CR-2023-001960

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

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

26 June 2023

Before:

MR JUSTICE LEECH

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IN THE MATTER OF LAMO HOLDING B.V.
AND IN THE MATTER OF THE COMPANIES ACT 2006

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MR DANIEL BAYFIELD KC and (on 16 May 2023) **MR MATTHEW ABRAHAM** (instructed by **Allen & Overy LLP**) appeared on behalf of Lamo Holding B.V. (the "**Company**")
MS GEORGINA PETERS (on 16 May 2023), **MR DAVID ALLISON KC** and **MS STEFANIE WILKINS** (on 25 and 26 May 2023 (instructed by **Norton Rose Fulbright LLP**) for six financial institutions who are lenders to the Company and the Vroon Group of companies (the "**Group**")
MR JEREMY GOLDRING KC (on 16 May 2023) and **MR RYAN PERKINS** (instructed by **Jones Day** for the shareholders (the "**Shareholders**") of Vroon Group B.V. (the "**Parent**")

Hearing dates: 16, 25 and 26 May 2023

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APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30 am on 26 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Leech:

I. The Application

1. By Claim Form dated 14 April 2023 the Claimant, Lamo Holding B.V. (the "**Company**") applied for an order to convene and conduct meetings for the purpose for considering and, if thought fit, approving a scheme of arrangement (the "**Scheme**") with certain of its creditors (the "**Scheme Creditors**") under Part 26 of the Companies Act 2006 (the "**Act**") and, subject to the approval of the Scheme Creditors, an order pursuant to section 899 of the Act sanctioning the Scheme.

2. The Scheme formed part of wider restructuring arrangements involving the Group. In particular, on 15 November 2022 both the Parent and the Company issued proceedings in the Court of Zeeland-West-Brabant in the Netherlands under the *Wet homologatie onderhands akkoord* (the "**WHOA**"), which recently came into force and which provides a procedure for the confirmation of private restructuring plans. WHOA proceedings permit a debtor to propose a composition or arrangement to its creditors and shareholders under Article 370 of the Dutch Bankruptcy Act (as amended). On 19 April 2023 the Parent proposed a private restructuring plan under the WHOA (the "**WHOA Plan**") to its creditors and the Shareholders.

3. Article 376 of the Dutch Bankruptcy Act also permits a debtor to apply for a stay of enforcement where it has proposed a WHOA plan or undertakes to do so within two months. Both the Parent and the Company applied for a stay on behalf of themselves and a number of Group companies under Article 376 and on 24 November 2022 the District Court granted a stay of enforcement (*afkoelingsperiode*) for an initial period of three months. On 14 March 2023 the District Court granted an extension until 30 April 2023 and the stay was extended again until 31 May 2023. On 15 May 2023 the Dutch Court heard argument on whether to confirm the WHOA Plan.

4. On 5 December 2022 the District Court also granted interim measures restraining the Shareholders from suspending, removing or appointing any managing director or supervisory board member of the Parent on an interim basis and on

23 December 2022 the District Court made a final decision continuing those measures on near identical terms. I will refer to the wider restructuring including the Scheme, the WHOA Plan and the stay of enforcement as the "**Restructuring Measures**".

5. On 16 May 2023 I heard the application to sanction the Scheme. Mr Bayfield and Mr Abraham appeared for the Company, Ms Peters appeared for a group of creditors supporting the Scheme and Mr Goldring and Mr Perkins appeared for the Shareholders opposing the Scheme. The Company adduced evidence to demonstrate that if the Restructuring Measures failed, the Group's creditors would enforce their various security rights forcing the Company and other members of the Group into insolvent liquidation under the Dutch Bankruptcy Code or broadly equivalent legislation in the relevant jurisdictions.

6. The Shareholders served evidence putting in issue the Company's case that the true comparator (i.e. the alternative if the Scheme does not proceed) was not a liquidation but an orderly wind down and sale of the Company's fleet on a solvent basis and that this was more likely to generate a better return for both the Group's creditors and the Shareholders. This gave rise to issues of fact which I could not finally resolve without hearing live evidence from the relevant witnesses.

7. Mr Bayfield submitted that I should sanction the Scheme without hearing that evidence. He did not dispute that the Shareholders had standing to be heard but he submitted that the Shareholders had not only had, but taken, the opportunity to challenge the Company's evidence in the WHOA proceedings before the Dutch Court. Mr Goldring submitted that it was unfair to sanction the Scheme without deciding what the true comparator was and whether the outcome would be better for the Shareholders if the Court refused to sanction the Scheme.

8. I did not resolve this argument but as a matter of case management I directed that a further hearing take place on 25 and 26 May 2023 for the hearing of live evidence and closing submissions. That hearing took place and at about 3 pm on 26 May 2023 the Dutch Court handed down its decision confirming the WHOA Plan but without giving reasons. After a short adjournment to consider the

evidence and submissions of the parties I announced my decision to grant the Company's application and to sanction the Scheme.

II. The Orders

9. On 26 May 2023 I made an order (the "**Sanction Order**") sanctioning the Scheme and appointing Mr Robert Schuijt, the Chief Financial Officer of the Parent, to act as the Company's Foreign Representative (as defined in the Sanction Order). I also adjourned the sanction hearing to a date to be fixed when I had circulated my draft judgment for the hearing of any consequential matters and, in particular, for any application for permission to appeal by the Shareholders. On 6 June 2023 I made an order by consent (the "**Consent Order**") that there should be no order as to costs. In the Consent Order the Shareholders also gave an undertaking not to seek permission to appeal.

10. In this judgment I set out my reasons for sanctioning the Scheme. Given that the Shareholders gave an undertaking not to seek permission to appeal either from this Court or from the Court of Appeal without waiting for the Court to give a reasoned judgment, my reasons for exercising the Court's discretion to sanction the Scheme are to some extent moot. Nevertheless, I must set out those reasons although I do so as briefly as is possible in the circumstances.

III. Background

11. The Company is a private limited company incorporated under Dutch law and has its official seat in Breda in the Netherlands. It is registered in the Dutch Trade Register under registration no. 70208514. It is the holding company of the Group which was originally established in 1890 and operates and manages a fleet of 101 vessels in two divisions (the "**Deepsea Division**" and the "**Offshore Division**"). The Group comprises 123 separate legal entities (eight of which are joint venture entities or entities in which the Group holds a minority interest).

12. The Parent is the sole shareholder of the Company and also its sole corporate director. Barcelona Investments N.V. (a public company incorporated under the laws of Curacao), IKN Holdings N.V. (also a public company incorporated under the laws of Curacao) and TLOB Holdings N.V. (a private limited company

incorporated under Dutch law and registered in Rotterdam) are the Shareholders and they are controlled by Mr F.D. or "Coco" Vroon, who was formerly the chief executive officer of the Group.

13. The day-to-day management of the Company is the responsibility of a management team under the supervision of the Parent (as its sole director). In turn, the Parent's corporate governance structure consists of a management board and a supervisory board. Mr Herman Marks was the chief executive officer and Mr Schuijt was the chief financial officer at the time of the events which I describe in this judgment and the members of the management board of the Parent were Mr Willem Ledeboer (the Chairman), Mr Reiner Zwitserloot, Mr Toine van Laack, Mr Magnus Karlsen and Mr Dennis Kerkhoven were the members of the supervisory board.

14. The Group is predominantly financed by external debt provided by a number of financial institutions. The Group's financing was traditionally provided on a bilateral basis and has predominantly been used for the acquisition and financing of vessels (which provided the collateral and formed part of the security package in respect of the relevant loans). Mr Schuijt's evidence was that at the date of the issue of the Claim Form 28 different financing arrangements were in place between Group entities and 14 different lenders.

15. From 2016 challenges in the shipping market together with the Group's ongoing debt service obligations under its existing finance arrangements put significant pressure on the Group's liquidity. The Group entered into discussions with its existing lenders with a view to renegotiating the terms of its financial indebtedness. These discussions were complicated because of the differing pricing structures, security packages and terms and conditions of the Group's loans, the different interests of its lenders and fluctuations in the market value of the vessels owned by the Group.

16. Much of the Group's indebtedness arose under individual facility agreements secured over individual vessels which give the lender independent enforcement rights in relation to the vessel itself, the income derived from it and the shares in the individual company which owned the vessel. In evidence, the parties referred

to each facility and the associated rights as a "**Facility Agreement**" and identified it by a number preceded by the prefix "**FE**" and I adopt the same convention.

17. On 13 November 2018, however, the Group entered into a framework agreement (the "**Framework Agreement**") with the lenders of 33 separate Facility Agreements under which the Company guaranteed the obligations of the individual Group companies which owned the vessels. The principal objective of the Framework Agreement was to harmonise and align the Group's financial arrangements. In summary, it provided for a uniform final maturity date of 31 March 2021 for all relevant debt claims; it contained cross-guarantees and indemnities pursuant to which each relevant member of the Group (including the Company itself) provided guarantees in respect of the debt owed by each other relevant Group member to each lender; and it introduced new security for the benefit of each lender in respect of the Group's assets (which was subordinated to any existing security in respect of those assets).

18. Following the execution of the Framework Agreement, certain lenders were appointed to act as a monitoring committee (the "**MoCom**") and its role included managing and facilitating communications between the Parent and other financing parties, approval of certain financial reports of the Group, functions in connection with the sale of any vessels and instructing the restructuring agent appointed under the Framework Agreement.

19. Despite the Framework Agreement the Group continued to experience financial difficulties in the period leading up to and following the Covid-19 pandemic. Over the course of 2019 there was a deterioration in the Group's operations and the Group's 2019 financial results did not generate the improvements required to comply with the Group's obligations under the Framework Agreement. As a result, in the fourth quarter of 2019 the Group informed the Lenders that it had committed breaches of certain covenants in the Framework Agreement and was likely to commit breaches of further covenants in the future.

20. The Covid-19 pandemic had a particular negative impact on the Group's operations and on global shipping markets generally because of reduced

shipping demand, the reduction in demand for goods from China and decline in the price of oil, the closure of ports across the globe, the introduction of enhanced screening procedures and quarantine requirements for crew and the repeated introduction and re-introduction of prohibitions on non-essential travel in multiple territories. In 2021 significant volatility remained in all of the Group's market segments and despite a smaller fleet its financial position remained weak and the levels of accrued default interest remained high.

21. The Group has been in default under the Framework Agreement since 30 June 2020. The various obligors under the Framework Agreement also failed to repay in full the amounts which were outstanding on the final maturity date of 31 March 2021 and this led to a global acceleration event under the Framework Agreement. Nevertheless, most of the Group's lenders continued to support the ongoing operation of the Group's business by agreeing to a de facto standstill on enforcement action (whilst reserving their rights) and by providing the necessary waivers and consents under the Framework Agreement to permit the sale of vessels.

22. However, some lenders chose to enforce their security rights over bank accounts holding the cash generated by individual vessels or otherwise restricted the Group's access to free cash. Moreover, during 2022 DNB Bank ASA and DNB (UK) Ltd (together "**DNB**"), which had provided facilities under Facility Agreements FE0021 and FE0028, were not willing to consent to the Restructuring Measures on the same terms as the majority of the Group's other lenders and on 3 August 2022 DNB served notice that it had arrested the vessel VOS Prince in the port of Haifa in Israel. On 11 November 2022 DNB also appropriated amounts in various accounts secured in its favour.

23. In November 2022 NIBC Bank N.V. ("**NIBC**"), which was at the time a member of MoCom, also resigned from MoCom and threatened enforcement over the vessels which were secured in its favour. On 1 November 2022 the Group informed the MoCom that NIBC had arrested one of the two vessels over which it held security, the Iver Action. The Group reached a bilateral agreement with NIBC whereby the two vessels were sold and it agreed to release any deficiency

claim in relation to such sale. NIBC is therefore no longer a creditor of the Group.

24. Nevertheless, the threat of further enforcement action prompted the Group to commence the WHOA proceedings in the Netherlands. Indeed, if it had not been for the stay ordered by the Dutch Court, any of the Group's lenders would have been entitled to exercise its rights under each existing Facility Agreement and to enforce its security rights. Default interest also continues to accrue and as at 31 March 2023 it stood at approximately US $124 million.

25. On 19 December 2022 and 20 December 2022 the Parent's managing board and the Parent's supervisory board approved the terms of a proposed restructuring support agreement which had been reached with the majority of the Group's creditors (including the MoCom). Over lengthy negotiations it had become clear that the Group's creditors were not willing to agree to the Group retaining the vessels in its Offshore Division and the lenders of the relevant facilities expressed a preference for them to be sold. On 31 January 2023 the Company, the Parent and the Scheme Creditors apart from two (The Export-Import Bank of China and Hawthorn Marine SA) entered into the restructuring support agreement (the "**Restructuring Support Agreement**") to facilitate the implementation of the Restructuring Measures.

26. On 31 January 2023 the Group also entered into two bilateral support agreements. The first related to the DNB facilities and under its terms DNB agreed to sell its exposure to the Group and not to take any further enforcement action. The second related to facilities granted by Deutsche Bank AG ("**DB**") to Petrolmar Srl and under its terms DB also agreed not to take any enforcement action.

IV. The Scheme

(1) The Convening Hearing

27. On 18 April 2023 the convening hearing took place before Sir Anthony Mann (sitting as a judge of the High Court) and he gave judgment confirming that the Court had jurisdiction to sanction the Scheme and dealing with class composition

(the "**Convening Judgment**"). He also made an Order convening two meetings of creditors (the "**Convening Order**").

(2) The Scheme Creditors

28. The Scheme Creditors are all parties to the Framework Agreement and were divided into two classes for the purposes of class composition: first, the "**NewCo Scheme Creditors**" and, secondly, the "**Exiting Scheme Creditors**". Because of their exposures under different Facility Agreements, it is possible for individual creditors to fall within both classes. Moreover, the two classes of Scheme Creditors do not include all of the creditors of the Group. I will therefore refer to those who were excluded from the Scheme altogether as "**Excluded Creditors**".

29. The Scheme will apply to any liability of the Company to a Scheme Creditor. In relation to NewCo Scheme Creditors, the Scheme will apply to its "**NewCo Exposure**" which is the exposure to loans under each Facility Agreement associated with the "**NewCo Vessels**". These are vessels within the Deepsea Division as well as emergency response and rescue vessels against which each NewCo Scheme Creditor has recourse. In relation to each Exiting Scheme Creditor, the Scheme will apply to its "**Exiting Exposure**" which is the exposure to loans which are not associated with the NewCo Vessels but with those vessels which are intended to be sold as part of the Restructuring Measures, which I will call the "**Exiting Vessels**".

30. Each NewCo Scheme Creditor will release its claims under the relevant Facility Agreement relating to the relevant NewCo Vessels in substitution for a new series of arrangements which will eliminate the amount of any deficiency. Mr Bayfield explained these arrangements in detail in his Skeleton Argument and there was no challenge to that description which I gratefully adopt. Sir Anthony Mann also gave the following summary of those arrangements in the Convening Judgment at [6](d):

> "The NewCo Scheme Creditors will have their present loans and guarantee structures replaced by participation in a new guaranteed syndicated facility. Their respective participation in that facility will be measured by reference to the fair market value of the vessels over

> which each has security; each takes a "haircut" as to the remainder of the outstanding principal of the present debt. Security over all the vessels is now to be shared and there is a mechanism for assigning priorities and adjusting interest rates. The term of the new debt and the interest rates chargeable are adjusted from the term date of the present indebtedness. As some form of compensation for the deficiency which each NewCo Scheme Creditor will have to bear, each such creditor gets a share in cash within the Group (though at the moment it does not look as though there will be any) and some DRs allocated according to a formula. Thus they gain some participation in the equity of the business going forward."

31. Each Exiting Scheme Creditor will also release its claims under the existing Facility Agreement but will not retain any security because the Exiting Vessels in the Offshore Division are to be sold. Again, Mr Bayfield has explained the way in which the Scheme is intended to operate for Exiting Scheme Creditors in his Skeleton Argument and there was no challenge to that explanation either. Sir Anthony Mann also gave the following summary in the Convening Judgment at [6](d):

> "Exiting Scheme Creditors will not have security interests in vessels retained within the Group. The vessels over which they have security will be sold in an orderly fashion so as to maximise recoveries and these creditors will have no recourse for the recovery of their loans beyond the proceeds of sale of those vessels. The remainder of their loans is a deficiency which will not be recoverable as such. However, they too will be entitled to a share of the (presently non-existent) cash resources of the Group and will have an allocation of DRs."

(3) The Excluded Creditors

32. The Scheme excludes the exposure of the Group to a number of creditors under Facility Agreements FE0008, FE0021, FE0028, FE00039, FE0045 and FE0055. ABN AMRO Bank N.V. ("**ABN AMRO**") is the lender under Facility Agreements FE0008 and FE00045 and COSCO Shipyard Group Ltd ("**COSCO**") is the lender under Facility Agreement FE0055. These creditors were excluded from the Scheme because they were expected to recover in full even if the WHOA Plan and the Scheme did not take effect. The terms of both facilities are to be amended as part of the wider restructuring but the relevant lenders are not Scheme Creditors and parties to the Scheme.

33. Facility Agreements FE0021 and FE0028 relate to the loans made by DNB and are governed by the separate support agreement (above). Mr Bayfield submitted that the vessels securing those loans were important to the ongoing operations of the Group. Moreover, DNB had taken strong objection to the Restructuring Measures and had taken its own enforcement action. Finally, DB is the lender under Facility Agreement FE0039, which is also the subject matter of a separate support agreement (above).

34. The general principle is that a company is free to select the creditors with whom it wishes to enter into an arrangement and need not include creditors whose rights are not altered by the scheme: see *Re Bluebrook Ltd* [2010] BCC 209 at [24] (Mann J). If a company excludes too many creditors, it may make the Scheme unworkable or impractical to implement and this may itself provide a reason for refusing to sanction the Scheme. If it excludes creditors on an unprincipled basis, then the scheme company runs the risk creditors whose claims are compromised by the Scheme may refuse to support it. Mr Goldring and Mr Perkins did not challenge the Company's analysis or its reasons for excluding any of the Excluded Creditors and none of the Scheme Creditors opposed the Scheme on the basis that it operated partially or unfairly.

(4) The WHOA Plan

35. The WHOA Plan provides that the Parent will transfer the shares in the Company to a "*Stichting Administratiekantoor*" established under Dutch law (the "**STAK**"). It also contemplates that the STAK will issue negotiable instruments known as "**Depositary Receipts**" or "**DRs**" to the Shareholders corresponding to 4.91% of the equity value of the Company. It also provides that the Parent will be released from its claims and obligations to its creditors and the Shareholders and for the disposal of certain vessels and the liquidation of the Parent on a solvent basis. The final version of the WHOA Plan was before this Court and it provides the following description of such a plan:

> "2.1 A private plan (*onderhands akkoord*), such as this WHOA Plan, is a plan offered in the context of a formal procedure under Part 2 of the Dutch Bankruptcy Act (*Faillissementswet*), which procedure was introduced as part of the Act on the Confirmation of Private Plans (*Wet homologatie onderhands akkoord*) (the **WHOA**). A private

> plan allows a debtor to propose to its creditors and/or shareholders, or any subset of them, a composition or arrangement with respect to its debts or obligations owed by it to those creditors and/or shareholders. A private plan under the WHOA will become legally binding if, in short, the following requirements are met: (a) the approval of at least one 'in-the-money' class of creditors by a majority representing at least two thirds (2/3) in value of the relevant creditors in that class who casted a vote; and (b) the sanctioning, upon request, of the private plan by a competent court.
>
> 2.2 If a private plan is approved by a relevant creditor class and subsequently sanctioned by the competent court, such private plan will bind all creditors and shareholders subject to it, including those creditors and shareholders who voted against it or abstained from voting, as well as their successors and assignees. A private plan will only be sanctioned by the court, if the court is satisfied that the private plan meets the relevant statutory requirements.
>
> 2.3 In accordance with section IV of the European Restructuring Directive Implementation Act (Implementatiewet richtlijn herstructurering en insolventie) this WHOA Plan is governed by the law as it applied before the entry into force of section I of said act."

36. Mr Perkins, who appeared at the resumed sanction hearing on behalf of the Shareholders, placed considerable reliance on the different measures which the WHOA Plan and the Scheme were intended to implement. These are conveniently set out in the WHOA Plan itself and it provides the following description of the WHOA Plan measures:

> "7.7 Under this WHOA Plan, the shares in the Scheme Company will be transferred to the STAK, and thereafter the Group will undergo further restructuring, as further described below. The Creditors and Shareholders of the WHOA Company are entitled to the (reorganisation) value generated by such transfer and subsequent restructuring. The allocation *(toebedeling*) of that (reorganisation) value will be described in more detail below.
>
> 7.8 To effect the Restructuring, the following measures are contemplated by this WHOA Plan: (a) a transfer of the shares in the Scheme Company to the STAK and a transfer, by way of a contribution as share premium (*agio*), of all claims held by the WHOA Company against Vroon Group Finance B.V. to the Scheme Company (the Transfer); (b) a release and discharge of all rights and claims against the WHOA Company and, insofar related to the FWA Guarantee, each WHOA Group Company; (c) replacement shareholder approval, in accordance with section 370(5) of the Dutch Bankruptcy Act, to the extent necessary to implement the Restructuring, including for the purpose of (i) approving or ratifying the WHOA Company's entry into the Restructuring Support

> Agreement and the transactions contemplated thereby, including the Transfer and the disposal of the Exiting Vessels (pursuant to the terms of the Restructuring Support Agreement and, following the Restructuring Effective Date, the Override Agreement) (the Exiting Vessels Disposals); and (ii) the liquidation of the WHOA Company, by way of a turbo-liquidation (*turbo-liquidatie*) in accordance with section 2:19(4) of the Dutch Civil Code."

37. The WHOA Plan then goes on to describe the Scheme. Mr Perkins relied on the following passage as demonstrating that the DRs were to be issued to the Shareholders under the Scheme rather than under the WHOA Plan itself:

> "7.11 The Scheme Company has proposed, as set out in the Practice Statement Letter, a scheme of arrangement with the Scheme Creditors pursuant to Part 26 of the UK Companies Act 2006 (the Scheme). A scheme of arrangement is a statutory procedure under English law which allows a company to agree a compromise or arrangement with its creditors (or classes of creditors) and for the terms of the compromise or arrangement to bind any non-consenting or opposing minority creditors, subject to certain conditions being satisfied.
>
> 7.12 The Scheme aims to modify and vary certain rights of the Scheme Creditors against the WHOA Company and to confer on the Scheme Company a power of attorney to execute on behalf of each Scheme Creditor any necessary documents to implement certain steps under this Restructuring, including the allocation of the value realised under this WHOA Plan by effecting certain releases in exchange for which the participating parties will acquire certain new rights and/or instruments as described below. The key terms of the Scheme are set out in more detail in the Practice Statement Letter, which is attached to this WHOA Plan as Annex 8 (Practice Statement Letter) and the Witness Statement, which is attached to this WHOA Plan as Annex 9 (Witness Statement)."

38. The WHOA Plan continues by setting out in detail the financial consequences of the Restructuring Measures. It states that the reorganisation value is to be to be distributed by reference to the "Applicable Order of Priority" in accordance with the Article 384(4) of the Dutch Bankruptcy Act. It also states that 95.09% of the DRs are to be issued to (and divided between) the creditors of the Group and, in particular, that 87.96% will be issued to the NewCo Scheme Creditors and the Exiting Scheme Creditors by reference to their deficiency claims, 7.13% will be issued to the Scheme Creditors and the lenders under Facility Agreement FE0045 and 4.91% to the Shareholders. After setting out the financial

consequences for the individual creditors and Shareholders the WHOA Plan then states as follows:

> "9.3 The above consideration will be allocated (*toebedeeld*) to the relevant Creditors or Shareholders. This will not take place as part of this WHOA Plan, but under or in connection with the Scheme (including pursuant to the Implementation Agreement) and/or certain ancillary measures (or any other document entered into in connection therewith), as summarised below. The Implementation Agreement, which is attached to this WHOA Plan as Annex 11 (Implementation Agreement) explains in more detail how the above consideration is to be allocated amongst the various Classes. The Implementation Agreement will be executed upon sanctioning of the Scheme by, among others, the Scheme Company for itself and, to the extent that any Scheme Creditor has not already done so, on behalf of the Scheme Creditors who are a party to it (acting as their attorney and agent pursuant to the terms of the Scheme). Creditors and Shareholders should refer to the Implementation Agreement for more details."

39. Finally, Mr Perkins took me to the sale and purchase agreement which is appended to the Explanatory Statement as Appendix 7, Part 5. He submitted (and I accept) that it was intended to give effect to the WHOA Plan by providing for the transfer of the Company's shares to the STAK for EUR 1. He made the point that the WHOA Plan did not provide the mechanism for the issue of the DRs. This was the subject matter of the "**Implementation Agreement**" appended as Appendix 6 to the Explanatory Statement to which I now turn.

(5) The Implementation Agreement

40. The Scheme confers authority on the Company to enter into a series of documents and instruments on behalf of itself and the Scheme Creditors. For present purposes the critical document which it authorises the Company to execute is the Implementation Agreement. It is common ground that the Shareholders are not parties to the Implementation Agreement or bound by its terms. However, they do fall within the definition of "**DR Party**" in clause 1.1. That clause also provides that the term "**Restructuring Documents**" means the following:

> "(a) this Deed; (b) each of the documents substantially in the form set out in Schedule 6 (Key Restructuring Documents); (c) each of the

> documents listed in Schedule 7 (Security Documents); (d) the FE0055 Side Letter; and (e) any other document that is necessary or desirable to give effect to the Restructuring in accordance with this Deed, the Scheme and the other Restructuring Documents."

41. Clause 8 of the Implementation Agreement is headed "Allocations and Calculations" and clause 8.4 provides for the calculation and distribution of the DRs to be issued by the STAK:

> "(a) Subject to the other provisions of this Deed, each DR Party may only be issued with the Depositary Receipts calculated in accordance with the provisions of this Clause 8.4 (Calculation and distribution of Depositary Receipts).
>
> (b) Each DR Party (and/or its Nominee, as applicable) shall be issued with a proportion of the Depositary Receipts calculated in accordance with Part 3 (Calculation of Depositary Receipts) of Schedule 4 (Calculations).
>
> (c) A DR Party shall only be issued with Depositary Receipts as part of the Restructuring Steps, and may only elect for one or more Nominees to be issued with all or part of its Depositary Receipts as part of the Restructuring Steps, if: (i) it has validly completed and delivered a Lender Claim Form, including for the avoidance of doubt a validly executed and delivered Confirmation Deed, to the Information Agent prior to the Voting Instruction Deadline; (ii) in the case of a Nominee it has validly executed and delivered a Confirmation Deed, to the Information Agent prior to the Voting Instruction Deadline; (iii) it (and/or its Nominee, as applicable) is not a Disqualified Person; (iv) Lamo has received confirmation prior to the KYC Deadline from the STAK that such DR Party (and/or its Nominee, as applicable) has provided the STAK KYC in a form satisfactory to the STAK; and (v) Lamo has received confirmation prior to the KYC Deadline from the NRF Notary that such DR Party (and/or its Nominee, as applicable) has provided a notarial power of attorney substantially in the form set out in schedule 3 (Form of Notarial Power of Attorney) to the Lender Claim Form and any additional documentation in a form satisfactory to the NRF Notary.
>
> (d) If a DR Party does not satisfy the requirements of this Clause 8.4 (Calculation and distribution of Depositary Receipts) to be able to be issued with the Depositary Receipts on the Restructuring Effective Date, such DR Party's Depositary Receipts will, unless such DR Party (and/or its Nominee, as applicable) is a Sanctioned Person or a Russia Connected Person, instead be issued on the Restructuring Effective Date to the Holding Period Trustee, to hold in accordance with Clause 9 (Holding Period Trustee) and the Holding Period Trust Deed."

42. Schedule 4, Part 3, paragraph 1 also contains a calculation for "Shareholder Depositary Receipts" by reference to a complex mathematical formula and it was common ground that this formula produced the figure of 4.91%. Mr Goldring and Mr Perkins referred to this provision as the "**Shareholder Allocation Clause**" and I will do the same.

43. Clause 9 anticipated that Scheme Creditors and Shareholders might not complete and submit Lender Claim Forms and, in that event, it provided for them to be issued to a "**Holding Period Trustee**" for a "**Holding Period**". It also provided that if they had not been claimed by the end of that period, the Holding Period Trustee would request the management board of the STAK to cancel the DRs and also the corresponding shares in the Company held by the STAK.

44. Schedule 9 contained a number of initial conditions precedent which had to be satisfied before the Scheme could take effect. These included a condition that this Court made the Sanction Order and a condition that the Dutch Court gave judgment confirming the WHOA Plan. Mr Bayfield accepted that the Scheme could not go ahead unless the Dutch Court approved the WHOA Plan although he submitted that the Court should determine whether to sanction the Scheme independently and without waiting for the Dutch Court's decision.

45. Finally, the Explanatory Statement also appended the Lender Claim Form as Appendix 4. It was clearly designed for Scheme Creditors rather than the Shareholders (although the version of the Lender Claim Form made available to the Shareholders was slightly different) and, as Mr Goldring and Mr Perkins observed, it required each Scheme Creditor to enter into a confirmation deed undertaking to be bound by the Restructuring Documents (above). Moreover, although the Shareholders were not parties to the Holding Trust Deed they were identified as "Beneficiaries" and entitled to enforce its terms under the Contracts (Rights of Third Parties) Act 1999.

(6) The Contribution Deed

46. On 13 April 2023 the Company entered into a deed of contribution (the "**Contribution Deed**") in favour of the beneficiaries listed in Schedule 1. Those beneficiaries were the individual borrowers under each of the Facility

Agreements covered by the Scheme and the purpose of the deed was to prevent "ricochet claims". Sir Anthony Mann dealt with the Contribution Deed in the Convening Judgment at [12]:

> "In order to achieve that in the present case, the Scheme Company and its relevant subsidiaries have entered into an arrangement which creates a closer interest in the Scheme Company in the underlying debt. By a contribution agreement dated 13 April 2023, just six days ago, the Scheme Company has agreed with each debtor subsidiary that in the event of the debtor making a payment under its loan, the Scheme Company will contribute half of that payment. That artificial contrivance brings about a situation in which for a scheme of arrangement in relation to the guarantee to be effective the underlying debt now has to be dealt with because otherwise fulfilment of an obligation under the underlying debt would create a "ricochet" claim back against the guarantor, thus defeating the object of the claim. The way in which it is to be dealt with under the scheme is to require the Scheme Creditors to release the principal debt so as to prevent this artificially created ricochet claim and that is what is proposed under the present scheme. If the trick works, then the scheme can be effective. It has to be acknowledged that this is a highly artificial contrivance but such artificiality has not stood in the way of similar contrivances in past schemes and, at least at this stage, it should not stand in the way of this one. (See, for example, in the matter of *E D & F Man Holdings Limited* [2022] EWHC 687 (Ch) and *Swissport* (in which the scheme was ultimately sanctioned)). There are no other jurisdictional or analogous barriers to the scheme which prevent my making an order convening the requested meetings."

(7) The Deed of Release

47. Finally, the Scheme also authorises the Company to enter into a deed of release (the "**Deed of Release**") as agent for the Scheme Creditors releasing the officers and professional advisers from any claims arising out of the negotiation and implementation of the Restructuring Measures. In its original form the Deed of Release provided as follows (my emphasis):

> "With effect from the Restructuring Effective Time on the Restructuring Effective Date, subject to Clause 2.2 below, each Creditor, each Nominee and each Company Party (on behalf of itself and each of its successors and assigns):
>
> (a) irrevocably, unconditionally, fully, finally and absolutely waives and releases and forever discharges, to the fullest extent permitted by law, each and every Claim that it ever had, may have or hereafter

> can, shall or may have against the Released Parties, in each case, in relation to or arising directly or indirectly out of or in connection with:
>
> (i) the preparation, sanction or negotiation of the Restructuring, the Scheme or the Restructuring Documents or the implementation and/or execution of the Restructuring;
>
> (ii) the execution of the Restructuring Documents or any other documents required to implement the Restructuring or the taking of any steps or actions necessary or desirable to implement the Restructuring (including, without limitation, the steps set out in the Restructuring Steps Plan); and/or
>
> **(iii) with respect to any Relevant Director (past or present), any matter arising out of or in connection with any steps, actions or omissions on or prior to the Restructuring Effective Date by or on behalf of such person holding such positions with respect to any Company Party"**

48. Mr Goldring and Mr Perkins drew my attention to the width of sub-clause 2(a)(iii) (above) in their opening submissions and Mr Perkins made the point in his oral closing submissions that the release went far beyond the restructuring and related to any claim which the Company might have against a director whenever and however arising. Mr Bayfield undertook on instructions to remove sub-clause 2(a)(iii) from the Deed of Release and this undertaking was recorded in the Sanction Order. It is unnecessary, therefore, for me to consider this point further.

V. The Scheme Meetings

49. On 4 May 2023 the Scheme meetings took place in hybrid form. The Scheme was approved by the requisite statutory majority, namely, a majority in number representing at least 75% by value of those present and voting at each of the Scheme Meeting. 88.89% by value and 89.52% by number (8 out of 9) of the NewCo Scheme Creditors and 87.50% by value and 86.55% by number (7 out of 8) of the Exiting Scheme Creditors voted in favour of the Scheme. The only Scheme Creditor to vote against the Scheme was The Export-Import Bank of China in its capacity both as a NewCo Scheme Creditor and an Exiting Scheme Creditor. However, it did not appear to oppose the sanctioning of the Scheme or explain the reasons why it had voted against it. Indeed, the Shareholders were the only parties to oppose the Scheme at the sanction hearing.

VI. The Test

(1) The General Principles

50. Section 899 of the Companies Act 2006 confers power on the Court to sanction a scheme of arrangement:

> "(1) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement. (1A) Subsection (1) is subject to section 899A (moratorium debts, etc). (2) An application under this section may be made by– (a) the company, (b) any creditor or member of the company, (c) if the company is being wound up, the liquidator, or (d) if the company is in administration, the administrator. (3) A compromise or arrangement sanctioned by the court is binding on– (a) all creditors or the class of creditors or on the members or class of members (as the case may be), and (b) the company or, in the case of a company in the course of being wound up, the liquidator and contributories of the company. (4) The court's order has no effect until a copy of it has been delivered to the registrar."

51. There was no dispute that the principles which the Court must apply in deciding whether to approve a scheme were set out by David Richards J (as he then was) in *Re Telewest Communications (No 2) Ltd* [2005] 1 BCLC 772 at [20] to [22] (citing the decision of Plowman J in *Re National Bank Ltd* [1966] 1 WLR 819):

> "20. The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Ltd [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:
>
> > "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."
>
> 21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve". That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> 22. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court "will be slow to differ from the meeting."

52. In *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) Snowden J (as he then was) cited this passage. He then summarised the questions which the Court must address at the sanction hearing at [16]:

> "The relevant questions for the court at the sanction hearing can therefore be summarised as follows:
>
> i) Has there been compliance with the statutory requirements?
>
> ii) Was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the class meeting?
>
> iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?
>
> iv) Is there some other 'blot' or defect in the scheme?
>
> In the case of a scheme with international elements there is also the question of whether the court will be acting in vain if it sanctions the scheme. This requires some consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions."

(2) The opposition of creditors and shareholders who are not parties

53. Section 899 of the Companies Act 2006 does not state in terms that a shareholder or creditor who is not a party to the proposed scheme and who has not voted at the scheme meetings has standing to oppose the scheme at the sanction hearing. Likewise, in formulating the general test which the Court should apply, David Richards J in *Telewest (No 2)* and Snowden J in *KCA Deutag* did not exclude the possibility that a creditor or shareholder, who is not a party and who is not entitled to vote, should be entitled to oppose the scheme on the basis that it is unfair or that there is some blot or defect in the scheme which should prevent the Court from exercising its discretion to sanction it.

54. Mr Goldring and Mr Perkins identified five authorities in which the Court had given creditors who were not parties to the proposed scheme an opportunity to be heard. Those authorities were *Re BAT Industries plc* (Neuberger J, unreported, 3 September 1998), *Re Bluebrook Ltd* [2010] BCC 209 (Mann J), *Re Noble Group Ltd* [2019] BCC 209 (Snowden J), *Re Swissport Fuelling Ltd* [2020] EWHC 3413 (Ch) (Trower J) and *Re Steinhoff International Holdings NV* [2021] EWHC 134 (Adam Johnson J). They submitted that these decisions provided authority for the following propositions:

> "(1) In principle, a party not bound by a scheme has standing to appear at the sanction hearing and oppose the sanction of the scheme. There are no statutory restrictions seeking to limit the class of persons who can address the Court, or the considerations which can be taken into account by the Court. However, the Court does not have a roving commission at the suit of any objector who claims any prejudice as a result of a scheme, and the Court's discretion must be kept within proper bounds.
>
> (2) It would be blinkered, narrow and uncommercial for the Court to ignore the fact that the scheme is the first and necessary step of the wider Restructuring, with which it is inextricably intertwined. If a third party is not affected by the scheme itself but by a subsequent step which is dependent on the sanctioning and implementation of the scheme, then the Court is entitled to take that into account. The contrary approach would be unduly artificial. The Court should consider whether there is a close connection between the scheme and the relevant subsequent step, or whether the connection is merely remote and inchoate.
>
> (3) The Court cannot ignore objections of a third party on the basis that they are better raised in another forum. The Court must apply its own legal principles to determine whether it is right to sanction the scheme. However, the Court is entitled to consider whether the

> objecting party will have other opportunities in other legal proceedings to voice its objection, especially where the relevant subsequent steps (which form the basis for the objection) have only a remote and inchoate connection with the scheme.
>
> (4) In the specific context of a creditors' scheme which forms part of a wider restructuring involving a debt-for-equity swap (through a transfer of the group's assets to a new company owned by the senior creditors):
>
> (a) In principle, the company is entitled to propose a scheme with its senior creditors alone.
>
> (b) However, if any junior creditors or shareholders can adduce evidence to satisfy the Court that they have a real (as opposed to fanciful) economic interest in the company, then they are entitled to object to the scheme – even if the scheme does not alter their strict legal rights. The Court is exercising a discretion and can properly consider whether the scheme is unfair in that sense.
>
> (c) The above propositions are correct (and provide a basis upon which the Court can properly refuse to exercise its discretion to sanction the scheme) even if: (i) the scheme itself does not operate to transfer away the assets of the company (but is merely a condition precedent to such a transfer); and/or (ii) the scheme is solely designed to obtain the consent of a small minority of senior creditors, and the scheme would be unnecessary if all of the senior creditors consented to the restructuring.
>
> (d) For the purposes of assessing whether a person has a real economic interest in the company, the Court must ask whether any value would be available for such a person in the comparator to the scheme.
>
> (e) If the Court concludes that the company is wrong in its assessment of where the value "breaks" (in other words, if the Court concludes that the scheme and the wider restructuring provide a worse outcome for the objecting parties than they would receive in the comparator), then the Court should not exercise its discretion to sanction the scheme. There would be a blot on such a scheme. Further, sanctioning the scheme would legitimise a transaction which is unfair to the objecting parties."

55. In general terms, I accept propositions (1) to (4)(b) although I do not accept that there is an absolute entitlement for junior creditors or shareholders to adduce evidence or challenge the evidence of the scheme company or the scheme creditors. Section 899 does not confer a statutory right to be heard and there are no rules of court which confer such a right either. Nevertheless, all of the authorities upon which Mr Goldring and Mr Perkins relied provide support for

the proposition that they have a sufficient interest to be heard and that the Court should take their views into account.

56. So far as proposition (4)(c) is concerned, I am prepared to accept that the Court could in theory refuse to exercise its discretion to sanction a scheme even if it does not itself operate to transfer away the assets of the scheme company and even if exactly the same result could have been achieved without a court order (if all of the scheme creditors consented). But it will all depend on the scheme and the wider restructuring of which it forms a part. I observe that in none of the five authorities upon which Mr Goldring and Mr Perkins relied did the Court refuse to sanction the scheme or do so in the circumstances envisaged in proposition (4)(c). Moreover, none involved objections by shareholders (and, in particular, shareholders who were not prepared to invest new money in the company).

57. I do not accept proposition (4)(d) either. In my judgment, the Court is not bound as a matter of law to inquire whether a person who appears to oppose the scheme but whose legal rights are unaffected by the scheme has a real economic interest in the company or whether any value would be available for such a person in the comparator to the scheme. In particular, I do not accept that such a person is entitled to adduce evidence or cross-examine the company's witnesses because they assert such an interest. In the absence of procedural rules requiring the Court to give an opposing party a right to adduce evidence or cross-examine witnesses, this must be a matter for the Court in the exercise of its wider discretion. The Court will of course be astute to avoid procedural unfairness. But it will not give carte blanche to those whose interests may be affected by the wider restructuring to treat a sanction hearing as the trial of an action commenced under CPR Part 7. I return to this issue below.

58. Finally, I do not accept proposition (e) either or, at least, not without substantial qualification. I can easily foresee circumstances in which the Court is presented with complex and heavily contested issues of both factual and expert evidence which it would be impossible to resolve without a full trial. In my judgment, it would be open to the Court to decline to resolve those issues and to accept the evidence of the scheme company precisely because the relevant issues are so

difficult to determine and on the basis that the scheme creditors are in the best position to evaluate the relevant uncertainties and to assess the relevant risks.

59. Moreover, if almost all of the scheme creditors had voted in favour of the scheme and the opposing parties (whether other creditors or shareholders) had also had an opportunity to make the same objections and test the evidence in an alternative forum, then in my judgment the Court would be fully justified in exercising its discretion to sanction the scheme without hearing live evidence or resolving the heavily contested issues. With these very general observations in mind, I turn to the present case.

VII. The Shareholders' Opposition

60. Mr Bayfield submitted that the Court should not entertain the Shareholders' objections because a solvent wind down of the Group was dependent on the forbearance of the Scheme Creditors. He also submitted that if the Shareholders had a valid grievance, it was one which related to the WHOA Plan and not to the Scheme. He did not submit that the Shareholders had no standing to be heard. However, he submitted that the Court should not embark on a trial of the relevant issues for the following reasons which he set out in his Skeleton Argument:

> "106. The Company accepts that the Court is entitled to hear from the Shareholders. It does not take a strict "standing" point notwithstanding that, if the Company is correct as to what is the comparator to the Scheme, the Shareholders have no real economic interest in the Company absent the Restructuring (of which the Scheme is an integral part). They are entirely out-of-the-money as matters stand.
>
> 107. However, issues relating to the intended transfer of the Parent's shares in the Company to the STAK arise in the proceedings before the Dutch court where the Shareholders challenge the fairness of the WHOA Plan. The Shareholders contend before the Dutch court that the WHOA Plan does not sufficiently value their rights and should not be sanctioned. They advance the argument before the Dutch court that, if the Restructuring fails, there will be a solvent wind-down of the Group and not a collapse. They rely upon the same evidence as they have filed in this Court. These are all matters which the Dutch court will be able to take into account when considering whether or not to sanction the WHOA Plan.
>
> 109. The Dutch court has a broad discretion and, in any event, whether or not the transfer of the Parent's shares in the Company

> should be permitted without the approval of the Shareholders is entirely a matter of Dutch law on which the English court should not trespass. It is not for the English court to form its own view as to what the test should be for such a permission or to seek to apply that (or any) test. The issue for the English court is whether the Scheme (a domestic matter between the Company and the Scheme Creditors) should be sanctioned in circumstances in which it will bind the Scheme Creditors to the Restructuring. The Scheme will not bind the Shareholders to the Restructuring. Their interests are a matter for the Dutch court and are being protected through the arguments raised by them through their Dutch counsel."

61. In the event, I made a case management decision to re-list the sanction hearing for 25 and 26 May 2023 and to hear the live evidence before the stay of enforcement expired. I did so to give the Shareholders a full opportunity to be heard in relation to the fairness of the Scheme. It was unnecessary, therefore, for me to decide whether to accept Mr Bayfield's submission. It may well be that a case will arise in which it is not possible to case manage a sanction hearing effectively to give the parties a full opportunity to be heard and the Court will have to consider and decide whether to accept Mr Bayfield's argument. In my judgment, a full consideration of the authorities should await such an occasion and I prefer to express my views on the issue only briefly.

(1) The effect of the Scheme

62. The parties did not agree about the scope and effect of the Scheme. Mr Bayfield submitted that the Shareholders' real objection was not to the Scheme itself but to the WHOA Plan and the transfer of the shares in the Company to the STAK for EUR 1. He submitted that it was not unfair to sanction the Scheme without giving the Shareholders an opportunity to challenge the Company's evidence in relation to the comparator if they had not only had but taken the opportunity to challenge the Company's evidence in relation to the likely outcome in the Dutch Court.

63. Mr Goldring and Mr Perkins accepted that the WHOA Plan provided for the transfer of the Company's shares to the STAK. But they submitted that the allocation of Depositary Receipts was governed by the Share Allocation Clause in the Implementation Agreement and they relied on paragraph 9.3 (which I have set out above). They submitted that it was the Scheme and not the WHOA Plan

which imposed an obligation upon the Company to execute the Implementation Agreement. They therefore submitted that the Court in exercising its discretion to sanction the Scheme should consider whether the Shareholder Allocation Clause operated fairly towards the Shareholders.

64. In my judgment, the difference between the parties over the Restructuring Measures was not one of substance which depended upon the construction or effect of either the WHOA Plan or the Implementation Agreement. It was a difference of emphasis. Mr Bayfield emphasised the importance of the WHOA Plan to the restructuring of the Shareholders' interests and Mr Perkins emphasised the significance of the Implementation Agreement. In my judgment, both submissions demonstrated the close connection between the Court proceedings in both jurisdictions and that they both had a material effect on the Shareholders' interests. The Shareholders would have had no complaint if the Company's shares had not been transferred to the STAK and no complaint either if they had been allocated substantially more than 4.91% of the DRs and a percentage which reflected their own assessment of the likely alternative outcome.

65. I, therefore, approached the question whether to permit the Shareholders the opportunity to challenge the Company's evidence in relation to the comparator on the basis that the Scheme in combination with the WHOA Plan had a material effect on the Shareholders' interests and that this gave them a sufficient interest to be heard. However, I also balanced against this the fact that the approval of the WHOA Plan by the Dutch Court was a condition precedent to the Implementation Agreement taking effect. If, therefore, the Shareholders had been successful in opposing the WHOA Plan before the Dutch Court, then the Scheme could not be implemented and would fall away.

(2) Same or substantially the same issues

66. Again, the parties could not agree whether the Dutch Court and the English Court were being asked to decide the same or substantially the same issues. Mr Bayfield submitted that the Shareholders were in effect seeking to have a second bite of the cherry. Mr Goldring and Mr Perkins submitted that the legal tests

were different. They relied on the evidence of the Shareholders' Dutch counsel, Mr Jasper Berkenbosch of Jones Day (who were also acting for the Shareholders in the Dutch Court), that although there were similarities the tests were not identical.

67. Article 384 of the Dutch Bankruptcy Act sets out the test which the Dutch Court applied in deciding whether to approve the WHOA Plan. Paragraphs 3 and 4 of Article 384 provide as follows in translation:

> 3. At the request of one or more creditors or shareholders with voting rights who rejected the restructuring plan or who wrongly were not admitted to the vote, the court may deny a request for confirmation of the restructuring plan if there is prima facie evidence that these creditors or shareholders will be worse off under the restructuring plan than they would have been in the event of liquidation of the debtor's assets in bankruptcy
>
> 4. At the request of one or more creditors or shareholders with voting rights who did not accept the restructuring plan and who were placed in a class that did not accept the restructuring plan, or who wrongly were not admitted to the vote and should have been placed in a class that did not accept the restructuring plan, the court shall deny a request for confirmation of the restructuring plan that has not been accepted by all classes if:
>
> a. in the distribution of the value realised with the restructuring plan, a class of creditors as referred to in Article 374(2) is offered a distribution in cash that is less than 20% of the amount of their claims, or to whom, pursuant to the restructuring plan, a right will be offered with a value that represents less than 20% of the amount of their claims, while no compelling ground for doing so has been demonstrated;
>
> b. the distribution of the value realised with the restructuring plan deviates from the ranking that applies upon recovery against the debtor's assets in accordance with Title 10 of Book 3 of the Dutch Civil Code, with any other law or arrangement based thereupon or under a contractual arrangement, to the detriment of the class that did not accept the restructuring plan, unless there is a reasonable ground for such deviation and the interests of said creditors or shareholders are not prejudiced as a result;
>
> c. the said creditors, not being creditors as referred to in subsection d, are not entitled on the basis of the restructuring plan to opt for a distribution in cash in the amount that they could have expected to be paid in cash in the event of a liquidation of the debtor's assets in bankruptcy, or
>
> d. the said creditors with priority arising from a right of pledge or mortgage as referred to in Article 287(1) of Book 3 of the Dutch

> Civil Code who have issued financing to the debtor in the course of their business and, based on the restructuring plan, in the context of an amendment of their rights, have been offered shares or depositary receipts for those shares without also being entitled to opt for a distribution in a different form."

68. On 1 May 2023 seven of the nine classes of creditors voted in favour of the WHOA Plan. The two classes of creditors who voted to reject it were the Shareholders and COSCO. The Shareholders' principal ground for challenging the WHOA Plan was that the Group's management had placed too low a valuation upon its assets and had not, therefore, allocated a fair proportion of the Company's equity to them under Article 384(4)(b). The Shareholders also took points about disclosure and consultation.

69. I accept the submission that the legal test under Article 384 is not precisely the same as the legal test which the Court must apply in deciding whether to sanction the Scheme (and which I have set out above). However, in support of their case that the Group had been undervalued, the Shareholders argued that the Group was solvent and that there was sufficient time for a "careful process" to realise its assets. In their request for the rejection of the WHOA Plan dated 10 May 2023 Jones Day advanced that argument in the following terms:

> "3.31 In view of the extent of the interests involved, it would be unacceptable for an agreement with such serious shortcomings to be approved. Further research into the various aspects mentioned above is necessary, if necessary by an expert to be appointed by your Court.
>
> 3.32 Vroon and the MoCom will tell you, just as during the Hearing, that it is really one to twelve and that any further delay would lead directly to the bankruptcy of Vroon.
>
> 3.33 However, there is still time to organise a careful restructuring process. Although a restructuring or at least a refinancing is necessary because the financial indebtedness of Vroon Group has become due and payable in its entirety, the Vroon Group has proven to be operationally successful in recent years. Between 2018 and 2022, the Vroon Group structurally achieved a positive operating result (EBITDA) of an average of USD 77 million (the A&M Valuation Report, Production 6, p. 20). The Vroon Group now has approximately USD 100 million in cash in its bank account and has been able to meet all its ongoing operating costs.
>
> 3.34 Vroon Group is therefore not in need of liquidity and there is no need for additional working capital. The need for restructuring is therefore solely motivated by the fact that the long-term loans of

> Vroon Groep become due and payable. Normally, these loans are refinanced and not, at least not in full, repaid. It [sic] The problem at Vroon Groep is that the loans are spread over approximately 15 different banks and it is therefore very difficult to refinance all debts. In addition, a substantial part of the Banks has now been taken out by an external investment fund or an investment bank. This has led to this WHOA process.
>
> 3.35 However, in view of the positive results of the Vroon Group, this process is not under great time pressure, at least not because bankruptcy is imminent due to liquidity shortages. Only the Banks can possibly file for bankruptcy. At the same time, however, they are pre-eminently the ones who have an interest in a structured process and for whom bankruptcy would be very harmful. This means that there would have been time, with the help of the restructuring expert, to draw up a more careful and balanced plan than what is now before you."
>
> "3.48 The 'threat of bankruptcy' that Vroon and MoCom have been using for several years to exclude the Shareholder from the discussion is therefore exaggerated to a certain extent. The Banks have already seen a substantial part of their claims repaid to date and are aware that they are also very likely to be repaid the remainder of their claims if they reach a joint solution.
>
> 3.49 According to EY, the alternative scenario presented to your Court, namely that Vroon would be declared bankrupt and the Banks proceed to a fire sale of their collateral, would result in the Banks being left with a residual claim of approximately 50 to 30 percent of their claims.
>
> 3.50 In the context of the English Scheme of Arrangements that Lamo has started in the context of the present restructuring, the shareholder's lawyers sent a letter to the lawyers of the Vroon Group on 5 May 2023 explaining that such a chaotic, piece meal bankruptcy liquidation is not a realistic alternative at all in the event that the restructuring as contained in the RSA will not take place (Jones letter Day [sic] to Allen & Overy on UK Scheme of 5 May 2023, **Production 39**).
>
> 3.51 It is much more likely that, in such a scenario, the Banks will attempt to liquidate the Vroon Group company on a solvent basis. Vroon has the necessary cash to finance such a process and the proceeds would be sufficient to repay the Banks in full. There would then be a surplus of USD 100 to 200 million, as the CEO explained in his email to the CFO of 19 January 2023 (see the Letter of Objection, production 8d Vroon, par. 2.4). The Banks, the Vroon Group and the Shareholder therefore all have an interest in a joint solution."

70. In my judgment, this was in substance the same argument which the Shareholders were advancing in support of their case that it was unfair for the

Court to sanction the Scheme. Their argument in opposition to its sanction before this Court was that the Restructuring Measures were unfair because the Group was solvent and they would receive more than 4.91% of the equity value of the Group on an orderly wind down. Before both Courts they were also challenging the evidence of the Company and the MoCom that the Scheme Creditors would exercise their enforcement rights and put the Group into liquidation if the Restructuring Measures were not approved.

71. Further, it is also clear that Dutch law dictates the allocation of DRs to which the Shareholders are entitled. It was common ground that the "absolute priority rule" (or the "Applicable Order of Priority" as it is described in the WHOA Plan itself) dictates the distribution of DRs to the Scheme Creditors and the Shareholders. Article 384(4)(b) above provides that the Dutch Court must apply that rule unless there are reasonable grounds for deviating from it and the interests of said creditors or shareholders are not prejudiced as a result. The Shareholders did not argue before the Dutch Court that there were any grounds for deviating from the absolute priority rule if their arguments on valuation were not accepted.

72. Although I accept the submission made by Mr Goldring and Mr Perkins that the Share Allocation Clause in the Implementation Agreement contained the contractual mechanism by which the Shareholders were allocated and issued DRs in the STAK, I am satisfied that Dutch law determined the amount of those DRs once the WHOA Plan had been confirmed or approved. Once the Dutch Court had accepted the Company's valuation evidence, the STAK was bound to apply the absolute priority rule under Article 384(4)(b) in allocating DRs to the Scheme Creditors and the Shareholders.

(3) Conclusion

73. If the Dutch Court had handed down its decision before the first hearing on 16 May 2023, I would have accepted Mr Bayfield's submission and refused to give the Shareholders an opportunity to challenge the Company's evidence in relation to the comparator. I would have done so because they would have been attempting to reargue valuation issues which the Dutch Court had already decided against them in order to prevent the Restructuring Measures taking

effect. I would also have done so on the basis that the Company was required to allocate 4.91% of the DRs to the Shareholders under the absolute priority rule.

74. However, in the absence of a decision by the Dutch Court, I took the view that I should not prevent the Shareholders being heard or directing that the relevant witnesses should be cross-examined. I did so primarily for case management reasons and because the Court could accommodate the adjourned hearing before the expiry of the stay of enforcement on 31 May 2023. I also considered that in the absence of an express power to strike out or stay the Shareholders' opposition, I should hear their objections for essentially the same reasons as Adam Johnson J gave in *Steinhoff* (above) at [122] to [124]:

> "122. I do not find persuasive the Company's argument based on an analogy with the *forum non conveniens* cases – that is to say, the argument that Conservatorium should be denied standing in this jurisdiction because it will have the opportunity of making its case in either South Africa or the Netherlands.
>
> 123. I do not find the *forum non conveniens* analogy an apt one. Where a case is stayed on *forum non conveniens* grounds, the Court declines jurisdiction and the entire matter is referred on to another Court for determination. But there is no question of declining jurisdiction here. For one thing, I was not asked to by the Company: it positively wishes its application for sanction to proceed. For another, as David Richards J pointed out in *Re T & N* [2005] 2 BCLC 488 at [122], the jurisdiction under the statute is not one which the Court has power to decline: "The English Courts…remain bound by statute to give their own consideration to the fairness of the CVAs or schemes of arrangement, and notwithstanding the strong cross-border element and the desirability of concerted action, have no right or power to cede or qualify that jurisdiction."
>
> 124. It seems to me that if the Court forms the view, as I have, that the objector has raised issues which arguably have a bearing on the question of the fairness of the scheme before it, the Court should consider those issues in determining whether to sanction the scheme or not. It cannot decline to take them into account on the basis that they are better raised elsewhere. If arguably relevant to the fairness analysis, then they should at least be evaluated. The Court cannot decline to deal with one part of the overall inquiry it is bound to undertake."

VIII. The Comparator

75. I turn, therefore, to deal with the comparator. I do so briefly and in the knowledge that the Dutch Court accepted the Company's evidence in relation to valuation and rejected the Shareholders' evidence. Mr Bayfield did not, however, suggest that the decision of the Dutch Court gave rise to any issue estoppel and I must, therefore, consider the evidence and arguments on their merits.

(1) The Law

76. It was common ground that in the context of a scheme of arrangement the Court must identify the comparator so that it can properly consider both class composition and also whether it produces a result for all scheme creditors which is better than or, at least no worse than, the result which would be achieved in the absence of the scheme. In *Re Stronghold Insurance Co Ltd* [2018] EWHC 2909 Hildyard J stated this at [48] to [51]:

> "48. What is now ordinarily adopted as the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed. In *Re British Aviation Insurance Co Ltd* [2006] 1 BCLC 665; [2005] EWHC 1621 (Ch) ("the BAIC case"), Lewison J (as he then was) considered this to be "critical to deciding whether all the policyholders form a single class"; and in Re Apcoa Parking (UK) Ltd [2014] EWHC 997 (Ch) I agreed that "that will necessarily inform, and in many if not most cases be the most important factor in, the discussions".
>
> 49. The reason is two-fold. First, a fair comparison between a policyholder's rights if there is no scheme and its rights under the proposed scheme depends on ascertaining the nature and quality of the right in the 'non-scheme world', and the latter depends on the appropriate comparator. Secondly, only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights be weighed fairly.
>
> 50. Thus, for example, the likelihood of imminent liquidation may accentuate or diminish the importance of lender priority according to the effect of liquidation on the rights in question, and on whether the assets of the company on liquidation would be sufficient to cover all or only some debts according to their different positions in the debt waterfall."

77. I also accept that the comparator <u>may</u> be relevant to assessing the effect of the scheme on shareholders or creditors who are not parties to the scheme. In

Bluebrook (above) Mann J accepted that the mezzanine creditors, who were not parties to the scheme, were entitled to be heard because they argued that they would be in the money if the scheme was not sanctioned: see [26]. However, on the evidence the judge found that the mezzanine creditors were not being deprived of value. He set out his conclusions at [51] and [52]:

> "51. Does the exercise nevertheless demonstrate that there is a realistic chance that the value of the group is in excess of the value of the Senior Debt, which is one of the ways in which Mr Chivers puts it? For these purposes, again I do not think that it does. It is too technical an approach to engender much confidence. I do not consider that I can conclude that, on a valuation basis, the Mezzanine Lenders are getting a raw deal because there is a good or even reasonable case for saying that they are being deprived of value. The evidence is not that strong.
>
> 52. I have considered this conclusion particularly carefully in the light of the manner in which the evidence has been presented. There was no cross-examination on the valuation evidence, so I must approach a rejection of the evidence with particular care. The absence of cross-examination has meant that my understanding (particularly of the Monte Carlo technique and the limits of its appropriateness) is more limited than it would have been with the benefit of the sort of testing that comes from cross-examination. However, I have to consider the evidence as it is presented to me. The scheme companies have produced expert evidence which is comprehensible and relates to a real point – how much would a purchaser pay for the group now? The MCC has chosen to counter it with a different type of evidence, which does not address that evidence but which seems to carry out a much more theoretical exercise. I do not consider that it is successful in displacing the companies' evidence (and indeed in some respects it does not seek to do so – it seeks to do something different), or in raising a sufficient possibility of there being some unrealisable value in the group of which the Senior Lenders will be the unfair beneficiaries if the restructuring goes ahead. This also applies to the two confirmatory exercises carried out by LEK (identified above) which featured very little in the MCC's case."

78. *Bluebrook* does not provide clear authority, therefore, for the proposition that the Court should refuse to sanction the scheme if excluded creditors or shareholders will be worse off if the scheme is sanctioned and implemented because the judge did not accept the evidence of the mezzanine creditors. He might well have taken a different view if he had accepted their valuation evidence (or had done so once it had been tested in cross-examination). But he also dismissed their opposition

to the scheme because he was not prepared to force the parties into further negotiations. He described this as "not a legitimate or sensible use of the court's power" at [79]:

> "The Senior Lenders have decided to run a risk, which is a real one in the circumstances. If the business does not succeed, then they may end up being worse off than they are now. If it does succeed, then they will be better off. It is their decision to run that risk, and neither outcome is certain. It is to be assumed that the Senior Lenders think it is more likely that they will succeed than that they will fail – otherwise they would not enter into the overall arrangements. But there is nonetheless a risk, and it is a real risk to them. It is a risk that the Mezzanine Lenders are not prepared to run themselves – they are not prepared to buy out the senior debt and take over the arrangement. Their response is to say that they should have a slice of the benefit after the Senior Lenders have had a proper return. Their most recent proposals allow the Mezzanine Lenders a return when the Senior Lenders have had an additional return of 19% over 3 years. Mr Dicker submitted that that was not much better than putting the money into a savings account, and there is something to be said for his point. It does not strike me that that is a very handsome return for the risks being undertaken, though I received no evidence about that. However, I cannot make a real finding about it, which illustrates another of the difficulties about the MCC's approach. They say that I should refuse to sanction the schemes, leaving the parties to negotiate again so that the MCC can seek to agree another deal, and that that is a sensible and legitimate aim. But it does not seem very sensible to me. How am I to know that the MCC will not make unreasonable demands? If it matters, how is the reasonableness of those demands to be measured in the present circumstances? How can I be at all confident that there would not be a full enforcement (which the Mezzanine Lenders could not oppose) with a loss of value to the Senior Lenders and no return at all to the Mezzanine Lenders? The fact is that I cannot. Refusing to sanction the scheme in order to throw the parties into a further negotiation is not a legitimate or sensible use of the court's power. I have to judge the schemes as they are, on their merits, and either sanction them or refuse to sanction them. If I do the latter, the parties will have to take their own course in relation to future negotiations or future tactics, but that will be the result of a refusal to sanction on grounds other than a wish to generate a further negotiation."

(2) The Witnesses

(a) Mr Schuijt

79. Mr Schuijt, the chief financial officer of the Company, made three witness statements in support of the Scheme and was cross-examined by Mr Perkins. I found him an honest and straightforward witness and I accepted his evidence. He accepted that the Group's business produced revenues of US $399 million in the 2022 financial year and a positive EBITDA. He also accepted that cashflow was positive for the first quarter of 2023 and that he believed that most of the Group's business would continue to trade well. He also accepted that it was not structurally loss-making or inherently unsustainable.

80. Mr Perkins took Mr Schuijt to a report dated 10 March 2023 prepared by Ernst & Young LLP ("**EY**") and titled "Project Venice: Analysis for Relevant Alternative to the Scheme of Arrangement". This title explains its purpose and I will refer to it as the "**EY Comparator Report**". Mr Schuijt accepted that EY had assumed that the costs of liquidation would be between US $96 million and US $106 million based on management's estimates and that these costs would have to be funded by the creditors. He also accepted that even this estimate assumed a reasonable level of cooperation between the bankruptcy administrators and the creditors. The EY Comparator Report also recorded management's view that in liquidation the Group's assets would be sold at discounts of between 20% and 75% relative to fair market value and Mr Schuijt accepted that these were incredibly large discounts.

81. Finally, Mr Schuijt accepted that if the Exiting Vessels were sold over an eighteen-month period, they could be sold for fair market value and in line with the broker valuations which management had received. He was also taken to an email exchange and he accepted that Mr Marks expressed the opinion that an orderly wind down of the Group's business was a genuine alternative to entering into the Restructuring Support Agreement. When Mr Perkins put this alternative to him, Mr Schuijt was entirely candid:

> "Q. Yes, I see. Let me just ask one more question, and for the purposes of answer this question I want you to ignore what the Lenders say they will or will not do. We are just about to hear from Mr. Stahl. My question is this: from the perspective of the Board, an orderly sales process over a period of 18 months would be a preferable outcome to a liquidation, would it not? A. If in a completely free world would we like to see a bankruptcy avoided,

> including all the cost of that bankruptcy, yes, we would. Absolutely. That is our obligation as directors of the Company, to avoid such bankruptcy. Q. Absolutely. If there is an obstacle to an orderly sales process of 18 months, the Board is not the obstacle, is it? A. Could you please specify what you mean with "not an obstacle"? Q. The Board does not stand in the way of an 18-month sales process ... (cross-talking) A. That is not true. The Board has taken the decision to support the restructuring that we are discussing here. The Board has signed the documentation, all the documentation to implement this restructuring. So that is the Board's view and there may be considerations and thoughts and other plans and other considerations, but this is the plan that the Company has committed to implement."

(b) Mr Jesper Stahl

82. Mr Jesper Stahl, who is a senior client executive at Danmarks Skibskredit A/S ("**DSF**"), made a witness statement dated 12 May 2023 on behalf of the MoCom and DB, who represent exposures totalling approximately US $550 million or 64% of the total exposure of the Group. His evidence was that over the last seven years he had devoted huge amounts of time to facilitating the restructuring of the Group's financial liabilities.

83. Mr Stahl was also cross-examined by Mr Perkins and I also found him to be an honest and straightforward witness trying to assist the Court. As Mr Schuijt had done, he also made concessions where it was fair to do so. He accepted that DSF had 600 or 700 ship mortgages at any one time and that the last time it had arrested a vessel was in 2011. He also accepted that enforcement action takes time and is costly and that it is quite hard to find any lender who regularly takes enforcement action in the sense of arrest and sale by judicial auction. He also accepted that enforcement action was unappealing because there were many different jurisdictions in which ships are registered, they are highly diverse and have their own distinctive legal traditions and complex procedures. Indeed, he volunteered the evidence that DSF would never accept an Italian flag as security.

84. Because I have found Mr Stahl to be a truthful and straightforward witness, it does not necessarily follow that I should accept his evidence about what DSF (or, for that matter, other members of the MoCom or DB) would have done if the Dutch Court was not prepared to confirm the WHOA Plan or this Court to

sanction the Scheme. When asked to consider what they would have done in a hypothetical or counter-factual situation, witnesses can often be guilty of wishful thinking or convince themselves that they would have acted differently with the benefit of hindsight. I consider Mr Stahl's evidence in that context further below.

(c) Mr Vincent Van Liere

85. Mr Vincent Van Liere, Managing Director Restructuring of Alvarez and Marsal Benelux B.V. ("**A&M**"), made a joint expert's report dated 11 May 2023 with Mr Menno Booij, Managing Director Valuation Services. He also produced an addendum to that report dated 18 May 2023 and he was cross-examined by Mr Allison on behalf of the MoCom and DB. Both Mr Allison and Mr Bayfield submitted that little weight should be given to Mr Van Liere's evidence because he lacked independence and had failed to give adequate disclosure of A&M's role as Mr Vroon's financial adviser, his own role in the negotiations on behalf of Mr Vroon and his role as an advocate before the Dutch Court.

86. Given the time pressure under which all of the parties were operating before the stay of enforcement expired in the Netherlands, I am prepared to accept that it was not possible for the Shareholders to instruct an independent expert with the knowledge and expertise of Mr Van Liere although it would have been better if he had disclosed his personal involvement in acting for Mr Vroon in the report itself rather than refer to an earlier engagement letter. I am also prepared to accept that he was not partisan and that he was doing his best to assist the Court in his oral evidence.

87. However, I can attach very limited weight to Mr Van Liere's opinion evidence that a solvent and orderly wind down of the Group was the most likely comparator or that it was commercially and economically irrational for the Scheme Creditors to say that they were unwilling to support any other plan apart from the Restructuring Measures. I say this because he made a number of important admissions in evidence which made this view untenable (and I set them out below). Moreover, when he was cross-examined it became clear that there was no evidential basis for his opinion. He accepted that an orderly wind down and sale of the Group's assets would require the agreement of its creditors

and that it was only possible if those creditors were willing to fund it and not to enforce their security rights. But he had not spoken to any of the Group's creditors to see whether they would support the Group if the Restructuring Measures failed. His evidence amounted, therefore, to speculation and no more.

88. Mr Van Liere also seemed unfamiliar with the complex facilities of the Group and unaware of the different securities held by different lenders. For example, Mr Allison took him to a table in his report from which he had drawn the conclusion that it was not commercially or economically rational to put the Company and the Group into liquidation. But he accepted that it did not reflect the fact that each lender had separate security over each vessel and that the value of each security will differ or that the cash held by each lender by way of security would be different. Moreover, he seemed unaware that ABN AMRO, the lender under Facility Agreements FE0008 and FE00045, had negotiated a separate support agreement or what its terms were.

(d) Mr Jasper Berkenbosch

89. Mr Berkenbosch, the Shareholders' Dutch counsel, is a partner in Jones Day and he made a witness statement dated 11 May 2023. He had the day-to-day conduct of Jones Day's representation of the Shareholders before the Dutch Court and he gave some helpful evidence about the background to the WHOA proceedings. But otherwise I attribute little weight to the evidence of fact which he gave in his witness statement. He was either repeating the advice which the Shareholders had received from A&M or referring to documents (to which Mr Perkins then took Mr Schuijt) or he was expressing opinions about the conduct of the Group's creditors about which he had little or no personal knowledge and could not give expert evidence.

90. Moreover, Mr Bayfield took Mr Berkenbosch to the English translation of Jones Day's submissions before the Dutch Court which contained the following statement: "A bankruptcy would be virtually inevitable if the WHOA court rejected the Plan." Mr Berkenbosch accepted that the English translation was correct and he could provide the Court with no explanation for the inconsistency between the position which the Shareholders had adopted before this Court and

the position which they had adopted in the WHOA proceedings. I was driven to the conclusion, therefore, that his evidence about the comparator in his witness statement was self-serving and had little value.

(3) The counter-factual

91. Both Mr Schuijt and Mr Stahl gave evidence in their witness statements of the consequences of a failure to implement the Scheme. Mr Schuijt's evidence in his first witness statement dated 14 April 2023 was as follows:

> "120. As I have described above, the Scheme Company has faced financial difficulties since 2016, which were compounded by the unprecedented challenges resulting from the Covid-19 pandemic. The overall restructuring of the Group has been heavily negotiated with its different stakeholders since 2020. The Group has entered into a number of Support Agreements with key stakeholders under which the Scheme Company has agreed to propose the Scheme as a key part of the implementation of the Restructuring. If the Scheme is not approved, these Support Agreements will terminate (which will also automatically terminate the Court-Ordered Stay) and the Board considers it unlikely that the terms of a different restructuring will be agreed with all creditors.
>
> 121. Should the Restructuring fail, and given the outstanding payment defaults on the Group's obligations to the lenders, enforcement against the Group's primary assets is a realistic prospect that would be detrimental to the interest of the Group and its creditors as a whole. Absent the implementation of the Restructuring, the Scheme Company considers that there is unlikely to be sufficient time to seek, and significant uncertainty on the possibility of obtaining, the requisite levels of stakeholder consent to implement any alternative transaction.
>
> 122. If the Restructuring is not successfully implemented and no alternative transaction can be agreed within a short period, it is expected that lenders would seek to enforce their security against the Group, which would precipitate the Scheme Company (and, by virtue of the existing complex and interdependent intra-group cross-security and guarantee structure (and the resultant "domino effect" in the event of the Scheme Company filing for bankruptcy), each other member of the Group) filing for bankruptcy in the Netherlands (or the analogous process in any relevant jurisdiction) (the Relevant Alternative)."

92. Mr Stahl gave evidence to the same effect. He began by describing the negotiations for the Restructuring Measures and the fact that they had taken over two years to conclude. He also stated that over the last seven years he had

devoted huge amounts of time to facilitating those measures and that in all of the restructuring situations which he had encountered none had been more difficult or time-consuming. He then gave the following evidence upon which Mr Bayfield placed particular emphasis:

> "23. Should the Restructuring fail, and having regard to the long-standing payment defaults on the Group's obligations to the Lenders, there will in my view most likely be multiple bilateral enforcement actions (including by the MoCom members and Deutsche Bank AG), which would involve enforcement over vessels and cash, followed by the Lenders (with the support of the MoCom) taking action pursuant to the common security and guarantees granted under the Framework Agreement. DSF and the other MoCom members and Deutsche Bank AG would be highly likely to take enforcement action if this Restructuring fails."
>
> "27. Mr Berkenbosch suggests that a "Solvent Wind-Down" is the true comparator (i.e. what is most likely to happen if the Scheme is not sanctioned). That is not correct for the following reasons:
>
> (a) Mr Berkenbosch approaches matters on the basis that the Lenders (under 33 separate facility agreements) are a homogenous group and as though they were all parties to a single facility with the same security package. This is simply not the case. In fact, some Lenders consider the security they hold over vessels or cash to be of sufficient value to discharge the Group's debt to them, whilst others see themselves as less well secured or less inclined to take individual action to realise their security. Put simply, one size does not fit all in considering the Lenders and their likely enforcement actions. The history of this case demonstrates that Lenders will not hesitate to act first or aggressively to seek repayment. As I have said, I fully expect that if this Restructuring is not completed, then a "rush for the door" will occur because Lenders will be concerned to capitalise on what they perceive to be "first mover advantage". Without the protection of the Court-Ordered Stay and the Restructuring Support Agreement, there will no longer be any mechanism in place to prevent this.
>
> (b) Mr Berkenbosch expresses the view that, if the Restructuring were to fail, the Lenders would collectively support a solvent wind-down of the Group over a period of up to 18 months. He contends that it would be contrary to Lenders' interests to take individual enforcement action. His contention ignores the point I made above that the Lenders are all in unique positions. Those who consider themselves to be fully or nearly fully secured, for example, may well take the view that they do not want to wait 18 months to be paid (in whole or potentially in part) and that they would like to take control of the situation by taking individual enforcement action against "their" security. In fact I am aware that a number of Lenders have already taken preparatory steps in this regard so that, if the

> Restructuring, does not complete they will be able to move quickly to arrest and sell the vessels over which they have security.
>
> (c) Further, if one or more of the Lenders does take individual enforcement action, as is highly likely if not inevitable, the commercial reality is that (as I have explained at paragraph 22 above) others will follow suit. They would do so because they would not be prepared to take the risk of a bankruptcy of the Group instead favouring the remedies available to them as mortgagees of the vessels….
>
> …. (e) The fact is that there is no "Plan B". In this case, it is "this deal, or no deal". It is my genuinely held belief that, after the Herculean effort in reaching this point, if the Scheme is not sanctioned, many if not all Lenders are very likely to conclude that "enough is enough".

93. As I have stated, it was common ground that an orderly wind down of the Group on a solvent basis required the forbearance or agreement of the Group's creditors. The evidence of both Mr Schuijt and Mr Stahl was that it was more likely that they would take enforcement action rather than enter into fresh negotiations for an orderly wind down. Mr Allison put it well when he suggested that the Company and its creditors were all suffering from "deal fatigue".

94. Mr Perkins advanced ten points or propositions why I should not accept the evidence of Mr Schuijt and Mr Stahl. However, I have found that both were honest and straightforward witnesses and none of the points which Mr Perkins made caused me to doubt that they were expressing their honestly held views. Indeed, I am fully satisfied that there is no basis for drawing the inference that either of them was deliberately attempting to mislead the Court or giving self-serving evidence simply to get the Scheme approved. Indeed, if either of them thought that a better deal was available, it is much more likely that they would have continued the negotiations to achieve it rather than launch or support a Court application to approve a different and less advantageous scheme.

95. For the purposes of sanctioning the Scheme, it might have been sufficient for me to do no more than express these general conclusions and to state that I accepted the Company's evidence on the comparator. However, in deference to Mr Perkins' detailed and thoughtful submissions I go on to set out his propositions and my assessment of them (below).

Proposition (1): The Group's business is highly profitable and has positive cashflow, and the Group's financial position is projected to continue improving.

96. Mr Schuijt accepted in cross-examination that the Group's underlying business was profitable and continuing to improve. However, a business may be both sound and profitable but unable to service the debt for which it is liable. Mr Perkins did not challenge the Company's evidence that it had been in default since 30 June 2020 or unable to repay its creditors on the final maturity date under the Framework Agreement.

Proposition (2): The Liquidation Scenario would destroy up to US $415 million of value. In contrast, the Orderly Sale Scenario would enable the Lenders to be paid in full.

97. Mr Schuijt also accepted in cross-examination that if the Group went into liquidation, the Group's assets would be sold at the significant discounts to fair market value projected in the EY Comparator Report. Mr Perkins submitted that it was overwhelmingly unlikely that the individual lenders would wish to expose themselves to the risk of such a large discount and this is why they have not taken enforcement action at any point in the last seven years.

98. I fully accept that none of the individual lenders wish to expose themselves to such large insolvency discounts (and Mr Schuijt accepted as much). But this is why they agreed to the Restructuring Measures and made the applications to both the Dutch Court and this Court. Mr Perkins did not address the real question which is whether they would have been prepared to agree to take no further action if either Court had refused to sanction or approve those measures. In relation to this question I accept Mr Stahl's evidence. I consider it highly unlikely that all of the Group's creditors and individual lenders would have agreed to take no enforcement action especially if the Restructuring Measures had failed and the Shareholders were unwilling to invest any new money to prevent enforcement taking place.

Proposition (3): The expenses of the Liquidation Scenario would amount to the extraordinarily large sum of US$100 million, and such costs would have to be funded by the Lenders.

99. Both Mr Schuijt and Mr Stahl accepted in evidence that the costs of liquidation would be in the order of US $100 million and that they would have to be funded by the lenders either directly or out of the cash generated by the Group. Again, I fully accept that the total costs of liquidating the Group's entire fleet could easily be in excess of US $100 million. But this is to look at the issue of enforcement through the Company's spectacles alone and not through the spectacles of an individual lender who has seen the Restructuring Measures fail and can see no immediate prospect of repayment. Such a lender may hold security over one or two vessels and may well be prepared to meet the comparatively high costs of enforcement in relation to those vessels alone.

100. I am satisfied that it is likely that the individual lenders would have been prepared to incur the costs of enforcement if the Restructuring Measures had failed (even if a single lender might not have been willing to incur the total costs of in excess of US $100 million). Indeed, Mr Stahl made this point himself in cross-examination. As he said in the passage which I set out (below), it would depend on how many investors in the Scheme there were and where they were located. He also said that: "I would have to pay what is relevant to the mortgage we set." I am not satisfied, therefore, that the total costs of enforcement against the Group's assets is a reason for rejecting Mr Stahl's evidence.

Proposition (4): The Liquidation Scenario would involve an exceptional level of legal complexity in dozens of jurisdictions and a high prospect of delay.

101. Mr Stahl accepted that enforcement against the Group's assets directly would involve a number of different jurisdictions and a number of different legal systems and procedures. However, he gave detailed evidence that a lender could mitigate the difficulties of enforcing against a ship by persuading the owner to co-operate and using other methods or tools of enforcement and, in particular, by enforcing a share pledge over the company owning the ship or at group level or by "warehousing" the vessels:

> "Q. Yes. I find it quite interesting that enforcement action is so rare in the shipping world. It is very common for banks to appoint receivers, for example, over land. That happens all the time. One of the world's leading shipping banks, your bank, has not done this at all, in 12 years. It is because ships are quite a difficult form of

security to take straightforward enforcement action over, is it not? A. No, just the opposite. It is probably much easier than many other assets. The problem with ships is that they will be in different jurisdictions all over the world, so it is about finding them but you have to collect(?) you have specialised companies tracing vessels, you have specialised companies to take possession of the vessels. What has happened in our situation is that we always manage to get the owner to co-operate, because the alternative (indistinct) for the owner, recovery for the owner are better in a private sale than in an enforcement sale. Often it is because we were alone and that we did not have other sort of insights into what he otherwise were doing. So every case are separately. It is also about what type of assets we are looking into and what time of the cycle we are. In some cycles we are active, some cycles we are reluctant. We have other tools, and vessel arrest, we usually have share pledges, we have taken quite a few vessels and put them in warehouse (indistinct), which you do not see in this structure, because it is not an enforcement on the vessel. It is enforcement on the assets. Q. Yes, absolutely and asset ---- MR. JUSTICE LEECH: Just for the transcript, you said you had some cycles were active, we had other tools, can you just describe the other tools to me again? A. What I am saying is if you are in a high market with a lot of liquidity as we had offshore, you are more inclined to take action than if you are at the bottom of the market. Q. The other tools? A. That is the enforcement. You know, for instance, in the UK, you can do it without involving the court. In Holland you need to involve the court. In Denmark and Singapore, you can do it without the court, so they are different depending on which jurisdiction ---- Q. You can enforce against the shares, the corporate structure? A. Yes. Q. That is not shown in the figures that we are looking at? A. Yes. Because what we do is we use that to transfer the vessel to a third party. MR. PERKINS: Your evidence is that you would not do a share pledge enforcement in this case, is it not? A. I am not saying anything of the kind. We are talking about share pledge on the Group level which is the, sort of the framework share pledge. Q. There is no share pledge over an SPV shipping company? A. There is a share pledge on all of them, as a first to the lender and as a second to the Class(?) All shipowning companies have share pledges on two levels, on the borrowing side for the direct lender and last as a security agent. So we could take every single shipowning company and depending on which jurisdiction we will follow the local jurisdiction. For instance, if you want to take Singapore vessels, we just write them a letter. In Holland, we have to go to court. The whole purpose of a share pledge from lender is a sort of power of attorney to transact. That means you can sell the vessel without involving the court in any sale. Of course you have to follow the normal rules about the proper value or whatever, but have you a means to do it. It is a safe(?) power."

102. Mr Allison also put the range of measures which were open to an individual lender to Mr Van Liere. He accepted that individual lenders could enforce on a unilateral basis. When it was put to him that individual lenders were blocking the Group's bank account, he said that he was: "Definitely not surprised." He also accepted that it was easy to enforce over a bank account and that individual lenders would block the cash in such an account and not leave it open to the Company to use it. He also accepted that as at 31 December 2022 the Group held cash of US $95.3 million in pledged accounts which would have been available to meet the claims of secured creditors after payment of the liquidator's fees. Finally, Mr Van Liere accepted that a lender could enforce a share pledge without the difficulties associated with a maritime arrest.

103. I accept Mr Stahl's evidence and I am not satisfied that the different jurisdictions in which the Group operated or the legal complexity of taking action would have deterred individual lenders from taking action if the Restructuring Measures had failed. Indeed, I am satisfied that the level of cash which the Group was holding in pledged accounts makes it more likely that individual lenders would have taken enforcement action if those measures had failed. They could have blocked the Group's bank accounts and either enforced their share pledges directly or used the threat of legal action to put pressure on the Company and the Group to consent to a sale of the secured vessel or vessels.

Proposition (5): It is rare for any bank to arrest a vessel let alone to sell a vessel through judicial auction.

104. Mr Stahl accepted that the last occasion on which DSF had arrested a vessel was in 2011. He also accepted that although two ships had been arrested, neither had been sold through distressed action and both were ultimately the subject of a deal done between the relevant banks and the Company. Mr Perkins relied on this evidence in support of his submission that the Scheme Creditors (and other lenders) would participate in an orderly wind down rather than arrest the secured vessels and sell them by judicial auction.

105. I reject that submission. I accept that it is rare for a lender to arrest the ship. But the fact that both DNB and NIBC took that drastic step is clear evidence that by the end of 2022 individual lenders were prepared to exercise the power of arrest

and take direct enforcement action against vessels over which they held security. Moreover, the fact that it was unnecessary for them to sell either vessel by judicial auction makes it more likely, in my judgment, that individual lenders would have been prepared to exercise their powers of arrest if the Restructuring Measures had failed. The Company itself would have had an equally strong interest in avoiding a judicial auction and agreeing to a private sale as soon as possible.

106. Indeed, Mr Van Liere's evidence provides direct support for these conclusions. He accepted that DNB did not regard direct enforcement as a particular challenge and that individual lenders were ready to take enforcement action and would always have a fall-back plan if the Restructuring Measures failed:

> "Q. Can I just show you a paragraph from Mr. Schuijt's evidence and ask you a bit about that. It is volume 1 of the convening bundle, tab 4, and it is page 38, paragraph 49. Do you see there that Mr. Schuijt, in the second sentence, says that, "Further, during the course of negotiations in 2022, it became clear that DNB, which is a Lender under the Existing DNB Facilities ... was not willing to consent to the proposed Restructuring on the same terms as the majority of the Group's other Lenders." Do you see one of the steps that it took on 3rd August was a "... notice that it had [in fact] arrested a vessel ...in Israel." Do you see that? A. Yes. Q. It would be fair to assume, would it not, that DNB did not regard direct enforcement as a particular challenge, did it? A. Yes. Q. Can I just check, were you agreeing with my question there? A. I agree that they took that action, yes, to create. Q. And that suggests that Lenders will, if required, take enforcement action over vessels, does it not? A. Yes. Q. Again, at paragraph 51, we touched on this earlier, at page 39, this is where I think you said you did not know about this, in November 2022, NIBC Bank resigned from MoCom. A. Yes. Q. And said it was not supportive of the restructuring. Are you also aware that it made threats of enforcement over the vessel secured in its favour? A. Yes. Q. It was threatening to take direct enforcement action over the vessel? A. Yes. Q. Those steps by DNB and NIBC were taken against the backdrop of the attempts by Lenders to agree a consensual restructuring, were they not? A. To get out, yes. Q. At the time, Lenders as a group were trying to put together a consensual restructuring, were they not? A. Yes, a model, yes. Q. Even though MoCom was trying to put together a consensual restructuring, two Lenders still tried to take enforcement action? A. Yes. Q. Are you seriously suggesting to the court that it is your view that it is more likely than not that no enforcement will be taken if the restructuring falls away and there is no deal? A. If there is no, if the restructuring falls away, then there is new negotiations. How hard will it be and

> how difficult it will be, before the majority of the individual Lenders take action. Q. So your whole thesis depends on Lenders being prepared for yet another round of negotiations? A. Yes. Q. Are you aware that Mr. Stahl has given clear evidence that a number of Lenders have already taken preparatory steps so they are ready to enforce if the Scheme fails? A. Yes. Q. You are aware of his evidence that they are ready to move quickly and arrest vessels if the Scheme fails? A. Yes. That is the Plan C, yes. Q. Have you taken that into account in your evidence? A. I think you always have to have, as an individual lender, your own plan."

Proposition (6): The Group is already conducting an orderly sale of 40% of its fleet with the consent of the Lenders and there is no reason why a similar process cannot be extended to the rest of the fleet.

107. Mr Perkins placed significant reliance on the fact that the Group was already preparing to sell the Exiting Vessels through an orderly sales process and he submitted that the Lenders had already consented to this process under the Restructuring Support Agreement and the "Override Agreement" summarised in the Explanatory Statement. Mr Schuijt refused to accept that the lenders had agreed to this process and Mr Stahl gave evidence to the same effect. His evidence was that the sale of each vessel required the consent of the individual lender and in re-examination Mr Allison took him to clause 12(f) of the Restructuring Support Agreement which expressly provides that the sale price and terms of any sale require the approval of the relevant lender.

108. I accept the evidence of both Mr Schuijt and Mr Stahl that the relevant lenders have not given their approval to the sale of the Exiting Vessels. Moreover, it is obvious why they have yet to do so. The orderly process upon which Mr Perkins relied formed part and parcel of the Restructuring Measures and was dependent upon the approval of the WHOA Plan and the Scheme. The process relating to the sale of the Exiting Vessels provides no guide to the attitude of the lenders if the Restructuring Measures had not been approved and I attributed very little weight to the evidence relating to that process.

Proposition (7): The Lenders are commercially rational and have shown themselves to be able and willing to work together notwithstanding their different interests.

109. Mr Perkins submitted that at the end of his evidence Mr Stahl conceded that rather than take independent enforcement action, the lenders would work together to achieve an orderly wind down:

> "Q. It is [not] realistic to think that the Lenders would want to terminate the continuing sales process of the Exiting Vessels. That is very, very unlikely, is it not? A. Yes, but if you are sitting like one of the banks, I would not mention names, which already has been in the market, and processing a sale and had a buyer lined up, which also is on initial priority list, they would not wait for this, they would sell the vessels. They have a buyer. Q. Where in your evidence do you explain there are buyers waiting to purchase these vessels? A. I am telling you about enforcement and they will do enforcement because they have prepared themselves. I put that clearly in my statement. Q. Just so I can understand, is your evidence that there are banks, it is not your bank, is it, it is someone else? A. No. Q. You say they would prefer not to proceed with the orderly sales process of the Exiting Vessels and instead to take immediate enforcement action by way of arrest and judicial action? A. That is what they have been saying to the Company as well. Q. That is extremely implausible, is it not? A. You know, I trust them on this one. Q. What I struggle with is this, work with me on this. Suppose it is right that 40% of the vessels would just continue to be sold through an orderly sales process because there is no reason why they would not be. Why would you not just use the same protocol, the 60%? That is obviously what you should do, is it not? A. You know, when we did this process, we also put in (inaudible due to coughing) account because we did not expect that we could sell our vessels (indistinct) so we reserved $30 million for close-down cost. Of course, if we can find an orderly way together with a restructure whereby we can avoid cost it would be feasible but it will require that all exiting Lenders accept it so if some Lenders does not want to sell under this scheme, maybe such a bid cannot be concluded. Some of the bids are assuming they get all vessels, but we already know that the vessel on the initial priority list, which is eight vessels, will not be going in that direction."

110. I do not accept that Mr Stahl conceded in this passage that the lenders would work together to achieve an orderly wind down of the Group or that this is a fair characterisation of his evidence. The substance of Mr Stahl's evidence was that a number of individual lenders were poised to enforce their security and sell the relevant vessels. He reasonably accepted that the lenders might try and put together another restructuring plan if they could but that it would require the consent of all the lenders.

111. I am satisfied, therefore, that Mr Stahl did not withdraw the evidence which he gave in his witness statement and that I should continue to accept it. Moreover, I would have been very surprised if Mr Stahl had not accepted that the lenders would be prepared to consider modifications to the Restructuring Measures if they were not approved by the Dutch Court or this Court first time round. It is often the case that opposing shareholders and creditors will use a contested sanction hearing as leverage to improve the terms which are on offer.

112. Moreover, Mr Perkins did not adduce any evidence to support a finding that it was more likely that further negotiations would produce a new deal for an orderly wind down. Indeed, Mr Van Liere conceded that both DNB and NIBC broke ranks whilst the negotiations for the Restructuring Measures were taking place. He also accepted Mr Stahl's evidence that those negotiations were extremely challenging:

> "Q. Do you see that he concludes: "... in all the restructuring situations I have been involved in over the years, none has been as difficult or as time consuming as this one." You have no reason to doubt that evidence, have you? A. That is his statement; yes. Q. You have no reason to doubt it? A. To his opinion? Q. Yes. You have no reason to doubt that? Let me clarify, you are not suggesting he does not hold that view when he gives that evidence, are you? A. That is his view. MR. ALLISON: Yes. MR. JUSTICE LEECH: Do you share that view or not? A. I have been in many -- I do not know. Q. No, do you share that view -- he says his experience: "...none has been as difficult or as time consuming as this one." In your experience, is it the same or not? A. I think a seven-year period is extremely long, yes, and then I think with all the bilateral facilities and the stakeholders, it is extremely difficult in combination with the corona and the volatile market."

<u>Proposition (8): There are only two Lenders who might be fully "in the money" in the Liquidation Scenario (namely ABN Amro and COSCO) but they are unlikely to support or bring about the Liquidation Scenario.</u>

113. It is common ground that ABN AMRO and COSCO would be paid in full even if the Group went into insolvent liquidation. Nevertheless, Mr Stahl candidly accepted that neither lender was likely to enforce their security. In the case of COSCO he expressed the view that the Chinese never enforce their security and in the case of ABN AMRO he was taken to a "Letter of Quiet Enjoyment" dated 27 July 2018 in which it had undertaken to the charterer not to enforce. Mr

Perkins submitted that it was unlikely that either ABN AMRO or COSCO would take steps to enforce their security because they were fully "in the money". He also submitted that the other lenders would not take steps to enforce either because they stood to lose millions in the event of liquidation.

114. I accept Mr Stahl's evidence that it is unlikely that either ABN AMRO or COSCO would have enforced their securities if the Restructuring Measures had not been approved. But I do not accept that this provides any support for the proposition that other lenders would have taken the same stance. Mr Van Liere accepted in terms that lenders will, if required, take enforcement action in the passage from his evidence which I have set out above. Moreover, Mr Perkins did not suggest to Mr Stahl that any other lenders had agreed to give letters of quiet enjoyment. Nor did he suggest that DNB and NIBC would have been in the money and paid in full if they had carried through their enforcement action and put the relevant vessels up for sale by judicial auction.

Proposition (9): The directors of the Company would be highly likely to support an orderly sale of the fleet (in preference to a liquidation) if such a sales process had sufficient support among the Lenders.

115. Mr Schuijt gave evidence that it was the duty of the directors of the Company to avoid it going into liquidation under the Dutch Bankruptcy Act. Moreover, he was taken to correspondence between the members of the supervisory board showing that this was they preferred an orderly wind down. However, when Mr Perkins suggested to him that the Company would continue to support an orderly wind down if the Restructuring Measures failed, he gave the following evidence at various points in his cross-examination:

> "Q. What is more, when the first arrest occurred in August 2022, you and your fellow directors did not take any steps to file for bankruptcy proceedings, did you? A. No, we did not, but we seriously considered it. Q. That is because there is no duty under Dutch law to file for bankruptcy proceedings merely because a default has occurred or because a creditor has taken enforcement action, is there? A. Under Dutch law, there is no legal obligation to do so, that is correct, but there is a director's responsibility to assess that risk; yes."
>
> "Q. You would prefer a value destructive process with a $500 million insolvency (indistinct) and $100 million of expenses? A. Under Dutch law, as a director, I have to ensure the health going

> concern status of the business and to engage on a wind-down which has significant operational financial risk. This process would not be without risk and cost. I am talking about staff retention, about customers, about suppliers. If we would engage on basically saying, as directors, we liquidate the business only because there might be a chance that the Shareholder could potentially generate a higher return, I think that would be not a wise decision for the Board to take."
>
> "Q. That is why I asked you at the beginning, for the purposes of answering this question, I do not want you to consider what the Lenders say or not. I want to imagine a world where the Lenders are on board with the process. It is obvious that the Board with prefer on orderly wind-down in that scenario. It would preserve the Fair Market Value of the fleet? A. Quite frankly, we have not developed that plan, so for me to state that that would be a viable alternative, I think is very premature. It is very hard for me to say that. But, clearly, you are making an assumption that the Lenders would support it. That is an assumption you have to make. I think we have, based on also the discussions we have had internally, had discussions on this particular matter, with the MoCom and other Lender representatives. The answer was very clear, that the Lenders do not support such orderly wind-down and are not willing to finance it. Q. I just want to make sure I have an answer to my question. Suppose the Lenders support an orderly wind-down. Are you saying that there would none the less be doubt as to whether the Board would proceed with it? A. I cannot make that statement, because we as management had not developed a plan where I, as a CFO, can say, "Everyone, all the stakeholders, we can execute this. We think we can take the risk and can do this". I cannot state that, because that plan does not exist. Q. I want to suggest that that last answer is untrue and that if the Lenders support an orderly wind-down, there is absolutely no chance the Board would place the Group into liquidation. A. Is that a question? Q. I would like to hear your reaction to it. A. Could you restate that please? Q. There is no chance that the board would put the Group into liquidation if the Lenders supported an 18-month wind-down, is there? A. I think we would seriously consider it, yes. We have to consider alternative scenarios all the time. Also, if this process, as you suggested, would fail, we would need to re-assess as directors what our responsibility is, but for me to speculate on that now, I do not think it will help the process, quite frankly."

116. Mr Perkins challenged Mr Schuijt's evidence. But I accept it. In my judgment, it clearly demonstrates the wholly unrealistic position which the Shareholders adopted before the Court. Their case was that if the Restructuring Measures failed, both the Company and the lenders would have taken no action. But in my judgment, the failure of the Restructuring Measures would have placed the directors of the Company in a very difficult position and I accept that they might

have felt that the risks of attempting to wind down the Group in an orderly fashion were too great and that they had no option but to put the Group into liquidation if either the Dutch Court or this Court had rejected the WHOA Plan or the Scheme.

Proposition (10): Even if a small number of the Group's vessels were to be arrested, this would be unlikely to trigger a "domino effect" in which every other vessel was arrested.

117. Finally Mr Perkins relied on the fact that the arrests by DNB and NIBC did not trigger wholesale enforcement action by the lenders in support of proposition (10). In particular, he relied on the fact that it took several months before the Restructuring Support Agreement was executed and before the Dutch Court granted the stay of enforcement. He also relied on the fact that the Company and the lenders reached agreement and that neither vessel was sold by judicial auction.

118. Mr Bayfield submitted that the position would have been very different if the Restructuring Measures had failed. In particular, he submitted that deal fatigue would have set in and the lenders would have taken the position that "enough is enough" (as Mr Stahl put it in his witness statement). He also relied on the following passage from Mr Stahl's evidence:

> "Q. However, would you accept that a domino effect is not what actually happened when the two arrests took place last year? A. Yes, for good reason. Q. Yes. For example, the first arrest took place in August 2022, did it not? A. The reason the Lenders did not react was we were negotiating the full-scale restructuring. We started 12th July. There was a proposal for the Company. It was replaced by a revised proposal end of July. We were in the middle of negotiating this restructuring. So the more common the other Lenders had a preference to conclude this restructuring in a consensual way, so we accepted that the Company use cash pledged in favour of all Lenders to buy out DNB on this one. Actually, the reason was that the Company has told us they had a buyer for the vessel which was in excess of what they paid to DNB but that buyer failed to honour their obligation. So when this was done, it was actually on the perception that the vessel was sold straight after to a third party, which the Company failed to honour. Q. The reason, of course, behind all of this is the banks and the people who work at the banks, such as you, are commercial people and ultimately you would prefer a deal to --- A. We were in the middle of negotiating a deal. That is the whole

> point. We were sitting and doing the first part of this, the (indistinct) agreement. We were in the middle of coming to an agreement to save the NewCo part of it which was going to continue as an operating business, which was the whole purpose of the also the (indistinct) is to preserve and protect this company so that it can be a going concern afterwards. It is not about, you know, close down; it is about restructuring."

119. Again, I accept Mr Stahl's evidence on this point and that the Company was already in advanced negotiations for the Restructuring Measures when both DNB and NIBC took enforcement action. I also accept his evidence in his witness statement that the failure of the Restructuring Measures would have resulted in deal fatigue and that it is likely that enforcement by one or two lenders would have triggered enforcement action by most, if not all, of them. Finally, I accept that the significant risk of a domino effect (which they could not discount) would have left the directors of the Company with little option to put the Group into liquidation.

(4) Conclusion

120. For these reasons the Company satisfied me fully that the relevant comparator was insolvent liquidation of the Group either under the Dutch Bankruptcy Act or a similar process in other jurisdictions. But even if there had been a significant doubt in my mind that this was the relevant comparator, I would still have sanctioned the Scheme. I would have done so for the same reasons as Mann J in *Bluebrook* (above). The Shareholders' case was that the Court should refuse to sanction the Scheme so that the Scheme Creditors and other lenders could negotiate an orderly wind down of the Group. But I agree with Mann J that it is not a legitimate or sensible use of the Court's powers to force the parties to enter into further negotiations (especially after they have been negotiating for seven years). The function of the Court is to assess the scheme on the merits.

121. I also agree with Mann J that in cases of this kind the Court is not in a position to assess whether objecting shareholders or creditors will make unreasonable demands in any resumed negotiations. The Shareholders were not prepared to put up any new money to facilitate an orderly wind down of the Group and Mr Berkenbosch's evidence was that if the Court rejected the WHOA Plan, it would

not have been possible to submit a new plan to creditors or shareholders for a period of three years. This would undoubtedly have had a significant impact on the bargaining position of the respective parties.

122. Finally, I respectfully agree with the analysis in the last two sentences of Mann J's judgment in *Bluebrook* at [79]. Even if I had been satisfied that the Company and its creditors would be prepared to enter into a fresh round of negotiations to avoid an insolvent liquidation, this would have been the direct result of my own refusal to sanction the Scheme. This was a point with which I struggled when hearing the evidence because the whole thrust of the case which Mr Perkins put to both Mr Schuijt and Mr Stahl was that they would negotiate further if the Court refused to sanction the Scheme. Their response, which I found to be entirely reasonable, was not to rule out further negotiations but to object that they had been negotiating for seven years to reach an agreement to which the Scheme was intended to give effect.

IX. Sanction

(1) Compliance with statutory requirements

123. Mr Bayfield submitted that the relevant statutory requirements were as follows: (1) whether the statutory majorities were obtained by the Company; (2) whether there has been compliance with the terms of the Convening Order; and (3) whether the class in respect of the Scheme was properly constituted. Mr Goldring and Mr Perkins did not dispute that the requisite statutory majorities were obtained at the Scheme meetings or that they were summoned and convened in accordance with the Convening Order or that it was appropriate to constitute two classes of creditors, namely, the NewCo Scheme Creditors and the Exiting Scheme Creditors. I am satisfied, therefore, that the Company complied with the necessary statutory requirements.

124. Moreover, Mr Bayfield submitted (and I accept) that it is usual to require class composition issues to be considered at the convening hearing and that Sir Anthony Mann heard full argument on the issue and considered the relevant arguments. I agree with Mr Bayfield that there is no basis for departing from his decision on class composition.

(2) Fair representation and the bona fides of the majority

125. The turnout at the Scheme meetings was 100% and the Scheme was approved by all but one of the Scheme Creditors (who did not appear at the sanction hearing). Given that the creditors were a diverse group of experienced commercial lenders with different interests in a specialist market, there is no reason to believe that the majority who voted in favour of the Scheme were acting other than *bona fide*.

(3) Whether a creditor could reasonably approve the Scheme

126. I am also satisfied that the Scheme is one which an intelligent and honest Scheme Creditor acting in its interests might reasonably approve. The principal issue between the Company, MoCom and the Shareholders was whether the true comparator was a liquidation or an orderly wind down involving a sale of the Group's fleet on a solvent basis. For the reasons which I have given, I am satisfied that the Scheme Creditors were entitled to take the view that a liquidation was the most likely alternative and that it was reasonable to support the Scheme to avoid that outcome.

(4) Blot or Defect

127. Finally, I am satisfied that there is no blot or defect in the Scheme. In particular, I am satisfied that the Scheme is not unfair to the Shareholders for the reasons which I have already given. Moreover, even if they had persuaded me that they would have been worse off under the Scheme, I would not have regarded this as a reason for refusing to sanction it. Their case was, in substance, that the Court should compel the Scheme Creditors (and other lenders) to negotiate with them for an orderly wind down of the Group. But they were not prepared to put up any new money and the Court's refusal to sanction the Scheme might well have given them a much better bargaining position.

128. Further, the Dutch Court has now approved the WHOA Plan and, in doing so, it has rejected the same or substantially the same arguments on valuation which were presented to me. It has also applied the absolute priority rule. This results in the allocation of 4.91% of the DRs to the Shareholders even though the

calculation itself and the mechanism for allocation are contained in the Implementation Agreement rather than the WHOA Plan itself. The Shareholders had every opportunity to present their case to the Dutch Court which has rejected it.

X. Connection and effect

129. The Framework Agreement and the relevant Facility Agreements are governed by English law and I am satisfied that this provides a sufficient connection with this jurisdiction: see *Re Vietnam Shipbuilding Industry Group* [2014] 1 BCLC 400 at [9] (David Richards J) and *Re ColourOz Investment 2 LLC* [2020] EWHC 2464 (Ch) at [18] (Snowden J). I exercise the Court's jurisdiction to sanction the Scheme on this basis.

130. It is not necessary for the Company to establish that the Scheme will be effective in every other jurisdiction in the world provided that it is likely to be effective in the key jurisdictions in which it has assets or in which it operates: see *ColourOz Investment* (above) at [25]. Mr Schuijt exhibited expert evidence that the Scheme is likely to be recognised in the Netherlands, Scotland and Singapore which are the key jurisdictions in which the Company is registered and in which it carries on its material operations. Moreover, as Mr Bayfield submitted, it will likely have a substantial effect because all but one of the Scheme Creditors voted for the Scheme and was contractually bound to support it. I accept, therefore, that it is likely to be effective in the key jurisdictions of the Netherlands, Scotland and Singapore.

131. Finally, Mr Bayfield submitted that it may be necessary for the Company's "foreign representative" to apply to the Supreme Court of Singapore under the Insolvency Restructuring and Dissolution Act 2018 to give effect to the Scheme in Singapore. On 13 April 2023 the board of the Company resolved to appoint Mr Schuijt as its foreign representative for that purpose and Mr Bayfield invited me to include a provision in the Sanction Order declaring that he had been validly appointed and authorised to act accordingly.

132. Sir Anthony Mann was not prepared to make such an order at the Convening Hearing because it was a matter for the Supreme Court of Singapore to determine and there was no evidence of local law before the Court. However, for the sanction

hearing the Company filed an expert report dated 10 May 2023 made by Professor Paul Veder in which he gave evidence that Mr Schuijt had been validly appointed as the Company's foreign representative for the purpose of Dutch law. It also filed an expert report dated 10 May 2023 made by Mr Abraham Vergis SC, an advocate and solicitor of the Supreme Court of Singapore, in which he gave evidence that Mr Schuijt would be treated as a foreign representative within the meaning of Article 2(i) of the Singapore Model Law. None of this evidence was contested and I therefore made the requested declaration in the Sanction Order.

XII. Conclusion

133. For all of these reasons, and despite the attractive submissions made by Mr Perkins on behalf of the Shareholders, I was satisfied that it was appropriate to sanction the Scheme and to give effect to the votes cast by the majority of both classes of Scheme Creditors.