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Case No: CR-2025-001323

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 09/09/2025

Before :

MR JUSTICE HILDYARD

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Between :

IN THE MATTER OF WALDORF PRODUCTION UK PLC
- and -
IN THE MATTER OF THE COMPANIES ACT 2006

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- -

Mr. Daniel Bayfield KC and Ms. Charlotte Cooke (instructed by White and Case LLP) for the Plan Company
Mr. Matthew Abraham and Ms. Annabelle Wang (instructed by Milbank LLP) for the SteerCo
Mr. Jon Colclough (instructed by Mayer Brown International LLP) for the Capricorn Companies
Mr. Stefan Ramel (instructed by HMRC) for His Majesty's Revenue and Customs

Hearing date: Friday 29 August 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE HILDYARD

Mr Justice Hildyard:

Scope of this judgment

1. The principal question which I address in this judgment is whether to issue a certificate pursuant to section 12 of the Administration of Justice Act 1969 ("the AJA") ("a leapfrog certificate") which would permit the Plan Company[1] to make an application for permission to appeal to the UK Supreme Court in respect of my decision to decline to sanction the Plan. There is an ancillary question whether the Plan Company should, in the alternative, be granted permission to appeal to the Court of Appeal. A third, and more minor issue which I must determine relates to a dispute as to the costs incurred since my judgment (which I formally handed down on 19 August 2025), and in particular the costs relating to the Plan Company's application for a leapfrog certificate. This judgment follows a remote hearing (on Teams) on 29 August 2025.

Summary of the basis on which the Plan Company applies for a leapfrog certificate

2. For the reasons stated at some length in my judgment on the Plan Company's restructuring plan ("my Main Judgment" which can be found at [2025] EWHC 2181 (Ch)) I concluded, in summary, that in the particular circumstances there described, the Plan Company had not discharged the burden on it[2] of showing that the Plan is fair and such that it would be appropriate, just and equitable to exercise the Court's discretion to sanction it: see especially paragraph [195].

3. In reaching that conclusion, I referred to what I called a trilogy of recent cases in the Court of Appeal, namely, *In re AGPS Bondco plc* [2024] EWCA Civ 24 (*"AGPS Bondco"*) [2024] Bus LR 745, *Re Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475 (*"Thames Water"*), and *Re Petrofac Limited* [2025] EWCA Civ 821 (*"Petrofac"*). It seemed and seems to me plain that those cases mark an incremental departure from the approach derived from *Re Virgin Active* [2021] EWHC 1246 (Ch) (*"Virgin Active"*) in which *de minimis* payments to 'out of the money' creditors were justified and became the norm on the ground that, in the context of cross-class cramdown, the litmus test of fairness so far as such creditors were concerned was a comparison with what they would otherwise receive in the relevant alternative (and see paragraph [167] of my Main Judgment). By reference especially to *Petrofac* (since, of the trilogy, that case was most analogous to this case) I stated (at paragraph [173] of my Main Judgment) that:

> *"…it is clear from Re Petrofac that what falls to be assessed in determining the fairness of the Plan at the discretion stage is whether what the Plan would achieve is a fair and reasonable allocation of the benefits of the Restructuring having regard to the amounts contributed by each creditor class, including the class proposed to be crammed down."*

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1 Unless otherwise stated, I adopt the same abbreviations as in my Main Judgment.

2 It is common ground between the parties that the burden is always on the relevant plan company to persuade the Court that the plan proposed should be sanctioned.

4. The Plan Company's position is that the approach in that trilogy of Court of Appeal cases, and especially in *Thames Water* and *Petrofac*, is wrong and that my approach in the exercise of my discretion in this case, which was informed by those cases, was likewise wrong also. In its skeleton argument for the hearing of its application for a leapfrog certificate, the Plan Company elaborated its position as follows:

> *"(1) The correct approach is that out of the money creditors can fairly have their rights released through a restructuring plan for nominal consideration where they would be no worse off under the restructuring plan than in the relevant alternative and (in a case where the relevant alternative is an administration or a liquidation) where the restructuring plan involves no unjustified departure from the insolvency waterfall. In the present case: (i) the Unsecured Plan Creditors were, save for the prescribed part, out of the money in the Relevant Alternative; (ii) the Bondholders (being the Plan Company's secured creditors) would, in no circumstances, recover more than par in the Relevant Alternative; and (iii) the upside sharing payment arrangements prescribed under the Plan were designed to ensure that the shareholders would make no recovery unless and until the Unsecured Plan Creditors had themselves recovered in full.*
>
> *(2) A discretionary test to determine what is perceived to be a fair allocation of the benefits preserved or generated by a restructuring plan is wholly uncertain and unworkable. Further, the idea that the Court will be able to assess fairness with reference to failed negotiations between a plan company and certain of its plan creditors is misconceived and lends itself to gaming."*

5. The basis of its application for a leapfrog certificate is the Plan Company's contention that its argument:

> *"is not capable of being made at Court of Appeal level because the recent judgments of the Court of Appeal in Thames Water / Petrofac render that argument bound to fail. Any appeal must therefore be to the Supreme Court.*
>
> *Moreover, the case is wholly suitable for consideration by the Supreme Court as it raises a point of law of general public importance, namely, the appropriate test for assessing fairness and the exercise of the Court's discretion in the context of a cross-class cramdown."*

6. The Plan Company has also drawn to my attention the fact that an application for permission to appeal to the Supreme Court has been made by the plan company concerned in *Petrofac*, and has expressed the hope that the Supreme Court would consider the two applications together.

Criteria for the grant of a leapfrog certificate

7. Pursuant to section 12(1) of the AJA, a leapfrog certificate may be granted where the judge is satisfied:

> "*(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in subsection (3A) ("the alternative conditions") are satisfied in relation to those proceedings, and*
>
> *(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal…*"

8. The "*relevant conditions*" are specified in section 12(3) of the AJA, which provides that:

> "*…for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that point of law either –*
>
> *(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or*
>
> *(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous decisions.*"[3]

9. Section 12 is qualified by section 15 of the AJA. Relevantly, section 15(3) provides as follows:

> *"Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave."*

10. In *A v B* [2022] EWHC 2786 (Comm), HHJ Pelling KC summarised the approach to be taken on an application for a leapfrog certificate as follows (at [15]):

> "*As will be apparent, therefore, the test which has to be satisfied is, first of all, a requirement that what are described as the relevant conditions must be satisfied, and secondly, that a sufficient case for an appeal to the Supreme Court must be made out. Once those conditions are satisfied then the court has a discretion, but not an obligation, to grant such a certificate as is apparent by the use of the word "may" in the concluding part of the section.*"

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[3] The Plan Company does not rely on the "*alternative conditions*" being met, so these are not set out here.

11. As to the requirement for a sufficient case for an appeal to the Supreme Court, in *A v B* it was also explained (at [18]) that it must be shown that:

> "*there is a realistically arguable prospect of the Supreme Court taking the view that those decisions should be qualified or overturned in relation to the issues that arise*".

The parties' respective positions

12. The Plan Company submits that the relevant condition set out in section 12(3)(b) of the AJA is satisfied, in that a point of law of general public importance is involved in this decision and this point of law is one in respect of which the judge is bound by decisions of the Court of Appeal in previous proceedings, and was fully considered in the judgments given by the Court of Appeal in those previous decisions. The Plan Company urges me to conclude that there is a sufficient case to justify an application for permission to appeal to the Supreme Court and that it would be appropriate for the Court to exercise its discretion to grant a leapfrog certificate to enable the Plan Company to do so.

13. In more detail, Mr Bayfield KC (who, with Ms Charlotte Cooke, appeared for the Plan Company) sought to persuade me that the approach in *Thames Water* and in *Petrofac* was wrong for the following main reasons:

(1) First, and although the case was not mentioned in his skeleton argument, he relied in his oral argument on *In re Tea Corporation Limited* [1904] 1 Ch 12 (in the Court of Appeal, upholding the decision of Buckley J. at first instance) and a line of cases following it for the proposition that persons having no real financial interest in the assets of the company (whether because of its financial distress or, as in *re Tea*, because of the transfer of all a company's assets to a new company under a scheme of arrangement providing for such transfer made between the company and its preference shareholders, leaving the ordinary shareholders behind interested only in what had become a shell) need not be paid more than a nominal amount or small 'douceur'.

(2) Secondly, Mr Bayfield submitted that (quoting from his skeleton argument):

> *"the Thames Water / Petrofac approach leads to absurd results. The Plan does not involve the Bondholders appropriating to themselves an inequitable share of the benefits of the Restructuring (in fact, they are estimated to suffer material losses and their returns in the Relevant Alternative are far less in percentage terms than the returns being offered to the Unsecured Plan Creditors, in both the low and high cases); rather, the Plan gives the Unsecured Plan Creditors an upfront return more than 33 times greater than their return in the Relevant Alternative prior to any additional value that they might receive under the upside sharing payments arrangements. That is now deemed to be unfair, without there being a need to justify why a more than 5% return (plus the upside sharing arrangements) to the Unsecured Plan Creditors would constitute a fair allocation of the benefits of the Restructuring (noting, for example, that a 15% return would be approximately 100 times the return the Unsecured Plan Creditors would*

> *recover in the Relevant Alternative, in even further impairment to the Bondholders);"*

(3) Thirdly, he suggested that (again quoting from his skeleton argument) that:

> *"the Thames Water / Petrofac approach entails obvious scope for gaming the system. For example, in the present case it would seem that the Plan Company would have been in a better position in terms of obtaining sanction of the Plan if it had initially, cynically, made an offer of, say, 1%, before moving to 5%, because in that scenario the Plan Company would demonstrate to the Court that it had negotiated upwards to a higher payment;"*

(4) Fourthly, he submitted (quoting his skeleton argument) that:

> *"the Thames Water / Petrofac approach is unworkable in that it lacks sufficient certainty to enable companies to present a restructuring plan with any confidence as to whether it will be sanctioned, in particular, given the emphasis now placed on negotiations to establish fairness, which cannot have been intended when the jurisdiction was introduced. In contrast, the Virgin Active approach, where the focus is on the relevant alternative, does provide a framework whereby there is sufficient certainty."*

14. In addition, but stressing that it was pursuing this very much as an alternative to its application pursuant to the AJA, the Plan Company maintained that, contrary to my overall conclusion, it had discharged the burden of showing that the Plan is fair, even applying the *Petrofac* approach. Initially, I understood that the Plan Company sought to pursue this alternative only if I refused to grant a leapfrog certificate. But in its skeleton argument it made clear that it also seeks permission to appeal to the Court of Appeal if, though the certificate is granted, the Supreme Court refuses permission to appeal.

15. As to the grounds of the alternative application, Mr Bayfield KC submitted on the Plan Company's behalf that (contrary to my assessment) both the oral evidence and fact that the proposed payment to the Unsecured Plan Creditors of 5% of their Plan Claims was not a nominal or minimal amount were consistent only with a sufficient attempt to consider and balance the interests of the different creditors and achieve a fair allocation of the anticipated benefits of the Restructuring.

16. He submitted also that:

> *"there was insufficient weight given in the [Main] Judgment to negotiations after the promulgation of the Plan which ought to have provided sufficient assistance to the Court to determine that the Unsecured Plan Creditors were unreasonably holding out for more than an equitable share of the benefits of the Restructuring."*

17. The SteerCo (which was represented by Mr Mathew Abraham, with Ms Annabelle Wang) supports the Plan Company, as has been its position throughout.

18. The Capricorn Companies (represented by Mr Jon Colclough) and HMRC (represented by Mr Stefan Ramel) both oppose the Plan Company's application.

19. The Capricorn Companies' position is, in summary, that:

    (1) The issue is not a question of statutory construction and the Plan Company cannot rely on section 12(3)(a). The Plan Company cannot rely on section 12(3)(b) either, because it cannot show that I was bound by a decision of the Court of Appeal in concluding that I should not sanction the Plan. The Capricorn Companies submits in that regard that

        (a) *"The decision which bound the court cannot have been Re Petrofac" since the Plan "would not have been sanctioned even before Re Petrofac was handed down"*; and

        (b) *"The decision also cannot be Re Thames Water because the Plan Company did not argue (and, so far, has never argued) that the decision in Re Thames Water was wrong and/or compelled the Court to refuse to sanction the Plan. Indeed no one (including the opposing creditors) has ever argued that the decision in Re Thames Water meant that the court was <u>bound</u> to refuse to sanction the Plan."*

    (2) In any event, there is no point of general public importance, because:

        "The question of precisely how much of the benefits should be shared with the 'out of the money' creditors is likely to affect only a small number of restructuring plans under Part 26A…"

    (3) Furthermore, the point which the Plan Company seeks to argue in the Supreme Court is:

        "patently a bad one…The whole argument was/is built on Snowden J's (as he then was) analysis in Re Virgin Active - an argument now described by the Court of Appeal in Re Petrofac (including Snowden LJ) as fallacious. This is not a case in which there is a groundswell of academic and practitioner support – far from it."

    (4) Lastly, the Court should not exercise its discretion to grant a leapfrog certificate, because (a) given the developments since the Main Judgment was handed down, the appeal would be academic: after the formal hand down of the Main Judgment the Plan Company has found more money to support a revised offer to the Unsecured Plan Creditors of 7.5% (in place of the existing 5% offer), and since that revised offer must be taken now to be the relevant alternative the Unsecured Plan Creditors would be "worse off" under the Plan than under the revised offer; and (b) there is no need or warrant for a leapfrog appeal where the same arguments are to be advanced in the *Petrofac* appeal and neither the Supreme Court nor the public interest generally will be well served by *"a largely duplicative application for permission from a different plan company."*

20. HMRC's position is, in summary, that:

    (1) I had determined the matter, not on the basis of a point of law as to the applicability of Part 26A, nor as to the satisfaction of its conditions, but at the 'fairness stage' as a matter of discretion. Mr Ramel, on behalf of HMRC, submitted in his skeleton argument that the *"very fact that what is involved is the exercise of a discretion is not fertile ground for finding a point of law of general public importance; there are very few absolutes when it comes to the exercise of a discretion."*

    (2) Given that the cases in the Court of Appeal trilogy are:

    > *"ultimately decisions on "separate (and different) proposed restructuring plans which analyse how the discretion whether to exercise a cross-class cram down power should be exercised in each of those individual cases, it is difficult to see how it can be argued that a High Court judge hearing another restructuring plan case is "bound" by those decisions, which are highly fact-sensitive."*

    (3) Further, in order to obtain a certificate, Mr Ramel submitted that:

    > *"the Plan Company must establish that s. 15(3) of the AJA[4] is met (proper case for granting leave to appeal to the Court of Appeal). That would require the Plan Company to satisfy r. 52.6(1) of the CPR (appeal having a real prospect of success), which in turn would require the Plan Company to establish that the decision in this case was wrong within the meaning of r. 52.21(3)(a) of the CPR. There is presently no material before the court to establish that any appeal would have a real prospect of success. To the contrary, the judgment contains a lengthy, careful and complete analysis of the claim, the parties' rival submissions, the law, and its application to this case."*

21. Neither the Capricorn Companies nor HMRC had envisaged or addressed in their respective skeleton arguments the Plan Company's alternative application for permission to appeal to the Court of Appeal; but in oral argument both objected on the basis that there was no basis for an appeal against my exercise of discretion, nor had I erred in any appealable way.

My decision whether to grant a section 12 certificate

22. The first matter to determine is whether the applicants have identified *"a point of law of general public importance involved in the decision"*.

23. The Plan Company has identified the point of law in issue as being what should be the Court's approach in assessing fairness in the context of a cross-class cramdown of 'out of the money' creditors.

[4] See paragraph [9] above.

24. So described, the point does not resonate as a point of law so much as a call to identify what should be taken to be the relevant criteria in determining whether a plan is fair and in exercising the Court's discretion whether to approve it.

25. However, it seems to me that a point of law identifies the purpose and directs the purpose of that enquiry. The issue, which is one of law, is whether fairness to 'out of the money' creditors is to be assessed simply by reference to what those creditors would be likely to receive in the relevant alternative if a plan fails (as suggested by *Virgin Active*), or by reference to what those creditors, properly informed, would fairly and reasonably expect to be paid to give up their claims so as to enable the expected benefits of the restructuring if the plan is sanctioned and accomplished.

26. In disagreement with Mr Colclough's position on behalf of the Capricorn Companies, it seems to me also that that is a point of law which is of general public importance. The restructuring regime introduced by Part 26A is of considerable importance, both domestically and as regards companies outside the jurisdiction which choose to use it in response to their financial difficulties in preference to their own domestic procedures. This is demonstrated by the frequency of recourse to Part 26A by domestic and foreign entities alike, and by the concentrated and rapid development of cases to guide its exercise.

27. Further, I do not accept Mr Ramel's argument on behalf of HMRC to the effect that since the point of law relates to the exercise of discretion, section 12(3) cannot apply. The question is whether in exercising my judicial discretion and in assessing fairness I have adopted the correct legal test.

28. In *A v B*, HHJ Pelling KC summarised the approach to be taken on an application for a leapfrog certificate as follows (at [15]):

> "*As will be apparent, therefore, the test which has to be satisfied is, first of all, a requirement that what are described as the relevant conditions must be satisfied, and secondly, that a sufficient case for an appeal to the Supreme Court must be made out. Once those conditions are satisfied then the court has a discretion, but not an obligation, to grant such a certificate as is apparent by the use of the word "may" in the concluding part of the section.*"

29. As to the *"relevant conditions"* (which are set out in paragraph [8] above) it is not suggested that my decision in my Main Judgment relates wholly or mainly to the construction of an enactment or of a statutory instrument: section 12(3)(a) is not engaged. The Plan Company has expressly confirmed that it does not seek to rely on the *"alternative conditions"* which are set out in section 12(3A)[5].

30. In relation to section 12(3)(b) of the AJA, which is the section on which the Plan Company relies in this case, the approach of HHJ Pelling KC (in paragraph [18] of *A v B*) was as follows:

[5] It is thus not necessary to set out these *"alternative conditions"* or consider them further.

> *"…it is only if it can be shown first that the Court of Appeal would be bound to dismiss an otherwise arguable appeal, because the Court of Appeal would be bound to reach the same conclusions as I have reached by reference to Supreme Court authority and/or Court of Appeal authority binding on the Court of Appeal, and secondly that there is a realistically arguable prospect of the Supreme Court taking the view that those decisions should be qualified or overturned in relation to the issues that arise."*

31. Adopting that approach but adapting it to the present case, the first question is whether the Court of Appeal would be bound by its judgments in *Thames Water* and *Petrofac* to dismiss any appeal from my decision in this case. That requires an assessment of whether there are arguable grounds for distinguishing this case from those authorities and/or whether there are arguable grounds justifying an appeal on which the Court of Appeal might reverse my decision notwithstanding those authorities.

32. If the Court of Appeal would be so bound, the second question is whether there is a realistically arguable prospect of the Supreme Court concluding that the legal conclusion binding the Court of Appeal should be overturned or qualified (for example, by distinguishing between different types of restructuring plan) so as to affect the ultimate resolution of the case.

33. As to the first question (whether the Court of Appeal would be bound by its previous decisions to dismiss any appeal) it is necessary to consider, in particular, the basis of the Plan Company's application (albeit in the alternative) for permission to appeal to the Court of Appeal either if the leapfrog certificate is refused or if the Supreme Court does not grant permission.

34. This seems to me to raise a conundrum. The premise of such an application must, as it seems to me, be that it is arguable that the Court of Appeal could reverse my decision notwithstanding the application of what I have called the trilogy of Court of Appeal cases. The corollary of that would be that the Court of Appeal, though constrained, would not be bound to dismiss an appeal. If arguably the case can be distinguished from the Court of Appeal decisions which bind me that would be a reason for not granting a certificate, but to permit instead an appeal to the Court of Appeal. Similarly, if it is arguable that even if those decisions apply, nevertheless there are arguable grounds for an appeal on the basis that I was wrong to decide that the Plan Company had not discharged the burden of showing the Plan is fair because I overlooked or had no or no sufficient regard to facts arguably demonstrating the contrary, that too would militate against granting a leapfrog certificate. Error at first instance which can be corrected on appeal to the Court of Appeal in the usual way is not a ground for, but rather a usually decisive reason against, the grant of such a certificate.

35. I put this issue, and whether his alternative application effectively precluded the application of section 12(3)(b), to Mr Bayfield in the course of his oral opening argument. His answer was to the effect that section 12(3)(b) would still be applicable because the principal point he would wish to run as to the proper approach to the exercise of the cross-class cram down power can only now be determined by the Supreme Court, so that in the Court of Appeal he would be arguing the case *"with at least one arm tied behind our backs"*.

36. I also asked Mr Bayfield whether, as he had at the substantive Sanction Hearing before me, he would seek to distinguish *Thames Water* and *Petrofac* as being applicable to restructuring plans for the profitable continuation of the business into the future for the benefit of its stakeholders, and not to a restructuring plan of the type contemplated in this case which contemplates a sale of the business (and see paragraphs [140] to [146] of my Main Judgment). His response initially seemed to indicate that he did wish to leave open the argument that the trilogy of cases could and should be distinguished. However, ultimately, he appeared to me, at least for the purposes of his primary application, to confine the basis of the alternative application for permission to appeal to the Court of Appeal to the argument supported by the factual points advanced and adumbrated in his skeleton argument that, contrary to my conclusion, the Plan Company had discharged the burden of showing that the Plan is fair.

37. By my questions I was seeking to clarify whether, in terms of the specific provisions of section 12(3)(b), the Plan Company's proposed alternative argument undermined its principal argument that I was *"bound by a decision of the Court of Appeal…"* If the case in respect of which the certificate is distinguishable from the cases which it is contended bind the Court, no certificate should be granted: paragraph 3.65 of Supreme Court Practice Direction 3 (which sets out preconditions for the grant by the Supreme Court of permission to appeal where a certificate has been granted) makes clear that the Appeal Panel would refuse permission in such a case.

38. I have concluded in the end that, provided I am myself persuaded (as I am) that this case is not distinguishable from the trilogy of cases, and on the basis that the Plan Company's alternative application is confined to the points set out in Mr Bayfield's skeleton argument (which do not assert that it is) the Plan Company's alternative application does not undermine reliance on section 12(3)(b). I should perhaps make clear in that regard that, in my view, it is not necessary for me to be persuaded that the identified point of law is conclusive of the case (though that may be relevant in determining whether to grant the certificate): the test is not whether I was bound by the trilogy of cases to reach the result I did, but whether my decision centrally involved the application of a point of law on which I was bound. It is clear that it did.

39. The second question as formulated by HHJ Pelling KC in *A v B* (see paragraph [30] above) is whether there is a realistically arguable prospect of the Supreme Court taking the view that the decisions involving the point of law by which I am bound should be qualified or overturned in relation to the issues that arise.

40. As is implicit in my decision and apparent from my Main Judgment I am, for what it is worth, entirely persuaded both by the reasoning in the trilogy of Court of Appeal cases, all decided unanimously, and of the applicability of that reasoning to this case. It is to be noted also, of course, that Snowden LJ was the judge in *Virgin Active* and *AGPS Bondco* and *Petrofac* demonstrates his increasingly firm rejection of his previous approach (and see, in particular, *Petrofac* at [117]). It is not the purpose of this judgment to add further reasons for my decision to refuse sanction, nor is it my place to assert or dispute the correctness of the Court of Appeal decisions. However, in answer to the points addressed to me:

    (1) I do not accept that proposition or the applicability by analogy of *re Tea* to a case such as this, for the reasons explained by the Court of Appeal in *Petrofac*, especially at [130] to [150].

(2) I acknowledge that the approach in *Thames Water* and *Petrofac* may often require a subjective judgment as to whether the amounts offered to the creditors in the class proposed to be crammed down are sufficient, or whether they are unreasonably holding out for more than is fair and reasonable. I have already acknowledged also that in *Petrofac* itself, what the judgement called for was less subjective and less amorphous; the problem in that case was a lack of evidence as to the fairness of terms of funding and the solution lay in justifying the terms by expert evidence or adjusting them to conform: see paragraph [198] of my Main Judgment. However, for all its supposed attraction as offering a 'bright line', *Virgin Active* was based on a false test of fairness, and even if the 'new' approach brings other difficulties, it is logical and fair.

(3) Furthermore, the emphasis on fair negotiation based on sufficiently full information to assess the fairness of what is proposed (such as cash flow forecasts to test an assertion that anything more is unaffordable), which is an important part of the approach in *Thames Water* and *Petrofac,* seems to me to be entirely salutary; it is fair in general terms but also likely to assist considerably in making the subjective judgment which may be required.

41. Nevertheless, in assessing whether *"a sufficient case for an appeal to the Supreme Court…has been made to justify an application for leave to bring such an appeal"* (see section 12(1)(b) of the AJA) the test is not the strength of my conviction, but the coherence, plausibility and importance of the argument to the contrary notwithstanding the unanimous decisions of the Court of Appeal. In that regard, I must acknowledge that in numerous cases following *Virgin Active*, including at least one before me, the payment of a *de minimis* amount to the 'out of the money' creditors was considered to be sufficient, on the basis that the comparator (at all stages, including the 'fairness' stage) is the relevant alternative in which they would stand to receive nothing. That makes it difficult, in my view, to deny that the approach in *Virgin Active* and in all those various cases following it was not even arguable. Further, I accept that the submission in favour of a 'bright line' offered by *Virgin Active* cannot be dismissed as unarguable.

42. I have taken into account that, so far as I am aware, the Court of Appeal has not considered it appropriate to grant permission to appeal to the Supreme Court in any of the cases in the trilogy. That tells against the need for any further systemic guidance at an even higher level. Even so, and bearing in mind that the effect of the grant of a leapfrog certificate is only to enable an application for permission, and taking into account also that only in the Supreme Court would the Plan Company be able to deploy its full argument on what I consider to be the central point of law, I have concluded in the round that I should grant the leapfrog certificate sought.

43. I am fortified in this and in exercising my discretion in that way by the fact that an application has already been made to the Supreme Court for permission to appeal the decision of the Court of Appeal in *Petrofac*. It seems to me to that, provided the Plan Company and its advisers do not delay, the grant of a certificate will efficiently enable the Supreme Court to consider both applications and determine whether it wishes to hear an appeal in either or both.

44. Lastly, before considering the Plan Company's alternative application, I confirm, for completeness, that I have also considered whether section 15(3) of the AJA (see paragraph [9] above) precludes the grant of a certificate.

45. I have not found that provision easy to follow. Mr Bayfield shared my "misgivings" and admitted to struggling with its analysis. He was unable to assist me. Mr Colclough did not pursue the point. Only Mr Ramel relied on section 15(3) and then only in support of his argument that no certificate should be granted unless there is a proper case for granting leave to appeal to the Court of Appeal. On one reading, the sub-section might appear to suggest that no certificate should be granted unless there is some ground warranting an appeal to the Court of Appeal other than the point of law identified as justifying the grant of a certificate. However, that cannot be correct: the paradigm case for the grant of a certificate must be where the point of law is the only point and is conclusive. It seems to me that the gist of the provision is that no leapfrog certificate should be granted unless the point of law concerned is such that, if it had not already been decided by the Court of Appeal, it would be appropriate to permit an appeal to the Court of Appeal to enable it to be so. That construction also seems to me to fit with Practice Direction 3.65c. of the Supreme Court Practice Direction 3.

The Plan Company's alternative application

46. I turn to the question of whether I should accede to the Plan Company's alternative (or perhaps alternative alternative) application for permission to appeal to the Court of Appeal on the ground that I was wrong to consider that the Plan Company had failed to discharge the burden of showing that the Plan is fair, even applying the *Petrofac* approach.

47. After I had questioned in the course of his opening whether there were authorities to support the grant of what might be described as contingent or conditional permission to appeal, Mr Bayfield referred me to cases where such a course was adopted, *Ceredigion CC v Jones and others* [2007] UKHL 24, [2007] 1 WLR 1400, *CCC (suing by her mother and litigation friend) v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB), and *Nokia Technologies Oy v OnePlus Ltd Technology (Shenzhen) Co Ltd* [2023] EWHC 2250 (Pat.) These cases do support the submission that the course is not an unusual one.

48. Indeed, my further research after the hearing has led me to paragraph 3.67 of Supreme Court Practice Direction 3, which seems to me to endorse that position; it provides as follows:

> *"If the Panel grants permission to bring a leapfrog appeal direct to the Court without imposing terms, no additional appeal from the decision of the judge lies to the Court of Appeal even if there are grounds which are not covered by the leapfrog certificate: see Ceredigion CC v Jones and others [2007] UKHL 24. The appeal is brought in accordance with Practice Direction 4 and the usual requirements apply. However, an appeal does lie to the Court of Appeal from the judge's decision:*
>
> *a. where no application is made to the Supreme Court within the one month period after the judge has granted the certificate; or*
>
> *b. where permission to appeal direct to the Supreme Court has been refused by the Appeal Panel."*

49. An initial reading of the above might even suggest that conditional permission to appeal to the Court of Appeal is inherent in the grant of a certificate. However, I do not consider that can be the intention, nor that a Practice Direction would properly have such substantive effect. Accordingly, I must determine whether to permit a conditional or contingent appeal to the Court of Appeal in the event that the Supreme Court ultimately refuses permission.

50. I have concluded that the only arguable basis for granting conditional permission for an appeal to the Court of Appeal may be if permission to appeal to the Supreme Court is refused by the Appeal Panel because (contrary to my assessment) the Appeal Panel determines that this case is distinguishable from the decisions in *Thames Water* and *Petrofac*. If that were the basis of refusal, it could be unfair to preclude the Plan Company from advancing such an argument on appeal to the Court of Appeal.

51. However, since the Appeal Panel ordinarily does not give details as to its reasons for refusing permission beyond a statement that the application *"does not raise an arguable point of law"* or *"does not raise a point of law which is arguable or of general importance"*, it might well not be evident whether the Panel has considered whether the case before it is distinguishable. In such circumstances, and in light of the views I elaborate in paragraph [52] below, it seems to me that the best course is not to give conditional permission to appeal, but to direct (pursuant to CPR 52.12(2)(a)) an extension of time for filing an appellant's notice at the appeal court until whichever is the earlier of (a) the withdrawal by the Plan Company of its application to the Supreme Court and (b) 14 days after a refusal of permission to appeal direct to the Supreme Court by the Appeal Panel.

52. I should make clear, in any event, that I am not myself persuaded that there is any sufficient basis for an alternative appeal to the Court of Appeal based on the matters referred to in the Plan Company's skeleton argument and the submission that I gave insufficient weight to (a) evidence said to show an attempt to consider the fair allocation of benefits expected to be generated by the Restructuring and/or (b) negotiations said to have taken place after the promulgation of the Plan. I do not consider those, or any, grounds justify an appeal from what I regard as my exercise of discretion based on a multi-factorial assessment.

Costs after hand-down

53. The Plan Company has agreed to pay an amount equal to 70% of the actual costs of the Capricorn Companies, and 91% of the costs of HMRC as provided by each in their statement of costs. There is no dispute as regards those costs.

54. The only dispute remaining is in respect of the costs of the Capricorn Companies claimed after 21 August 2025. HMRC do not seek any further order in respect of such costs.

55. Mr Colclough submitted on behalf of the Capricorn Companies that the ordinary rule is that costs of a hearing consequential to judgment are to be paid to the winner of the main dispute. The Capricorn Companies applied for its costs since 21 August 2025 accordingly.

56. Mr Bayfield answered on behalf of the Plan Company that the only substantive issue at the consequential hearing was that relating to the application for a leapfrog certificate, which the Capricorn Companies need not have engaged. He accepted that, even if it were to be successful in persuading me to grant a leapfrog certificate, there should not be a costs order in the Plan Company's favour. The proper order, he submitted, was that there be no order for these costs.

57. According to paragraph 4 of Mr Colclough's skeleton argument, the costs in the period after 21 August 2015 involve *"relatively small sums"* and relate predominantly, if not exclusively, to the issue as regards a certificate, which is an unusual element in a consequentials hearing on which the Capricorn Companies were, in the event, unsuccessful. I consider that, in line with HMRC's approach, I shall make no further order in respect of them.