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## The English Courts' First Dive into Cross-Class Cram-Down

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### Synopsis

DeepOcean was the test case for the critical element of the UK's new restructuring plan procedure: cross-class cram-down. In this article, we explore the first application of the statutory requirements for binding a dissenting class, the court's approach to exercising its discretion in such a case, and what lessons DeepOcean provides for future cases.

### The restructuring plan procedure

The new restructuring plan procedure was introduced in June 2020 as Part 26A of the Companies Act 2006 (the 'Act'), pursuant to the Corporate Insolvency and Governance Act 2020 ('CIGA'). The restructuring plan is modelled on the scheme of arrangement, but with the key addition of the ability to bind a dissenting class. (For a class of stakeholders to approve a plan, at least 75% in value, of those voting, must vote in favour.<sup>1</sup> Unlike for a scheme of arrangement, there is no requirement for a majority in number, of those voting, to vote in favour.)

The first two restructuring plans, of Virgin Atlantic and Pizza Express, tested the waters – but each class ultimately approved the relevant plan. Until DeepOcean's case, the critical cross-class cram-down provisions under the restructuring plan procedure had not been tested.

### The DeepOcean case

DeepOcean group (the 'Group') is a leading provider of subsea services to global offshore industries. The Group's cable laying and trenching sub-group (the 'CL&T Group') had, historically, financially underperformed. In October 2020, the Group concluded it could not further fund the loss-making CL&T Group and accordingly those unsustainable operations would need to be wound down.

The Group concluded that restructuring plans could be used to provide a better outcome for stakeholders and avoid formal insolvencies and resultant trade disruption. Crucially, the Group's sponsor agreed to make a \$15 million equity investment available to the Group (conditional on sanction of the plans). This enabled the plans to provide creditors with a better result than in the relevant alternative (considered further below).

Each of the plan companies (DeepOcean 1 UK Ltd ('DO1'), DeepOcean Subsea Cables Ltd ('DSC') and Enshore Subsea Ltd ('ES')) (together the 'Plan Companies') was incorporated in England, with its centre of main interests in England. Two of the three plans were approved by the requisite majority of creditors in every class. In the third plan, whilst one of the two classes voted unanimously in favour, the requisite majority was not reached in the other class. Table 1 gives a summary of the plans, and how creditors voted.

The court (Trower J) ultimately sanctioned<sup>2</sup> all three plans, exercising its new 'cross-class cram-down' power for the first time.

### Conditions for binding a dissenting class

Two statutory conditions<sup>3</sup> must be satisfied to engage the court's discretion to sanction a restructuring plan which has not been approved by the requisite majority in every class:

- 'Sanction Condition A': the court is satisfied that no member of a dissenting class would be any worse off under the terms of the plan than they would be in the 'relevant alternative' to the plan<sup>4</sup> (i.e. whatever the court considers would be most likely to occur if the plan were not confirmed)<sup>5</sup>; and
- 'Sanction Condition B': the plan has been approved by a stakeholder class who would receive a payment, or have a genuine economic interest in the company, in the event of the 'relevant alternative'.<sup>6</sup>

### Notes

- 1 s. 901F of the Act
- 2 *Re DeepOcean 1 UK Ltd & Ors* [2021] EWHC 138 (Ch) ('sanction judgment')
- 3 s. 901G of the Act
- 4 s. 901G(3) of the Act
- 5 s. 901G(4) of the Act
- 6 s. 901G(5) of the Act

Table 1.

| Class   | Nature of Creditor / Claims  | Treatment under the Plan  | D01                                      | DSC  | ES                                      |
|---|--|---|--|--|---|
| Senior Lenders                                      | Lenders under c.€141m secured multi-currency facilities agreement; English law / jurisdiction<br><br>Security granted over all or substantially all of the Plan Companies' assets<br><br>(D01 was original borrower / guarantor; DSC and ES acceded as additional borrowers/ guarantors in Nov. 2019)  | Secured lenders to release their claims against the Plan Companies (including guarantees and security, and including in security in respect of the shares of the Plan Companies)<br><br>Secured lenders retain their claims against other obligors in the Group. Facilities agreement amended and restated: maturities extended to Feb. 2025; margin reduced; financial covenants reset; all subsisting defaults waived | 100% approved                            | 100% approved  | 100% approved                           |
| UK landlord   | Single landlord, in respect of claim under a UK lease entered into by D01  | Claim to be released in full in return for payment of c.4% of its claims (cf. nil return in relevant alternative)<br><br>Right to recover property<br><br>Negotiated settlement agreement to assign lease to another Group company – disclosed  | Approved (100%)                          | N/A  | N/A                                     |
| Vessel Owners                                       | Owners of two vessels chartered by D01, in respect of claims under UK vessel charter contracts   | Claims to be released in full in return for payment of c.5.2% of their claims (cf. c.1.2% return in relevant alternative), plus potential mitigation from re-chartering vessels<br><br>Right to recover their vessels<br><br>Negotiated settlement agreements for cash consideration linked to outstanding hire and to retain certain specialist equipment on the vessels that belonged to the Group – disclosed        | 100% approved                            | N/A  | N/A                                     |
| All other creditors (other than excluded creditors) | Including claims owed to suppliers, sub-contractors and trade creditors<br><br>Excluded claims of employees, tax claims, intercompany claims and claims required to be funded to ensure completion of a substantial project estimated to generate c.£4m gross (forming part of the consideration available for distribution under the restructuring plans) | Claims to be released in full in return for payment of:<br><br>– c.4% of their claims, for creditors of D01 or DSC (cf. nil return in relevant alternative)<br><br>– c.8.2% of their claims, for creditors of ES (cf. c.4.2% return in relevant alternative)  | 100% in value, of those voting, approved | >64% by value, of those voting, approved – <b>therefore requisite 75% majority not met</b> | 91% in value, of those voting, approved |

### *The court's approach to Sanction Condition A*

The court confirmed that identifying the 'relevant alternative' is similar to the exercise of identifying the appropriate comparator for class purposes in the context of a Part 26 scheme of arrangement.<sup>7</sup> This will be a preliminary question in each case and may be

complex in some scenarios, but was relatively simple in this case.<sup>8</sup> The Group had engaged Alvarez & Marsal to prepare an entity priority model ('EPM') to establish potential recoveries for stakeholders. The EPM set out two scenarios: insolvency of the CL&T Group or more extensive insolvency proceedings across all Group

#### Notes

<sup>7</sup> [29], sanction judgment

<sup>8</sup> *Ibid.* at [31]

companies; the Group gave evidence that it considered the former scenario more likely.

The court likened the ‘no worse off’ test to the exercise the court may conduct when applying a ‘vertical’ comparison for the purposes of an unfair prejudice challenge to a company voluntary arrangement<sup>9</sup> i.e. it sets a ‘lower bound’ below which the plan cannot go. The primary question for the court when comparing what will happen under a restructuring plan with what is likely to happen in the relevant alternative, is to look at the likely financial return in each scenario.<sup>10</sup> 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.<sup>11</sup> However, the court noted that the phrase ‘any worse off’ is a broad concept and appears to contemplate the need to take into account the impact of the plan on all incidents of liability to the relevant creditor, including matters such as timing and ‘the security of any covenant to pay’ (which we take to mean certainty of receipt).<sup>12</sup>

DeepOcean’s plan terms were structured specifically to provide the ‘all other creditors’ class with a return of 4% above returns forecasted in the ‘relevant alternative’, which the court confirmed to be an insolvency of the CL&T Group. Accordingly, the application of the ‘no worse test’ was relatively straightforward: not only would no member of the dissenting class be any worse off under the plan than in the ‘relevant alternative’ but each of them would clearly be better off.<sup>13</sup>

The court’s analytical approach to Sanction Condition A, placing firm reliance on the Plan Companies’ detailed valuation evidence, confirms that determining the relevant alternative is a factual exercise and demonstrates that the court is willing to make a definitive statement on what constitutes the relevant alternative. This exercise may be more complex if any plan stakeholder who voted against the plan has informed the plan companies or the court that they disagree with the EPM’s conclusions.<sup>14</sup>

### *The court’s approach to Sanction Condition B*

Establishing whether or not the plan has been approved by a stakeholder class who would receive a payment, or have a genuine economic interest in the company, in the event of the ‘relevant alternative’, is a matter of evidence.

DSC’s plan had been approved by the secured creditor class, who would make a recovery out of the charged assets to be realised in an insolvency of DSC (one of the consequences of an insolvency of the CL&T Group). Accordingly, the court found, each of DSC’s secured creditors would have a genuine economic interest in DSC in the event of the relevant alternative.<sup>15</sup> It is clear from DSC’s case that even a small recovery in the relevant alternative will suffice for this purpose. As the EPM showed that DSC’s secured creditors would make a small recovery out of the charged assets, it was unnecessary for the court to consider whether it would have sufficed if they had received zero return from DSC and received only a return from assets of the wider Group.<sup>16</sup>

The court may revisit class constitution at the sanction hearing if there appears to have been some ‘artificiality’ in the creation of classes in order to ensure Sanction Condition B is satisfied (though only if the possibility of artificiality was not apparent at the convening hearing).<sup>17</sup>

### *Exercise of the court’s discretion*

The court considered that the correct starting point for the exercise of its discretion as to whether to sanction a restructuring plan – even where not all classes have approved the plan – remains the traditional approach for sanctioning a scheme of arrangement.<sup>18</sup> However, unlike for a conventional scheme, the possibility of binding a dissenting class means it may well be appropriate for the court to exercise its power to differ from the dissenting class meeting.<sup>19</sup>

The court held that the legislative explanatory notes indicate that a plan company will have ‘a fair wind behind it’ in seeking sanction notwithstanding a

## Notes

9 *Ibid.* at [30]

10 *Ibid.* at [34]

11 *Ibid.* at [35]

12 *Ibid.* at [35]

13 *Ibid.* at [36]

14 See *ibid.* at [37]

15 *Ibid.* at [40]

16 *Ibid.*

17 *Ibid.* at [41]

18 *Ibid.* at [44]

19 *Ibid.* at [45] and cf. *Re National Bank Ltd* [1966] 1 AER 1006 at [1012] and *Re Telewest Communications plc (No. 2)* [2005] BCC 36 at [20]-[22], to the effect that ‘the court will be slow to differ from the meeting’ in a conventional scheme of arrangement – whereas, by its very nature, the court’s power to bind a dissenting class to a plan contemplates that the court *can* override the wishes of a class meeting (sanction judgment at [46]).

dissenting class where Sanction Conditions A and B are met.<sup>20</sup>

The court then considered the relative treatment of creditors under the plans, likening this discretionary factor to the 'horizontal' comparison undertaken for the purposes of an unfair prejudice challenge to a company voluntary arrangement<sup>21</sup>: '[w]hilst there is no prohibition on differential treatment, any differential treatment must be justified.'<sup>22</sup>

The court held that, because a class' right of veto is removed by the possibility of binding a dissenting class, 'justice may require the court to look at questions of horizontal comparability ... to see whether a restructuring plan provides for differences in treatment of creditors inter se, and if so whether those differences are justified. In particular the court will be concerned to ascertain whether there has been a fair distribution of the benefits of the restructuring (what some commentators have called the "restructuring surplus") between those classes who have agreed the restructuring plan and those who have not'.<sup>23</sup>

In DSC's plan, the differential treatment between secured and unsecured creditors was readily justified because of the secured nature of the secured creditors' claims. Moreover, because the plans were a precursor to a solvent wind-down of the CL&T Group, there was no real 'restructuring surplus' and therefore no question of fairness of allocation of any 'restructuring surplus'. We expect future cases to require more detailed consideration of this.

The court interpreted the wording of the explanatory notes to CIGA<sup>24</sup> to indicate that the court should focus on the negative question of whether a refusal to sanction is appropriate on the grounds that a restructuring plan is *not* 'just and equitable': '[t]he draftsman's focus was not on the more positive question of why justice and equity point to the plan being sanctioned'.<sup>25</sup> This subtle but important distinction confirms that plan companies do not shoulder the burden of satisfying the court that a plan is just and equitable.

The fact that the dissenting class was out of the money in the relevant alternative, and that the benefits under the plan were to be provided by the wider group, were 'a powerful pointer' towards sanction.<sup>26</sup> It remains to be seen how far future cases will follow this approach; can it be taken to mean that, assuming

a dissenting class is out of the money in the relevant alternative, 'anything is better than nothing'?

The court also considered various other discretionary factors, including the degree of support for the plans and whether the plan stakeholders were fairly represented at the plan meetings. It noted that the court's ability to override the decision of a dissenting class is engaged whether the value of dissenting votes is 26% (as in DSC's plan) or 100%.<sup>27</sup> The court took comfort not only from the fact that 64% of the non-consenting class had approved the plan, but also that the similarly-positioned 'all other creditors' classes in the other two plans had approved the plans.

Of particular interest in *DeepOcean* was the relatively low turnout in the 'all other creditors' class in each plan – between 25% and 32%. Low turnout is not in itself a reason to refuse to sanction a scheme or plan<sup>28</sup> – but where turnout is low, the court will consider whether that is owing to creditors simply choosing not to engage or because they were unable to engage (the latter being something that could threaten the conclusion that the vote was representative of the class). In *DeepOcean*, the court noted that the relatively low turnout was 'not particularly surprising' given the composition of the 'all other creditors' classes (i.e. suppliers, subcontractors and trade creditors), and found there was nothing to suggest any plan creditor had been unable to engage (as opposed to simply choosing not to do so); accordingly, there was no reason to think that the votes were not representative of their class.<sup>29</sup> Low turnout at the dissenting class meeting may also affect how much weight the court will give to the dissenting vote.<sup>30</sup>

## Additional lessons for future cases

### *Class constitution / fully locked-up consenting class*

The court will apply broadly the same approach to class constitution for a restructuring plan as applies on a conventional scheme of arrangement – although the court is alert to the possibility that the potential for a consenting class to bind a dissenting class may create an incentive to increase rather than reduce the number of classes (to improve the prospect that at least one class

## Notes

20 Sanction judgment at [48]

21 *Ibid.* at [62 – 64]

22 *Ibid.* at [62], citing Norris J in *Discovery (Northampton) Limited & ors. v Debenhams Retail Limited* [2020] BCC 9 at [12]

23 *Ibid.* at [63]

24 Paragraph 192 of the explanatory notes

25 Sanction judgment at [48]

26 *Ibid.* at [52]

27 *Ibid.* at [47]

28 *Re British Aviation Insurance Company Ltd* [2006] BCC 14 at [117]; *Re Cape plc* [2006] EWHC 1446 (Ch) at [20]-[25]

29 Sanction judgment at [55]

30 *Ibid.* at [54]

agrees to the plan).<sup>31</sup> In *DeepOcean*, class constitution was relatively straightforward; see the table above.

In *Virgin Atlantic*, the court had expressly declined to decide whether the power to bind a non-consenting class could be activated by including, within a restructuring plan, a class of creditors who would otherwise all have been prepared to enter into consensual arrangements to effect the restructuring of their rights.<sup>32</sup> It was unnecessary to decide this point in *Virgin Atlantic*, because each class approved the plan.

However, this point arose directly in *DeepOcean*, because the consenting secured creditor class in DSC's plan had fully locked-up to vote in favour of the plan, in advance of the convening hearing. The court was nonetheless prepared to sanction the plan, on the basis that, while some cases might involve 'artificiality' in the creation of classes (to engineer at least one consenting class), there was no sign of that in the present case. However, as noted above, the court held that where the possibility of artificiality only becomes apparent at sanction stage, the court may be prepared to revisit the conclusion it reached on class constitution at the convening hearing.<sup>33</sup>

### *Solvent wind-down / requisite purpose test*

This is the first time a restructuring plan has been used to facilitate a solvent wind-down, rather than to facilitate a rescue. The Act requires that the purpose of the compromise or arrangement must be to 'eliminate, reduce or prevent, or mitigate the effect of' financial difficulties that are affecting (or will or may affect) the company's ability to carry on business as a going concern.<sup>34</sup>

The question was raised as to whether the Companies' plans met the requisite purpose, in light of the fact that there was no intention that the Companies would carry on business as a going concern if the plans became effective. The court approached the requisite purpose test as follows:

- first, to identify the effect of the financial difficulties;
- second, to determine whether the compromise or arrangement has, as its purpose, a lessening or reduction in the gravity or seriousness of that effect.<sup>35</sup>

The court was prepared to construe the 'purpose' test expansively.<sup>36</sup> Here, even if there was no mitigating

effect on the Companies' ability to continue to carry on business as a going concern, the plans had a mitigating effect on the severity of the losses which the creditors could otherwise sustain. This was sufficient to satisfy the requisite purpose test.

### *Bar date*

In order to enable the plans to take effect, the plans required plan creditors (other than secured creditors) to lodge their claims by a bar date, falling three months after the plans become effective. If a plan creditor does not submit notice of its claim by the bar date, it will not be entitled to receive any plan consideration, but it will nevertheless be bound by the terms of the plans and its plan claims will be released. The plans also provide a mechanism for the adjudication of disputed claims.

A bar date was similarly set in the scheme of arrangement of Noble Group; *DeepOcean's* case is the first use of a bar date in the context of a restructuring plan.

### *Can a plan bind 'out of the money' stakeholders excluded from voting?*

Although this point did not arise in *DeepOcean's* case, the sanction judgment contains a helpful *obiter* view that a restructuring plan is capable of binding a class of stakeholders that have been excluded from voting on a plan on the grounds that the court is satisfied they do not have a genuine economic interest in the company.<sup>37</sup>

### *A drop in the ocean?*

Various facts of *DeepOcean's* case militated strongly in favour of sanction, including:

- the fact that creditors in the dissenting class were clearly out of the money in the relevant alternative (in which they would have recovered nil or very low returns);
- the fact that the benefits under the terms of the restructuring plans were provided by *DeepOcean* entities other than the Plan Companies – i.e. these incremental benefits would not arise in the relevant alternative;

## Notes

31 *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch) at [44]-[48]

32 *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at [50]

33 Sanction judgment at [41]

34 s.901A of the Act

35 Convening judgment at [46]

36 *Ibid.* at [48]

37 *Ibid.* at [51]

- the back-drop of the solvent wind-down – including the absence of any real ‘restructuring surplus’ for the court to consider and the high degree of certainty of payment to unsecured plan creditors shortly post-completion (in contrast to the more usual post-restructuring position);
- the overwhelming support across seven of the eight stakeholder classes (across the three plans) and the fact that, even in the dissenting class, 65% had voted in favour;
- the absence of any formal challenge; and
- the court could readily conclude that these plans were such that an intelligent and honest person,

acting in respect of their own interests, might reasonably approve, in part owing to the parallel nature of the plans (i.e. the fact that the ‘all other creditors’ class in DO1 and ES’ plans *had* approved the relevant plan, even if the equivalent class in DSC’s plan had not).

True it is that these facts are likely to be atypical – but this test case for cross-class cram-down breaks major new ground and the market can draw ample helpful guidance from Trower J’s judgment as to the ‘art of the possible’ for future cases. The exploration of the ‘deep ocean’ of cross-class cram-down is only just beginning.

## **International Corporate Rescue**

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