and detailed judgment where the result became obvious by the events at the end of the trial. There is a tendency for these plans under Part 26A of the CA 2006 to take up disproportionate amounts of court time and to require extensive and urgent evaluations of detailed expert evidence of the likely outcomes if the plan is or is not sanctioned. I know that the lawyers involved in preparing these restructuring plans are aware of the burden on the Court and I understand that it is important that fair consideration is allotted to each case and particular attention is applied to a plan where the cross-class cram down power is to be exercised and there is serious opposition to it. Furthermore the attraction of the English Court is obvious because of the ability to cram down dissenting classes.

18. A further important factor is that we have had the benefit, very recently, of Snowden LJ's comprehensive review of the law and practice to be applied in the Part 26A jurisdiction in his landmark judgment in *Re AGPS Bondco plc* [2024] EWCA Civ 24 ("***Adler (CoA)***"). A number of the issues arising in this case were dealt with by Snowden LJ and it seems to me unnecessary for a further judgment to deal in detail with those matters. I also bear in mind what Snowden LJ said in [55] to [65] of *Adler (CoA)* about the timing and procedure for the Court's consideration of the sanctioning of these plans.

19. I have one more thing to say at the outset, which has troubled me throughout. I was horrified to discover that the Plan Company has spent around US$150 million on professional fees in negotiating with its secured creditors from December 2022 and then putting forward the Plan and taking it to this hearing. That is an enormous sum of money, even taking account of the fact that it includes the costs of the supporting creditors as well. The Group actually raised US$250 million of new money while the Plan was being negotiated, but that was principally to fund the professional fees for getting the Plan through. The witness from a member of the AHG, Mr Richard Carona, said that he was deeply uncomfortable with this and I agree with his comment that there seems to be something wrong with the restructuring industry, particularly in the US, where the costs appear to be out of control. Obviously the fact that the Plan has been opposed has added to the costs, but it should have been apparent from an early stage that Reficar was not going to just accept an extinguishment of its debt. I think all I can say is that I hope there can be a better way to do these financial restructurings because costs of that magnitude could be a barrier to the sort of restructurings that Part 26A was meant to encourage.

20. With that introduction and explanation of the approach I propose to take, I now turn to explain some of the relevant factual background to the Plan.

FACTUAL BACKGROUND

Plan Company and the Group

21. As noted above, MIL is the ultimate parent company of the Group. The Group comprises over 300 legal entities across the globe. The present structure of the Group arose out of a merger in May 2018 between the McDermott Group and the Chicago

Bridge & Iron Group, whose holding company was MIH. The Plan Company is a subsidiary on the MIH side of the structure.

22. The Group's EPC business is organised into four business segments: (1) low-carbon solutions; (2) offshore Middle East; (3) subsea and floating facilities; and (4) storage solutions (involving the construction of tanks, terminals and vessels for storing a variety of liquids, such as liquified gases, petrochemicals, crude oil and refined products). The Group's customers are sophisticated and substantial undertakings that are often state-owned, such as Reficar and Saudi Aramco.

23. In January 2020, various entities within the Group, including the Plan Company, filed voluntary petitions for reorganisation under Chapter 11 of the US Bankruptcy Code in the US Bankruptcy Court for the Southern District of Texas (the "**Chapter 11 Process**"). Amongst other things, the Chapter 11 Process resulted in a transfer of the equity in the Group to the Group's financial creditors and restructured the Group's financial indebtedness.

The Secured Credit Facilities

24. Pursuant to the Chapter 11 Process, the Group entered into new restated finance documents. The key finance document is known as the Exit Credit Agreement (the "**ECA**"). The borrower under the ECA is LFC. 141 Group companies (including the Plan Company) are guarantors under the ECA (the "**Guarantors**").

25. The ECA created four credit facilities (the "**Exit Credit Facilities**"), namely:

    (1) The "**Super Senior LC Facility**", with lending commitments of US$743 million;

    (2) The "**Make-Whole Term Loan Facility**" with lending commitments of US$44.28 million;

    (3) The "**Senior LC Facility**" with lending commitments of US$1.176 billion; and

    (4) The "**Takeback Term Loan Facility**", with lending commitments of US$500 million.

26. The Super Senior LC Facility, the Make-Whole Term Loan Facility and the Senior LC Facility have a maturity date of 30 June 2024. The Takeback Term Loan Facility has a maturity date of 30 June 2025.

27. As their names suggest, the Make-Whole Term Loan Facility and the Takeback Term Loan Facility are simple term loans. In contrast, the Super Senior LC Facility and the Senior LC Facility are known as "letter of credit facilities" (or "**LC Facilities**").

28. In addition, on 31 December 2020, a number of Group companies entered into an additional financing arrangement known as the Escrow LC Facility Agreement (the "**EFA**"). The EFA and the ECA have the same Borrower (LFC) and Guarantors (including the Plan Company). The EFA creates an additional LC Facility with lending commitments of US$303 million (the "**Escrow LC Facility**"). The Escrow LC Facility has a maturity date of 30 June 2024.

29. The Exit Credit Agreement and the Escrow LC Facility Agreement are together known as the "**Secured Credit Agreements**". The lenders under the Secured Credit Agreements are the "**Secured Plan Creditors**". Both of the Secured Credit Agreements are governed by New York law.

30. The issuance of letters of credit to customers is critical for the Group's business. The Group's customers on their large-scale construction projects typically require security for the performance of the Group's obligations, which is provided in the form of a letter of credit issued by a bank.

31. The nature of a letter of credit is a binding payment undertaking given by one party (the issuer) to another party (the beneficiary) at the request of a third party (the borrower) whereby the issuer must pay the beneficiary a stipulated sum upon presentation of specified documents. In the event of a demand by the beneficiary under a letter of credit, the issuer of the letter of credit is required to make payment immediately, with very few exceptions.

32. The LC Facilities provide a mechanism whereby the Group can procure the issuance of letters of credit by a group of issuing banks (the "**Issuers**") up to a specified limit. The basic structure is as follows:

(1) The Borrower, LFC, can utilise the relevant LC Facility by making a request for one or more of the Issuers to issue letters of credit (up to a defined face value).

(2) If a demand is made by the beneficiary of the letter of credit, then the Borrower must pay the Issuer immediately. This is backed by an indemnity from each of the Borrower and the Guarantors to the Issuer. The lenders under the Secured Credit Agreements also agree to indemnify the Issuers.

(3) There are certain circumstances in which the Borrower, Guarantors and lenders can be required to pay cash collateral to the Issuer for the entire face value of the letters of credit. This cash collateralisation obligation will arise on 27 March 2024 and is the reason for the urgency of the Plan being implemented.

33. The LC Facilities under the ECA and the EFA have now been fully utilised (save for a *de minimis* buffer relating to currency fluctuations).

34. The claims of the Secured Plan Creditors are secured over a common security package. Any security realisation proceeds are to be distributed in accordance with the order of priority set out in the Exit Collateral Agency Agreement. In summary (and disregarding certain irrelevant complications), any security realisation proceeds are to be distributed in the following order of priority:

(1) the Super Senior LC Facility and the Hedging Agreements;

(2) the Make-Whole Term Loan Facility;

(3) the Senior LC Facility and the Escrow LC Facility (on a *pari passu* basis in the event of any shortfall); and

(4) the Takeback Term Loan Facility.

35. The Plan Company has certain other secured liabilities that are outside the Plan. These include certain hedging liabilities (which the Group uses to manage its currency and interest rate risk) and certain bilateral LC Facilities (which provide the Group with additional letter of credit headroom above the limits imposed by the Secured Credit Agreements) (the "**Bilateral Facilities**").

Unsecured litigation claims against the Plan Company

36. At the time of the Chapter 11 Process, Reficar was engaged in an arbitration, under the ICC Arbitration Rules 2012, against the Plan Company, MIH and CB&I Colombiana S.A., which has now been dissolved. Reficar's claims in the ICC Arbitration were expressly preserved in the Chapter 11 Process.

37. Reficar was established in November 2007 to pursue the modernisation and expansion of the Cartagena oil refinery in Cartagena, Colombia. This was one of the largest construction projects within the energy sector in the history of Colombia. Reficar engaged those Group companies in contracts entered into in June 2010 and one of those contracts contained an arbitration agreement incorporating the ICC Rules in force at the time.

38. Reficar was displeased with the performance of the Group companies and claimed that they were in breach of their core obligations under the contracts and were over two years late in meeting the guaranteed construction deadline. Reficar ended up paying US$5.9 billion in costs which was c.US$2.75 billion more than the original estimate in February 2010. On 8 March 2016, Reficar commenced the ICC Arbitration.

39. After Reficar had commenced the ICC Arbitration, Contraloría General de la República ("**Contraloría**"), an administrative agency of the Republic of Colombia, commenced an investigation into the Cartagena Project, alleging improper cost overruns. The Plan Company was one of the parties subject to that investigation.

40. On 26 April 2021, Contraloría issued its opinion that the Plan Company was jointly and severally responsible for cost overruns of c.2.95 trillion Colombian pesos (or US$718,400,000 as at the date of the Explanatory Statement) (the "**Contraloría Claim**"). The Plan Company sought to avoid the Contraloría Claim within the Colombian court system, but its claim was rejected on appeal in February 2022. The Group subsequently filed a bilateral investment treaty arbitration claim (alongside other respondents to the Contraloría Claim) and has brought further proceedings in Colombia counterclaiming against Contraloría. These claims are pending.

41. The Reficar ICC Arbitration lasted seven years. On 7 June 2023, the final award in the ICC Arbitration was notified to the parties. The ICC Tribunal found in Reficar's favour. Reficar was awarded net damages of US$937,495,061 with interest on that amount at the rate of six-month LIBOR +2 compounded daily from 31 December 2015 to the date of payment. Reficar was also awarded net costs of US$58,676,023.

42. The day after the parties were notified of the Reficar Award (*i.e.,* 8 June 2023), the Plan Company and MIH filed a petition to vacate the Reficar Award in the Southern District of New York. On 4 August 2023, Reficar filed a petition to confirm the Award and also its opposition to the petition to vacate. On 31 August 2023, the Plan Company and MIH filed their replies in relation to the petitions. There were some discussions between the

Group and Reficar in August 2023, but Reficar was not told that the Group had been negotiating the Plan or that it was about to launch it. The Practice Statement Letter ("**PSL**") was issued on 8 September 2023 and that came as a great surprise to Reficar.

43. Reficar's and Contraloría's claims are unsecured. However the following may provide some recovery to them:

    (1) Reficar has the benefit of a US$95 million letter of credit issued under the Senior LC Facility (the "**Reficar LC**"). All of the lenders under the Senior LC Facility will be liable to contribute *pro rata* towards any call by Reficar under the Reficar LC.

    (2) The Plan Company has certain insurance policies (with a remaining cover limit of US$213 million in aggregate) which may provide coverage for their claims. The Plan Company has said that its rights under those insurance policies will be transferred by operation of law to Reficar and Contraloría in accordance with the Third Parties (Rights Against Insurers) Act 2010.

44. Reficar and Contraloría are together described in the Plan as the "**Dispute Proceeding Plan Creditors**".

45. There are various other entities (inside and outside of the Group) which are jointly and severally liable for the Reficar claim and the Contraloría claim. Such persons may have rights of contribution against the Plan Company, and are therefore known as the "**Contribution Claim Plan Creditors**". Together, the Dispute Proceeding Plan Creditors and the Contribution Claim Plan Creditors are known as the "**Unsecured Plan Creditors**".

46. The Plan Company has maintained that the Contribution Claim Plan Creditors occupy the most subordinated position in the Group's debt stack. This is a consequence of the rule against double proof, which entails that a contribution claim cannot receive a distribution in an insolvency proceeding until the principal creditor has been repaid in full: see *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc* [2022] Bus LR 10 at [136]*ff* per Lewison LJ and *Re Kaupthing Singer & Friedlander Ltd (No 2)* [2012] 1 AC 804 at [11]-[12] per Lord Walker.

47. The Contribution Claim Plan Creditors formed a separate class of creditor, as directed by Miles J at the convening hearing. Some of that class, known as the "**Wood Parties**", were represented at the convening hearing and they continue to oppose the Plan, although for reasons of costs and proportionality they decided not to be represented at the sanction hearing. I received a letter from their solicitors, DLA Piper UK LLP, dated 5 February 2024, explaining their position. They do not accept the point about the rule against double proof but basically they adopt the submissions and opposition of Reficar.

<u>Events leading up to the launch of the Plan</u>

48. The Group has been in financial distress for several years, and the difficulties have increased in severity in recent months. Only four years ago it went through the Chapter 11 Process but since then, the Plan Company has identified a number of events that have further impacted the Group's liquidity position:

(1) The COVID-19 pandemic (which began only a few months after the Chapter 11 Process commenced) resulted in the imposition of lockdowns across all the countries in which the Group operates, causing unprecedented disruption and delay to projects for substantial and prolonged periods.

(2) Prices for oil and gas have been extremely volatile.

(3) The Russian invasion of Ukraine has caused further disruptions to the global supply chain and energy markets.

(4) Inflationary pressures, including rising costs in the steel and labour markets, have resulted in increases to the Group's non-fixed operating costs, in addition to raising costs for customers.

(5) In April 2023, the Group experienced a material cybersecurity incident, resulting in significant disruption to the Group's ability to accurately track contract progress, make new contract bids, make supplier payments and ensure collection of customer receipts in a timely manner. The Group was without key operating systems for 5-6 weeks.

(6) As a result of the merger in 2018, the Group inherited certain legacy projects that ultimately resulted in significant losses. Certain "problem" contracts have been identified by management that were expected to make a greater than US$600 million gross loss during 2023.

(7) Due to the Group's financial difficulties, some key customers have lost confidence in the Group and there are examples of certain significant contracts that had been awarded to the Group being cancelled because of the Group's inability to procure letters of credit in the required amount.

(8) To try to manage liquidity, the Group has stretched its supplier base to unsustainable levels. Delays in settling obligations with suppliers have caused significant operational issues, in many cases bringing projects to a halt or severely impacting project schedules, which in turn has resulted in increased carrying costs and delayed revenue realisation.

49. These were the key causes of the Group's financial difficulties and over the past few months the Group's financial position has deteriorated further. The Plan Company says that it is on the verge of collapse.

50. In late 2022, the Group commenced negotiations with two groups of its financial creditors, the AHG and "**SteerCo**", which is a group of certain lenders and issuers under the Secured Credit Agreements, including Crédit Agricole Corporate and Investment Bank, ("**Crédit Agricole**"), which was separately represented before me by Mr Mark Arnold KC and Ms Charlotte Cooke to support the Plan. The members of the AHG and SteerCo together comprise a majority in value of each class of the Secured Plan Creditors, except for the Make Whole Term Loan Facility class, and some members have cross holdings in other classes. Members of the AHG together hold 98% of the preferred equity in the Group and 67% of the ordinary share capital. This was the result of the Chapter 11 Process.

51. The negotiations were said to have been extremely difficult and tortuous as each member of the AHG and SteerCo had different interests and objectives. The Plan Company did manage to reach agreement with the majority of the Secured Plan Creditors in the form of a Transaction Support Agreement, which was signed on 8 September 2023 (the "**TSA**"). The TSA is similar to a lock-up agreement with the Plan Company and MIL agreeing to implement the Plan in accordance with a series of dates and deadlines, including originally that the Plan would be implemented by no later than 31 December 2023. Those dates can be extended with the written consent of the parties and, so as to account for this hearing, the implementation date was extended to 15 March 2024. A failure to meet any of the deadlines, or milestones under the TSA would be a Termination Event. All of the Secured Plan Creditors are entitled to accede to the TSA if they wish to do so at any time prior to the Restructuring Effective Date. All of the Issuers have signed up to the TSA as have the majority of the other Secured Plan Creditors.

52. Because of the Group's need to maintain liquidity reserves of at least US$100 million, it became apparent during the negotiations of the TSA that the Group was on the verge of running out of money altogether. As noted above, the Group determined that it was necessary to borrow US$250 million of new money under a new term loan (the "**Tanks Term Loan Facility**"), which was secured against certain assets within the Group's storage tanks business (the "**Tanks Business**"). Although the Plan Company said that the new money was needed to be borrowed urgently to avoid a collapse of the Group, and there was no time to wait for the Plan to become effective, in fact the majority of the new money was used to pay the professional fees for the Plan.

53. The Group approached all members of the AHG, but ultimately only SteerCo and 11 of the 15 members of the AHG were willing to participate in the Tanks Term Loan Facility. The rights of the lenders under the Tanks Term Loan Facility are not affected by the Plan.

THE PLAN

54. The Plan does not provide for any new money to be injected into the Group. Nor does it add to the letter of credit capacity under the LC Facilities. Instead the main impact of the Plan on the Secured Plan Creditors is that the maturity dates of the Super Senior LC Facility, the Make-Whole Term Loan Facility, the Senior LC Facility and the Escrow LC Facility will be extended from 30 June 2024 to 30 June 2027. The maturity date of the Takeback Term Loan Facility will be extended from 30 June 2025 to 31 December 2027.

55. There are also a number of other less significant changes to the Secured Credit Agreements. For example, the minimum liquidity covenant will be modified, and various changes will be made to the provisions governing asset disposals, restricted payments, permitted indebtedness and other matters.

56. As for the Reficar and Contraloría claims, the Plan releases them as against the Plan Company and any other co-obligors in the Group. The consideration payable to Reficar and Contraloría for the release of their claims is the greater of the following:

(1) The amount that Reficar and Contraloría would receive in the liquidation of the Plan Company, being the Plan Company's Relevant Alternative, which would be their share of the prescribed part; and

(2) Their pro rata share of a variable contingent cash payment calculated by reference to the Group's annual performance in its financial years ending 2023 and 2024. The amount of the cash payment will depend on the extent to which the Group's actual EBITDA for the relevant year exceeds the EBITDA projected by the Group's most recent business plan (the "**Target EBITDA**"). If the Group exceeds the Target EBITDA for 2023 or 2024, then a contingent payment will be payable in an amount equal to 2% of the excess above the Target EBITDA. The maximum amount in each financial year to be paid by the Plan Company to Reficar and Contraloría is capped at an aggregate amount of US$2 million. Such sum will only be payable 10 business days following the latest amended maturity date under the Plan which is 31 December 2027.

57. The Contribution Claim Plan Creditors will receive a different deal under the Plan, because of the view taken by the Plan Company as to their subordinated position in the debt structure. In consideration for the release of their claims, they will be entitled to share a one-off cash payment in the aggregate amount of £100,000.

58. It is unsurprising, given those figures, that Reficar was so vigorously opposing the Plan. It would release its hard fought Arbitration award in an amount of approx. US$1.3 billion for a participation in a contingent EBITDA which is a tiny fraction of the amount due and would only be payable in four years' time. Even if the maximum is paid, this would only amount to 0.2% of the claim; and if the prescribed part amount was paid, which would be a sum of US$516,523.62, that would be only 0.04% of Reficar's claim. This was the basis of Reficar's challenge to whether this was a "*compromise or arrangement*" or simply an extinguishment of the debt. On any view it is a very small amount and the intention of the Plan Company and the Group is pretty clear. As explained above, Reficar does retain the ability to draw on the Reficar LC and the possibility of coverage under the insurance policies, both of which are unaffected by the Plan.

59. The Plan does not compromise other unsecured liabilities, including trade liabilities and intercompany creditors. The Plan Company explained that trade creditors were left outside the Plan because it was essential to preserve trade relationships if the Group was to survive. Reficar accepted this. However, it said that the exclusion of intercompany creditors totalling US$70,149,316.25 was essentially unexplained and unfair.

60. Reficar also complains that it is unfair for the equity in the Group to be unimpaired under the Plan. As indicated above, there is substantial overlap between the Secured Lenders and the holders of the primary equity interests in the Group. The equity holders are to provide no new money under the Plan but nevertheless stand to benefit from any increase in equity value upon the release of the Reficar and Contraloría claims, which would rank ahead of the equity in an insolvency. While Reficar's points in relation to the equity might have carried some weight in relation to discretion, the offer that has been made to it, and the equity which it will receive anyway under the MIH WHOA Plan, mean that the existing equity holders are now being impaired and Reficar will be benefitting from the allocation of substantial equity in the Group.

PLAN MEETINGS AND VOTING OUTCOME

61. As noted above, the convening hearing took place on 28 September 2023. Miles J made an order giving the Plan Company permission to convene seven meetings of the Plan Creditors (comprising five classes of Secured Plan Creditors and two classes of Unsecured Plan Creditors) and laid down a timetable for evidence to be filed in advance of an expedited four-day sanction hearing. His judgment on the convening hearing is at: [2023] EWHC 2497 (Ch). The Secured Plan Creditors' meetings were in respect of the lenders in the five Facilities comprising the Secured Credit Agreements. The two unsecured creditors meetings were for Reficar and Contraloría in one; and the Contribution Claim Plan Creditors in the other.

62. In addition to Reficar, Contraloría and the Wood Parties, there was also an ad hoc group of sub-participants in respect of certain of the LC Facilities (the "**LC AHG**") who were opposing the Plan. The members of the LC AHG were not actually Plan Creditors, as the Plan only varied the rights of lenders of record and not the rights of sub-participants. Nevertheless, on 24 January 2024, shortly before the start of the sanction hearing, the Plan Company announced that it had reached an agreement with the LC AHG and certain modifications were made to the Plan. In return for withdrawing its opposition to the Plan, the Group offered the LC AHG both debt and equity – US$32.5 million of cash collateral and preferential equity – plus the payment of its legal and advisory fees of US$9 million. Reficar relied on this deal as showing the Group's and Secured Creditors' capacity for reaching a mutually acceptable agreement with dissenting creditors.

63. The sanction hearing was originally listed on an expedited basis with a time estimate of four days, to commence at the end of November 2023. However, Reficar applied to extend the time estimate to six days plus two days of pre-reading. This application was granted by Miles J on 3 November 2023, and the sanction hearing was accordingly relisted to February 2024 (with modified case management directions).

64. Given that the sanction hearing was delayed, the Plan Meetings were likewise delayed. There were two addendums to the Explanatory Statement: one on 21 December 2023; and the other on 24 January 2024, to deal with the LC AHG modifications. The latter also notified the Plan Creditors that the Plan Meetings had been delayed to 1 February 2024 and that all Plan Creditors would be free to change their votes if they wished to do so.

65. The outcome at each of the Plan Meetings on 1 February 2024 was as follows:

    (1) The Plan was *unanimously* approved by those voting at the meetings of all five classes of the Secured Plan Creditors. The turnout was extremely high at all five meetings, ranging from 91.7% (for the meeting for the Takeback Term Loan Facility Lenders) to 100% (for the meeting of the Escrow LC Facility Lenders).

    (2) At both meetings of the Unsecured Plan Creditors, the Plan did not pass. The Plan was rejected by 100% of those voting at the meeting of the Dispute Proceeding Plan Creditors and by 66.7% of those voting at the meeting of the Contribution Claim Plan Creditors.

66. The result, therefore, is that the requisite statutory majority was achieved within each of the five classes of Secured Plan Creditors (the "**assenting classes**") and was not achieved within either of the two classes of Unsecured Plan Creditors (the "**dissenting classes**").

THE LIST OF DISPUTED ISSUES

67. The Plan Company needs to satisfy the Court of certain matters, such as fair representation of the assenting classes and compliance with statutory requirements, that are not disputed by Reficar. The parties helpfully agreed a List of Disputed Issues, although not all of them were in the end contested. They come under three broad headings and are as follows:

Jurisdiction

(1) Is the plan a "*compromise or arrangement*" within the meaning of section 901A(3) of the CA 2006 vis-à-vis the Dispute Proceeding Plan Creditors?

Relevant alternative and the "no worse off" test

(2) What is the Relevant Alternative to the Plan?

(3) Is the "*no worse off*" condition in section 901G(3) met in relation to any dissenting classes?

Discretion

(4) Is the Plan unfair to the Dispute Proceeding Plan Creditors because of the manner in which the restructuring surplus of the Group is allocated under the Plan?

(5) Should the Court refuse to sanction the Plan on the basis that the Explanatory Statement is inadequate and/or misleading?

(6) Should the Court sanction the Plan if it would violate the New York Convention and thereby the obligations of the United Kingdom as a Contracting State?

(7) Should the Court refuse to sanction the Plan on the basis that the Plan is not likely to have substantial effect in the US?

WITNESS EVIDENCE

68. Before turning to the disputed issues, I should make some brief general comments about the witness evidence, both factual and expert, that I heard. The parties filed voluminous evidence, in particular in the expert reports, much of which was hardly touched on at the trial.

69. The Plan Company adduced the following factual evidence:

(1) Mr Travis Brantley, who made three witness statements, is the Group CFO and has held senior positions in the Group since 2015;

(2) Ms Kathleen Sweeney, who made one witness statement, is a Managing Director of Crédit Agricole and the Head of its Debt Restructuring and Advisory Services (Americas); even though Crédit Agricole was separately represented to support the Plan, Ms Sweeney was called by the Plan Company;

(3) Mr Richard Carona, who made one witness statement, is a partner at The Baupost Group, L.L.C., a member of the AHG; he too was called by the Plan Company even though the AHG was separately represented;

70. The Plan Company's expert evidence was as follows:

(1) Mr Andrew Charters, an insolvency practitioner and partner at Grant Thornton UK LLP. He prepared an Expert Report dated 21 December 2023 in response to the expert evidence filed on behalf of Reficar on 23 November 2023. He was also responsible for preparing the GT Relevant Alternative Report dated 24 September 2023.

(2) Ms Clare Gilbert is a partner at Grant Thornton and her specialism is the valuation of companies as a going concern. Ms Gilbert filed her evidence in response to Reficar's expert evidence as to the valuation of the Group as a going concern assuming the Plan is sanctioned. Ms Gilbert was also responsible for preparing the GT Valuation Report dated 24 September 2023.

(3) Mr Mark Morris, who is an experienced executive and board director in the construction and oil and gas sectors, in particular focusing on businesses in distress. He gave evidence as to the likely collapse of the Group into insolvency if the Plan fails and the behaviour of the Group's customers, suppliers and financial counterparties in that eventuality.

(4) Professor Steven Schwarcz is a professor of law at Duke University and an expert on letters of credit. He gave largely uncontested evidence as to the operation of the Group's LC Facilities and the obligation to post cash collateral on 27 March 2024.

(5) Judge Christopher S. Sontchi, a retired US Bankruptcy Judge for the District of Delaware. His expert report explained that the Plan would likely be recognised and enforced in the United States under Chapter 15 of the US Bankruptcy Code. This was conceded by Reficar's expert, Judge James Peck and so these experts were not called for cross examination and the issue of recognition was no longer disputed by Reficar.

71. Reficar's factual evidence was from Mr Mike Stenglein, a partner at Reficar's lawyers, King & Spalding LLP, and Managing Partner of the firm's office in Austin, Texas. Mr Stenglein conducted the Arbitration proceedings on behalf of Reficar as he is a specialist in EPC disputes. Some of his evidence was concerned with the Arbitration proceedings but he also proffered his opinion on the operation of the Group's LC Facilities and the likely behaviour of the Group's stakeholders if the Plan is not sanctioned. The Plan Company objected to that opinion evidence being admitted, as Mr

Stenglein is neither an expert in those areas nor had he prepared a compliant expert report (which he could not do as he is not independent, as one of Reficar's lawyers). There were also some errors in his witness statement, mainly in relation to the operation of the LC Facilities, which he corrected shortly before the trial by way of an errata sheet.

72. Reficar's expert evidence consisted of the following:

(1) Mr David Pike, an insolvency practitioner and a Managing Director at Interpath Ltd, which is the successor to KPMG's restructuring practice. He has extensive experience of advising businesses and stakeholders on operational and restructuring solutions and his evidence concerned the Relevant Alternative if the Plan is not sanctioned.

(2) Mr Daniel Moses is a Principal of Province L.L.C., a corporate restructuring firm with principal offices in Nevada, US. He too gave evidence as to the Relevant Alternative, concentrating on the likely commercially rational behaviour of the Group's stakeholders to avoid a collapse into liquidation.

(3) Mr Richard Boulton KC is both a barrister in private practice and a forensic accountant specialising in the quantification of complex damages claims and other valuation and accountancy matters at Berkeley Research Group. Mr Boulton KC provided expert evidence on the treatment of the Group's exposure to letter of credit liabilities in the context of a fair market valuation of the Group on an enterprise value basis. He also opined on the Relevant Alternative and the likely returns to creditors in a formal insolvency scenario.

(4) Mr David Mitchell is a partner at Interpath Ltd and a Managing Director in the Valuations Team specialising in valuing companies as a going concern. Mr Mitchell's evidence was directed at showing that if the Plan is sanctioned pursuant to a deal with Reficar it would be solvent and there would be value in the Group's equity.

(5) Judge James Peck is a retired US Bankruptcy Judge from the Southern District of New York. As stated above, the recognition issue is no longer a matter that the parties are asking me to resolve and I shall assume that it is likely to be recognised and enforced in the US.

(6) Mr Gary Born is a partner and Chair of the International Arbitration Practice Group for Wilmer Cutler Pickering Hale and Dorr LLP and he purported to give expert evidence on the obligations of Contracting States in relation to the New York Convention. His evidence was concentrated on whether the permitted write-off of the Arbitration award by the Plan would constitute a violation of the New York Convention. In the event Mr Born did not give oral evidence and the point was relied on as part of Reficar's arguments on the exercise of discretion. The Plan Company maintained that the evidence was inadmissible as it is a question of English law, on which the Court does not hear expert evidence, as to the effect of the New York Convention on the sanction of the Plan.

73. The Plan Company's factual evidence was largely credible and in my view honestly given. While their witness statements had clearly been heavily lawyered, I do not think

that the cross examination really dented what they were saying. Indeed it appears that Reficar, despite being critical particularly of Ms Sweeney's evidence, wishes to adopt certain statements in her and Mr Carona's oral evidence that it says supports other likely Relevant Alternatives to the disastrous liquidation scenario put forward by the Plan Company. I found both Mr Brantley and Mr Carona to be extremely candid about the situation that they found themselves, with both expressing sympathy for Reficar's predicament while also making clear that they could not see any other outcome than a liquidation if the Plan failed. I am aware of the self-interested nature of this evidence because they all want the Plan to be sanctioned but nevertheless I consider that they all showed that they were acting reasonably and rationally in a commercial sense in explaining how they and their firms would act in the event the Plan was not sanctioned.

74. The Plan Company attacked Reficar's expert evidence both as to its relevance – Mr Boulton KC, Mr Moses and Mr Mitchell – and even went so far as to question their expertise and independence. While Mr Moses did slip up in his evidence and showed that he has been close to Reficar's negotiating team, his evidence was unnecessary and largely duplicative. But I found that Mr Boulton KC and Mr Pike gave credible, reliable evidence within their expertise, albeit that in providing their opinions as to how the Group's stakeholders would react to the failure of the Plan, they were essentially just providing their assessment of the factual evidence that the Plan Company's witnesses had given. Mr Mitchell's evidence was concerned with the valuation of the Group as a going concern, which has little relevance to the issues that are now before the Court.

75. The same is true for the Plan Company's expert evidence. Ms Gilbert's evidence was a response to Mr Mitchell's and Mr Boulton KC's and was principally attacked for its treatment of the Group's letter of credit liabilities when calculating the Group's enterprise value on a going concern basis. I do not need to determine that point as the Group's enterprise value is now irrelevant to the analysis. Professor Schwarcz was required to attend for cross-examination by Reficar even though there was no real challenge to his report. And there was no dispute as to Mr Charters' estimated outcome in the event of the Plan Company's Relevant Alternative, which showed that Reficar and all unsecured creditors were wholly out of the money. I also found Mr Morris' evidence to be credible and based on actual experience, comparing the Group's position in the event of a failure of the Plan to having "*all the hallmarkings of a Carillion*".

THE DISPUTED ISSUES

Introduction

76. Before dealing with the disputed issues, I should make my findings as to the matters that were not disputed but which I have to be satisfied of before sanctioning the Plan. There are established principles in relation to the exercise of the Court's discretion to sanction a scheme of arrangement under Part 26 of the CA 2006 and these are applicable to restructuring plans under Part 26A of the CA 2006 where all classes have voted in favour of the plan and there is no need to rely upon the cross-class cram down provisions in s.901G CA 2006 – see *Re Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch) at [45]–[46].

77. Those principles were summarised by David Richards J, as he then was, in *Re Telewest Communications plc (No.2)* [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 and were set out by Snowden LJ in [115]-[116] of *Adler (CoA)*. As explained by Snowden LJ, those same principles apply to the discretion to be applied to assenting classes in order to impose the plan on a dissenting minority within that class – see [128]. However in relation to dissenting classes when the Court is considering whether to apply the cross-class cram down provisions, the second and third of those principles – whether the class was fairly represented at the meeting and whether the scheme is a fair one that a creditor could rationally approve – need to be modified to take account of the fact that the statutory 75% majority was not achieved and whether any weight can be applied to the fact that some members of the class may have voted in favour of the plan – see [129]-[147] of Snowden LJ's judgment in *Adler (CoA)*.

78. I can confirm however that I am satisfied, so far as the assenting classes are concerned, ie the five Secured Plan Creditors' classes, that the Plan is fair and rational and that my discretion would otherwise be exercised in favour of sanctioning the Plan. As Mr Allison KC submitted, the Plan was the product of extensive negotiations between the Group and the Secured Plan Creditors over a period of many months. There can be no suggestion that the majority creditors voting in favour of the Plan at the meetings of the Secured Plan Creditors were acting in bad faith or dishonestly. On the contrary, the majority creditors were obviously voting in their own commercial interests. The Plan was actually approved by an overwhelming proportion of the Secured Plan Creditors (in every class) and no Secured Plan Creditor appeared at the hearing to argue that the Court should not sanction the Plan.

Issue 1: Is the Plan a "*compromise or arrangement*" within the meaning of s.901A(3) of the CA 2006 vis-à-vis Reficar?

79. Even though this is naturally the first issue to consider because it goes to jurisdiction, that is whether the Plan is within Part 26A of CA 2006 at all, Reficar, in both its skeleton argument and written closings, relegated it to a couple of pages at the end of those documents. That may be an indication of its view as to the strength of its argument in this respect.

80. I have to say that, at first blush, I perhaps gave this argument somewhat more credence. While the point was dealt with by Snowden LJ in *Adler (CoA)*, albeit obiter, I did wonder if the consideration being provided to Reficar and Contraloría by the Plan Company, being a tiny fraction of their debt claims, was an insufficient amount for it to be a "*compromise or arrangement*" or whether it should more properly be characterised as an extinguishment or expropriation of their debts for no consideration.

81. In *Adler (CoA)*, Snowden LJ expressly disapproved Richard Smith J's comments in *Re Prezzo Investco Limited* [2023] EWHC 1679 (Ch) at [43], that there is no jurisdictional requirement to provide any consideration at all to an out of the money class in a Part 26A plan. Snowden LJ said that the fact that the same reference to a "*compromise or arrangement*" appears in both Part 26 and Part 26A indicates that the same meaning should be given to that phrase in both Parts. Relying on the reasoning of Brightman J, as he then was, in *Re NFU Development Trust Limited* [1972] 1 WLR 1548, Snowden LJ held that there is the same jurisdictional requirement of "*give and take*" between the company and the plan creditors and there cannot be "*a confiscation or expropriation of rights without compensating advantage*": see [258]-[278].

82. However the next question is how small can the consideration be to satisfy the requirement. Snowden LJ stated that it would be sufficient to provide a "*small payment*" to the relevant class in order to satisfy the jurisdictional requirements of a "*compromise or arrangement*" (see [273]). Later in the judgment (at [277]), Snowden LJ stated:

> "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." (emphasis added)

83. Mr Allison KC referred me to an earlier decision of Snowden LJ at first instance in *Re Smile Telecoms Holdings Limited* [2023] 1 BCLC 352 at [31] where he said:

> "As far as the amount of such payments is concerned … the Plan Creditors … and all of the Plan Members would all be "out of the money" in the event of the relevant alternative, and that their existing rights thus give them no genuine economic interest in the Company. It must follow that, in commercial terms, their existing rights to be surrendered or compromised under the Plan must be regarded as worthless. As such, in my judgment, even the relatively small payments of (a share of) US$10,000 to the Other Plan Creditors, the Subordinated Shareholder Creditors, the Contingent Claims Creditors and the Plan Members must be sufficient to prevent the Plan being an expropriation of their rights without compensating advantage."

Mr Allison KC said that the recovery rate in that case was therefore 0.025% of the individual creditor claims. That was even less in percentage terms than the minimum recovery that would be made by Reficar under the Plan.

84. Mr Allison KC also referred to another of Snowden LJ's cases at first instance *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) ("***Virgin Active***"), in which certain classes of out of the money landlords and general property creditors were given a miniscule payment equal to 120% of the expected dividend for unsecured creditors in an insolvent administration. Snowden J, as he then was, described the amounts in question as "*de minimis*": see [100]. Nevertheless, he was satisfied that the plan involved a "*compromise or arrangement*" between the company and the relevant out of the money creditors and he commented at [75] that "*there is no doubt that the Plans clearly involve the requisite element of "give and take" to amount to a compromise or arrangement between the Plan Companies and the Plan Creditors*".

85. In this case, Reficar and Contraloría will, as a minimum, receive a total payment of £800,000. That is irrespective of whether they receive anything from the Target EBITDA consideration. Actually the £800,000 is much greater than their share of the prescribed part would be in a liquidation as it is the maximum prescribed part amount that would have to be shared with all unsecured creditors on a liquidation. Furthermore, Mr Charters has said that a liquidator may be able to disapply the prescribed part provisions because of the scale of the insolvency.

86. In any event, even if the £800,000 payment is very small by comparison with the total debt, as it is, I am satisfied that it is sufficient to pass the apparently low jurisdictional threshold for it to be a "*compromise or arrangement*".

Issue 2: What is the Relevant Alternative to the Plan?

87. This was the core issue at trial as it is a condition of the use of the cross-class cram down power that the dissenting class would be no worse off under the Plan than it would be in the Relevant Alternative. For convenience the exact statutory wording of s.901G(1)-(5) CA 2006 is set out below:

> "(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."

88. I therefore have to decide what I think is "*most likely to occur in relation to the [Plan Company]*" if the Plan is not sanctioned. It is common ground that Condition B is satisfied. It is also not in dispute that the burden of proving that Condition A is satisfied lies on the Plan Company and that it must do so on the balance of probabilities. As it has been conceded that the Plan Company's Relevant Alternative would leave Reficar no worse off under the Plan, the only issue is whether the Plan Company has proved, on the balance of probabilities, that its Relevant Alternative is the most likely to occur if the Plan fails. If it does not succeed in proving that, there will be no jurisdiction to sanction the Plan.

89. The determination of the Relevant Alternative is made at the time at which sanction is being considered. If there are a number of alternatives, the Court must select the alternative which is more likely to occur than the other alternatives: see *Virgin Active* at [106]-[108]. At [107], Snowden J said:

> "…the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than

not that a particular alternative outcome would occur. The critical words in the section are what is "most likely" to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two."

90. This was adopted by Zacaroli J in *Re Hurricane Energy Plc* [2021] EWHC 1759 (Ch), where he said at [37] that:

> "the court is not required to be satisfied that a particular alternative would definitely occur, merely (where there are possible alternatives) which one is most likely to occur".

91. It has been recognised in the cases that because of the nature of the Relevant Alternative, it is a matter on which the directors are uniquely well-placed to give evidence. As Trower J said in *Re E D & F Man Holdings Limited* [2022] EWHC 687 (Ch) at [39]:

> "In my view, the court should recognise that the directors are normally in the best position to identify what will happen if a scheme or restructuring plan fails. Where the evidence appears on its face to reflect a rational and considered view of the company's board, the court will require sufficient reason for doubting that evidence."

The same was said in *Re AGPS Bondco PLC* [2023] EWHC 916 (Ch) per Leech J; and by me in *Re Fitness First Clubs Limited* [2023] EWHC 1699 (Ch): at [63].

92. However, the Court should not just accept what the Plan Company's witnesses say about this and should carefully scrutinise the evidence put forward by the Plan Company and its supporting creditors. It is often in the interests of a plan company (and senior supporting creditors) to present a "doomsday" scenario as if it were the relevant alternative (or comparator) to a scheme or plan, in order to justify the treatment of a dissenting creditor. A disastrous liquidation may in some cases be the most likely alternative to a plan (or scheme). However, it needs to be borne in mind that the plan company and its stakeholders would naturally wish to avoid that outcome if at all possible and would act in a commercially rational way in their best interests should the plan company find itself in that position. Its evidence must therefore show that there is real substance to its assertion that such a liquidation is the most likely to occur.

93. The Plan Company's Relevant Alternative, based on Mr Brantley's evidence and supported by Ms Sweeney and Mr Carona, together with the expert evidence of Mr Charters and Mr Morris, is that if the Plan is not sanctioned the Plan Company and the Group are highly likely to collapse into a form of insolvency in their local jurisdictions within a short period of time. In such an eventuality, it is anticipated that the ringfenced Tanks Business may be sold as a going concern through an accelerated sales process. However, they do not consider that other business units could be sold in the same way for various reasons and that they would more likely have to be sold on a piecemeal "break up" basis through worldwide insolvency proceedings. The Plan Company calls its Relevant Alternative a formal insolvency. Reficar calls it a disorderly liquidation.

94. Reficar's evidence and skeleton argument put forward what it said would be the most likely to happen if the Plan failed, thereby contesting the Plan Company's Relevant

Alternative of a formal insolvency. Reficar said that immediately on the failure of the Plan, there would be negotiations between the Group, its key stakeholders and Reficar and Contraloría towards a deal which preserves value in the Group and provides what it said would be a fairer distribution of value to Reficar and Contraloría. The deal would revolve around the grant of equity in the Group to Reficar by way of consideration for the release of its claims against the Plan Company. It is a critical part of Reficar's Relevant Alternative that the Plan would have to be relaunched because it recognised that the Group could not continue to trade as a going concern without the extension of the maturities of the Secured Credit Agreements. Reficar maintained that this could all be done relatively quickly because it would essentially be the same Plan and that the Secured Plan Creditors would be likely to forbear on enforcing the Group's cash collateral obligations to give time for all the above steps to be taken.

95. The Plan Company said that the Reficar Relevant Alternative was both vague and very unlikely to happen. Mr Allison KC said that it was directly contrary to the evidence of Ms Sweeney and Mr Carona that they would not be prepared to negotiate further with Reficar if the Plan was not sanctioned and that they saw liquidation as the only likely outcome. Furthermore Mr Allison KC submitted that as the Plan Company itself is hopelessly insolvent, the only way that Reficar could receive something more from the Group is by deploying its "*ransom value*" derived from its ability to derail the Plan by putting forward its spurious Relevant Alternative. He said that if a junior creditor is able to argue on these sorts of plans that it would be rational for the company and stakeholders to agree a better deal for the junior creditors as the price for avoiding a disorderly liquidation, then it would render Part 26A useless, as a proposed plan could always be defeated in this way. He relied on certain scheme cases to show that such a ransom value should not be taken account of in deciding whether to sanction a scheme. These included: *Re Tea Corp* [1904] 1 Ch 12; *Re MyTravel Group plc* [2005] 1 WLR 2365 (Ch); and *Re Bluebrook Limited* [2009] EWHC 2114 (Ch).

96. I was unpersuaded by the latter argument as applied to this Plan, largely because I considered the scale of the numbers in this Plan to be somewhat exceptional, and that I did not think it would be likely to sound the death knell of Part 26A if I were to conclude that Reficar was correct in its suggested Relevant Alternative. However it is not necessary for me to deal with such issues in this judgment, because Reficar completely changed its focus as to the Relevant Alternative in its closing submissions. While the Relevant Alternative set out above was still notionally referred to in the written submissions, Ms Toube KC made no oral submissions in support of it. Instead she switched to promoting two other Relevant Alternatives that she said had emerged from the evidence: (1) the "**AHG Relevant Alternative**" that she submitted arose out of Mr Carona's oral evidence; and (2) the "**Crédit Agricole Relevant Alternative**", that was said to have arisen out of Ms Sweeney's oral evidence. The strange thing about this is that neither AHG nor Crédit Agricole, who were represented before me, were putting these forward as Relevant Alternatives.

97. But before dealing with those suggestions, I should conclude on Reficar's original Relevant Alternative of a deal between the Group and Reficar in relation to equity in the Group and a new Plan in the same terms but incorporating the equity deal. The Plan Company had said that there was no appetite amongst the key stakeholders to negotiate a new deal with Reficar, particularly if it had successfully caused the Plan to fail. It also said that there would not be time to successfully implement such an alternative,

including relaunching a new plan and taking it through all the necessary stages, before the Group would be forced into liquidation. This was supported by the evidence of Ms Sweeney and Mr Carona.

98. The Plan Company's fears have been entirely borne out by the behaviour of Reficar during the course of the trial and its failure to agree a deal that gave it everything it had been asking for. As I have set out at the beginning of this judgment, the fact that Reficar has still been unable to accept the generous offer on the table, approved by the Dutch Restructuring Expert, demonstrates exactly why the Plan Company's evidence is most likely to be correct and there would be little prospect of a new deal being done with Reficar should the Plan fail. Reficar's ability to demonstrate that it could act "*nimbly*" and agree a deal in short order has been totally undermined by its failure to act in such a way before this sanction judgment and to require there to be an adjudication on the merits of its opposition to the Plan. Whether it is using that opposition to try to squeeze an even better offer from the Group, I do not know. But I am bound to conclude that its conduct of the negotiations and failure to agree a deal and to drop its opposition to the Plan means that its original suggested Relevant Alternative is not at all likely to occur if the Plan were to fail.

99. As for the other Relevant Alternatives posited in Reficar's closings, these are both opportunistically derived from answers given in the witness box by Ms Sweeney and Mr Carona in the context of considering the form of insolvency process that would ensue if the Plan failed. Ms Toube KC submitted that the AHG Relevant Alternative is based on Mr Carona's suggestion as to the course that a liquidation of the Group might take and specifically that certain businesses other than the Tanks Business may be sold as a going concern. The Crédit Agricole Relevant Alternative picked up on Ms Sweeney's suggestion that there could be a "*liquidating Chapter 11*" process that would limit the draws by customers on the letters of credit issued on behalf of the Group. She had contrasted the liquidating Chapter 11 process with a Chapter 7 "*straight liquidation*".

100. Ms Toube KC submitted that if either of these alternatives is the "*most likely*" Relevant Alternative, then there is no valuation evidence before the Court as to the outcome of such a liquidation process and in particular whether it would produce a surplus for unsecured creditors which Reficar would be entitled to share in. Accordingly without such evidence, she submitted that the Plan Company has failed to prove that Reficar is no worse off under the Plan than under either of those alternatives. When I asked Mr Pike about the outcome of a more orderly liquidation than that put forward by the Plan Company, he suggested that there may be a mitigation of letters of credit draws by customers as compared to Mr Charters' assumption in his valuation that all letters of credit would be drawn. But he could not say whether that mitigation would lead to all the Secured Plan Creditors being paid and a surplus for the unsecured creditors.

101. That is really the flaw in Reficar's argument. The two alternatives are still based on the Group going into liquidation and the premise must be that Secured Plan Creditors would actually be paid in full if the liquidation followed the orderly course allegedly described by Ms Sweeney and Mr Carona. If that were correct and they would make a full recovery if they put the Group into a form of orderly liquidation, it would not have made sense for them to have pursued the arduous negotiations towards the Plan and allowed the Group to spend US$150 million on it. Furthermore, as I heard in the evidence, participations in the Group's debt facilities have consistently been trading at

well below par and both Crédit Agricole and Baupost have made substantial provisions against their exposure to the Group. None of the experts have suggested that the Plan is unnecessary because the Secured Plan Creditors would be paid in full without it. While some of the Secured Plan Creditors have equity interests that might have value through the Plan, I do not believe that they all could have so miscalculated the effect of the Plan not being sanctioned.

102. Mr Charters' updated Relevant Alternative report shows how far the alternative liquidation scenarios would have to come to produce a return to unsecured creditors. Mr Charters made various assumptions as to the asset values that would be realised on a liquidation of the Group but his conclusion was that the net realisations available for distributions to creditors would be between US$1.1018 billion (in the low case) and US$1.458 billion (in the high case). The value would therefore break well into the secured debt: in the low case it would break in the Super Senior LC Facility; and in the high case in the Senior LC Facility and the Escrow LC Facility, with recoveries of between 10c/$ and 0c/$ for the lenders under those facilities. This would leave a shortfall to the Secured Plan Creditors of between US$2.252 billion (in the low case) and US$1.812 billion (in the high case).

103. Reficar's case must be that those massive shortfalls could be made up in full by a better managed and more orderly liquidation as suggested in the evidence of Ms Sweeney and Mr Carona. This is fanciful. Mr Charters included a sensitivity analysis in his report which showed that unsecured creditors would not recover anything even if many of the assumptions he had relied upon were changed in favour of the unsecured creditors. This shows the danger of alighting upon comments in the evidence that really do not affect the outcome materially for unsecured creditors. In fact the passage relied upon from Mr Carona's evidence, when properly read in context, reflects the approach taken by Mr Charters and Grant Thornton. He said as follows:

> "So I think what will happen, and we are starting to see it, we are starting to see embers come that could turn into a fire in the building, that you know, suppliers will start to not ship products to McDermott, they will start to tighten the terms, customers may not make advance payments. That will tighten liquidity on the company. Then if this plan is not sanctioned, we will not have enough time to pursue other alternatives in advance of the March 27 cash collateralisation, that will provide an event of default across the credit facilities. We have heard from Crédit Agricole that they, and they have testified that at that point the extension of the LC facilities is basically dead, and that we are pursuing some type of wind down of the company. Depending on how those facts evolve, how quickly McDermott unravels and you may be familiar with the Carillion case in the UK, that company unravelled very quickly. It's possible that we could take actions that would slow that down. In that case, a liquidation would not be disorderly, but we may be able to do things to make it more orderly. I believe certain businesses within McDermott, for example Ms Sweeney referenced Tanks. I also believe that the offshore Middle East business and possibly the sub-sea business could be sold as going concerns. I think that the CB&I part of the business is likely unsalvageable, there has not been interest in it and it's been kind of the toxic part of the group. So I think what that means is that in all of those scenarios, you know, Reficar's claim is a zero. So the precise dynamics of where it goes, I don't see as relevant to this proceeding. Maybe it's

relevant to, you know, how I may conduct it, but that's kind of my view." (emphasis added)

Therefore even if there is a more orderly liquidation with other businesses being sold as going concerns, Mr Carona recognises that the gap is too large to make up for Reficar to receive a return. And in any event, the sale of assets was modelled by Mr Charters.

104. Returning to the Plan Company's Relevant Alternative, there was much discussion at the trial, and in particular in the cross-examination of Reficar's witnesses, as to the mechanics of the cash collateralisation obligation that will arise on 27 March 2024 under the Secured Credit Agreements. The Plan Company said that this will trigger the liquidation of the Group if the Plan is not sanctioned; Reficar said that there will be some forbearance by the Secured Plan Creditors from enforcement of the obligations, giving time either to negotiate the deal with it and launch a new plan or to achieve a more orderly liquidation.

105. It was common ground in the end that the relevant obligations under the Secured Credit Agreements would work in this way:

(1) On 27 March 2024, LFC, as the Borrower and the 141 other companies in the Group as the Guarantors under the Secured Credit Agreements (together, the "**Obligors**") will be required to pay cash collateral to the Issuers in the sum of approximately US$2.2 billion (the "**Cash Collateralisation Obligation**"). This is because it will be 95 days prior to the maturity date of the LC Facilities and it is payable irrespective of whether the letters of credit have been drawn by the beneficiaries (ie the customers). The obligation is to post an amount equal to 105% of the face value of all then-outstanding letters of credit.

(2) The Cash Collateralisation Obligation cannot be amended, waived, or extended without the consent of each Issuer and lender (in their capacities as such). That consent will not be granted. On the contrary, as Ms Sweeney confirmed, the Issuers will demand cash collateral of approximately US$2.2 billion from the Obligors.

(3) The Obligors will not be able to provide the required amount of cash collateral, since the total cash resources of the Group are in the region of only US$100 million, resulting in an Event of Default under the Secured Credit Agreements. The lending commitments in respect of the LC Facilities will therefore be automatically terminated because of the cashflow insolvency of the Group. Furthermore, no Issuer will be required to issue any new letters of credit or extend any expiring letters of credit.

(4) The Issuers will then require the lenders to post the full amount of cash collateral, which the lenders are required to do under the terms of the Secured Credit Agreements. There is no suggestion that the lenders will fail to comply with their obligations.

(5) Once the lenders have posted the required amount of cash collateral, the lenders will have a claim against the Obligors for the immediate reimbursement of the full amount of the cash collateral posted by the lenders (the "**Reimbursement Obligation**"). The Obligors will be wholly unable to satisfy the Reimbursement

Obligation, resulting in an additional Event of Default under the Secured Credit Agreements.

(6) The Obligors are therefore unable to pay their debts under the Secured Credit Agreements as they fall due, having regard to the events that will occur in the reasonably near future (indeed in the next month). On that basis alone, the Obligors are cashflow insolvent. (The Plan Company and MIH are also cashflow insolvent by reason of their failure and inability to pay Reficar's Arbitration award.)

(7) A simple majority of the Super Senior LC Facility Lenders can direct the Collateral Agent to enforce against the security posted by the Group. That means that a simple majority of the Super Senior LC Facility Lenders can decide to forbear from immediate enforcement against the security and, if they do so, the other classes of Secured Lender can only direct enforcement after 180 days have elapsed since delivering a notice of termination and acceleration. Reficar relied on this to say that it is effectively within the power of the AHG and Crédit Agricole to block enforcement of remedies for an Event of Default and thereby give time to pursue a non-disastrous liquidation or other course.

106. However, the Plan Company said that the lack of availability of continuing LC Facilities will severely hamper its ability to continue trading and it certainly would not be able to secure new projects. Mr Brantley explained that the Group cannot function without access to the LC Facilities.

107. Further the Group's cashflow insolvency will place the directors of the 142 Obligors in an extremely difficult position, particularly in circumstances where there is no deal with Reficar and the Plan has failed. They will necessarily have to consider whether they can properly allow their companies to continue to trade. Mr Charters put it well in an answer he gave in cross examination:

> "Q. Could you just assist the court from your experience as a restructuring adviser, on whether [the failure to post US$2.2 billion of cash collateral] is likely to have any impression on how the directors act following a failed plan?
>
> A. Yes. I think it would have a significant impression on the minds of individual directors. Clearly, I'm more versed in English insolvency and directors' duties and matters, but I have got some experience of some overseas jurisdictions as well. But take the English position, it would seem to me, I don't think it is disputed actually in the case that the company would be insolvent. It would be unable to pay its debts, it would have failed to pay its debts and, therefore, the directors would be very much in what I think is colloquially called the "zone of insolvency" and they would have to have regard to their fiduciary duties and fundamentally, I think, anyone advising them, like myself, or legal advisers would be asking the question of them, "Do you think there is a reasonable prospect of continuing as a going concern because if not you should be filing for insolvency?" I think there is a strong possibility that you struggle to meet that reasonable prospect test without some firm letter of support or commitment from your lenders because you owe them such a substantial amount of money at that point, potentially without some kind of indication in this instance from Reficar because you owe them 1.3, 1.4 billion. There are other claims as well … I think, as directors , you would want something very concrete to give you

confidence to continue trading on, rather than some hope that another deal could be negotiated."

108. The Plan Company's evidence showed that it anticipates the Group will descend into a liquidation scenario quite quickly after the Plan fails. There will be immediate liquidity problems because of the likely reactions of customers and suppliers in respect of approx. 150 contracts worldwide. There has been recent tightening of trade terms, including some suppliers insisting on payments up front and, because of the Group's well-publicised financial difficulties, some customers have asked for their payments to be ringfenced and to be used only for their project. Mr Allison KC submitted that it would not be long before customers and suppliers would take steps to terminate their relationships, leading to draws being made on the letters of credit.

109. Reficar challenged the exact course that such a liquidation of the Group would follow. Apart from the Secured Plan Creditors forbearing on enforcing the Reimbursement Obligation for a period of time, Ms Toube KC submitted, and it was clear from Mr Sprange KC's cross examination of the Plan Company's witnesses, that it would be in all stakeholders' interests, including all customers, suppliers and issuers of Bilateral Facilities, not to precipitate a collapse of the Group and a disorderly liquidation.

110. But this is only really about the timing of events that would occur in a liquidation scenario and whether, by some forbearance, there could be a better realisation of assets. It seems to me that there does not need to be, and indeed there cannot be, absolute precision as to how a liquidation of a Group of this size will pan out. Mr Charters and Grant Thornton modelled a liquidation of the Group that assumed that all the letters of credit would be drawn. It is conceivable that some letters of credit would not be drawn in the short term so as to ensure that there can be a period of continued trading so as to facilitate a sale of a particular business as a going concern. But ultimately, the Group will not be able to perform on most of its contracts and that would most likely lead to draws on the letters of credit supporting those contracts.

111. Ms Toube KC accepted the figures set out in Mr Charters' report if the liquidation followed the course set out therein and constituted the Plan Company's Relevant Alternative. As I have said above, the Crédit Agricole and AHG Relevant Alternatives are not really alternatives to the Plan Company's Relevant Alternative; they are suggested possible tweaks to the timing of events in the liquidation of the Group and as a result a potentially slightly better outcome for the Secured Plan Creditors. I think that those suggested adjustments to the order of events in a liquidation scenario do not affect the general conclusion that what is most likely to occur if the Plan fails is a liquidation of the Group. And Reficar is so far out of the money in that eventuality, that there is no possibility that the changes suggested by the Credit Agricole and AHG Relevant Alternatives would materially affect the outcome for unsecured creditors.

112. I therefore find that the Plan Company has proved on the balance of probabilities that the Relevant Alternative is a worldwide formal liquidation of the Group as explained in its evidence.

<u>Issue 3: Is the "no worse off" condition in section 901G(3) of CA 2006 met in relation to any dissenting classes?</u>

113. It is accepted by Reficar that, if the Plan Company succeeded on Issue 2 that the Relevant Alternative is a formal liquidation scenario, then the unsecured creditors would be wholly out of the money in the Relevant Alternative. Accordingly the "*no worse off*" condition is satisfied and there is jurisdiction to consider sanctioning the Plan despite there being dissenting classes.

Issue 4: Is the Plan unfair to the Dispute Proceeding Plan Creditors because of the manner in which the restructuring surplus is allocated under the Plan?

114. I now turn to the matters relevant to the exercise of my discretion. The events of the last day of the trial, which I have described in [9] to [13] above, and the further letter from the Dutch Restructuring Expert dated 16 February 2024, completely undermined all of Reficar's arguments on discretion. Whether it does finally accept the offer of 19.9% of MIL or not, it will receive 10.9% of MIL and it is now really impossible for Reficar to argue that it will not be receiving a fair distribution if the Plan is sanctioned.

115. As I also said above, I had some sympathy with Reficar's case on discretion. Mr Allison KC had submitted that as Reficar is out of the money in the Relevant Alternative, no weight should be accorded to its views in relation to discretion and fairness. It was for the Secured Plan Creditors to decide how the restructuring surplus should be distributed and Reficar is not entitled to demand a share of that surplus. He relied on statements to that effect by Snowden J in *Virgin Active* at [247]-[249] and endorsed in Snowden LJ's judgment in *Adler (CoA)* at [251]-[252].

116. The alleged unfairness in this case stemmed from the fact that the equity in the Group, which was largely held by some of the Secured Plan Creditors as a result of the Chapter 11 Process, was unaffected by the Plan and might mean that that equity had some value as a result of the success of the Group following the sanction of the Plan. In other words, even though the equity ranks below the unsecured creditors in priority on a liquidation, nevertheless the equity holders might receive a share of the restructuring surplus, whereas Reficar's debt will have been released for next to nothing. Ms Toube KC sought to distinguish *Virgin Active* by reference to the fact that new money was being provided by the shareholders but I have to recognise that Snowden J went so far as to say that, when dealing with an out of the money creditor, there does not even have to be a credible commercial reason offered by the secured creditors for the decisions they have taken as to the distribution of the surplus – see [263] and [267].

117. Reficar also challenged the definition of a creditor being "*out of the money*", in particular as to whether it necessarily has to be by reference to the Relevant Alternative. Ms Toube KC made interesting submissions as to whether "*out of the money*" should be tested by reference to the Relevant Alternative or any of the possible alternatives that might occur if the Plan failed. Snowden J, again in *Virgin Active* at [247]-[249], based his decision that it is limited to the Relevant Alternative on his analysis that the test in s.901C(4) CA 2006 is the same as that in s.901G(5) CA 2006, even though the former does not include reference to the Relevant Alternative. This is not the place to disagree, respectfully, with Snowden J's analysis; I will simply say that I can see the force of Ms Toube KC's submission that there should be some scope for making a horizontal comparison between out of the money creditors and shareholders in testing the fairness, as between them, of the proposed distribution of the restructuring surplus under the Plan. I note that that seems to be the approach in the Netherlands, as

demonstrated by the Dutch Restructuring Expert's consideration of the fair distribution to Reficar.

118. Having said all that, Reficar has clearly secured for itself a fair distribution of between 10.9% and 19.9% of MIL's equity, and I do not see that it is in a position now to complain that it has not.

119. Accordingly, and this is unaffected by what I say below about the other issues raised in relation to discretion, I am satisfied that my discretion should be exercised in favour of the Plan, on the basis that Reficar will be receiving between 10.9% and 19.9% of MIL, at its election, and that Reficar has therefore been treated more than fairly by the Plan Company and the Secured Plan Creditors.

Issue 5: Should the Court refuse to sanction the Plan on the basis that the disclosure in the Explanatory Statement is inadequate?

120. While this was raised as an issue by Reficar, it did not pursue the point at the trial. It was never particularised and it was difficult to see that any such deficiencies in the Explanatory Statement could have had any impact on the voting at the class meetings. I therefore do not need to consider this further.

Issue 6: Should the Court sanction the Plan if it would violate the New York Convention and thereby the obligations of the United Kingdom as a Contracting State?

121. Mr Sprange KC made some brief submissions on this issue on behalf of Reficar. He made clear that Reficar relied on this on the question of discretion; he was not suggesting that there is no jurisdiction to sanction the Plan because this would violate the New York Convention in effectively denying recognition of the Arbitration award (even though this was what Mr Born appeared to have been suggesting in his report). Mr Sprange KC also accepted that in and of itself this issue is not going to affect discretion if there are no other points on discretion in Reficar's favour.

122. That is probably the end of the matter, because I have already decided that the Plan plus the offer of equity is fair to Reficar. Mr Sprange KC's argument depended on the equity being unimpaired whereas Reficar, as the Arbitration award creditor, was having its debt released. As that is not what is happening, it seems to me that the issue goes nowhere and does not affect my primary conclusion that the Plan is now fair.

Issue 7: Should the Court refuse to sanction the Plan on the basis that the Plan is not likely to have substantial effect in the US?

123. This issue was not pursued by Reficar at the trial. It cannot therefore affect the exercise of my discretion.

CONCLUSION

124. For the reasons set out above, and in the light of the events described in the Introduction section, I will sanction the Plan. It is unfortunate that Reficar was unable to agree the deal that would have shortened the trial and would have meant that I was considering an unopposed Plan. I recognise that I would still have had to satisfy myself that there

was jurisdiction to sanction the Plan using the cross-class cram down power and that my discretion should be exercised in favour of sanction.

125. I thought it appropriate to prepare this judgment as soon as possible after the hearing as I am concerned that Reficar might have been using any delay to try to improve the offer. I am providing this judgment in draft to the parties on Friday 23 February 2024 and I know that it is possible that Reficar might accept the deal at any time, including before judgment is formally handed down. But if it does so, this does not affect my judgment because I have in any event relied on what Reficar will inevitably receive through the MIH WHOA Plan.

Postscript

126. After circulating a draft of this judgment to the parties on 23 February 2024 for their suggested corrections, I received a letter dated 26 February 2024 from Reficar's solicitors, King & Spalding International LLP. I referred to their letter of 19 February 2024 in [14] above. From what I can gather from their latest letter, the Reficar board has now decided, unsurprisingly, to accept the offer set out in the Dutch Restructuring Expert's letter dated 16 February 2024. However it has also decided to abstain from voting on the MIH WHOA Plan. The letter says that Reficar considers that my criticisms of its approach to approval of the deal are unfair. I make it clear that I stand by what I have said in my judgment about the course of the negotiations, Reficar's failure to agree a deal and the impact this has had on the grounds of opposition to the Plan that it was putting forward. Even now, it appears that Reficar is maintaining its opposition to sanction being granted. The letter does not suggest otherwise.