Neutral Citation Number: [2025] EWCA Civ 821

Case No: CA-2025-001239

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr Justice Marcus Smith
[2025] EWHC 1250 (Ch)

IN THE MATTER OF PETROFAC LIMITED
AND IN THE MATTER OF PETROFAC INTERNATIONAL (UAE) LLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Tuesday 1 July 2025

Before :

LORD JUSTICE SNOWDEN
LORD JUSTICE ZACAROLI
and
SIR CHRISTOPHER FLOYD

- -

Between :

(1) SAIPEM S.P.A. **(2) SAIPEM SINGAPORE PTE LTD** **(3) SAMSUNG E&A CO., LTD** **(4) SAMSUNG E&A (THAILAND) CO., LTD**	**Appellants**
- and –	
(1) PETROFAC LIMITED **(2) PETROFAC INTERNATIONAL (UAE) LLC**	**Respondents**

- -

Andrew Thornton KC and Jon Colclough (instructed by **Mayer Brown International LLP**) for the **Appellants**
David Allison KC, Henry Phillips, Ryan Perkins and Stefanie Wilkins (instructed by **Linklaters LLP**) for the **Respondents**
Daniel Bayfield KC and Riz Mokal (instructed by **Weil, Gotshal & Manges (London) LLP**) for Boundary Creek Advisors LP, FIL Investments International, Fortress Investment Group LLC, Sparta Capital Management Ltd and Mason Capital (the "**Ad Hoc Group**")

Hearing dates : 2, 3 and 4 June 2025

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Approved Judgment

This judgment was handed down remotely at 10.00 a.m. on Tuesday 1 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden, Lord Justice Zacaroli and Sir Christopher Floyd:

Introduction

1. This is an appeal against the decision of Marcus Smith J, sanctioning two related restructuring plans (collectively the "**Plans**") under Part 26A of the Companies Act 2006 ("**Part 26A**") in respect of two companies: Petrofac Limited ("**PL**") and Petrofac International (UAE) LLC ("**PIUL**"). Together PL and PIUL are the "**Plan Companies**", and with their subsidiaries they comprise the "**Petrofac Group**" or the "**Group**".

2. The appeal raises issues (i) as to the meaning of the "no worse off" condition for the application of the Court's discretion to impose a restructuring plan on a dissenting class or classes of creditors, and (ii) as to the appropriate allocation of the benefits of the restructuring, and the treatment of creditors who would be "out of the money" in the relevant alternative to the plan.

3. For the reasons set out below, although we reject the appeal on the first of those grounds, we allow the appeal on the second ground and set aside the judge's order.

The statutory framework

4. Part 26A applies where two conditions are met (see section 901A(1) to (3)):

   (1) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

   (2) Condition B is that (a) a compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them, and (b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2).

5. Pursuant to section 901C, the Court may order a meeting of the creditors or classes of creditors to be summoned in such manner as the Court thinks fit, although by section 901C(4), the Court can exclude from participation in meetings creditors who have no "genuine economic interest in the company".

6. The Court's discretion to sanction a plan under Part 26A is found in section 901F(1):

> "If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement."

7. By section 901G, however, the Court may sanction a plan even though one or more of the classes fails to approve it by the requisite majority:

> "(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

<u>The Plan Companies</u>

8. PL was incorporated and registered in Jersey in 2002. Its shares are listed on the London Stock Exchange. It is the ultimate parent company of the Group, and primarily operates as a holding company.

9. PIUL was incorporated and registered in Sharjah, UAE, in 2008. 1% of its shares are owned by PL and 99% are owned by Petrofac International Limited, a wholly-owned subsidiary of PL.

10. The Group is a leading international service provider to the energy industry, with expertise in the design, construction and operation of energy facilities. It operates across 29 countries. PIUL is the Group's principal operating company.

<u>Background to the Plans</u>

11. The Group first encountered serious financial difficulties in 2017, when PL and others were investigated by the Serious Fraud Office ("**SFO**") for suspected bribery, corruption and money laundering. PL pleaded guilty to seven offences of failing to prevent bribery by associated persons, and paid a fine of £70 million. Notwithstanding an extensive corporate governance review and an overhaul of its compliance systems

and controls, the Group's business has continued to suffer. This has been exacerbated by, among other things, the Covid pandemic and the war in Ukraine.

12. In November 2021 the Group completed a refinancing, comprising a US$250 million capital raise by PL, the issue by PL of US$600 million senior secured notes, the creation of two new bank facilities and an extension of maturity of an existing US$50 million senior secured term loan facility.

13. By September 2023, it had become clear that the 2021 refinancing had not resulted in the long-term stabilisation of the Group, and it began exploring options for alleviating its financial position, out of which the Plans emerged in the latter part of 2024.

The Plan Companies' liabilities

14. The Plans compromise the liabilities of the Plan Companies to five categories of "**Plan Creditors**": (1) Senior Secured Funded Debt; (2) Shareholder Claims; (3) Director Claims; (4) PL Insurance Restitutionary Claims; and (5) claims connected to the "Clean Fuels Project".

(1) Senior Secured Funded Debt

15. PL is the borrower and issuer in respect of four English law governed financing agreements (comprising secured notes, an RCF facility, and two further loan facilities) in an aggregate amount (as at the date of the convening hearing) of approximately US$909 million (exclusive of fees and interest), (the "**Senior Secured Funded Debt**"). PIUL is a guarantor in respect of the Senior Secured Funded Debt, which has the benefit of a common guarantee and security package over certain of the Group's main assets. The holders of Senior Secured Funded Debt are referred to as the "**Senior Secured Funded Creditors**".

(2) Shareholder Claims

16. These claims arise out of the investigation commenced by the SFO in 2017 and PL's subsequent guilty plea.

17. Certain shareholders or former shareholders have brought, or threatened to bring, claims (under the Financial Services and Markets Act 2000) alleging that PL made misleading statements and/or dishonest omissions or delays in its public disclosures, resulting in the inflation of PL's share price and losses to the relevant shareholders.

18. The Plan Companies deny these claims. They are at an early stage and difficult to quantify. The Plan Companies estimate, however, that, if the claims were to be established, the quantum would be potentially very high and (while the Plan Companies dispute this) has been claimed to be as high as US$1.25 billion. This is the figure the Plan Companies have used in estimating the recovery likely to be made in respect of the Shareholder Claims in percentage terms under the Plans.

(3) Directors' Claims

19. During the SFO investigations, a number of directors and employees of the Group were interviewed and retained independent legal advisers. PL was liable to indemnify some of them for their legal fees, and voluntarily assumed liability to pay the legal fees of

others. The Plan Companies do not expect further claims of this nature, but recognise there is at least some risk in this regard. There is also a risk that former directors or employees may incur additional fees in relation to the Shareholder Claims. Albeit that the Plan Companies do not ascribe any significant value to these claims, they wished to erase any risk by including them within the Plans.

(4) PL Insurance Restitutionary Claims

20. In November 2022, the Group's D&O policy insurers purported to elect to avoid the D&O policy on the grounds of fraudulent non-disclosure and/or fraudulent misrepresentation, and asserted a claim to recover amounts paid out under the policy. PL disputes the insurers' entitlement to do so, but has included an estimated US$6 million for actual and potential claims of this nature within the Plans.

(5) Claims connected to the Clean Fuels Project

21. In October 2018, certain companies in the Group entered into a project commissioned by Thai Oil Public Company Limited ("**Thai Oil**"), relating to an expansion to enable increased efficiency and cleaner fuel production at a refinery in Thailand (the "**Clean Fuels Project**"). The Group companies entered into this project as part of a consortium with companies in the Saipem group ("**Saipem**") and the Samsung group ("**Samsung**"). PL has issued an English law governed guarantee of the liabilities of its Group companies towards Thai Oil.

22. The Clean Fuels Project, which the consortium entered into for a fixed price, has proved disastrous. It has been beset with problems that have increased the anticipated cost. Saipem and Samsung served termination notices on Thai Oil on 23 April 2025. Thai Oil served its own termination notice the following day.

23. This has given rise to substantial claims by Thai Oil. Arbitration proceedings are pending to determine the extent of those claims. The liability of the joint venturers for Thai Oil's claims is joint and several, and is divided as follows: PL and PIUL as to 36%; Saipem as to 36%; and Samsung as to 32%. Saipem and Samsung, for understandable reasons, are careful not to accept in these proceedings the quantum of Thai Oil's claim. For the purposes of the Plans the exposure of the consortium to Thai Oil has been assumed to be in the region of US$1.627 billion (recognising that it may be much more or much less). To the extent that Saipem and Samsung might be required to pay more than their identified share of the liabilities of the consortium to Thai Oil, they would have claims for a contribution or indemnity against PL and PIUL.

24. In addition, Saipem and Samsung have direct claims against the Plan Companies arising out of the joint venture. Samsung has a claim against PIUL of about US$92.8 million, and Saipem and Samsung have combined claims against PL of about US$26.7 million, giving a total of about US$119.5 million.

25. All of the above claims relating to the Clean Fuels Project will be compromised under the Plans. In addition, three banks (ABN Amro, Argonaut and HSBC) have crystallised and contingent claims against PL and PIUL arising out of performance guarantees and counter-guarantees which they gave in relation to the Clean Fuels Project.

26. ABN Amro has claims relating to its performance guarantees and counter-guarantees of approximately US$29.6 million. Its claims are governed by English law. They are secured and rank *pari passu* with the Senior Secured Funded Debt. These claims will be compromised under the Plans.

27. Argonaut has unsecured claims (not covered by margin held) of approximately US$20 million which are also governed by English law. These claims will also be compromised under the Plans.

28. HSBC has an unsecured claim against PIUL of approximately US$49.7 million (after a deduction of US$16.5 million of cash collateral). Its claim is governed by UAE law and will not be compromised under the Plans. Instead, HSBC will enter into a bilateral arrangement under which it has agreed that its claim will be converted, on a full US$1 for US$1 basis, into a new senior secured term loan.

<u>Formulation of the Plans</u>

29. From about mid-2023 the Group began to explore a potential sale of certain of its business lines. In parallel, it considered a range of financing options, both by way of equity investment and by way of junior financing (i.e. subordinate to the Senior Secured Funded Debt). From late 2023 discussions also took place with the Group's secured lenders and banking group. None of these efforts resulted in any viable solution.

30. In the first half of 2024, the Group considered, but ultimately rejected, a Group-wide restructuring, but comprising liabilities at the level of PL alone, a break-up of the Group and a Group-wide insolvency. Thereafter, the boards of the Plan Companies decided to promote the Plans (alongside certain bilateral negotiations with other key stakeholders). In that same time period, the Group held discussions with Thai Oil and Saipem and Samsung in an effort to resolve the disputes over the Clean Fuels Project. According to the evidence of the Group's CFO, Mr Alfonso Reis e Sousa ("**Mr Sousa**"), the lack of engagement from Thai Oil and the "obvious delta" between the Group's position and that of Saipem and Samsung, meant that "we had no option but to consider more complex unilateral solutions – i.e. whether it would be possible to compromise the Clean Fuels Project-related liabilities under the Plans".

31. The potential restructuring was first announced in high level terms by way of a public announcement dated 27 September 2024. There was ongoing dialogue thereafter between the Plan Companies and Saipem and Samsung, and the latter were given access to key documents.

32. The terms of the Plans were, however, negotiated principally between the Plan Companies and a so-called "*ad hoc* group" of five entities that have, or claim to represent funds that have, investments in the Senior Secured Funded Debt (the "**AHG**"). From about early 2024, the AHG had indicated that they would in principle be prepared to provide an investment of new money of around US$200 million, subject to an independent appraisal of the business and conditional on a successful restructuring on agreed terms. According to Mr Sousa, "ultimately, the terms of that investment have been negotiated and agreed as part of the restructuring." The judge observed (at §53 of his judgment) that the Plans had been "long in the making, and the subject of considerable and hard-fought negotiation." Indeed, the level of the "work fee" agreed with the AHG (described in more detail below) was said to be justified by the "massive

time and effort" of the AHG in formulating and negotiating the Plans (see §74 of the judgment).

33. The restructuring was formally announced on 23 December 2024. On the same date, the "Practice Statement Letter" was sent to creditors. According to Mr Sousa, shortly prior to that date, the Group made contact with Thai Oil and Saipem and Samsung to discuss its terms in further detail and to see whether there was scope to agree a consensual deal. Thereafter, Samsung and Saipem made various offers for a different restructuring, none of which were accepted.

The treatment of Plan Creditors' claims under the Plans

34. The treatment of the existing and contingent claims of the different groups of Plan Creditors varies under the Plans.

35. The Senior Secured Funded Creditors will receive, in return for the release of their existing claims, equity in the restructured Group in the form of new ordinary shares in PL ("**Ordinary Shares**") equating to about 17.5% of the post-restructuring equity. As with the existing ordinary shares in PL, those new shares will be immediately tradable securities and hence immediately realisable.

36. Claimants in respect of the Shareholder Claims will receive, in return for the release of their existing claims, a right to participate, *pro rata*, in a "Shareholder Claims Settlement Fund" of £1 million. Claimants in respect of the Directors' Claims and the PL Restitutionary Claims will be entitled to share, pro rata, in a similar "non-Shareholder Claims Settlement Fund" of £1 million.

37. In addition, claimants in all three categories will be entitled to receive, *pro rata* to their admitted claims, warrants giving an entitlement to new Ordinary Shares in PL equating to about 1.5% of the post-restructuring equity of PL in the event that its market capitalisation exceeds US$1.35 billion and an additional 2% of the post-restructuring equity if PL's market capitalisation exceeds US$1.95 billion ("**Warrants**").

38. ABN Amro will receive, in return for the release of its existing and contingent secured claims arising out of its provision of guarantees, new Ordinary Shares in PL in the same proportion as the holders of the Senior Secured Funded Debt, equating to between 0.44% and 0.62% of the post-restructuring equity.

39. Argonaut, which is unsecured, will receive, in return for the release of its existing and contingent claims, new Ordinary Shares in PL equating to about 0.2% of the post-restructuring equity.

40. As indicated above, HSBC's unsecured claims will not be compromised under the Plans but will be converted into a new senior secured debt instrument on a US$1 for US$1 basis.

41. Samsung's unsecured claim of US$92.8 million against PIUL will be released under the Plans in return for a distribution of cash or new Ordinary Shares in PL equating to 110% of what it would be likely to receive in the relevant alternative (high case).

42. Samsung and Saipem's remaining unsecured claims against PL, together with the unsecured claims of Thai Oil itself, will be released under the Plans in return for a right

to share in the non-Shareholder Claims Settlement Fund of £1 million and to receive a proportion of the Warrants.

43. Finally, and specifically in response to objections from Samsung and Saipem, Samsung was offered the opportunity – together with Argonaut – to participate in providing up to US$25 million for new equity within the PIUL Plan, on the same terms as the equity investment offered to the holders of the Super Senior Funded Debt. Shortly prior to the sanction hearing, this offer was extended to include Saipem. The position of Samsung and Saipem is that they are unable to and/or do not wish to participate in subscribing for such new equity.

The relevant alternative

44. Before the judge, Saipem and Samsung contended that an alternative restructuring plan, on the terms of an open offer they had made to the Plan Companies, was the "relevant alternative" for the purposes of determining whether the Court has the jurisdiction under section 901G to sanction the Plans notwithstanding the existence of a dissenting class. Saipem and Samsung do not pursue this argument on appeal. Instead, it is accepted that the relevant alternative would be an insolvent liquidation of the companies in the Group, including the Plan Companies.

45. The judge's findings in respect of the likely distributions that Plan Creditors would receive in respect of their claims against the Plan Companies in the relevant alternative were based on a report from Teneo Financial Advisory Limited ("**Teneo**"), commissioned by the Plan Companies. This provided an estimated outcome for each of the creditor groups in the relevant alternative of a Group-wide liquidation on "low case" and "high case" scenarios.

46. According to Teneo, in the relevant alternative:

(1) The Senior Secured Funded Creditors and ABN Amro in respect of its secured guarantee-related claims, were likely to recover between 24.3% and 31.9% of their claims.

(2) Argonaut would be likely to recover between 7.0% and 9.3% of its claims.

(3) Samsung would be likely to recover between 6.9% and 9.3% of its claim against PIUL.

(4) None of the other Plan Creditors would be likely to make any recovery on their claims and would thus be "out of the money" in the relevant alternative.

Recoveries under the Plans: the Teneo Valuation Report

47. The Plan Companies also commissioned a valuation report from Teneo in September 2024. Teneo was instructed to prepare a (post-restructuring) valuation analysis of the enterprise value of the Group on a debt-free, cash-free going concern basis. In February 2025 Teneo reported that the post-restructuring enterprise value of the Group was between US$1.35 billion and US$1.7 billion.

48. That valuation was updated in April 2025. Teneo concluded that the enterprise value of the restructured Group on a going concern basis would be between US$1.4 billion and

US$1.75 billion. Teneo's valuation expressly took account of the risks associated with the delivery of the management's Business Plan post-restructuring, including in particular the Group's ability to secure guarantee lines for its ongoing contracts and future contracts.

49. Taking into account the post-restructuring net cash available to the Group of between US$96 million and US$104 million, the Teneo valuation report implied that the day one post-restructuring equity value of PL would be between US$1.5 billion and US$1.85 billion. That figure was agreed between the parties before us.

50. On the basis of that low case day one post-restructuring equity valuation of PL, the parties broadly agreed the following summary of the likely recoveries of the Plan Creditors under the Plans in respect of their Plan claims. The numbers are rounded, and where there were disagreements as to the figures, they are not relevant for the purposes of the analysis. Under the Plans, on the likely low case outcome (i.e. based on a post-restructuring equity value of US$1.5 billion):

(1) The Senior Secured Funded Creditors and ABN Amro (in respect of its secured guarantee claims) would receive equity valued at US$270.4 million: a return of about 28.8%.

(2) Argonaut would receive equity valued at US$3 million: a return of 8.5%.

(3) Samsung (in respect of its claim against PIUL) would receive equity valued at US$9.5 million: a return of 10.2%.

(4) The Shareholders, in respect of the Shareholder Claims will receive equity and cash valued at US$23 million: a return of 1.9%.

(5) All other unsecured claims, including Thai Oil, Samsung and Saipem, will receive Warrants and/or cash equating to a return of 1.4%.

51. It is common ground that the returns described above are, in all cases, likely to be better than if the Plan Companies went into liquidation. The Senior Secured Funded Creditors, for example, would be likely to recover only 24.3% of their debt (in the low case), Samsung would be likely to recover only 9.3% in respect of its claim against PIUL, and the remaining unsecured creditors would receive (practically) nothing in a liquidation. But under the Plans they stand to recover Ordinary Shares and/or cash amounting to a slightly greater percentage of their claims.

52. In aggregate, therefore, all of the Plan Creditors' existing claims against the Plan Companies will be compromised in return for equity and cash in the restructured Group valued on a low case basis at US$329 million.

53. Of the remaining equity in the restructured Group, and excluding fees, 67.7% will be allocated to the providers of US$350 million "New Money" to the restructured Group (as set out below). On the basis of Teneo's low case post-restructuring equity valuation of US$1.5 billion, this equity will be worth about US$1 billion. It is this allocation of value to the providers of New Money that is at the heart of the second ground of appeal.

New finance

54. A central feature of the Plans is the provision of new financing for the restructured Group. This comprises an investment of "**New Money**" of US$350 million, and the provision of a "cash back guarantee facility" of US$80 million (the "**CBG Facility**").

55. The New Money divides into two parts: US$131.25 million will be provided by way of loan in exchange for "**New Money Notes**" issued by a wholly-owned indirect Jersey subsidiary of PL, with the benefit of a guarantee and security package, and paying interest at a rate of 9.75% per annum; and US$218.75 million which will be provided in exchange for "**New Money Equity**" which comprises new Ordinary Shares in PL. Both the New Money Notes and the New Money Equity will be listed and tradeable securities, and hence immediately realisable for cash on day one after the restructuring takes effect.

56. All of the Senior Secured Funded Creditors (and ABN Amro in respect of its secured guarantee debt) will be entitled under the Plans to participate in the provision of the New Money, *pro rata* to the amount of their existing claims. Any such participation must be split equally between New Money Notes and New Money Equity. In fact, not all of the Senior Secured Funded Creditors opted to participate in the New Money, and it will be provided as follows:

(1) The Senior Secured Funded Creditors will provide a total of US$187.5 million of New Money: US$93.75 million in return for New Money Notes and US$93.75 million in return for New Money Equity. This New Money was underwritten by certain of the Senior Secured Funded Creditors in return for "Backstop Fees" (see below).

(2) Two funds represented by an entity called Nut Tree Capital Management LP ("**Nut Tree**") are providing a total of US$75 million: US$37.5 million in return for New Money Notes and US$37.5 million in return for New Money Equity. Although, at the time Nut Tree was approached to invest in the Group it was not an existing investor, a number of funds which it represented subsequently purchased a quantity of Senior Secured Funded Debt at a price that was lower than the anticipated return on that debt in the relevant alternative.

(3) The remaining US$87.5 million is being provided by various persons whose identity has not been revealed, but who include existing shareholders and directors of the Group. This investment is being provided exclusively in return for New Money Equity.

57. The CBG Facility involves the provision of US$80 million to a bankruptcy remote special purpose vehicle ("**SPV**") to be used as collateral for certain of the Group's existing customer contracts. US$30 million is to be provided by a member of the AHG. The remaining US$50 million is to be provided by funds connected with Nut Tree.

58. The US$80 million will be provided in return for notes issued by the SPV ("**CBG Notes**"). The CBG Notes pay quarterly interest in cash at 7% over the prevailing base rate. The member of the AHG and the funds connected with Nut Tree will also be issued by PL with a further US$19.57 million in aggregate of New Money Notes, and the Nut

Tree funds will additionally be paid a fee of US$1.25 million in cash and will receive a "contingent value rights instrument" worth US$9.8 million.

Backstop Fees and Work Fees

59. In addition to the allocation of equity in the restructured Group in return for the provision of New Money, the Senior Secured Funded Creditors (but not ABN Amro in respect of its claim arising from the provision of guarantees) also had the opportunity to receive further equity under the Plan by way of so-called "**Backstop Fees**" and "**Work Fees**".

Backstop Fees

60. The Backstop Fees were available to those Senior Secured Funded Creditors who agreed to underwrite the provision of the US$187.5 million of New Money by the Senior Secured Funded Creditors. The Backstop Fees were provided in the form of New Money Notes and new Ordinary Shares in PL. On the likely low value of the post-restructured Group, the Backstop Fees in relation to the provision of US$187.5 million of New Money amounted to about US$62.6 million. In the region of 80% of the Backstop Fees were allocated to the AHG.

Work Fees

61. The "Work Fees" were negotiated and agreed between the AHG and the Plan Companies shortly before the Practice Statement Letter was circulated in late December 2024 . They are said to be compensation for the work undertaken by the AHG in relation to the restructuring, and for the fact that when the members of the AHG obtained access to confidential information relating to the Group they became "restricted" under applicable market abuse laws. However, the amount of the Work Fees was not calculated by reference to the actual value to the Plan Companies of the work done or the amount of time expended by members of the AHG. It was simply fixed as an agreed percentage (2.5%) of the AHG's aggregate holding of Senior Secured Funded Debt. This equalled US$7.1 million.

62. If the Plans are not sanctioned, the Work Fees will be payable in cash but will rank as an unsecured claim. However, if the Plans are sanctioned, the Work Fees will be paid in equity. The evidence was that the number of new Ordinary Shares in PL that would be issued in this respect (428,705,264) was fixed in late December 2024 on the basis of a notional post-restructuring equity value of the Group of US$351 million because the Teneo valuation report was not then available.

63. For reasons that were not explained, however, the number of new Ordinary Shares to be issued to the AHG in respect of the Work Fees remained the same, notwithstanding that the post-restructuring equity value of the Group was subsequently determined by Teneo to be between US$1.5 billion and US$1.85 billion rather than the notional US$351 million.

64. This means that if the Plans are sanctioned, the number of new Ordinary Shares in PL to be issued to the AHG in respect of the Work Fees will be worth between US$24.1 million and US$29.9 million rather than the US$7.1 million that was initially agreed.

This represents an increase to between 339% and 421% of the agreed value of the "work".

65. Saipem and Samsung did not contend on appeal that the increased value of the new equity in PL allocated to the AHG by means of the Work Fees should itself have led to the judge declining to sanction the Plans. However, they did submit that the way in which the Work Fees were dealt with was symptomatic of a general approach under which a disproportionate share of the benefits of the restructuring was conferred upon the providers of the New Money (including members of the AHG) under the Plans. We shall return to that issue in our consideration of Ground 2 below.

The outcome of the meetings of Plan Creditors

66. Pursuant to the order of Marcus Smith J made at the convening hearing, seven separate meetings were convened in respect of the PL Plan, and five separate meetings were convened in respect of the PIUL Plan.

67. These were, in relation to the PL Plan:

(1) The Senior Secured Funded Creditors (apart from those in classes (2) and (3) below). 99 creditors, holding 88.41% of the claims by value, attended. 100% voted in favour.

(2) The Nut Tree funds and the member of the AHG which were to subscribe for CBG Notes. 16 creditors, holding 100% of the claims, attended. 100% voted in favour.

(3) ABN which, constituting 100% of the class, voted in favour.

(4) Argonaut which, constituting 100% of the class, voted in favour.

(5) The Shareholder Claimants. 272 creditors, holding 99.9% of the claims attended. 99.92% of those voted in favour.

(6) Thai Oil, the Director Claimants and the PL Insurance Restitutionary Claimants. All voted against the Plan.

(7) Samsung and Saipem and PSS BV (the joint venture vehicle). All voted against the Plan.

68. In relation to the PIUL Plan, the meetings were:

(1) The Senior Secured Funded Creditors (apart from those in classes (2) and (3) below). 99 creditors, holding 88.41% of the claims by value, attended. 100% voted in favour.

(2) The Nut Tree funds and the member of the AHG who were to subscribe for the CBG Notes. 16 creditors, holding 100% of the claims, attended. 100% voted in favour.

(3) ABN which, constituting 100% of the class, voted in favour.

(4) Argonaut which, constituting 100% of the class, voted in favour.

(5) Thai Oil, Saipem and Samsung and PSS BV. All voted against the Plan.

The issues raised on appeal

69. Saipem and Samsung appeal with the permission of the judge on two grounds:

(1) First, that the judge was wrong to hold that even though Saipem and Samsung will be "worse off" under the Plans, they will not be "worse off" in a way that is relevant for the purposes of the statutory test under section 901G(3).

(2) Second, that the judge was wrong to sanction the Plans because the benefits preserved or generated by the Plans are not being fairly shared between the Plan Creditors.

Ground 1: the "no worse off" test

70. Section 901G(3) of the 2006 Act imposes, as a jurisdictional gateway to the sanction of a plan where there is a dissenting class, a condition ("**Condition A**") that, if the plan were to be sanctioned, "none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative."

71. On the basis of the figures explained at §50 above, Saipem and Samsung accept that – if regard is had solely to the amounts they can expect to recover in respect of their debts owed by the Plan Companies – they are likely to be better off under the Plans than in the relevant alternative of the liquidation of the Group.

72. They contend, however, that in assessing whether they would be "any worse off" under the Plans than in the relevant alternative, the judge should have had regard not only to the direct monetary returns that they would make on their claims against the Plan Companies, but also to any indirect economic benefits which would accrue to them if the Group went into liquidation. In that event, Saipem and Samsung would be freed of a competitor and would stand to make substantial profits from future business which would otherwise have been taken by the Group.

73. Saipem's and Samsung's case was that they stood to make profits of approximately US$340 million from such business in the relevant alternative. The judge accepted – without needing to delve into the expert evidence that supported this figure – that the competitive advantage which would accrue to Saipem and Samsung in the event of the liquidation of the Group was self-evidently substantially greater than the very small returns they could expect under the Plans.

74. The judge held, in reliance on a dictum of Trower J in *re Smile Telecom Holdings Ltd* [2021] EWHC 685 (Ch) at §30 that the "no worse off" test in section 901G(3) was exclusively concerned with the impact of a plan – compared with relevant alternative – on a creditor *in its capacity as a creditor*.

75. The judge then concluded, at §69, that the indirect benefits which Saipem and Samsung would lose if the Plans were sanctioned would have accrued to them in their capacity as creditors:

> "The Saipem and Samsung Opposing Creditors contended that the indirect economic benefits of the Liquidation – namely the dissolution of the Petrofac Group – did arise in their capacity as creditors. A joint venture like the Clean Fuels Project is a risk-sharing endeavour, where the potential liabilities are shared amongst the joint venturers. Where the joint venturers are competitors, and one of the joint venturers cannot meet their obligations under the joint venture due to insolvency, at least the solvent joint venturers, who will shoulder additional liabilities, have the benefit of a competitor leaving the market. The Plan undercuts this balanced outcome, by compromising Saipem and Samsung's claims against the Petrofac Group, whilst permitting the Group to stay in business and compete without the burden of the joint venture liabilities. To my mind, it is difficult to say that these consequences are not suffered by Saipem and Samsung as creditors."

76. The judge nevertheless found that Condition A was satisfied, because the indirect benefit that would accrue to Saipem and Samsung if the Group went into liquidation "does fall out of consideration" or (as he put it) was "too remote": see §70. The judge gave four reasons. The first three essentially boiled down to the point that Condition A was a jurisdictional requirement that needed to be "as clear-cut, as binary, as possible", and that although the relative size of the benefits by comparison to the returns under the Plans were clear enough in the instant case, in another case it might be very hard to quantify the indirect economic benefits without a wide-ranging inquiry which would be better undertaken at the discretionary/fairness stage. The fourth reason essentially suggested that if wider economic consequences were to be taken into account so far as Saipem and Samsung were concerned, then the economic consequences of the Petrofac Group's liquidation (e.g. effects on employees and effects on markets) "need to be considered in the round" so as to give full weight to Part 26A's place in the "rescue culture".

77. For Saipem and Samsung, Mr Thornton KC contended that the judge was wrong to limit the no worse off test to the impact on creditors in their capacity as such. He submitted that the correct test was whether there was a sufficient connection between the benefits that would accrue to the creditor in the relevant alternative and the underlying debtor-creditor relationship that a plan seeks to compromise. Mr Thornton also submitted that if the judge was right to limit the no worse off test to a consideration of the impact of a plan on a creditor in its capacity as such, then he was wrong to introduce an undefined test of "falling out of consideration" or "remoteness" and was wrong on the facts to conclude that the competitive advantage that would accrue to Saipem and Samsung on the Group's liquidation was too remote to be taken into account.

78. For the Plan Companies, Mr Allison KC contended that the judge was right to conclude that Condition A was satisfied, albeit for a different reason. He submitted that the judge had been right to conclude that the no worse off test focuses on the impact on a creditor in its capacity as a creditor of the plan company. However, he contended by way of a respondents' notice, that the judge ought to have held that the indirect benefits of

reduced competition in the relevant alternative would not accrue to Saipem and Samsung in their capacity as creditors of the Plan Companies.

Discussion

79. We have no doubt that the judge was correct to find that Condition A was satisfied on the facts of this case, although our reasoning differs from that of the judge. In summary, as explained in this section, the court is required to determine the financial value which a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights which the plan offers in return for the compromise of those existing rights. The scope of that enquiry is primarily concerned with the financial value of rights of the creditor against the plan company, but where a plan compromises or releases other rights of the creditor, it extends to those other rights. In the instant case, the loss of a competitive advantage upon sanction of the Plans is clearly beyond the scope of that test.

80. It is appropriate first to consider the nature of the "no worse off" test.

81. The genesis of the no worse off test is to be found in the law relating to schemes of arrangement under Part 26 of the Companies Act 2006 ("**Part 26**"). The explanatory notes to Part 26A stated (at §15) that "the new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement" and (at §16) that "while there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."

82. In *re T&N Ltd* [2005] 2 BCLC 488, at §82, David Richards J explained that in exercising its discretion to sanction a scheme of arrangement under Part 26, where it was an alternative to a winding-up, the Court was unlikely to sanction a scheme:

> "which was likely to result in creditors, or some of them, receiving less than they would in a winding-up of the company, assuming that the return in a winding-up would, in reality be achieved and within an acceptable time-scale."

83. The same idea appeared in the context of challenges to CVAs on the basis that they were unfairly prejudicial, in the guise of the "vertical comparator" test: see *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch); [2007] Bus LR 1771, per Etherton J at §75 to §81.

84. The provisions of Parts 26 and 26A both apply where "a compromise or arrangement is proposed between a company and (a) its creditors, or any class of them, or (b) its members or any class of them": see sections 895(1) and 901(A)(3)(a) respectively. It has also been said that for a compromise or arrangement between a company and its creditors to qualify as a scheme of arrangement under Part 26, it must be a compromise or arrangement "which deals with their rights *inter se* as debtor and creditor": see *re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161 ("***Lehman Brothers***") at §65.

85. The comparison required by section 901G(3) is between the outcome for the creditor under the "compromise or arrangement" and in the relevant alternative. This suggests that, at least as a starting point, there should be a correlation between the scope of the no worse off test and the scope of the compromise or arrangement.

86. That is consistent with the approach taken in some of the first cases to come before the courts under Part 26A. In *re DeepOcean 1 UK Limited* [2021] EWHC 138 (Ch) at §§34-35 ("***DeepOcean***"), Trower J stated,

> "The primary question for the court when considering what will happen under a restructuring plan and comparing it with what is likely to happen in the relevant alternative, is to look at the likely financial return in each of the alternative eventualities.
>
> Doubtless, the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt. However, the phrase used is "any worse off", which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay."

87. Trower J revisited this question in *Re Smile Telecom Holdings Ltd* [2021] EWHC 685 (Ch) at §30. He said that the no worse off condition,

> "… is concerned with, and only with, those persons in their capacity as members of that class. If they might be worse off in some other capacity as a result of the sanctioning of the plan, that is capable of having an impact on the exercise of the court's discretion, but does not of itself mean that condition A is not satisfied."

88. Neither of these cases raised the question of indirect benefits such as those in play on this appeal. That question arose, however, in *Re Great Annual Savings* [2023] EWHC 1141 (Ch) ("***GAS***"). In that case, it was contended by HMRC that Condition A was not satisfied in relation to it. The plan company's response was to contend that the benefits of the plan to HMRC included the future tax revenues which would be collected by HMRC by reason of the fact that the company would continue to trade. Those revenues would be lost if the company was liquidated.

89. Adam Johnson J rejected that argument. His first reason was to point out the fallacy in the proposition that HMRC would collect less tax in the event of the company's liquidation, because the company's employees would be likely to find work elsewhere, and its present counterparties would transact replacement business elsewhere – generating the same tax liabilities. His second reason, however, is of particular relevance to this appeal. At §85 of his judgment, referring to Trower J's comments in *DeepOcean*, Adam Johnson J said:

> "I think the inquiry Trower J had in mind was whether the relevant class of creditors are likely to be any worse off as

> regards the existing rights the plan seeks to compromise – hence his reference to "the impact of the restructuring plan on all incidents of the liability to the creditor concerned". I accept that is potentially a broad inquiry, but what it seems to involve is a comparison between the financial value which the creditor's existing rights would be likely to produce in the relevant alternative, and the value of the new or modified rights which the proposer of the plan is offering up under the terms of its proposed compromise, in return for the existing rights being extinguished."

90. The references in each of these dicta to a creditor's *rights* is no accident. In matters that go to jurisdiction under both Part 26 and Part 26A, the focus on *rights* rather than *interests* is fundamental. So, for example, the classes for voting purposes are defined by reference to *rights* that the scheme or plan modifies or extinguishes, and not merely to *interests* of the plan creditors that might be affected by the plan: see e.g. *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at §§30-34.

91. Against that background, we agree that the starting point for application of the "no worse off" test is a comparison between the value of the existing rights which a creditor has against the plan company in the relevant alternative, and the value of the new or modified rights given under the plan in exchange for the compromise of those rights.

92. Where a plan compromises or releases only creditors' rights against the plan company, that is also the end point. Where, however, a plan interferes with rights of creditors against third parties, the scope of the no worse off test must extend to such rights.

93. The most common circumstance is where creditors have the benefit of a guarantee from a third party. Where the guarantor would have a right of subrogation or indemnity against the plan company, then the plan can require the creditor to give up its claim against the guarantor to avoid "ricochet" claims being brought against the company by the guarantor. The rationale is that such claims would undermine the essential compromise of the company's liabilities to its creditors. That was clearly explained by Patten LJ in *Lehman Brothers* at §§62-65 where he indicated that the rights which can be released or re-organised under a scheme are not limited to those enjoyed by scheme creditors but can include rights against third parties related to and essential for the operation of the scheme.

94. Since the guarantor in such a case is not a party to the scheme or plan and hence unable to enforce a release contained in it, such releases are conventionally achieved through the appointment under the terms of the scheme or plan of an attorney for the creditors who is authorised to enter into a deed of release of the creditors' rights against the guarantor.

95. Claims against guarantors are obviously closely connected to the debtor-creditor relationship between company and creditor, not least because if the guarantor pays under the guarantee, it will be subrogated to the claims of the creditor. It is also possible for the terms of a plan to go beyond this, and in an appropriate case to require plan creditors to release other types of claims that they might have against a third party. An example canvassed in argument was that if a plan company sought to compromise the claims of the holders of debt instruments, the creditors might bring claims in negligence

for the unrecovered balance against the financial advisers who had advised them to acquire the instruments in the first place. The financial advisers might in turn seek a contribution or indemnity from the plan company on the basis that they relied on misleading financial information published by the plan company.

96. Such claims against third parties are difficult to characterise as an incident of the debtor-creditor relationship between plan company and plan creditor. In our judgment, it is nevertheless a relevant consideration – in applying the no worse off test under s.901G(3) – that a creditor is being required by the terms of a plan to release such a claim against a third party, where that claim would be retained in the relevant alternative. Hence, we prefer the test we have set out at §79 above.

97. An approach which focusses on the valuation of rights affected by the plan is also preferable, in our judgment, to some form of remoteness test as adopted by the judge. There is no basis in the wording of the statute for such an approach, and the judge did not explain how a concept of remoteness would be applied to decide what would fall "in" for consideration and what would fall "out".

98. We do, however, agree with the judge that any broader prejudice that a creditor contends it would suffer as a consequence of a plan being sanctioned which is not encompassed in the valuation of its rights, goes to the issue of discretion.

99. Mr Thornton accepted that a creditor who happened to operate in the same market as the insolvent debtor could not claim to be worse off under a plan because of the loss of a competitive advantage that would accrue to it merely by the insolvent debtor ceasing to operate in the same market. He said, however, that the judge was correct to find that the special circumstance that Saipem and Samsung were in a joint venture with the Plan Companies in relation to the Clean Fuels Project made all the difference.

100. The reason advanced by the judge, at §69, as to why this was a consequence suffered by Saipem and Samsung in their capacity as creditors was because the joint venture between them and the Plan Companies provided what the judge described as "a balanced outcome" between (1) the detriment that on the liquidation of one of the joint venturers, the others would be liable for the failed company's share of the liabilities to Thai Oil and (2) the advantage that in that event the others would have the benefit of the failed company leaving the market. The judge said that the Plans undercut that balanced outcome by compromising Saipem and Samsung's claims against the Plan Companies, but permitting the Plan Companies to stay in business and compete without the burden of the joint venture liabilities.

101. That approach, however, appears to us to do no more than describe the commercial position and interests that Saipem and Samsung would have as joint venturers and competitors if the Plans were not sanctioned, and those that they would have if the Plans were sanctioned. Whilst the judge correctly identified the adverse effect that the Plans would have on Saipem and Samsung's rights to seek contribution from the Plan Companies in relation to the Thai Oil joint venture, the other aspect of his "balanced outcome" was not referrable to any rights that Saipem and Samsung had that would be required to be compromised under the Plans. Specifically, in spite of being challenged to do so in argument, Mr Thornton could not point to any rights that Saipem or Samsung had under the joint venture (or otherwise) to compel the Plan Companies to cease trading in competition with them in any particular situation.

102. We therefore dismiss the appeal on Ground 1.

Ground 2: fairness and discretion

103. The headline complaint of Saipem and Samsung under Ground 2 is that the benefits of the Plans are not being fairly shared with them. They contend that the judge did not approach the question of fairness in the right way and that he based his exercise of discretion to sanction the Plans on a number of errors of principle and fact.

104. The main objection of Saipem and Samsung in this respect centres on the allocation of equity in the restructured Group in return for the provision of New Money. They contend that the benefits preserved or generated by the Plans were largely the result of the compromise of the secured and unsecured claims against the Plan Companies, and were reflected in a very substantially increased value of the equity in PL as parent of the restructured Group. However, a disproportionate majority of that equity was allocated under the Plans in return for the provision of New Money rather than to the creditors whose claims were compromised.

105. Saipem and Samsung contend that the judge wrongly thought that this was a fair allocation of the benefits of the restructuring because he wrongly thought that the New Money was high risk and that the return to the providers of the New Money was "competitive". They say that, properly understood, the New Money is not high risk because it will be provided to a profitable Group which will be relieved of its debt burden by the Plans, and the evidence does not in fact show that the terms for the provision of the New Money are the result of any competitive testing of the market for such finance.

The fair allocation of the benefits of the restructuring

106. This is the third case under Part 26A to come before the Court of Appeal. The other two were *Re AGPS Bondco Plc* [2024] EWCA Civ 24 (commonly referred to as "***Adler***") and, more recently, *Kington S.a.r.l. v Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475 ("***Thames Water***").

107. *Thames Water* emphasised (at §94) that Part 26A is a developing jurisdiction, in which the approach to be adopted to sanctioning a plan is to be developed on a case-by-case basis. There are, however, several common themes that have been identified. The most relevant to the instant case is what has been called "the fair allocation of the benefits preserved or generated by the restructuring".

108. That concept can be traced back to the judgments of Trower J in *DeepOcean* at §63 and Zacaroli J in *re Houst Limited* [2023] 1 BCLC 729 ("***Houst***") at §29. In *Adler*, after referring to those judgments, and making the point that satisfaction of the "no worse off" test in section 901G(3) is a necessary, but not sufficient, condition for the exercise of the cross-class cram down power, Snowden LJ said this at §§160-161,

> "160. … As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my

> judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.
>
> 161. It is this concept that has been encapsulated in the expression "the fair distribution of the benefits of the restructuring" or "fair distribution of the restructuring surplus": see *DeepOcean* and *Houst* (above). To similar effect, in the paper referred to in *Houst* at §30, Professor Sarah Paterson adopted a dictum of Mann J in the scheme case of *Bluebrook Limited* [2009] EWHC 2114 (Ch) at §49 and suggested that the essential question for the court is whether any class of creditor is getting "too good a deal (too much unfair value)"."

109. As Snowden LJ pointed out at §§162-163, *Adler* was a relatively straightforward case in terms of carrying out the inquiry into the fair allocation of the benefits of the restructuring, because all of the plan creditors would have been unsecured and would have ranked equally in the relevant alternative of a formal insolvency. The plan in *Adler* also did not envisage a continuation of the business of the group as a going concern but was simply designed to achieve a more advantageous realisation and distribution of the assets in a wind-down process controlled by the management than would have been the case in a formal insolvency. Snowden LJ noted that the inquiry might be more difficult where plan creditors had different priority rankings of secured and unsecured debts, or where the plan envisaged a complex restructuring of debts in order to continue trading.

110. Two of the issues that have been raised in such cases include the extent to which a class of creditors which would be "out of the money" in the relevant alternative should be entitled to share in the distribution of the benefits of the restructuring, and the extent to which a plan can reward the providers of new money.

Treatment of out of the money creditors

111. As the Court of Appeal noted in *Thames Water* at §112, the treatment of creditors who would have been out of the money in the relevant alternative was not directly in issue in *Adler*, where all of the plan creditors would have ranked *pari passu* in a distribution of assets in the relevant alternative. But it was addressed in *Thames Water*, albeit in the context of a plan with limited scope.

112. The plan in *Thames Water* sought only to provide the company with breathing space (or a "bridge") to enable to it to formulate a full-scale restructuring of its debt. This was achieved by extending the maturity date of its financial indebtedness. The relevant alternative was a special administration regime, in which a special administrator would likely have sought to impose a similar bridge, while seeking either to rescue the company as a going concern via a restructuring of its debt, or sell the business and assets as a going concern.

113. The position of the out of the money creditors was raised and addressed by the Court in response to an argument advanced by counsel for the plan company that was summarised at §§124-125 as follows,

> "124. [Mr Smith KC, counsel for the plan company] maintained that a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness the fact that out of the money creditors get nothing at all counts for nothing…
>
> 125. Mr Smith accepted, in light of the comments of this Court in *Adler* as to the need for give and take in respect of any creditor whose rights were compromised by a plan, that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but submitted that this need be no more than *de minimis*. He maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such *de minimis* consideration. He submitted that we are bound to reach this conclusion because of this Court's approval, in *Adler*, of Snowden J's decision in *re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) ("***Virgin Active***")."

114. The Court of Appeal in *Thames Water* squarely rejected that submission. The Court not only held, at §140, that it was no part of the ratio of *Adler* to endorse the aspects of *Virgin Active* upon which the plan company had relied, but it also expressly disapproved those aspects and explained why the plan company's argument was not right as a matter of principle.

115. At §133 the Court of Appeal referred to the particular statement in *Virgin Active* at §266 upon which reliance had been placed, and continued, at §134,

> "If that is taken to mean that the Court cannot take account of the treatment of out of the money creditors in considering the fair distribution of the benefits preserved or generated by a plan, simply because they would be out of the money in the relevant alternative, then – for the reasons developed below – we disagree with it."

116. The Court of Appeal then set out its reasoning at §§142-148 and concluded, at §149, as follows:

> "As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As

> we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly."

117. That was a clear rejection of the argument based upon *Virgin Active*. It should also not be read as an indication that in most cases an out of the money class can fairly be excluded from the benefits of a restructuring and need only be given a *de minimis* amount necessary to satisfy the jurisdictional requirement that the plan should amount to a "compromise or arrangement".

The provision of new money

118. The continuation of a business as a going concern will often depend upon the company being able to access new funding. From first principles, new money which is made available to a post-restructured company can be analysed in various ways, depending on the circumstances. In some cases, the purpose of the restructuring is to remove sufficient of the company's debt burden, so that it is better able to access new funding at more advantageous rates in the market. In such a case, the new money does not in itself form part of the plan.

119. In other cases, such as the instant case, the restructuring itself includes new money being committed so that it is available to the restructured company immediately following sanction of the plan. If the new money is provided from independent third parties following a competitive process in the market, then the proper analysis is that the returns for the providers of new money are simply a cost of the restructuring. It is also well established that those providing new money to facilitate a plan in such circumstances should be entitled to receive full repayment of that money under a plan in priority to pre-existing plan creditors: see *Adler* at §168.

120. A similar analysis applies, in our view, where existing creditors of the company are invited to participate in lending the new money. If the returns to such creditors are equivalent to what it would cost the company to obtain the funding in the market, the provision of new money should be regarded primarily as a cost of, as opposed to part of the benefit arising from, the restructuring.

121. If, however, the returns offered to those providing new money are such that it costs materially in excess of that which could be obtained in the market, and existing creditors are invited to participate in the new money, then the excess cost is better analysed as a benefit conferred by the restructuring.

122. Since it is the plan company that seeks the exercise of the Court's discretion under section 901G, the burden of showing that the returns on new money are either equivalent to that which could be obtained in the market (and hence not a benefit of the restructuring), or justifying the fair allocation of those benefits must rest with the plan company.

123. That analysis is consistent with the comments of Snowden LJ in *Adler* at §169 in relation to the possibility that returns on new money might be structured by way of an elevated return on plan creditors' existing claims:

> "It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money."

124. Mr Allison accepted that in a case where there was "egregiously priced money" the fact that it was offered to all would not be enough to save the plan. He submitted, however, that there would need to be careful consideration of whether certain creditors had reasons why they could not participate.

The Plan Companies' arguments

125. Against this background, Mr Allison submitted that three key principles could be distilled from the authorities.

126. First, he submitted that the "obvious reference point" for assessing the fairness of a plan is the treatment of creditors in the relevant alternative. This is undoubtedly correct. But it is only a starting point. The fairness of the treatment of dissenting classes of creditors under a plan requires more than simply deciding whether they would be out of the money in the relevant alternative.

127. Mr Allison sought to bolster this proposition by reference to *Virgin Active*. However, as we have explained, insofar as that case addressed the position of out of the money creditors as a matter of principle, it must be read in light of *Thames Water*, particularly at §134. It is also relevant to note that *Virgin Active* was one of the earliest decisions in this developing area. The complexities involved in the exercise of the cross-class cram down power have become more apparent in the numerous cases decided since then.

128. To that end, we should explain further why we do not accept the basic premise of the argument, recorded in §124 of *Thames Water*, and in essence sought to be resurrected by Mr Allison, that "a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan". That assertion - and its corollary that the creditors who would be "in the money" in the relevant alternative are the economic owners of the business and entitled for that reason alone to all of the benefits created by a plan – contains a *non sequitur*, the fallacy of which is readily apparent on the facts of the instant case.

129. In many cases, such as the instant case, the relevant alternative is an insolvent liquidation of the plan company. In that scenario the plan company would be unable to pay its debts to its creditors and would be forced to cease to trade. The business of the

company as a going concern would be lost, and neither it, nor its value, would be realised for the benefit of, or belong to, any group of creditors.

130. In these circumstances, absent recourse to Part 26 or Part 26A, if a class of creditors who would expect to receive a distribution from the realisation of assets in the liquidation wished to obtain the additional benefit of the preservation of the company itself and the value of its business as a going concern, free of the claims of the other creditors, they would have to negotiate with the company and with the classes of out of the money creditors for the latter to give up their claims. That would inevitably require a genuine commercial compromise by all parties.

131. Prior to the enactment of Part 26A, a scheme of arrangement under Part 26 provided a means by which such a negotiated deal could be implemented without having to get unanimity among all affected creditors. But the terms of the deal would have to be good enough to attract a sufficient assenting majority in each of the classes of creditors, including those who would have been out of the money in the liquidation alternative. As was made clear by the legislative history to which reference was made in *Adler* at §259 to §270, the primary purpose of the introduction of the cross-class cram down power under Part 26A was to allow the Court, in an appropriate case, to override the absence of assent in each class and thereby to prevent any one or more classes of creditors from exercising an unjustified right of veto. The cross-class cram down power was not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring. The Court's discretion to *refuse* to sanction a plan would in such circumstances clearly be engaged (c.f. the Explanatory Notes to Part 26A, at §192, where it is pointed out that the Court may refuse to sanction a plan, even if the section 901G conditions are met, if it would not be just and equitable to do so).

132. Mr Allison's second submission was that the fairness of a plan will be assessed by reference to its purpose, citing *Thames Water* at §§117-118, §149 and §153. Specifically, he submitted that a different approach is justified where the plan is designed merely to provide a "bridge" (as in *Thames Water*) from where it is designed to implement a comprehensive balance sheet restructuring (as in this case).

133. In *Thames Water*, the Court of Appeal relied on the fact that the plan was intended only to provide a bridge as one of the reasons why regard should be had to the position of the out of the money creditors. The Court was careful, however, to say nothing about when it might be appropriate to have regard to their position if the plan had a different purpose, such as a comprehensive balance sheet restructuring.

134. While we agree, therefore, that the purpose of the plan is one of the factors to be taken into account, there is nothing in *Thames Water* which supports the proposition that the impact on the out of the money creditors should carry no or even little weight in the case of a plan designed to implement a comprehensive restructuring of the company's balance sheet.

135. Mr Allison's third submission was that if the plan company requires an injection of new money, then it might be fair for the new money providers to receive an enhanced share of the benefits of the restructuring.

136. We have dealt with the provision of new money as a matter of principle above. As we have said, we accept that those providing new money to facilitate a restructuring can properly expect to be repaid that money in priority to the existing indebtedness of the company. That also clearly applies to the return on the new money, insofar as that return reflects the price for new money that would be obtainable in a competitive market. But whether, and if so, to what extent, the providers of new money should also be entitled to share – above and beyond market rates for such funding – in the benefits generated by the restructuring is dependent on the facts of each case and is the key issue in this appeal, to which we now turn.

The benefits of the restructuring and the returns on the New Money

137. As the Teneo valuation report makes clear, the value to be preserved or generated by the restructuring of the Group is likely, on the low case, to amount to about US$1.25 billion, i.e. the difference between the day one value of the equity in the restructured Group as a going concern (US$1.5 billion) and the US$250 million that would be realised for the assets of the Group in the relevant alternative of a liquidation.

138. That likely preservation or generation of value is contributed to by the write-off of US$900 million of Senior Secured Funded Debt, the write-off of unsecured debt in an unknown amount but estimated to be in the region of US$3 billion (of which more than US$1.6 billion is assumed to be due to Thai Oil), and the provision of the New Money to the restructured Group.

139. As we have indicated above, the return to all of the Plan Creditors for the write-off of their existing claims against the Plan Companies is equity and cash valued on a low case basis at US$329 million, and (excluding the Backstop Fees and the Work Fees), the providers of US$350 million New Money will be allocated 67.7% of the new equity in the restructured Group, with a value of about US$1 billion.

140. There are numerous ways in which this return on the New Money can be presented. In closing argument the Plan Companies provided a table which shows that the overall return upon the investment of all of the New Money (US$350 million), the CBG Facility (US$80 million), and a small amount which it is envisaged will be raised from retail investors and a third party (US$14 million) would be US$939,343.036. That equates to a return of 211.7% on the sums invested.

141. So far as the participating Senior Secured Funded Creditors are concerned, the table indicates that for an investment of US$187.5 million of New Money, they will receive equity and debt with a value of approximately US$500.2 million. This represents a return of 266.8% (on the likely low case outcome).

142. As Mr Perkins, who explained the table at the hearing of the appeal on behalf of the Plan Companies, acknowledged, this shows a blended return including both the issue of New Money Notes and New Money Equity. The returns identified within the table referable to the former are lower (reflecting the lower risk of debt, particularly secured debt, and the fact that the primary return, a coupon of 9.75%, is not included within the table at all). It follows that the return on the equity investment is significantly higher.

The judge's conclusions on the pricing and risk of the New Money

143. The judge addressed the nature of the pricing and risk attaching to the New Money in a number of places in his judgment, and in the context of a variety of different arguments.

144. He heard evidence from Mr Sousa and from Mr Samuel Read ("**Mr Read**"), a partner at Mason Capital, a member of the AHG.

145. At §54, in a section of the judgment dealing with the relevant alternative, the judge found the financial position of the Group to be "precarious in the extreme. Not only are there stresses in the upstream (the supply chain to Petrofac), so too are there stresses in the downstream (the markets Petrofac serves)." At this point, the judge appears to have been commenting on the Group in its current, pre-restructuring, state, although his comments about the stresses in the market had broader application.

146. At §56, also dealing with the relevant alternative, the judge addressed the question whether – if the Plans failed – there would likely be an alternative plan in the form of "Plan B", put forward by Saipem and Samsung, which involved – among other things – a cash payment of US$25 million to them. In this context, the judge made a variety of points. These included a statement that, "This is a high risk restructuring, and the rewards to the providers of New Money are considerable. But I consider this to be reflective of risk, not a gouging of a company that is going bust".

147. The judge did not elaborate further on this statement, but it would seem that a key point for the judge in this section of his analysis, dealing with whether a "Plan B" was a viable alternative, was that some of the providers of New Money had no existing exposure to the Group, so there was nothing – beyond the return they expected to gain – to tie them to the Plans. In this respect the judge also referred to the evidence that further concessions that eroded the returns that the AHG had negotiated under the Plans would not be forthcoming. In evidence, Mr Read, on behalf of the AHG, firmly rejected the proposition that a tweaking of the Plans was possible. That was corroborated by Mr Sousa's evidence. He referred to a letter written by Nut Tree which said that they were not willing to consent to any changes to terms "that would transfer value from them or from their prospective value to other parties." Mr Sousa also said that he did not believe the Plan Companies would be able to obtain the new money required on the basis of the alternative restructuring put forward by Saipem and Samsung.

148. At §75, in considering an objection to the Work Fees, the judge noted that although the Work Fees appeared to be high, that was because the AHG had elected to take them in equity rather than cash. The point of the Plans, he said, was that the equity would increase in value if the Group was successful if the Plans was sanctioned. But, he said, "the Plan is not risk-free. It is perfectly possible for the Group to fail, and if it does so, the Work Fee will be rather less than it presently appears."

149. Finally, at §89, in considering the fair allocation of the benefits of the restructuring, the judge addressed directly the justification for the allocation of equity. His conclusions, at §89(i), in relation to those contributing New Money who were not also existing holders of debt are important, and we set them out in full (emphasis in the original):

> "…They have no prior involvement in the Petrofac Group, and the Group does not owe them anything. They have nothing to claim, and so nothing to lose. They choose to involve themselves by injecting US$226m of New Money: but only if the Plan is sanctioned, and as has been seen, I have accepted that the Plan sits at the very cusp of providing an acceptable return to these investors. I have accepted Mr Sousa's evidence that Plan B would not be accepted by these new investors. The notion that a new investor, choosing to inject US$226m, should thereby receive a "haircut" of 59% is absurd. But this is the substance of the point made by the Saipem and Samsung Opposing Creditors … Obviously these investors must receive a return and – given the risks – that return is going to be substantial. It is not the job of courts to re-write commercial agreements and to impose a price on markets save in the most exceptional of cases. Here, the furthest a court can go, is to say that the reward is disproportionate and so unfair. I decline to reach this conclusion in this instance:
>
> a) This is a significant cash injection (US$226m) into an organisation that would otherwise fail and go into Liquidation. I see nothing disproportionate in a return of 211%.
>
> b) I was impressed by the evidence of Mr Sousa. I am satisfied that this return is a competitive one. This is demonstrated by the fact that even a marginal shift from the Plan to Plan B will result in these investors walking away, and the Relevant Alternative of Liquidation obtaining.
>
> c) The secured creditors had the option of injecting New Money. Some took that option, some did not. If the returns on the injection of New Money were disproportionate in favour of the investor, one would expect greater take up and/or opposition to the Plan."

150. We shall return to this analysis in greater detail after reviewing the evidence. However, we would observe at once that in the body of this paragraph and in sub-paragraph (b), the judge appears to have elided two different questions. The first question was whether the AHG, or the new investors which they had enlisted to provide New Money under the Plans, would have been prepared to agree to a reduction in those agreed terms in order to accommodate an alternative "Plan B" put forward by Saipem and Samsung. That is not the same as the question of whether the terms which had been agreed for the provision of New Money were equivalent to the terms that could have been obtained in the market.

The evidence

151. In assessing whether the returns on the New Money are in excess of those that could be obtained in the market, it is critical to appreciate that the New Money is only being committed conditional upon the sanction of the Plans and completion of the restructuring, and will be invested in the restructured Group. As we will explore in

greater detail below, much of the evidence from the Plan Companies seeking to justify the cost of the New Money relied on the difficulties in obtaining funding from the market in the very different context of considering alternatives to the proposed Plans, i.e. obtaining funding for the insolvent Group. What matters, however, is what price could be obtained in the market for new debt and/or equity funding in the restructured Group, once it was freed of virtually all of its debt.

152. A reasonable starting point in considering the price at which New Money might be obtained in such circumstances is the value ascribed to the post-restructuring Group by an independent expert. As we have already noted, the valuation report prepared by Teneo ascribes an equity value to the restructured Group of approximately US$1.5 billion to US$1.85 billion.

153. As Mr Allison and Mr Bayfield KC stressed, there is no absolute correlation between the enterprise or equity valuation of the Group and the price at which investors in the market may be prepared to invest in debt or equity issued by the Group. Investors will have regard to other factors such as their own perception of the risks facing the Group's business and wider market conditions. It is, however, an obvious starting point, particularly where – as here – the valuation is presented to Plan Creditors as a justification for why they should approve the Plan, and the New Money Debt and New Money Equity is to be listed and hence represents immediately realisable value in the hands of the investors upon implementation of the Plan.

154. The Explanatory Statement (at page 191) presented the valuation as "an assessment of the enterprise value of the Group as at a valuation date of 9 January 2025, on the basis that the Restructuring is implemented and the Group's business is able to continue operating in accordance with the Business Plan". The Explanatory Statement then provided an analysis of the recoveries of Plan Creditors in liquidation "compared with the value of the Entitlements of Plan Creditors in the Restructuring (on the basis of the Going Concern Valuation)". This assumed, among other things, that the Tranche 1 Warrants (but not the Tranche 2 Warrants) become exercisable "which is consistent with the conclusions of the Going Concern Valuation".

155. The boards of the Plan Companies recommended to Plan Creditors (at page 129 of the Explanatory Statement) that they vote in favour of the Plan because the benefits to the Plan Companies will in turn benefit the Plan Creditors "not least as they are expected to be no worse off with respect to their recoveries" if the Plans were sanctioned.

156. The Explanatory Statement contained, as is usual, a detailed list of risk factors (at part 7). Nowhere in the Explanatory Statement is it suggested, however, that the risks of the business failing are such that, notwithstanding the Group is relieved of virtually all of its debt (totalling nearly US$4 billion), there is any real or significant risk that Plan Creditors will not do better under the Plans than under the relevant alternative. That, however, is so only if the equity value of the restructured Group is at, or at least not much less then, the likely low value ascribed to it in the valuation report.

157. As Mr Colclough, who presented this part of the case on behalf of Saipem and Samsung, submitted, if the New Money Equity and New Money Debt were as risky as the Plan Companies now contend, then the picture as presented to Plan Creditors in the Explanatory Statement was at best incomplete and at worst misleading.

158. Mr Allison relied on numerous passages in the Explanatory Statement, and in the evidence of Mr Sousa, which he said highlighted the risky nature of the Group's business.

159. He submitted that the business is a "contract business", without significant property (including intellectual property) assets. Mr Sousa's evidence was that it relies on contracts and its relationship with clients in its core geographies to succeed and survive. In Teneo's report on the relevant alternative, Thai Oil is given as an example of a contract going badly wrong, with liabilities that present an "existential threat" to the Group's viability as a going concern. The Explanatory Statement stated that should any of the Group's relatively small number of contracts prove less profitable than forecast, that could have a significant adverse impact on the Group's profitability.

160. Mr Allison also pointed to passages in the Explanatory Statement referring to specific geopolitical risks in the Middle East and North Africa region, which accounted for 26% of the Group's consolidated revenues for the year ended 31 December 2023. Some of the countries in that area have experienced prolonged periods of political, social and economic upheaval. If such disturbances were to occur or escalate in countries in which the Group operates, that may have a material adverse effect on the Group's business and financial position. These factors underscore the vulnerabilities inherent in operating within volatile geopolitical landscapes.

161. The difficulty with this submission is that all of these risk factors were taken into account in the Teneo valuation report. It is correct, as Mr Allison submitted, that Teneo identified a number of assumptions which underpinned their discounted cashflow analysis, and that these included significant growth in the business, and that management anticipated the Group E&C segment would generate more than 80% of its revenue from unsecured contracts by 2027 (albeit that one-third of this was already committed under a framework agreement with one client, TenneT). Mr Allison also pointed to the "Limiting Conditions" set out at page 28 of the valuation report, in which Teneo stated their assumptions that management's forecasts are reasonable and achievable subject to the successful implementation of the restructuring (although they also noted that if the Group tracked to its financial forecast in the business plan, its future cash flows would be further de-risked supporting a higher valuation).

162. However, on the following page 29 of the valuation report, Teneo stated:

> "throughout our discussions and our review of the Business Plan, we have identified and documented the key risks associated with the forecasts, which are then reflected in our assessment of the discount rate estimates and sensitivity analysis as part of the income approach (DCF analysis) and in our selection of the multiple range as part of the market approach corroboration."

163. At page 30 of the report, the following also appeared:

> "WACC: Our concluded WACC range of 21.0% to 24.0% reflects the execution risk in the Business Plan that is predicated on the Group's ability to secure guarantee lines. It also captures the potential risks of operating as a high-growth business with a significant proportion of unsecured contracts over the forecast

> period. It further captures the customer concentration risk with ADNOC and TenneT representing c.70% of the total E&C revenue over the forecast period."

164. In short, as would be expected of competent valuers, the key risks associated with the Group's business, and its ability to meet its forecasts and business plan, were taken into account by Teneo in arriving at its conclusions on valuation. Notwithstanding those risks, Teneo concluded that the Group would have a post-restructuring equity value of approximately US$1.5 billion to US$1.85 billion.

165. Although, as we have noted, there is no absolute correlation between an independent expert's conclusion as to the equity value of the Group and the price at which investors in the market might be prepared to invest in return for debt or equity, the fact that Teneo has arrived at such a large valuation in this case is, at the very least, something which calls for an explanation, rooted in credible evidence, as to why the Plans should give what appears to be an immediate three-fold or even higher return on the New Money.

166. The most obvious way of demonstrating this would be evidence from a market expert as to the range of prices that debt or equity might have been obtained by the restructured Group. The Plan Companies, however, adduced no such evidence.

167. Another way would be evidence of market testing. The Plan Companies' evidence of the steps taken to raise finance is found mainly in Mr Sousa's witness statements, supplemented in part by Mr Read's evidence. Mr Allison and Mr Bayfield between them took us to the parts of that evidence which they contended addressed this issue.

168. Although Mr Sousa refers to the extensive negotiations with the New Money providers, to his belief that they pushed these providers "as far as we could", to "the challenges we have faced in getting funding" (see for example §10.12 of his first witness statement), and (in cross-examination) to his belief that the new debt and equity had some considerable risk to them, he did not give any evidence – at least any sufficiently clear evidence – that the Group or its advisors carried out any market testing to ascertain at what cost the Group was likely to be able to raise funds in the market, once its balance sheet was cleansed of all debt pursuant to the restructuring.

169. In his first witness statement (at §2.38) Mr Sousa describes the efforts made in the twelve months following December 2023 to explore "potential balance sheet and operational solutions … including new financing". While these were not limited to a potential sale of the Group or parts of it, but included provision of new money (see §6.1 of Mr Sousa's fourth statement), it is clear that these were *not* addressing the question of investing in the post-restructured Group. That is evident, for example, from §2.31.3 where – in explaining why such offers of equity investment that were made could not be taken forward – Mr Sousa said "each expression of interest that we received was conditional on a comprehensive restructuring to deleverage the balance sheet and remove impediments to equity value, such as by effecting a compromise of the Shareholder Claims".

170. Mr Sousa also exhibited to his fourth statement Powerpoint slides summarising the work of an investment bank (Lazard) engaged by the Group. Nothing in these, however, demonstrates any attempt to ascertain at what price investment in the restructured Group might be obtained. Lazard's engagement was stated to be in relation

to a potential sale of all or substantially of PL and potential equity capital raising options.

171. At §2.33 of his first statement, Mr Sousa outlined the difficulties encountered by the Group based on feedback from potential investors and advisors. These included the number of historical liabilities, which meant that parties that expressed any interest in the Group were only prepared to consider it on the basis that there was considerable deleveraging. At §10.15.2, in a part of his statement explaining the challenges in attracting investment, Mr Sousa referred to an attempt at a further capital raise being thwarted for the reasons he had referred to in §2.33. Mr Sousa returned to this in his fourth statement where, at §6.4, he referred to the extensive outreach process undertaken by three investment banks, including Lazard, seeking "every form of investment". Again, however, one of the reasons given for such offers as were received in this process being unacceptable was that they were conditional on the completion of the restructuring. It is apparent from this that the Group were *not* seeking to test the market for investing in the post-restructured Group. Similarly, at §2.43, Mr Sousa refers to the lack of interest from its consortium of 21 banks, because the Group's balance sheet was heavily leveraged.

172. In other parts of his evidence, Mr Sousa emphasised that there had been hard-fought negotiations with the AHG, and with Nut Tree, over the terms on which the New Money would be invested. No doubt the members of the AHG were focused on obtaining the best value they could from the restructuring. It is also clear from Mr Read's evidence (see §50 of his witness statement) that he viewed the restructuring as founded on the principle that the Senior Secured Funded Creditors, who alone stood to obtain any material recovery in the relevant alternative, were converting their claims to equity and being incentivised to participate in the New Money by being offered attractive potential recoveries. Mr Read said,

> "From my perspective, it would make little commercial sense to allocate more value to unsecured creditors like Saipem and Samsung, who would receive no or *de minimis* recoveries under the Relevant Alternative and who are contributing no new financing or support of the Group as part of the Restructuring."

That evidence has clear echoes of the mistaken approach to out of the money creditors that was rejected in *Thames Water* (above). However, it does not go far, if at all, in demonstrating what terms could be obtained for new financing in the market by the restructured Group, with a clean balance sheet shorn of all liabilities.

173. The same observation can be made in respect of the evidence from Mr Sousa and Mr Read that Nut Tree, when asked for its views on the alternative plans put forward by Saipem and Samsung after the Plans had been proposed, insisted that it would not countenance any modification of the deal it had negotiated in December 2024. Nut Tree was well placed to take a hard line in negotiations, since – by reason of the low price at which it had acquired its investment in the Senior Secured Funded Debt – it stood to make at least some profit even if the Plans failed. This provides no insight into the terms on which new money might have been obtained in the market.

174. The Plan Companies also relied on the fact that not all Senior Secured Funded Creditors were willing to participate (as confirmed by the evidence of Mr Read, in particular).

They ask, rhetorically, if the return on the New Money was so disproportionately high, why did they not all participate? That is a legitimate point. It only goes so far, however, when set against the fact that nothing is known as to the reasons why the relevant secured creditors chose not to participate.

175. Mr Read (at §36 of his statement) gave his opinion why he considered "some investors may not be prepared to participate in the New Money", emphasising the risks to the Group going forward, including the fact that the operational re-organisation which is an integral aspect of the restructuring would not be completed for some time. This speculation does not fill the evidential gap as to why those who did not take up the opportunity did not do so. We have also already observed that these risks were factored into the equity valuation by Teneo.

176. Mr Sousa did provide some evidence of the reason why two of the five members of the AHG did not participate in the Backstop Agreement. At §10.27.2 of his first statement he said this was because of the "Group's difficulty in attracting new capital and building consensus between its many and varied stakeholders". While this may be relevant to the additional risk which is assumed by someone backstopping the equity raise at an early stage in the process, it is difficult to see why either of these factors would have an impact on the price at which investment could be obtained by the restructured Group.

Discussion

177. With that evidence in mind, we turn to the judge's reasons for dismissing the objections based on the price of the New Money. There are two key passages in his judgment.

178. The first is at §89(i), where the judge said that "obviously" the providers of New Money who were not existing creditors of the Group "must receive a return and - given the risks - that return is going to be substantial". He then expanded upon that at §89(i)(a) (quoted at §150 above), where he said that such creditors were making a cash injection of US$226 million "into an organisation that would otherwise fail and go into liquidation. I see nothing disproportionate in a return of 211%". This, in our judgment, addresses the wrong question, focussing as it does on the pre-restructuring risks faced by the Group. As we have noted at §152 above, the correct question is the cost at which new money could be raised by the Group on day one *after* the restructuring and *conditional upon* the sanction of the Plans which would remove the existing liabilities from the Plan Companies' balance sheets and hence avoid liquidation.

179. The second is at §56(i), where the judge said that the rewards for the New Money were "considerable", but he considered this to be reflective of risk. That, too, appears to make the same error. The judge began the paragraph with the comment that "this is a high-risk restructuring". We do not think the judge intended by this to refer to the riskiness of the business, and thus investments by way of the New Money, post-restructuring. Neither that, nor his assessment at §54 – that the financial position of the Petrofac Group was "precarious in the extreme" – would make sense in relation to the post-restructured Group: the latter, in particular, is not a description which could be applied to the Group once cleansed of all its liabilities.

180. For the reasons we have set out above, we consider that Teneo's equity valuation of the restructured Group is an important factor in considering whether the price of the New Money was excessive. It begged an obvious question, one which required cogent

evidence – either by way of expert evidence or by evidence of the market having been tested – to explain why allocating the lion's share (approximately US$1 billion on the low case) of the value preserved or realised by the restructuring (approximately US$1.25 billion, also on the low case) to the providers of New Money was a fair reflection of the cost at which funding could be obtained in the market.

181. This is not, however, an analysis which the judge undertook. He made no reference to Teneo's equity valuation of the restructured Group. Its relevance was not factored into his consideration. Specifically, he did not consider whether the question it begged was answered by any evidence as to the price at which new money might have been raised by the restructured Group in the market.

182. Mr Allison pointed to the fact that Saipem and Samsung did not themselves provide any evidence to challenge the Plan Companies' evidence that they believed the New Money had been procured on the best terms available. He referred to *Thames Water* (at §208) where this Court took into account, against the opposing creditors, the absence of any evidence as to what terms super senior funding could have been obtained in the market "without which the assertion that the costs associated with the [funding] are excessive compared with what could be obtained remains speculation."

183. As we have said, the burden of establishing that a plan is fair, so as to justify the exercise of the Court's discretion to sanction a plan notwithstanding the presence of a dissenting class or classes, rests squarely on the plan company. Whether it has discharged that burden is a question of fact to be determined on the specific facts of the case. Where, as here, the Plan Companies' own evidence in the form of the valuation of the equity in the restructured Group begs clear questions, then there is a burden on the Plan Companies to provide evidence to meet those questions.

184. In addition to these points, it is also revealing to stand back, as Mr Thornton and Mr Colclough urged us to do, and to look at the wider picture. The Plans were negotiated between the AHG and the Plan Companies in 2024. The terms by which over two-thirds of the new equity in the Group was to be provided to the providers of New Money, including Nut Tree, and to members of the AHG by way of Work Fees, were agreed in December 2024 before Teneo's valuation report was available. The basis for that agreement was described in the passage at §6.3 of the Explanatory Statement (and reflected in Mr Sousa's evidence), addressing how the equity allocation for the Work Fees was initially arrived at using a notional post-restructuring equity valuation of US$351 million:

> "As the Going Concern Valuation was still in the process of being prepared at the date of the Practice Statement Letter, the US$351 million post-Restructuring equity value was not intended to represent the post-Restructuring equity valuation of the Group. **Rather, it was used as a common reference point, reflecting the price at which the various new investors were willing to acquire new equity and a reference to which new equity allocations could be calculated.**" (emphasis added)

185. The clear impression given by this passage is that the allocations of new equity to the providers of New Money were set in stone by late December 2024, before Teneo's valuation report was prepared, and there was no evidence that they were revisited

thereafter. Instead, the Plans were persisted in, even though, on the basis of Teneo's subsequent equity valuation report, the equity rights to be conferred on the AHG for Work Fees and the providers of New Money turned out to be significantly more valuable than they would have appeared in the context of the notional equity value used to calculate their allocations of equity in December 2024.

186. This is significant. Keeping the same allocation of equity entitlements as between existing creditors, even when it later transpires that the valuation of the restructured company is substantially higher, might not be of such concern because it could be said that what matters is the entitlement of such creditors *relative to each other*. That is not so, however, where the increase in the valuation results in an increase in the value of the rights granted to the providers of new money in absolute terms. That is because these fall to be benchmarked against the market, and not measured against the entitlements of other stakeholders. If – as the evidence here suggests – the increase is such that the price becomes disproportionate to the price at which equivalent finance could have been obtained in the market, then for the reasons that we have explained, it becomes a benefit, not a cost, of the restructuring, the allocation of which needs to be specifically justified. These matters cried out for an explanation in the instant case, but none was given, the Plan Companies called no expert evidence as to market terms, and their evidence of market testing was wholly inadequate for the reasons given above.

187. In these circumstances, we consider that the judge's key statements that the New Money was provided on "competitive" terms that were not disproportionate cannot stand. Given the fact that the issue of equity in return for New Money represented the allocation of over two-thirds of the value preserved or generated by the restructuring, this was plainly a material error that vitiated the judge's exercise of discretion to sanction the Plans against the dissent of Saipem and Samsung. The judge also did not then go on to consider whether such allocation of the benefits of the restructuring was fair or justified on the correct basis.

188. It is not an answer to these objections to say that Saipem and Samsung were (belatedly) offered an opportunity, in relation to Samsung's claim against PIUL, to participate in the New Money on the same terms. This might have been a commercial solution to prevent objections being pursued by Saipem and Samsung, but it does not answer the underlying problems we have identified. Moreover, as Mr Allison explained in argument, this offer was made in relation to the PIUL Plan, where Samsung has a claim of around US$90 million but was not made in respect of the much larger claims compromised under the PL Plan.

189. It is also not clear to us that the unfairness inherent in the fact that providers of New Money are being given an excessive return is cured by offering the same opportunity to all creditors, but only at a further cost to them. There may be many and varied reasons why creditors are not prepared to make the further investment required in order to participate in that opportunity (irrespective of whether they are *unable* to do so, which Mr Allison accepted would be a relevant consideration). The fact that they do not wish to do so may well not be a reason for depriving them of a share in the benefits of the restructuring to which they would otherwise be entitled. We did not hear full argument on this point, and we do not need to resolve it in view of our earlier conclusions.

190. Having determined to set aside the judge's exercise of discretion, the question arises whether it is appropriate for us to re-exercise the discretion. We do not, however, consider that it is appropriate to do so on the basis of the evidence before us.

191. As we have observed (see above at §131), the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders. Our conclusion that the Plan Companies have failed to justify the returns granted in respect of the New Money as a cost of the restructuring means that the formulation of the Plans – and such negotiation as there may have been between the different classes of creditors – has taken place on a false premise. It has failed to address at all the appropriate allocation of such part of the return on the New Money that constitutes a benefit preserved or generated by the restructuring. Moreover, the absence of evidence as to the price at which equivalent funding for the restructured Group could have been obtained in the market means that we could only speculate as to what part of the return on the New Money should be regarded as a benefit of the restructuring, the fair allocation of which falls to be considered.

Other objections to the sanction of the Plans

192. Mr Thornton raised further objections to the sanction of the Plans under Ground 2. These related mainly to alleged unfairness as between the treatment of Saipem and Samsung on the one hand and other creditors who sit equally with, or below, them in the capital structure. He referred specifically to HSBC, to HMRC and to liabilities in respect of a different project carried out by the Group with a Lithuanian company. He also referred to the Plan Companies' failure to engage with the offers made by Saipem and Samsung.

193. Our conclusion on the principal objection raised by Saipem and Samsung to the Plans under Ground 2 means that it is unnecessary to consider these other objections. We need say no more than that, had these objections stood alone, we would not have been persuaded to interfere with the judge's exercise of discretion to sanction the Plans.

Conclusion

194. For the reasons set out above, we will allow the appeal on Ground 2 and set aside the judge's order sanctioning the Plans.