Virgin Atlantic proposes the first restructuring plan under Part 26A of the Companies Act 2006

LOTTIE PYPER

Just weeks after the Corporate Insolvency and Governance Act 2020 received Royal Assent, Virgin Atlantic Airways Limited proposed the first restructuring plan to be convened and sanctioned under Part 26A of the Companies Act 2006. This article considers the initial guidance given on the operation of Part 26A in the resulting judgments.

Introduction

2020 was not a good year for airlines. The restrictions made necessary by the COVID-19 pandemic resulted in passenger demand plummeting in a way that was previously unimaginable. This is clear from turning back to the risk assessment in the Virgin Group's 2018 Annual Accounts, which list the key operational and business risks as being: (1) damage to the brand's reputation, (2) Brexit, (3) regulatory changes, (4) terrorism and other security incidents, (5) technology failure, (6) the failure of a key supplier and (7) industrial action by its workforce. None of these risk factors come anywhere close to anticipating a global pandemic that caused a near shutdown of the entire international travel industry.

Although Part 26A of the Companies Act 2006 ("**CA 2006**") was conceived back in May 2016 and developed following extensive industry consultations, it was introduced as part of the emergency insolvency legislation developed to help businesses navigate the economic devastation wreaked by the COVID-19 pandemic. Part 26A was therefore inserted into the CA 2006 as schedule 9 to the Corporate Insolvency and Governance Act ("**CIGA 2020**"), which was hurried through parliament in May and June 2020 and received Royal Assent on 25 June 2020.

Given this timing, it is unsurprising that the first company to propose a restructuring plan under Part 26A was Virgin Atlantic Airways Limited ("**Virgin Atlantic**" or the "**Company**"), on behalf of the Virgin Group. It is clear that the only reason for Virgin Atlantic to propose a restructuring plan under Part 26A, rather than a scheme of arrangement under Part 26, was to enable the Company to rely on the cross class cram down provisions in section 901G, if the statutory majority was not achieved at each class meeting. Save for the potential uncertainty in relying on a newly-enacted procedure, there was no downside to taking this approach rather than proposing a Part 26 scheme of arrangement. Given the Company's dire financial position, there was no question that it would meet the threshold conditions in section 901A, which is the only additional jurisdictional hurdle.

In the event, the restructuring plan could have been proposed under Part 26 instead. By the time of the convening hearing, the only class that was not guaranteed to meet the statutory majority was the class of 168 trade creditors included in the plan (the "**Trade Plan Creditors**"). In fact, the Trade Plan Creditors voted overwhelmingly in favour of the restructuring plan, with over 99% by value of those present and voting supporting the restructuring plan, with a turnout of 66%. This meant that no application under section 901G was required.

The restructuring plan was convened by Mr Justice Trower on 4 August 2020 and sanctioned by Mr Justice Snowden on 3 September 2020: see *Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch) (the "**Convening Judgment**") and [2020] EWHC 2376 (Ch) (the "**Sanction Judgment**") respectively. Although Virgin Atlantic's restructuring plan was uncontested and did not require cross class cram down, these judgments provide some helpful initial guidance on the interpretation of Part 26A. In each case, they followed the established principles under Part 26, including regarding notice, class composition and sanction.

This approach is consistent with the Explanatory Notes to the CIGA 2020. As observed by Snowden J (at paragraph 44):

"these Explanatory Notes are admissible as an aid to the interpretation without needing to show that the legislation is ambiguous or unclear: see Flora v Wakom (Heathrow) Ltd [2007] 1 WLR 482 at [15]-[16]."

Both the Convening Judgment (at paragraph 18) and the Sanction Judgment (at paragraph 44) cite paragraph 16 of the Explanatory Notes, which provides as follows:

"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."

Given the conservative nature of both stages of the Virgin Atlantic case, the judges were able to follow the existing body of Part 26 case law almost entirely, save for regarding the threshold conditions in section 901A.

The Convening Hearing

Notice of the Convening Hearing

In tandem with the enactment of CIGA 2020, the government introduced a new practice statement dated 26 June 2020, titled *Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)* (the "**Practice Statement**"). This incorporates case law developments since the previous practice statement was published in 2002, as well as making provision for the additional features of Part 26A restructuring plans.

Paragraph 6 of the Practice Statement provides as follows:

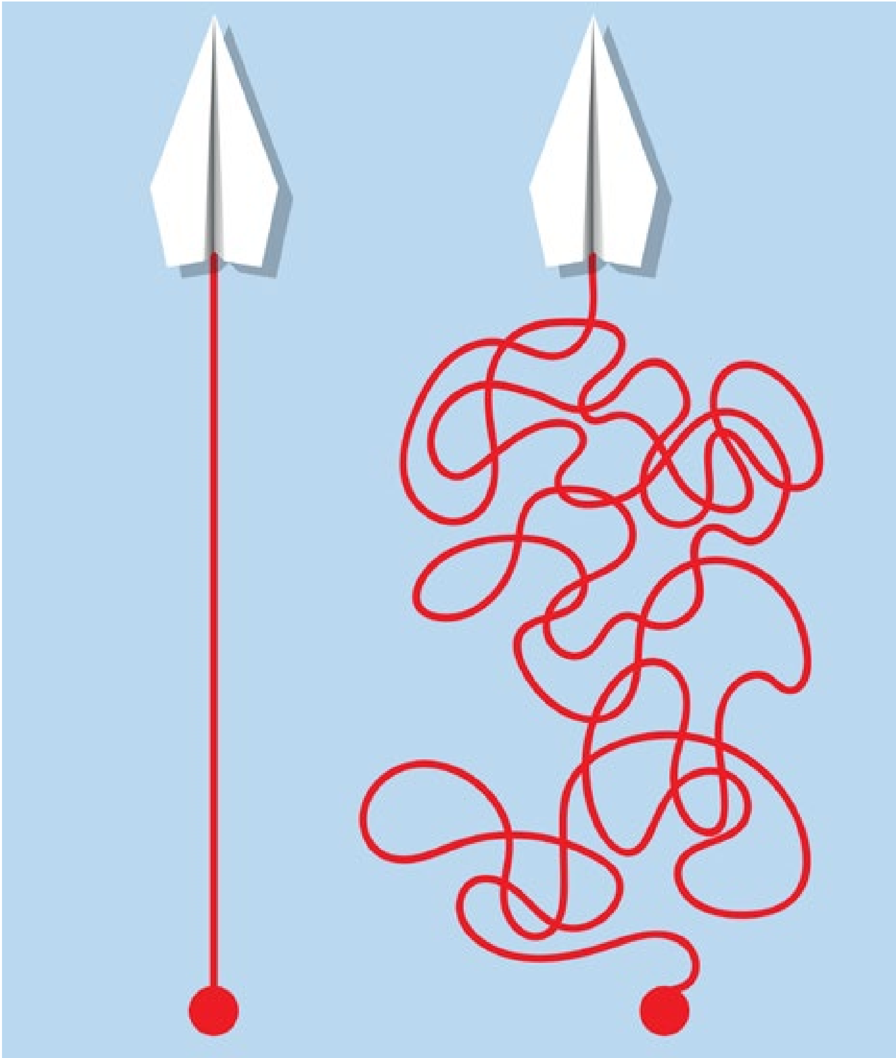
"It is the responsibility of the applicant, by evidence in support of the application or otherwise, to draw to the attention of the court at the hearing for an order that meetings of creditors and/or members be held ("the convening hearing"):

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

It is well-established that at a Part 26 convening hearing, the role of the court is *"emphatically not"* to consider the merits or fairness of the scheme, which should instead be considered at the sanction hearing: *Re Telewest Communications plc* (No 1) [2004] BCC 342, [14]. At paragraph 35 of the Convening Judgment, Trower J held that paragraph 6(d) of the Practice Statement *"makes clear that the same approach should be adopted at the convening hearing held for the purpose of giving directions to summon meetings of creditors for a Part 26A restructuring plan."*

Paragraphs 7 of the Practice Statement goes on to state that, if any of the issues identified in paragraph 6 are engaged, *"the applicant should, prior to the convening hearing, take all steps reasonably open to them to notify any person affected by the of the following matters:*

- *"a. that the scheme is being promoted,*
- b. *the purpose which the scheme is designed to achieve and its effect,*
- c. *the meetings of creditors and/or members which the applicant considers will be required and their composition,*
- d. *the other matters that are to be addressed at the convening hearing, including the issues identified in paragraph 6 above,*
- e. *the date and place fixed for the convening hearing,*
- f. *that such persons are entitled to attend the convening and sanction hearings, and*
- g. *how such persons may make further enquiries about the scheme."*



It is for the applicant to ensure that such notification is given in a concise form and communicated in an appropriate manner. However, paragraph 8 emphasises that this is not an inflexible requirement:

"Save for the circumstance in which there are good reasons for not giving the notification identified in paragraph 7 above, it should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps which have been taken to give the notification and what, if any, response the applicant has had to the notification."

It is now clear that, following Snowden J in *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) at paragraph 47 (the first Part 26 scheme proposed under the new Practice Statement), *"the question of the adequacy of notice of the convening hearing is therefore not affected by the level of support for the scheme from the creditors who have already locked up. It falls to be judged by reference to the position of those who have not locked up and who might wish to oppose the formulation of classes proposed by the company."* Trower J followed this approach in the Convening Judgment, holding that the only creditors with whom the court was concerned were the Trade Plan Creditors, since unlike the other plan creditors, they had not been involved in the restructuring negotiations or invited to enter into support agreements. This made it *"all* *the more important that the court should give careful consideration to whether the notice actually given to them was sufficient"* (paragraphs 26 to 27).

In this case, Trower J was satisfied that the notice given was adequate.

Firstly, there was detailed evidence as to how the Trade Plan Creditors had been identified.

Secondly, he was satisfied by the Company's evidence that the restructuring was urgent, holding that (at paragraph 32) "[t]*his is not one of those cases in which the court is sceptical as to the genuineness of proposed deadlines. The evidence points to a very real prospect that the Company will go into administration with a substantial loss of value to creditors if the Restructuring Plan is not sanctioned in the early part of September."*

Thirdly, the Trade Plan Creditors were given 21 days to consider the Practice Statement Letter before the Convening Hearing. The Practice Statement Letter was sent to the Plan Creditors on 14 July 2020, which was 21 days before the Convening Hearing. This was followed by an Addendum sent on 20 July 2020, with a number of updates, including moving the date on which Trade Plan Creditors' claims would be valued (the "**Trade Plan Creditor Record Date**").

They were also invited to attend a webinar on 21 July 2020, a recording of which was uploaded online. Although not discussed in the Convening Judgment, the reason why the Trade Plan Creditor Record Date was moved was because of the discussions with Trade Plan Creditors following the circulation of the Practice Statement Letter. A number of them expressed concern about the fact that, if they continued to supply the Company, their claims to be compromised by the Restructuring Plan would continue to increase until the original Record Date in mid-August. In order to address these concerns, the Trade Plan Creditor Record Date was moved to 1.30pm on 14 July 2020, being the time when the original Practice Statement Letter was circulated.

Fourthly, although a number of Trade Plan Creditors had been in touch, none of them had contended that there was inadequate time for them to consider their position prior to the Convening Hearing.

Since Part 26 and Part 26A share the same Practice Statement, the same principles evidently apply to both procedures in this respect.

Threshold Conditions

Unlike a Part 26 scheme, a company has to meet certain additional threshold conditions in order to propose a restructuring plan under Part 26A. These are contained in section 901A, which provides as follows:

"(1) The provisions of the Part apply where conditions A and B are met in relation to a company.

(2) 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.

(3) Condition B is that—

(a) a compromise or arrangement is proposed between the company and—

(i) its creditors, or any class of them, or

(ii) 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)."

No difficulty arose in establishing that Virgin Atlantic was a "company" under section 901A, as it is registered in England.

In terms of Condition A, this was not a borderline case. The difficulties caused by the COVID-19 pandemic resulted in the Company being *"on the brink of collapse"* and, if the restructuring plan was not approved, it was likely to enter administration by mid-September 2020, with a view to winding up the business and selling its assets (paragraph 37).

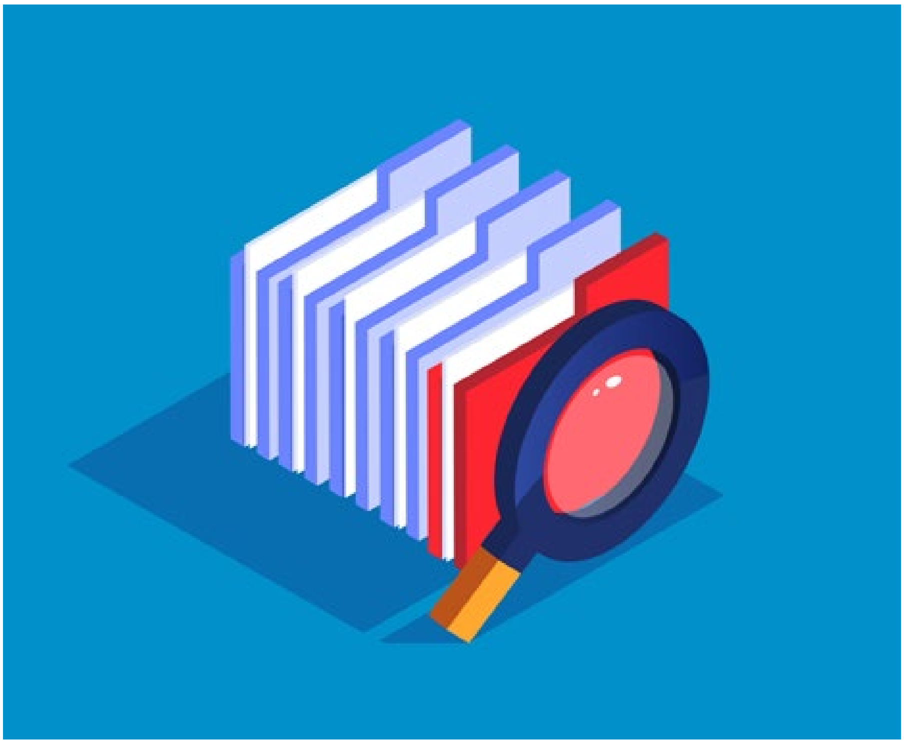
Condition B was also plainly satisfied. As to the first limb, Trower J held that "*there is no reason to think that the concept of what is capable of amounting to a compromise or arrangement for the purposes of s.901A is any different to the same phrase used in Part 26. Indeed, quite the contrary, there is every reason to think that Parliament has intended the same language should be construed in the same way*" (at paragraph 38). The restructuring plan was clearly a "*compromise or arrangement*", involving a degree of give and take with each class of creditors.

The second limb of Condition B is that the purpose of the compromise or arrangement must be *"to eliminate, reduce or prevent, or mitigate, the effect of any of the company's financial difficulties under condition A."* Trower J held that (at paragraph 39) *"this is broad language which was intended to be expansively construed."* In this case, the only purpose of the Restructuring Plan was to *"mitigate and, if possible, to eliminate"* the financial difficulties caused by the COVID-19 pandemic.

Class Composition

Having outlined the existing authorities on class composition for Part 26 schemes of arrangement and the principal differences introduced in Part 26A, Trower J held that *"while the court undoubtedly has power to sanction a restructuring plan in circumstances in which it would not have power to sanction a Part 26 compromise or arrangement, it seems to me that the approach to classifying the other creditors with whom they should be required to consult is broadly the same"* (at paragraph 45).

"Unlike a Part 26 scheme, a company has to meet certain additional threshold conditions under Part 26A"



He gave three main reasons for this, whilst noting that there had been no adversarial argument on this point.

Firstly, he observed that purpose of class meetings under Part 26A is the same as class meetings under Part 26, namely to enable those with a genuine economic interest in the company, whose rights will be affected by the restructuring plan, to reach a collective conclusion on whether the proposed restructuring plan should be approved. He noted that in both cases *"Parliament has chosen the same language of compromise and arrangement to describe what must be approved"* (paragraph 46).

Secondly, he held that the established approach under Part 26 of concentrating on rights rather than interests was equally applicable to Part 26A, and in particular *"whether, ignoring any personal or extraneous interest, there is more that unites the relevant creditors than divides them."* In acknowledgement of the fact that the class test under Part 26 has been developed to promote the success of a procedure that does not enable cross class cram down, he also made the following observation: *"having regard to the fact that the cross-class cram down provisions under s.901G, and, in particular, the requirements of section 901G(5), point to the possibility that in some circumstances a company may have an incentive to increase rather than reduce the number of classes in respect of which class meetings need to be called so that it can improve the prospect that at least one class votes to agree it"* (paragraph 47).

Thirdly, he identified a number of specific matters that supported this view (at paragraph 48). Firstly, the language in the relevant parts of sections 901A and 901C CA 2006 is identical to the language in the comparable sections in Part 26, i.e. sections 895 and 896. Secondly, the Explanatory Notes expressly contemplate a commonality of approach being taken. Thirdly, and perhaps most importantly, he observed *"the constitution of classes has long been at the heart of the case law dealing with schemes under Part 26 and its statutory predecessors. It is to be expected that, if a difference in approach was anticipated by Parliament, it would at least have been signalled in some way in the legislation, which is not the case."*

Applying those principles, he was satisfied that the constitution of classes proposed by Virgin Atlantic were appropriate. Indeed, in this case the existing rights of each class were materially different, and so was their treatment under the restructuring plan. Although the point was not argued before the court, it is likely that it would not have been possible to reduce the number of classes, at least under the existing Part 26 jurisprudence.

By way of summary:

(1) The "**RCF Plan Creditors**" were secured finance creditors with claims under a revolving credit facility. The restructuring plan made certain changes to the facility, including converting it into a term loan and extending the maturity date, as well as making arrangements for the security over one of the secured assets – an aircraft engine – to be released in exchange for security over a bank account.

(2) The "**Operating Lessor Plan Creditors**" were the lessors under certain operating leases for the Company's aircraft. The restructuring plan gave them three options, two of which involved deferring rent payments (on slightly different repayment terms) and the third enabled them to repossess their aircraft. In the event, all of these creditors selected the same deferral option.

(3) The "**Connected Party Plan Creditors**" were connected parties with unsecured claims under various contracts. Under the restructuring plan, for the most part, their existing and future claims were to be exchanged for the same preference shares. The only potential class issue was that one of the Connected Party Plan Creditors would not be required to exchange its future claims under a particular contract – the Delta Air4 Agreement – for preference shares. However, since each of the Connected Party Plan Creditors had already agreed to support the restructuring plan in advance of the hearing, it was not impossible for them all to consult together.

(3) The Trade Plan Creditors were all unsecured creditors of the Company. Their claims would all be altered in the same way under the restructuring plan, in that a haircut of 20% would be applied, and the remainder repaid in a total of nine instalments over two years. This represented a substantially better result than in an administration, which was the most likely alternative.

International Jurisdiction

Unsurprisingly, Trower J took the same approach towards international jurisdiction as is usually taken in Part 26 schemes, and adopted what he referred to as the *"usual practice"* (paragraph 59) of assuming that Regulation EU (1215/2012) (the "**Judgments Regulation**") applies without deciding the matter. As there were a number of plan creditors domiciled in England, including at least one in each class, the court therefore had jurisdiction pursuant to Article 8 of the Judgments Regulation. He was not, however, satisfied that the Company could rely on Article 25, as there was no clear evidence that each of the Trade Plan Creditors had contracted on terms with an English jurisdiction clause.

Confidentiality

It has become almost routine for companies disclosing sensitive financial information in their evidence for Part 26 schemes to seek an order that keeps that detail confidential. Given the very candid detail given about Virgin Atlantic's precarious financial position in the Company's evidence, the court was asked to make an order pursuant to CPR 5.4D(2), that notice shall be given to the Company of any application made by a person to obtain a copy of a document from the court file. Trower J held that *"whether or not this has become a standard order in Part 26 schemes, I am satisfied that there is sufficiently commercially sensitive material which has been put before the court to make such an order appropriate in the present case"* (at [67]). He then observed that this order did not preclude anybody from obtaining the documents, but simply required the Company to be given notice of an application to inspect them.

Where a similar order was made in *Noble Group Limited* [2018] EWHC 2911 (Ch), the commercially sensitive information was confined to the company's witness statement and not mentioned in open court or the judgement. Snowden J deliberately skirted over the details at paragraph 177 of his judgment, commenting on the tight timetable for the implementation of the restructuring: *"the pressure that this approach created was compounded by evidence from Mr Brough, the detail of which I have ordered should be kept confidential for the time being, but which I can nevertheless say warned of dire consequences for the company and its creditors if the timetable set by the SIC was not met."*

By contrast, in Virgin Atlantic, the commercially sensitive information was repeated in both written and oral submissions as well as summarised in the Convening Judgment itself.

Hours after the hearing concluded, quotations from the hearing had been published in numerous online news publications: see for example:

(1) https://www.law360.com/articles/1298146/virgin-atlantic-gets-ok-to-take-covid-19-refinancing-to-vote

(2) https://www.travelweekly.co.uk/articles/381761/virgin-atlantic-could-run-out-of-cash-by-end-of-september-without-12bn-bailout

(3) https://www.thisismoney.co.uk/wires/pa/article-8592061/Virgin-Atlantic-run-money-end-September.html

(4) https://metro.co.uk/2020/08/04/virgin-atlantic-run-money-altogether-next-month-13083397/

(5) https://uk.finance.yahoo.com/news/coronavirus-virgin-atlantic-rescue-restructuring-close-flights-airlines-091229553.html

It can be seen even from these website domains that the details of the Company's precarious financial position was not kept confidential for long. This casts doubt on whether the order pursuant to CPR 5.4D(2) had any practical utility at all.

The Sanction Hearing

Outcome of the Plan Meetings

Due to restrictions caused by the ongoing COVID-19 pandemic, and following Trower J's guidance in *Re Castle Trust Direct plc* [2020] 969 Ch (in particular paragraphs 42 and 43), the class meetings took place by Zoom conference on 25 August 2020. The restructuring plan was approved at all four meetings. 100% in value and number of the RCF Plan Creditors, Operating Lessor Plan Creditors and Connected Party Plan Creditors voted in favour, with a turnout of 100% at each meeting. 99.24% in value of the Trade Plan Creditors voted in favour, with a turnout of 66.05%. Two Trade Plan Creditors holding 0.39% by value voted against and three Trade Plan Creditors holding 0.37% by value abstained from voting.

In these circumstances, the Company sought for the restructuring plan to be sanctioned under section 901F.

As a practical point, during the hearing Snowden J indicated that although the statutory majority in Part 26A does not include a numerosity requirement, it would nevertheless assist the court for the chairperson's report and the evidence to contain details about the number of plan creditors who voted at the plan meetings and how they voted.

A warning against 100% consent

Snowden J began by noting that (at paragraph 45) *"it is clear that the court has a general discretion whether to sanction a restructuring plan under Part 26A. It is also envisaged that the authorities under Part 26 may, where appropriate, assist the court in deciding how to exercise its discretion under Part 26A."* Since all of the classes of plan creditors had approved the plan, the court was in a similar position to a Part 26 sanction hearing and *"accordingly, I shall simply follow the tried and tested approach to the exercise of discretion which has been established under Part 26"* (paragraph 46).

However, he also addressed the potential difficulty caused by the fact that three of the four classes had, prior to the convening order being made, already agreed to vote in favour of the restructuring plan. The compromises with those creditors could therefore have been implemented consensually. Indeed, when the Practice Statement Letter was sent out, there was an additional class of plan creditors, comprising of the lessors and finance parties in respect of various finance leases. By the time of the convening hearing, those creditors had been removed from the restructuring plan, as 100% consent had been obtained.

In light of this, Snowden J noted that (at paragraph 48) *"under Part 26, the court would not ordinarily entertain an application to convene scheme meetings or sanction a scheme of arrangement where it was known in advance that all creditors have consented or would be prepared to consent to a variation of their rights against the company. As such, although very high majorities are sometimes locked up in advance to support a scheme, it is not normal practice to include classes in a Part 26 scheme where 100% of the relevant creditors are known to be willing to consent."*

In this regard, there is precedent for the court convening a Part 26 scheme

> *If creditors who rank pari passu with scheme or plan creditors are being treated more favourably outside the scheme or plan, this should be fully explained to the creditors who are being dealt with under the scheme or plan, so that they can assess whether they are being treated unfairly*

where 100% support has been obtained from all of the creditors: see *Re NN2 Newco Limited; Politus BV* [2019] EWHC 1917 (Ch), where Norris J made an order convening meetings in respect of the scheme proposed by Politus BV, notwithstanding that all of the scheme creditors had agreed to support the scheme by the time that the convening order was made. However, he noted that if Politus still wished to implement its restructuring by way of a scheme it would be for the judge at the sanction hearing to decide *"whether, if all Politus Lenders are agreed, it is a proper exercise of discretion to sanction the scheme"* (at paragraph 25). In the event, Politus abandoned the scheme before the scheme meetings.

As a practical matter, future applicants under Part 26A should take care to ensure that less than 100% of at least one consenting class formally agree to support the restructuring plan in advance. This will avoid any risk that the court considers using fully consenting classes to cram down a dissenting class is an inappropriate use of its discretion.

The approach to sanction

Snowden J began by summarising the established four-stage test for Part 26 sanction hearings, which is follows (paragraphs 51 and 52):

(1) Whether the statute has been complied with.

(2) Whether the class was fairly represented at the meeting, and whether the majority was coercing the minority in order to promote interests adverse to the class which they purport to represent.

(3) Whether the scheme is a fair scheme which a creditor could reasonably approve.

(4) Whether there is any blot or defect in the scheme.

In this case, three of the four stages were clearly satisfied. The provisions of the statute had been complied with; the high level of support for both the restructuring plan and the broader recapitalisation, including by the Trade Plan Creditors, suggested that the compromise offered was fair; and the court was not aware of any "blot" or defect in the restructuring plan.

However, Snowden J gave more detailed attention to the second stage of the test, in order to address the question of whether the class of Trade Plan Creditors was properly constituted. As alluded to above, four categories of the Company's suppliers were not included in the Restructuring Plan (the "**Excluded Trade Creditors**"), as follows (see the Convening Judgment at paragraph 11):

(1) Creditors whose claims were less than £50,000 as at 12 June 2020. Including these creditors in the plan was considered to be financially inefficient, given that the logistical difficulties and additional expense it would have generated were considered disproportionate when compared to the total value of these claims.

(2) Public bodies and insurance companies who were owed liabilities, the non-payment of which would jeopardise the ability of the Company to carry on business.

(3) Other suppliers whose continuing goodwill was essential to the continuation of the Company's business.

(4) Suppliers who the Company had already reached agreement to compromise their claims at a level equal to or below the level provided by the restructuring plan.

Although there was no doubt that companies have the ability to choose which of their creditors to include in a scheme under Part 26 and, therefore, Part 26A (following in particular *SEA Assets v PT Garuda* [2001] EWCA Civ 1696), Snowden J emphasised that the selection of creditors had implications for the exercise of the court's discretion (at paragraph 42). In order for the classes to be fairly constituted, the creditors must have been properly consulted. This requires the creditors to have been given both sufficient time for consideration and sufficient information to make a reasonable judgment about whether the proposal is in their commercial interests or not. The information required includes both information about what the creditors are likely to get under the scheme as opposed to absent the scheme, and in addition *"if creditors who rank pari passu with scheme or plan creditors are being treated more favourably outside the scheme or plan, this should be fully explained to the creditors who are being dealt with under the scheme or plan, so that they can assess whether they are being treated unfairly"* (paragraph 63).

In this case, the exclusion of the Excluded Trade Creditors was not unfair. In particular, there was a reasonable commercial justification for excluding creditors with the power to jeopardise the Company's ability to carry on business (categories 2 and 3 above), for the same reasons given in *Garuda* itself. There was also a reasonable justification for excluding the creditors who were owed less than £50,000, since including them in the restructuring plan would have increased the number of Trade Plan Creditors by around 1,000 in exchange for a debt reduction of about £1 million (category 1 above) (see paragraphs 65 and 66). As Snowden J did not specifically consider the position of category 4 creditors, it seems evident

that he considered there was no unfairness in excluding creditors who had already agreed to a haircut equal to or greater than that imposed by the restructuring plan. He was also satisfied that sufficient information had been given about the exclusion of the Excluded Trade Creditors in the explanatory statement. Therefore, this limb of the test was also satisfied.

Finally, there was no doubt that, if sanctioned, the restructuring plan was likely to have a substantial effect (paragraphs 71 to 75).

Conclusion

In a case such as Virgin Atlantic, where the restructuring plan could, in hindsight, also have been proposed as a Part 26 scheme, adopting a consistent approach was both logical and appropriate. However, there will no doubt be future cases which test the limits of applying the existing scheme jurisprudence to Part 26A restructuring plans. At the moment, the classic principles of class composition enable a company to artificially manufacture a consenting class, in order to engage section 901G. The class composition in Virgin Atlantic dipped a toe in this water since, by the time of the Convening Hearing all of the classes other than the Trade Plan Creditors had already received 100% support, and therefore could have been implemented outside of the restructuring plan. It will be interesting to see how far the court is happy to tolerate this in cases where section 901G is engaged.

Most striking, however, is the fact that the *Buckley* test cannot be applied so directly when the court is considering whether to sanction a restructuring plan under section 901G. Clearly, imposing a restructuring plan on a dissenting class requires the court to depart from the established principle that creditors, rather than the court, are best placed to judge what is in their commercial interests, at least on a class by class basis. Until a new fairness test is formulated, there remains considerable uncertainty about the circumstances in which the court will exercise this new discretion.