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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMPANIES COURT (CH)
[2020] EWHC 3549 (Ch)

No. CR-2020-004470
CR-2020-004473
CR-2020-004475

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 15 December 2020

Before:

MR JUSTICE TROWER

IN THE MATTER OF DEEPOCEAN 1 UK LIMITED
AND IN THE MATTER OF DEEPOCEAN SUBSEA CABLES LIMITED
AND IN THE MATTER OF ENSHORE SUBSEA LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

MR T. SMITH QC and MS C. COOKE (instructed by Kirkland & Ellis International LLP)
appeared on behalf of the Applicants.

MR J. GOLDRING QC and MR R. PERKINS (instructed by Norton Rose Fulbright LLP) appeared
on behalf of Original Locked-up Lenders.

MR A. WRIGHT (instructed by Wikborg Rein LLP) appeared on behalf of Havila Chartering AS.

J U D G M E N T

MR JUSTICE TROWER:

- 1 These are applications by DeepOcean 1 UK Limited (“DO1”), DeepOcean Subsea Cables Limited (“DSC”), and Enshore Subsea Limited (“ES”) which I shall call together “the Plan Companies” for orders pursuant to section 901C of the Companies Act 2006 (the “2006 Act”) convening meetings of creditors for the purposes of considering and, if thought fit, approving restructuring plans in respect of each of the Plan Companies. All three Plan Companies appear by Mr Tom Smith QC and Ms Charlotte Cooke. The group of which the Plan Companies form part (the “DeepOcean Group”) is a leading provider of subsea services to the offshore industry principally focused on the oil and gas and offshore renewable sectors.
- 2 The DeepOcean Group operates in Europe, the Americas, and Africa and focuses on inspection, maintenance, and repair work, and decommissioning and subsea construction work. It employs approximately 1,000 people globally and operates two businesses in the United Kingdom. The first comprises an inspection, maintenance and repair business and a decommissioning and subsea construction business operated from Aberdeen. The second comprises a cable laying and trenching business which is described in the papers as the CL&T business operating from Darlington and the Port of Blyth.
- 3 The CL&T business is operated in two separate divisions by the Plan Companies and their subsidiaries (the “CL&T Group”). The first division is run by DSC and specialises in the installation of interconnector export and inter-array cables for the power and offshore wind industries. The second division is run by ES and provides trenching services for the burial and protection of pipelines and cables. Both DSC and ES are subsidiaries of DO1. The parent of the DeepOcean Group is DeepOcean Group Holding BV (“BV”). Each of the three Plan Companies is incorporated in England and Wales and the evidence is that each of them has its COMI in the United Kingdom.
- 4 The CL&T Group has underperformed for many years with the consequence that it has long required funding from the wider DeepOcean Group. It only made a net profit once in the last ten years. The evidence indicates that there are a number of reasons for this underperformance. For the most part, the detail is not of direct relevance to the matters to be determined at the hearing but, in broad summary, the reasons are said to include uneconomic charter rates, which I should add has some relevance to the matters with which I am required to deal today, clients requiring contractors to undertake large or complex projects, and structural changes in the market including clients moving away from multi contracting procurement strategies in favour of contracts where a single contractor is responsible for the delivery of the whole.
- 5 There is evidence as well that the COVID-19 pandemic has exacerbated the position. It has led to further underutilisation of the Plan Companies’ vessels and the wider DeepOcean Group has now decided that it can no longer provide any further funding. Without that support, the operations of the Plan Companies are thought to be unsustainable.
- 6 The creditor profile differs as between each Plan Company. Broadly speaking, there are four groups of creditors (together the “Plan Creditors”) which can be summarised as follows.
- 7 The first category comprises the finance creditors. They are lenders to the Plan Companies under the terms of an English law facilities agreement originally dated 27 February 2013

which has subsequently been amended and restated on a number of occasions. DO1 was one of the original borrowers under that facilities agreement. DSC and ES acceded to it as additional borrowers and additional guarantors in November 2019. All of the lenders are now parties to a lock-up agreement to support the restructuring plans. All but one of them were represented at this hearing by Mr Jeremy Goldring QC and Mr Ryan Perkins. There are four separate facilities under the facilities agreement: a senior multicurrency revolving credit facility; a senior multicurrency term loan facility; a super senior revolving ancillary facility; and a senior revolving ancillary facility which is not yet drawn down.

- 8 The facilities agreement benefits from a range of security. There are charges granted by their parents over the shares in DO1, DSC, and ES; there are fixed and floating charges granted by each of the Plan Companies; and there are account charge agreements executed by each of the Plan Companies. There are also a number of supplemental security arrangements governed by both English and Norwegian law.
- 9 The next two categories of Plan Creditor, categories 2 and 3, are only creditors of DO1. Category 2 comprises the landlords under leases entered into by DO1. Some of the materials, including the original practice statement letter (the “PSL”), indicated that DSC and ES may also have had landlord creditors but the most recent evidence confirms that that is not, in fact, the case. Indeed, as I understand it, there is only one landlord creditor who falls into this class in the DO1 restructuring plan.
- 10 Category 3 comprises two creditors described as the UK vessel owner creditors. These are the owners of two vessels, the HAVILA PHOENIX and the MAERSK CONNECTOR, chartered by DO1 under charterparties dating from February 2013 and February 2014 respectively. DO1’s obligations under these charterparties have been guaranteed by BV. The unfavourable terms of these charterparties (so far as DO1 is concerned), together with the underutilisation of the vessels, and the DeepOcean Group’s inability to renegotiate their terms, is put forward by the Plan Companies as one of the principal reasons for the difficulties faced by the CL&T Group. The owners of the HAVILA PHOENIX, Havila Chartering AS (“Havila”), were represented at this hearing by Mr Alexander Wright.
- 11 The fourth and final category of Plan Creditor comprises all of the creditors of each Plan Company not otherwise falling into one of the first three categories, but excluding creditors with what are called excluded claims. The excluded claims are those claims which are required to be paid before the date on which the restructuring plans are implemented in order to enable the administrative functions of the Plan Companies and the ongoing projects of the group to continue. They also include claims required to be funded in order to ensure completion of what is called the Moray Firth Project which is anticipated to generate gross receipts of in excess of £4 million for DO1, the net amount of which will be available as part of the plan consideration.
- 12 There are also two categories of claim which will be funded by other members of the DeepOcean Group and are excluded. They are employees who have claims estimated at approximately \$4.3 million in aggregate and the Plan Companies’ liabilities to tax. Inter-company claims are also excluded. The Plan Companies says that there are good commercial reasons for excluding these categories of creditor. For the purposes of today’s hearing, nobody says that that is not the case. There is no reason for the court to conclude that the Plan Companies have not adopted a proper approach to assessing the commercial justification for these exclusions.

- 13 The terms of the proposed restructuring plan differ depending on the category of creditor concerned. Overall, the wider DeepOcean Group will introduce a small amount of cash into the restructuring plan to enhance the dividends that would otherwise be payable. It is in the wider interests of the DeepOcean Group as a whole to avoid an uncontrolled insolvency of the CL&T Group.
- 14 So far as the secured finance creditors are concerned, there is a wider refinancing. The terms of the facilities agreement will be amended, restated and extended in accordance with the term sheet scheduled to a lock-up agreement under which the ultimate beneficial owner of the DeepOcean Group will also invest \$15 million by way of equity and subordinated debt into the wider group. All of the obligations of the Plan Companies under the relevant finance documents, together with the security granted over the assets of the Plan Companies will be released.
- 15 So far as the UK landlord creditor is concerned, and there is, as I say, only one, the plan provides for its existing claim to be released in full and for it to have the right to recover possession of its property. In consideration for this release, it will be entitled to receive an amount representing approximately 4 percent of the claims (on the basis of the original proposal), a percentage figure which has or may be increased in circumstances to which I will return shortly.
- 16 So far as the UK vessel owner creditors are concerned, the plan provides for their existing claims to be released in full and for them to have the right to recover possession of their vessels. In consideration for this release, they will be entitled to receive recoveries amounting to approximately 5.2 percent of their claims, a percentage figure that may also vary in circumstances to which I shall come.
- 17 So far as the other Plan Creditors are concerned, the plan provides for their existing claims to be released in full on the restructuring effective date in consideration for which they will be entitled to receive an amount representing approximately 4 percent of their claim in the case of each DO1 creditor and each DSC creditor and approximately 8.2 percent of their claim in the case of each ES creditor. Again, those percentage figures may change.
- 18 The restructuring plans contains a number of very detailed provisions relating to the admission and termination of claims including a bar date and provision for a plan administrator and bespoke adjudication provisions. The prescribed adjudicators are well known Queen's Counsel, whose role will be to resolve disputes as to liability or quantum. For present purposes, the details of those provisions do not matter.
- 19 The evidence adduced by the Plan Companies supports the conclusion that, overall, the proposed restructuring plans provides for a better result for Plan Creditors than the assumed likely alternative. The return on an assumed likely alternative for each Plan Company has been quantified in an entity priority model (the "EPM"), prepared for the whole DeepOcean Group including the CL&T Group, by Alvarez & Marsal Europe LLP ("A&M"). This is supported by a number of valuation reports which, like the EPM, will be annexed to the explanatory statement.
- 20 In carrying out that exercise, A&M have considered two separate scenarios. The first scenario is one in which, as a result of the continued group liquidity shortfall for the DeepOcean Group, all group companies, including the Plan Companies, enter into formal insolvency proceedings in their local jurisdictions.

- 21 The second is a scenario in which the wider DeepOcean Group determines that it can no longer afford to fund the CL&T Group and, as a result, the Plan Companies enter into administration or liquidation. This may or may not be combined with a separate enforcement by the secured creditors. It is thought that this would ultimately lead to bankruptcy filings by BV and certain other group entities although it is also thought that the core of the DeepOcean Group's business operations would be able to continue. In the papers before me, this is described as the CL&T Group insolvency scenario.
- 22 The evidence is that the Plan Companies consider that the second of those scenarios is the more likely, because the wider DeepOcean Group will choose to cease supporting the CL&T Group in order to preserve its own viability and continued survival. The detail of the likely difference in returns for all creditors other than the secured creditors in either eventuality is, broadly speaking, that they will recover nothing at all or a purely nominal dividend on a formal insolvency. By contrast, in the event of approval of the restructuring plans, they will receive the small dividends that I have already mentioned.
- 23 Turning then to the legislation, this application relates to what is still a relatively new form of statutory compromise, the restructuring plan, which was introduced as a new Part 26A of the 2006 Act by the Corporate Insolvency and Governance Act 2020. As explained in those parts of the explanatory notes that I cited in the convening judgment in *Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch), it is intended to follow broadly the process for approval and sanction of a scheme of arrangement under Part 26 of the 2006 Act.
- 24 There are, however, a number of differences. These include the need for a company proposing a restructuring plan to satisfy the two statutory conditions set out in section 901A of the 2006 Act (conditions A and B) to which I will revert shortly. There is also another important difference, which is the absence of any requirement for a restructuring plan to be approved by a majority in number of the relevant class of plan creditors. The required majority is simply 75 percent by value of plan claims.
- 25 Furthermore, and this may become of relevance in due course in the present case, the jurisdiction under Part 26A includes provision for what has come to be called "cross-class cramdown". Thus, section 901G of the 2006 Act gives the court jurisdiction to sanction the restructuring plan even if one of the classes does not agree to the compromise or arrangement by the required 75 percent in value, if two conditions are met. The first is that the court is satisfied that, if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of what is called the "relevant alternative". The second is that the compromise or arrangement has been agreed by 75 percent in value of another class of creditors who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.
- 26 The relevant alternative is defined to mean:
- "...whatever the court considers would be most likely to occur in relation to the company if they compromise or arrangement were not sanctioned."
- In the present case, the Plan Companies contend that the relevant alternative is or is certainly likely to be the CL&T Group insolvency scenario.
- 27 The procedure for making an application for the sanction of a restructuring plan is set out in a practice statement dated 26 June 2020 which also applies to applications to sanction schemes of arrangement under Part 26 of the 2006 Act (the "Practice Statement"). This is,

as I mentioned at the beginning of this judgment, the convening stage of these proceedings. As I explained in [35] of my judgment in *Virgin Atlantic*, like a convening hearing for a Part 26 scheme, it is emphatically not the stage to consider the merits or fairness of the proposed plan. That will occur at the sanction stage.

28 Paragraph 6 the Practice Statement provides as follows:

“It is the responsibility of the applicant, by evidence in support of the application or otherwise, to draw to the attention of the court at the hearing for an order that meetings of creditors and/or members be held (‘the convening hearing’):

- (a) any issues which may arise as to the constitution of meetings of members or creditors or which otherwise affect the conduct of those meetings;
- (b) any issues as to the existence of the court’s jurisdiction to sanction the scheme;
- (c) (in relation to a Part 26A scheme) any issues relevant to the conditions to be satisfied pursuant to section 901A of the 2006 Act and, if an application under section 901C(4) of the 2006 Act is to be made, any issues relevant to that application; and
- (d) any other issue not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme.”

29 The following matters are therefore to be considered at the convening hearing:

- (1) Jurisdictional requirements;
- (2) Conditions A and B;
- (3) Class composition;
- (4) Any other issues not going to merits or fairness which might cause the court to refuse to sanction the restructuring plans; and
- (5) Practical issues regarding the adequacy of notice, documentation and proposals for the meetings of creditors.

30 Paragraph 10 of the Practice Statement provides that it is open to the court to reconsider any of the issues referred to in paragraph 6 at the sanction hearing. However, the court will expect any objecting creditor who first raises any issue relating to the threshold conditions at the sanction stage to show good reason why they did not raise the issue earlier i.e. at the convening hearing.

31 To enable that to happen, paragraph 7 of the Practice Statement provides for notification to creditors. Where an application is made to convene a meeting or meetings in respect of a plan which gives rise to any of the issues identified in paragraph 6, the applicant should, unless there are good reasons for not doing so, take all reasonable steps open to it to notify any persons affected by the restructuring plan of a number of identified matters. These are

all directed towards enabling the creditors concerned to determine whether or not they wish to participate in the hearing in the light of the provisions of paragraph 6.

- 32 In the present case, contact between the Plan Companies and the Plan Creditors has been facilitated by an information agent. It circulated a letter to all known Plan Creditors on 18 November 2020, mostly by email, just under four weeks ago. It also uploaded a copy of the PSL to the plan website. In addition, on 20 November and 25 November, advertisements of the proposed plan were printed in the press circulating in the area local to the Plan Companies' businesses and an announcement was made in the London Gazette. I have read a copy of the PSL. In my view, it deals with all of the matters which are required to be dealt with by the terms of the Practice Statement and I am satisfied that paragraph 7 has been complied with. In particular, I am satisfied that sufficient time has elapsed between the publicity given to the proposals in this hearing to enable those Plan Creditors who wish to participate to do so.
- 33 Very recent evidence filed by the Plan Companies indicates that there have been a number of developments since the PSL was sent out. The first is that there has been correspondence received from solicitors instructed by the owners of the MAERSK CONNECTOR demanding payment by BV under the terms of the guarantee of DO1's obligations under the charterparty and disputing the ability of the restructuring scheme to release BV from those liabilities. It also now appears that the owners of the MAERSK CONNECTOR have accepted what they assert to be the repudiatory breach by DO1 of its obligations under the charterparty.
- 34 The second is correspondence from solicitors instructed by the owners of the HAVILA PHOENIX, who have instructed Mr Wright to attend at this hearing, culminating in a determination of the charter contract again for a repudiatory breach. The vessel has now left the Port of Blyth for Norway with what DO1 contends to be its equipment on board.
- 35 It is DO1's position that the effect of any termination of the charterparties is that there will be a significant reduction in the amount of the UK vessel owner creditors' claims in the plan as a result. That is not accepted to be the case so far as either of those owners are concerned but, to deal with that possibility, the EPM prepared by A&M has been amended.
- 36 As to jurisdiction, which is the first matter specifically required to be dealt with under the Practice Statement, Mr Tom Smith QC for the Plan Companies submitted that each of the Plan Companies is liable to be wound up under the Insolvency Act 1986 and is therefore a company in respect of which this jurisdiction is available (see section 901A(4)). I agree that the evidence establishes that this is the case. He also submitted that there is jurisdiction over the Plan Creditors because the Recast Judgments Regulation (EC 1215/2012) does not operate as an impediment to binding any Plan Creditor who may be domiciled in the EU.
- 37 In my view, an application for the sanction of a restructuring plan under Part 26A is, like an application to sanction a Part 26 scheme of arrangement, a civil or commercial matter. This gives rise therefore to the theoretical possibility that, if an application for the sanction of a restructuring plan under Part 26A means that Plan Creditors are being "sued", they are entitled to be sued in the place of their domicile.
- 38 In a case such as the present, however, the short answer to this potential impediment is that Article 8 of the Recast Judgments Regulation enables a person domiciled in a member state to be sued where he is one of a number of defendants in the courts of the place where any one of them is domiciled, provided that the claims are so closely connected that it is

expedient to hear and determine them together to avoid the risk of irreconcilable judgments. The evidence in the present case is that a substantial number of Plan Creditors - a minimum of 38 in the case of DO1, 84 in the case of DSC, and 25 in the case of ES - are domiciled in United Kingdom. On the basis of the many authorities which have already considered this point, it follows that there is jurisdiction over all Plan Creditors so far as the Recast Judgments Regulation is concerned.

- 39 The next question relates to the satisfaction of conditions (a) and (b). Condition (a) is concerned with a plan company's existing or anticipated financial condition; what Mr Goldring called in his submissions "the factual threshold". Section 901A(2) of the 2006 Act provides that it is necessary for each Plan Company to have encountered or be likely to encounter financial difficulties that are affecting, or will, or may affect its ability to carry on business as a going concern. This is a qualitative description of the nature of the financial difficulties which must be established before Part 26A of the 2006 Act can apply in relation to a company. In other words, the actual or likely financial difficulties must be sufficiently serious to give rise to a possibility that the company will become unable to carry on business as a going concern.
- 40 Condition (b) is set out in section 901A(3) of the 2006 Act. It provides that the purpose of the compromise or arrangement proposed between the company and its creditors, or any class of its creditors, must be to eliminate, reduce, or prevent, or mitigate the effect of any of the financial difficulties mentioned in the description of condition (a), i.e. the financial difficulties which are sufficiently serious to affect the company's ability to carry on business as a going concern. This condition is concerned with the purpose of the compromise or arrangement, not with the likelihood of whether or not the relevant circumstance will happen.
- 41 In the present case, the Plan Companies submit that it is clear that their financial underperformance has been such that they have continuously required funding from the wider DeepOcean Group. The evidence supports a conclusion that the wider DeepOcean Group is no longer able to continue to provide that funding without putting its own financial stability at risk and is unlikely to do so. I am satisfied that there is a real possibility that the underperformance which has given rise to its own serious financial difficulties means that the company is on the point of becoming unable to carry on business as a going concern. This is sufficient to satisfy condition (a).
- 42 It was also submitted that the effect of the financial difficulties facing each of the Plan Companies will be reduced or mitigated by implementation of the restructuring plans so as to satisfy condition (b). The reason for this is that the plans, amounting as they do to compromises or arrangements are said to give rise to a better return for Plan Creditors. This is then said to be a result which mitigates the effect of the financial difficulties which each Plan Company has encountered.
- 43 There is no suggestion that the proposed restructuring plan does not amount to a compromise or arrangement between each of the Plan Companies and some part of their creditors. This was a point that was alluded to at the convening hearings in both *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch) and *Re Pizza Express Financing 2 Ltd* [2020] EWHC 2873 (Ch). In both judgments, the conclusion was reached that there was no reason to think that the concept of what is capable of amounting to a compromise or arrangement for the purposes of Part 26A of the 2006 Act is any different to the same phrase used in Part 26. In the present case, the proposed plan involves a sufficient element of give and take.

- 44 The question which does arise, however, is whether the purpose of this restructuring plans satisfies the requirements of section 901A(3). In a letter dated 25 November 2020 from Reid Smith acting for one of the UK vessel owner creditors, the question was raised as to whether the purpose of the compromise or arrangement contained in the DO1 restructuring plan was to eliminate, or reduce, or prevent, or mitigate the effects of financial difficulties that are affecting, or will, or may affect DO1's ability to carry on business as a going concern in light of the fact that there is no intention that the DO1 will carry on business as a going concern if the restructuring plan becomes effective.
- 45 In making this point, and by expressing it in the way that they did, Reid Smith sought to reserve their client's rights as to whether the requirements of section 901A are satisfied in the present case. In effect, they were reserving on behalf of their clients the right to argue at the sanction hearing or elsewhere that condition (b) (section 901A(3)) is not satisfied. Whether they have succeeded in reserving their rights is ultimately a matter for the judge at any sanction hearing, but it is a point of jurisdiction on which I am required to reach a conclusion before making a convening order under section 901C. The reason for this is that section 901C is one of the provisions of Part 26A which only applies where conditions (a) and (b) are met in relation to the Plan Companies (see section 901A(1)).
- 46 In my view, where the purpose of the compromise or arrangement is to mitigate the effect of the financial difficulties referred to in condition (a), the question for the court is twofold. The first is to identify what constitutes the effect of the financial difficulties. The second is to determine whether the compromise or arrangement has, as its purpose, a lessening or reduction in the gravity or seriousness of the effect of those financial difficulties.
- 47 In a case such as the present, the immediate effect of the financial difficulties has been to cause a winding down of the trading activities of the Plan Companies such that their ability to continue to carry on business as a going concern is imperilled. To that extent, the effect of their financial difficulties might be said not to be mitigated by the compromise or arrangement because it is not said that the restructuring plans will or may enable any of the Plan Companies to continue to carry on business as a going concern. Put another way, as it is not the purpose of the plans to have any effect on the ability of the Plan Companies to carry on business as a going concern, can condition (b) still be satisfied?
- 48 In my view, the answer is 'yes'. It seems to me that an approach which requires the mitigation to be directed only at the actual or putative inability of the plan company to carry on business as a going concern would be to give too narrow a construction to what it is that constitutes the effect of any of the financial difficulties mentioned in subsection (2). The effect of the financial difficulties to be mitigated may, in some cases, be a lessening of the prospect that the company will no longer be able to carry on business as a going concern but it is well capable of being a broader concept. If it can be said that the effect of a company's financial difficulties is that it is no longer able to carry on business as a going concern, with the consequence that its creditors will receive only a small dividend on their claims, I can see no reason why a compromise or arrangement which provides for a slightly enhanced dividend on those claims should not be treated as mitigating the effect of those financial difficulties, irrespective of whether or not there is any intention for the company to continue carrying on business as a going concern. Even if there is no mitigating effect on the company's ability to continue to carry on its business as a going concern, there is a mitigating effect on the severity of the losses which its creditors could otherwise sustain.
- 49 In my view, there is nothing in the structure of the legislation or the explanatory notes which indicates that such a restrictive reading of what is capable of being a mitigating effect would

reflect the parliamentary intent. Put another way, while it is doubtless the case that some of the focus of Part 26A is on enhancing the ability of a company to continue to carry on business as a going concern, there is no reason to consider that that is the only purpose for which relief can be granted. One particular indication that this is not the case is that, in the same way that Part 26 is available even after a company has gone into liquidation (section 896(2)(c) of the 2006 Act) and has regularly been used in that context., in the case of Part 26A restructuring plans, Parliament has provided by section 901C(2)(c) of the 2006 Act for liquidators to initiate the procedure. This seems to me to be both consistent with and to point towards the construction of section 901A that I prefer. Accordingly, I consider that in the present case, condition (b) is satisfied.

50 The next issue is the question of class constitution. At [44]-[48] of my judgment in *Virgin Atlantic*, I explained why it was that I considered that the same approach to class constitution should apply on a Part 26A restructuring plan as applies on a Part 26 scheme of arrangement. The question, therefore, is whether the rights of the various groups and categories of creditor are so dissimilar as to make it impossible for them to consult together with a view to their common interest. As Chadwick LJ said in *Re Hawk Insurance Company* [2002] BCC 300 at [30]:

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

51 In this case, the Plan Companies propose the four separate classes that I identified at the beginning of my judgment.

52 In my view, it is plain that the secured creditor should fall into one class. Their claims all rank *pari passu* against the Plan Companies and they all benefit from an extensive suite of security granted by the Plan Companies and also from the same joint and several guarantees. If the plans become effective, their rights will all be compromised in the same way. Although there is a lock-up agreement, it is well-established that such an arrangement does not, of itself, fracture the class of lenders entitled to lock-up based on whether or not they exercise the right to do so. However, in any event, my understanding is that the position now is that all lenders are locked up. None of the questions relating to consent and other fees that have arisen in other cases arise in this case.

53 Mr Smith QC has not been able to identify any other consideration that might fracture the secured lender class and none has occurred to me.

54 As to the position of the UK landlord creditors, it is proposed that they should form a separate single class in the DO1 plan. This proposal is advanced on the basis that their present rights include proprietary rights in property presently in the possession of DO1 and an entitlement to take steps to forfeit and repossess that property in circumstances of non-payment. The effect of taking those steps may be to reduce the claim they would otherwise have against DO1. Furthermore, the entitlements of the UK landlord creditor to recovery under the plan is to a dividend payment which is different both to the returns which are intended to be available to the UK vessel owner creditors and to those available to the remaining Plan Creditors. They are, of course, different as well to the rights which will be available to the secured creditors if the restructuring plan becomes effective.

- 55 As to the position of the UK vessel owner creditors, it is proposed that they too should form a separate single class in the DO1 plan. Like the UK landlord creditor, they have no security and would therefore rank in an insolvency junior to the claims of the secured creditors but they also have rights as against DO1 (which have, in some part, been exercised) to recover the vessels which are the subject of their charterparties. This may have a consequential impact, which may be disputed, on the amount of the claim in respect of which they are entitled to prove under the plan for a dividend. I should add that I am not here reaching any conclusion one way or the other as to the extent of any impact that repossession will have.
- 56 I agree with the submission made by Mr Smith QC on behalf of DO1 that this means that the UK vessel owner creditors should fall into a class that is separate from the secured creditors, the UK landlord creditor, and the other unsecured Plan Creditors, and Mr Wright does not suggest to the contrary. I also agree that the two UK vessel owner creditors have rights which are sufficiently similar, both in respect of their present ability to effect recovery of their vessels, and in respect of the dividend to which they will become entitled under the plan, that it is not impossible for them to consult together with a view to their common interest.
- 57 As to the remaining Plan Creditors of each of the Plan Companies, I agree with the Plan Companies' submission that it is appropriate for them to form a single class under each restructuring plan. Their rights against each Plan Company are, in essence, the same in circumstances in which I am satisfied that the Plan Companies have established that the likely alternative to approval of the restructuring plan is the CL&T insolvency scenario. The appropriate comparator is therefore one in which they are all limited to a right to prove for a dividend on their unsecured claims. Furthermore, the dividend to which they are likely to become entitled under the restructuring plan is *pari passu* between themselves but, in percentage terms, slightly different from the dividend entitlements of the UK vessel owner creditors and the UK landlord creditors. So, for those reasons, I agree with the Plan Companies' proposals for the convening of a separate single class meeting for these creditors of each Plan Company and will so order.
- 58 I am also required to consider whether there are any other issues not going to the merits or fairness of the plan but which might cause the court to refuse to sanction it. As I have already mentioned, this is not the occasion on which the merits or fairness of the plan is required to be considered and, in particular, it is clear from the recent correspondence that the question of the impact of the plan on the ability of the UK vessel owner creditors to effect a recovery against BV under its guarantee of the charterparties is not a matter on which I am required to reach any determination today.
- 59 On or relating to that issue, one of the questions that has arisen at this hearing relates to the recognition of the restructuring plan in the Netherlands, particularly so far as the claims against BV under the guarantees are concerned. This gives rise to two potential Dutch law issues. The first is whether a restructuring plan is an insolvency proceeding, so as to oust the application of the Recast Judgments Regulation. The second is whether there is, in any event, a difficulty arising out of the fact that the proposed restructuring plan makes provision for third party releases of the claims against BV under the guarantee.
- 60 The Plan Companies have adduced expert evidence from a Dutch lawyer which deals with both issues. This evidence establishes that, for present purposes, there is no obvious roadblock to the scheme having substantial effect by reason of an inability to enforce the

terms of any sanction order in the Netherlands. Ultimately, however, that is a matter for the sanction hearing, and I express no more than a provisional view at this stage.

- 61 There are two other matters raised by Mr Wright on behalf of Havila, the owners of the HAVILA PHOENIX which I should also address although, in the event, they have not proved to be matters which give rise to significant or material difficulties. I should say by way of introduction to his client's position that they do not contend that the court should not make the convening order sought. However, as I have already mentioned, they strongly dispute the reduction in their claim which is asserted to be the consequence of the termination of the charterparty. In the light of this, they expressed concern that the determination of their claim will be a matter for the discretion of the chairman at the relevant class meeting, and that their voting rights will be based on what was originally described in Mr Wright's skeleton argument as an obviously false prospectus.
- 62 In making that submission, he did not suggest that the court can determine the issue as to the amount of Havila's claim at the convening hearing, but he raised two practical questions which arise in consequence of it. The first is the consequence of a determination by the chairman of the meeting as to the value of the claim, if Havila does not agree with that determination. He pointed out, quite understandably, that given the fact that there are only two members of the UK vessel owner creditor class, it is possible that this may give rise to problems as to whether or not a majority of 75 percent by value had been achieved.
- 63 In large part, this was met during the course of the hearing by a proposal advanced by Mr Smith QC. It is his client's position that the chairman of the meeting will simply admit the claims at the meeting for the value which are asserted by both of the UK vessel owner creditors. Both of those creditors have now accepted what they assert to be repudiatory breaches by the Plan Companies in respect of the charterparties. It is therefore said that the chairman will approach the quantification of their claims in the same way. This seems to me to be a sensible and pragmatic solution.
- 64 Apart from giving appropriate directions for the conduct of the meeting, I cannot reach a final decision as to the impact of any dispute for another reason. The question of the value of the UK vessel owner creditors' claims is a matter which may, and I stress may, have to be considered at the sanction hearing in due course if any issue arises in relation to the application of cross-class cramdown.
- 65 The second practical point which flows from the valuation of the Havila claim relates to a concern that I raised, namely the way in which the consequences of any quantification of that claim is described in the explanatory statement. While the court will not approve the form of the explanatory statement at the convening hearing, it needs to be satisfied that it takes an appropriate form and at the sanction stage will require to be satisfied that it fairly reflects the outcome for creditors.
- 66 The point arises in this way. Since these papers were first filed, the EPM has been amended to reflect the total percentage return for the various categories of creditor under an approved restructuring plan reflecting a situation in which the UK vessel owner creditors' claims have been reduced in accordance with the acceptance of repudiatory breach in respect of the charterparties. In light of the dispute as to the true extent of the owners' claims, DO1 will need to give careful consideration to the question of whether the uncertainty on this issue is expressed in an appropriately qualified form.

- 67 As I have already explained, Mr Wright's clients do not accept that the reduction asserted by the company is accurate or correct. In those circumstances, it seems to me that it is appropriate for the explanatory statement to be qualified in the way it is expressed to ensure that the possibilities both of a reduction and of no reduction in the amount of the claims to be advanced by the UK vessel owner creditors are fully described on the face of the explanatory statement.
- 68 Havila has also raised a further point. It says that it only received the detailed material in relation to the proposed restructuring plan relatively recently and it expresses the view that the time allowed between the date for the proposed plan meetings, which is 6 January 2021, and the date of the proposed sanction hearing, which is 13 January 2021, is unduly short. The concern which was expressed by Mr Wright is that, if the UK vessel owner creditors oppose the restructuring plan as a class, this may be the first occasion on which the court has had to consider the Part 26A cross-class cramdown provisions and it fears that the time allowed for argument on that point will be insufficient. It therefore suggested, anyway originally, that a sanction hearing should be fixed for a slightly later date. In support of that suggestion, it pointed out that the Plan Companies have not identified any particular urgency, there is no hard deadline as there is in some cases, and that a period of three weeks between the plan meeting and the sanction hearing would be appropriate.
- 69 Having discussed this aspect of the matter during the course of the hearing with Mr Smith QC, I do not agree that this is the right procedural course and in the event, I did not understand Mr Wright to press his original suggestion. In my judgment, it is more appropriate for the case to return for possible sanction on 13 January 2021 in any event. At that stage, it will be apparent whether there is opposition to the relief sought by the Plan Companies and if there is, such that it is not possible to determine the matter there and then, directions can be given for a substantive hearing. If, however, it transpires there is no opposition, it is likely to be possible to deal substantively with the sanction application on that date. In reaching this conclusion, I bear in mind that neither of the UK vessel owner creditors have said, in terms, that they will certainly be opposing the restructuring plan if it is otherwise voted through, or, indeed, that they will be appearing at the sanction hearing, and nor would I expect them, in all the circumstances, to have reached a conclusion yet as to what their position will be.
- 70 So, for those reasons, I propose to grant the relief sought by the Plan Companies and I will now go through the order with Mr Smith QC to deal with any further points on its form.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.