Re Hurricane Energy plc

[2021] EWHC 1759 (Ch), [2021] All ER (D) 48 (July)

Company – Arrangement. The applicant company unsuccessfully applied for an order sanctioning a restructuring plan. In dismissing the application, the Chancery Division held that despite the court having jurisdiction to sanction the restructuring plan under Pt 26A of the Companies Act 2006, as decided in [2021] All ER (D) 83 (May), the discretion provided in s 901G of the Act to sanction a plan under condition A was not satisfied. That was because, among other things, the relevant alternative involved on each side's case allowed for the company's continued profitable trading for at least a further year and there was a realistic prospect that the company would be able to discharge its obligations to the bondholders, leaving assets with at least potential for exploitation, which was enough to refute the contention that the shareholder members, as the dissenting class, would be no better off under the relevant alternative than under the plan, as required by s 901F of the Act. Accordingly, the discretion as to whether to sanction the plan did not fall to be exercised.

Catchwords

Company – Arrangement – Restructuring plan (Part 26A)

Background

The applicant company, Hurricane Energy plc (the company) was an AIM listed company, the parent company of the 'Hurricane Group' of companies. The group carried on business in the oil and gas industry and held licences granted by the Oil and Gas Authority in relation to the exploration and exploitation of hydrocarbon resources. The company wanted to introduce a restructuring plan related to a plan of reorganisation (the plan), which would enable it to continue to exploit the positive cash flows from the Lancaster Area for an extended period, so as to maximise the return to the bondholders.

In earlier proceedings (see [2021] All ER (D) 83 (May)), the court had held that because the company was incorporated in England and Wales there was no doubt that the court had jurisdiction to sanction a plan under Pt 26A. The court had made an order, pursuant to CA 2006 s 901C, giving liberty to the company to convene meetings of its respective plan creditors for the purposes of considering and, if thought fit, to approve the restructuring plan in respect of the company. It was directed that two meetings be convened: one for the bondholders and one for the shareholders because the rights of shareholders were 'affected by' the plan within the meaning of that phrase in CA 2006 s 901C(3). In June 2021, the plan meetings were held. The bondholders' meeting approved the plan with 100% of those attending (representing 84.89% of the bondholders) voting in favour. The shareholders' meeting however rejected the plan with 92.34% voting against and 7.66% voting in favour. Overall, 32.8% of the issued share capital of the company had voted at the meeting.

In the present proceedings, the company applied, pursuant to CA 2006 s 901F for an order sanctioning the plan. Various shareholders of the company were represented (including one of the two largest shareholders of the company, Crystal Amber Fund Ltd).

Issues and decisions

Whether the restructuring plan should be sanctioned.

There was an important difference between a scheme under CA 2006 Part 26 and a plan under Part 26A where not all of the relevant classes of creditors and/or members had approved the plan. CA 2006 s 901G provided the court with a discretion to sanction a plan notwithstanding that one or more of the classes had not approved the plan by the requisite majority (termed a cross-class cram-down). Where that was the case, as in the present case, the plan could be sanctioned provided that two threshold conditions were met (CA 2006 s 901G(2)-(5)). With regard to condition A, the court had to be satisfied that, if the compromise or arrangement was sanctioned under CA 2006 s 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. Pursuant to condition B, the compromise or arrangement had to be agreed by a number representing 75% in value of a class of creditors or (as the case might be) members, present and voting either in person or by proxy at the meeting summoned under CA 2006 s 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative. The relevant alternative was defined by CA 2006 s 901G(4) as whatever the court considered would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under s 901F thereof (see [33]-[35] of the judgment).

Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch) (Virgin Active) set out three steps involved in condition A, namely: (1) identifying what would be most likely to occur in relation to the company if the plan was not sanctioned; (2) determining what would be the outcome or consequences of that for the shareholders; (3) comparing that outcome with the outcome and consequences for the shareholders if the plan was sanctioned (see [36] of the judgment).

As to the first step, the court was not required to be satisfied that a particular alternative would definitely occur, merely (where there were possible alternatives) which one was most likely to occur. As to the second step, the outcome or consequences for the shareholders was to be assessed primarily, but not exclusively, in terms of the anticipated returns on their claims. Further, in *Re DeepOcean 1 UK Ltd and other companies* [2021] All ER (D) 08 (Feb) the phrase 'any worse off' was a broad concept and appeared 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. A similarly broad approach was required in determining whether shareholders were 'any worse off' as a result of the plan: it was necessary to take into account all incidents of their rights as shareholders (see [37], [38] of the judgment).

The question whether the shareholders were out of the money was a critical element in determining whether they would be any worse off in the plan than in the relevant alternative and in the exercise of discretion and particular care was needed in the application of the cross-class cram-down provision where, as in the present case, the plan would deprive the members of the dissenting class of all but a fraction of their interest in the company (see [47], [48] of the judgment).

In the present case, of the two threshold conditions in CA 2006 s 901G, there was no doubt that condition B was satisfied: the plan had been approved by the bondholder class and they would clearly receive a payment in the event of the relevant alternative. The dispute centred on condition A, which involved the three-step approach outlined in Virgin Active. On the evidence, the company and the ad hoc committee had contended that the shareholders were clearly out of the money so that the fact that shareholders were provided with 5% of the diluted equity in the plan meant that they could not be worse off than under the relevant alternative. As to step 1, it was common ground that if the plan was not sanctioned the company would most likely, in the short to medium term, continue trading profitably. That was what the current board proposed to do. Further, it was not likely that the new board would deplete the existing cash balance or revenue to be generated from the P6 well (the company's only well with any oil production) towards the cost of alternative investments. On that basis, the contention that the relevant alternative would be the near-term insolvent liquidation of the company was rejected (see [53], [55], [59], [68]).

As to the third step, it was common ground that the plan was not anticipated to provide any meaningful return to shareholders and that, even in respect of such less-than-meaningful return that might be generated, the current shareholders' interest in it would be limited to 5%. That meant that the second step raised the following question: whether in the absence of the plan the shareholders would be better off (taking into account all the incidents of their rights as shareholders) than having a 5% stake in equity which promised no meaningful return. It was for the company, therefore, to demonstrate that the shareholders would not be any better off than receiving a less than meaningful return, if they retained their shares and the company continued trading for at least the next year (see [69]-[71] of the judgment).

Given that the relevant alternative involved on each side's case the company's continued profitable trading for at least a further year, that question did not require to be satisfied, in order to find against the company, that the most likely outcome from the relevant alternative was that there would be a return to shareholders at some point in the future. The fact that there was a realistic prospect that the company would be able to discharge its obligations to the bondholders, leaving assets with at least potential for exploitation, was enough to refute the contention that the shareholders would be no better off under the relevant alternative than under the plan. The company being able to trade beyond May 2022 and therefore opening up the possibilities identified for bridging the funding gap, or outperforming the projections, was a realistic one. Accordingly, threshold condition A was not satisfied. On that basis, the discretion whether to sanction the plan did not fall to be exercised (see [125], [127], [128], [133] of the judgment).

The sanctioning of the plan would be declined (see [135] of the judgment).

BTI 2014 LLC v Sequana and others; Sequana v Bat Industries plc and others [2019] EWCA Civ 112 [2019] 2 All ER 784 [2019] All ER (D) 36 (Feb) applied

Re Virgin Atlantic Airways Ltd [2020] EWHC 2376 (Ch) [2020] All ER (D) 08 (Sep) followed

Re Virgin Active Holdings Ltd and other companies [2021] EWHC 1246 (Ch) followed

Re DeepOcean 1 UK Ltd and other companies [2021] EWHC 138 (Ch) [2021] All ER (D) 08 (Feb) followed

*Re Ralls Builders Ltd (in liquidation); Grant and another (Joint Liquidators of Ralls Builders Ltd) v Ralls and others [*2016] EWHC 243 (Ch) [2016] All ER (D) 142 (Feb) considered

Re Noble Group Ltd [2018] EWHC 3092 (Ch) [2018] All ER (D) 100 (Nov) considered

Judgment date

28 June 2021

Judge

Zacaroli J

Representation

Tom Smith QC, Matthew Abraham and Ryan Perkins (instructed by Dentons UK and Middle East LLP) for the company

Stephen Robins (instructed by Akin Gump LLP) for the ad hoc committee of the bondholders

Andrew Thornton QC and Ben Shaw (instructed by Rosenblatt Ltd) for the shareholders, Crystal Amber Fund Ltd

Paul Steward, Peter Baker and Derek French, shareholders in the company, appeared in person

This Digest was first published on Lexis®PSL and Lexis®Library.