Neutral Citation Number: [2025] EWHC 205 (Ch)

Case No: CR-2024-005890

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES LIST

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 3 February 2025

THE HONOURABLE MR JUSTICE THOMPSELL

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IN THE MATTER OF SINO-OCEAN GROUP HOLDING LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

Mr Tom Smith KC, Mr Ryan Perkins and Ms Annabelle Wang (instructed by **Sidley Austin LLP**) for the **Plan Company**
Mr David Allison KC (instructed by **Allen Overy Sterling LLP**) for the Co-ordination Committee of creditors of the Plan Company
Mr Mark Arnold KC and Mr Henry Phillips (instructed by **Linklaters LLP**) for **Long Corridor Asset Management Limited**

Hearing dates: 16,17 and 20 January 2025

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Approved Judgment

This judgment was handed down remotely at 11.30 am on 3 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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THE HONOURABLE MR JUSTICE THOMPSELL

Mr Justice Thompsell:

1. INTRODUCTION AND BACKGROUND

1. This judgment relates to a hearing on 16, 17 and 20 January 2025, being the Sanction Hearing in relation to a proposed restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006 ("**CA 2006**"). The Plan relates to Sino-Ocean Group Holding Limited (the "**Plan Company**"). The Plan Company seeks the court's sanction of the Plan.

2. The background to, and main features of, the Plan were outlined in my judgment relating to the Convening Hearing on 18 October 2024 (Neutral Citation Number: [2024] EWHC 2851 (Ch)) (the "**Convening Judgment**"). Terms defined in the Convening Judgment are also used in this judgment.

3. I will not repeat all that explanation, but as a reminder of some of the major features:

   i) The Plan Company is incorporated in Hong Kong, and its shares are listed on the Hong Kong Stock Exchange.

   ii) The Plan Company has defaulted on its debt and faces enforcement action by numerous groups of financial creditors. A winding-up petition (the "**Petition**") was presented against the Plan Company in Hong Kong on 27 June 2024 in respect of an undisputed debt exceeding US$13 million. The Petition has been adjourned three times to allow the Plan Company to promulgate the Plan and for its subsidiary, Sino-Ocean Land (Hong Kong) Limited, to promulgate a linked Hong Kong scheme of arrangement (referred to further below). Unless there is another adjournment, the Petition is due to be heard on 17 February 2025.

   iii) The Plan constitutes one part of an overall cross-jurisdictional arrangement (the "**Reorganisation**"). The Plan Liabilities under the scope of the Plan are governed by Hong Kong law (in the case of Class A) and English law (in the case of Classes B, C and D).

   iv) To ensure that the compromise of the Class A Debt is regarded as fully effective in Hong Kong, as well as in the United Kingdom, Sino-Ocean Land (Hong Kong) Limited has also proposed a parallel scheme of arrangement in Hong Kong (the "**Hong Kong Scheme**"). The Hong Kong Scheme relates only to the debt governed by Hong Kong law which is the same debt that forms the Class A Debt. The Plan and the Hong Kong Scheme are inter-conditional.

   v) It is intended that the Plan will achieve its objective by restructuring the four key classes of the Group's unsecured financial indebtedness (labelled "**Class A**" to "**Class D**") and providing for the release of those liabilities in return for the issue of a package of new secured debt instruments convertible securities and perpetual Securities termed the "**Plan Consideration**".

vi) The Plan Consideration falls into two basic categories:

a) New debt claims in the form of either a new loan obligation (relevant to the proposed Class A creditors), or new notes. The new notes are relevant for the other proposed classes of creditor, and are an option offered to the proposed Class A creditors as an alternative to the proposed new loan obligations. It is understood that the commercial terms of the new loan obligations and of the new notes are broadly equivalent, so that the difference between them is principally one of form.

b) New securities in the form of either new mandatory convertible bonds ("**MCBs**") (which convert, subject to the terms of the MCB's, on (i) a voluntary basis or (ii) on a mandatory basis into shares in the Plan Company 24 months after issuance or upon an event of default) or new perpetual securities which appear to be the equivalent of a type of preference share, though ranking as debt rather than share capital.

vii) The Plan proposes the issuance of these different types of Plan Consideration in different proportions in respect of different classes, and in some cases, with some elections being available to members of particular classes between these different types of security. For this purpose the Plan Company has categorised the Plan Creditors into the four classes, Classes A to D, reflecting among other things, the different rights that the Plan Company proposes to offer for these different classes of creditor, if the Plan succeeds. This in turn has been influenced by the Plan Company's assessment of what each of these classes of creditor would be likely to receive in the event of the Company entering into formal liquidation proceedings which, the Plan Company considers, will trigger severe distress worldwide across the Group, including a combination of enforcements, insolvency filings and distressed sales. The Plan Company argues that this is the "relevant alternative" against which the Plan should be judged. Whilst each class (other than Class D, which is subordinated to the other classes) ranks *pari passu* as regards the obligations of the Plan Company, it is forecast that each class would receive substantially different returns in the relevant alternative. This is because the different classes have in addition recourse to other co-obligors within the Plan Company's group which would have available different assets to satisfy (in part) the obligations to creditors in the different classes.

4. The Convening Hearing took place before me on 18 October 2024. I made an order (the "**Convening Order**") giving the Plan Company liberty to convene meetings of the Plan Creditors of the four classes (the "**Plan Meetings**") to consider and, if thought fit, approve the Plan.

5. In accordance with the Convening Order, the Plan Meetings took place on 22 November 2024. According to the Chairperson's Report, the results of the Plan Meetings are as follows:

i) A total of 938 Plan Creditors voted at the Plan Meetings. This figure excludes multi-class positions where Plan Creditors hold positions across more than one class and does not double count Plan Creditors with multiple positions in a single class.

ii) The Plan was approved by over 75% in value of those voting at the meetings of the Class A creditors and the Class C creditors. However, the Plan was not approved by the requisite statutory majorities of the Class B creditors and the Class D creditors.

iii) In more detail, the voting outcomes were as follows:

a) in Class A, the Plan was supported by 100% in value of those voting (with a turnout of 86.2% in value);

b) in Class B, the Plan was supported by 47.7% in value of those voting, (with a turnout of 73.9% in value): of those voting: a majority voted against;

c) in Class C, the Plan was supported by 81.5% in value of those voting (with a turnout of 84.5% in value); and

d) in Class D, the Plan was supported by 34.9% in value of those voting (with a turnout of 61.9% in value), of those voting, a majority voted against.

iv) In total, the Plan was approved by over 74% in value of those voting across all four classes.

6. Although a number of Plan Creditors within Classes B and D voted against the Plan, only one of them, Long Corridor Asset Management Limited ("**Long Corridor**") has appeared at the Sanction Hearing to oppose the Plan.

7. Long Corridor holds a very small proportion of the Plan Liabilities:

i) within Class A, Long Corridor does not hold any debt;

ii) within Class B, Long Corridor holds about US$53.7 million of the debt (representing about 3% by value);

iii) within Class C, Long Corridor holds about US$8.8 million of the debt (representing less than 1% by value); and

iv) within Class D, Long Corridor holds about US$22.8 million of the debt (representing about 4% by value).

8. In total, the Plan Liabilities held by Long Corridor (of about US$85.3 million) represent about 1.5% in value of the Plan Liabilities.

9. Long Corridor considers that its views are shared by other dissenting creditors especially those within what has been described as an "Ad Hoc Group" of creditors and in particular the Steering Committee of that group, although the court was not taken to any evidence to substantiate this.

10. Long Corridor's chief commercial objection to the Plan is that it is too generous to shareholders. Under the Plan, whilst shareholders do face substantial dilution, they are still left with some 53.8% of the equity in the Plan Company, and this equity should

have a substantial value after the reduction in the indebtedness of the Plan Company effected by the Plan. For example, one of the largest shareholders, China Life Insurance Company Limited ("**China Life**"), following implementation of the Plan, will retain 15.91% of the Plan Company's equity, which the Plan Company estimates will be worth between US$7.3m and US$9.1m. The shareholders obtain this advantage without putting in any new money and against the background that they would receive nothing in the event of a liquidation.

11. Long Corridor considers that the result of the Plan is that shareholders will, in effect, benefit at the expense of Plan Creditors and that a fairer plan, and one that would provide greater benefit for Plan Creditors, would be one that provides them with instruments which will give them a greater share of the equity, thereby diluting existing shareholders to a small percentage.

2. THE ORDER SOUGHT

12. The Plan Company now seeks an order sanctioning the Plan under section 901F of CA 2006.

13. Section 901F of CA 2006 provides as follows:

> "*(1) If a 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 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.*
>
> *(2) Subsection (1) is subject to … section 901G …*"

14. The Plan Company acknowledges that this is possible only if the court exercises its power under section 901G CA 2006.

15. Section 901G of CA 2006 specifically empowers the Court to sanction a Plan notwithstanding the dissent of one or more classes, provided that certain conditions are satisfied. Use of this power is referred to as a "**cross-class cram down**".

3. THE CONDITIONS FOR A CROSS-CLASS CRAM DOWN

16. Section 901G bears the heading "*Sanction for compromise or arrangement where one or more classes dissent*". So far as is material, section 901G provides as follows:

> "*(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.*
>
> *(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.*
>
> *(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of*

the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).

(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

17. If I am to approve the Plan, I need to satisfy myself that the conditions in section 901G are met. Satisfaction of those conditions is a necessary but not a sufficient reason for me to approve the Plan – I will still need to exercise the discretion provided to the judge under section 901F.

18. The Plan Company argues that these conditions are all met, but this view is disputed by Long Corridor. I have considered carefully the points raised by Long Corridor.

Condition A

19. As noted above, Condition A to the use of the cross-class cram down is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative. For these purposes the "*relevant alternative*" is defined as "*whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F".*

20. The Plan Company argues that the relevant alternative is an insolvent liquidation of the Plan Company. This view is supported by the witness evidence of Mr Sum and by Ms Lisa Rickelton's expert evidence. Mr Sum is, in relation to the Plan Company, its company secretary as well as a former chief financial officer.

21. Long Corridor argues that the "relevant alternative" is that some other plan would emerge that would provide a better deal for Plan Creditors by giving them more equity, thereby diluting to a small percentage the equity held by existing shareholders. It argues that "where there's a will there's a way" – in other words, that if the Plan is not sanctioned it would be possible to negotiate and bring into effect what they would see as a fairer deal for creditors.

22. In relation to the question of the relevant alternative, I must agree with the Plan Company for various reasons:

   i) In my view the definition requires a particular alternative to be identified. Long Corridor has identified no such alternative – whilst it did at a late stage put forward a plan referred to as the "Alternative Plan", it is not now suggesting that this is the relative alternative, and given commercial defects identified in the Alternative Plan, I think Long Corridor is being realistic in not continuing to suggest that the Alternative Plan should be regarded as the relevant alternative.

Instead, Long Corridor is now promoting a vague idea that Plan Creditors and shareholders might agree another plan, but that is not sufficiently choate an idea to amount to a relative alternative. Unless a putative alternative plan is specified in detail it is impossible for the court to judge the effect on creditors of that plan.

ii) The undisputed evidence of Mr Sum is that the Plan Company can stave off its creditors for only another month, whereas agreeing and implementing another plan would take many weeks longer. A relevant alternative must be something where there is at least some prospect of implementing the alternative, and on the evidence before the court there is no prospect that the Plan Company could hang on to do anything other than to go into liquidation.

iii) There is evidence that the Class A creditors would not support an alternative plan of the type advocated by Long Corridor and also there may be little reason for shareholders to provide the necessary votes for it.

iv) Long Corridor's suggestion that a better plan could emerge out of a liquidation is not realistic given the complex nature of the Plan Company's Group; liquidation of the Plan Company is likely to lead to severe reputational and financial damage (for example through acceleration of loans and the drying up of credit lines through-out the Group) and there would be insufficient resources to pay a liquidator to put in place and meet the necessary professional fees in developing and implementing such a plan.

23. For all the above reasons I conclude that the relevant alternative is an insolvent liquidation of the Plan Company. It is overwhelmingly the most likely outcome if the Plan is not approved.

24. Having accepted that liquidation is the relevant alternative, I accept also that each class of Plan Creditor would be substantially better off under the Plan than in the relevant alternative. This is demonstrated by the expert evidence of two senior managing directors at FTI Consulting, namely Ms Lisa Rickelton who is an experienced insolvency practitioner, and Mr Ben Johnson, an experienced valuation specialist. There has been no challenge to the expert evidence on this point.

25. I consider therefore that Condition A is met.

Condition B

26. Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

27. The Plan Company argues that Condition B is satisfied twice over since more than 75% of those voting in both Class A and Class C have voted in favour.

28. Long Corridor argues, for different reasons, that the votes of neither of these Classes can be used as what is referred to as a "cramming class" to satisfy Condition B.

29. Long Corridor points out that section 901G confers a formidable power on the court. It enables the assenting votes of one class of creditor to form the basis of imposing a restructuring plan which they approve on a dissenting class which has not approved the plan. The jurisdiction is especially susceptible to manipulation and abuse, particularly through the artificial creation of a "cramming class" of creditors. The courts are astute to consider this point.

30. In *Deep Ocean 1 UK Ltd* [2021] EWHC 138, Trower J recognised (at [41]) that

> "there may be some cross-class cram down cases in which there is artificiality in the creation of classes to ensure that the requirements of the section 901G Condition B are satisfied…"

and clearly considered that the creation of such a class would be inappropriate.

31. In *Gategroup Guarantee* [2022] 1 BCLC 98, Zacaroli J (as he then was) held (at [171]) that

> "in the context of a plan under Part 26A, the artificiality of the structure is undoubtedly an issue of direct relevance to the discretion to sanction the plan".

32. In *Re Houst* [2022] B.C.C. 1143 ("***Houst***"), Zacaroli J said (at [20])

> "Clearly, attempts artificially to create an in-the-money class for the purposes of providing an anchor to activate the cross-class cram down power should be resisted, particularly where such a claim is not impaired by the plan".

33. Long Corridor argues it is therefore particularly important for the protection of the integrity of the Part 26A regime for the inclusion of a cramming class of creditors to be properly justified. It argues further that requirement is even more acute when what is being undertaken is a "cram across" of a *pari passu* class of in-the-money creditors, as opposed to a cram down of a junior ranking class.

34. I accept these points and have taken them into account in my analysis below.

Condition B in relation to Class A

35. In relation to the Class A Debt, Long Corridor makes the following point:

> "The Class A debt, which is governed by Hong Kong law, is being compromised pursuant to the Hong Kong scheme. That compromise will be recognised in this jurisdiction in accordance with the ordinary principles of private international law. In those circumstances, Long Corridor will contend that the inclusion of the Class A creditors in the RP is unnecessary, unjustified and its sole purpose is to create an artificial "cramming class" of creditors such that it would not be fair or appropriate in the circumstances for the Court to exercise its "cross-class cram

> down" powers under s.901G of the Act based on votes in favour of the RP by the Class A creditors."

36. In this regard Long Corridor makes the following points:

i) Whilst a company is, in principle, able to select which of its creditors to include and which to exclude from a scheme of arrangement or restructuring plan, "*the exclusion or inclusion of creditors from a restructuring plan*" is not "*a simple or unqualified choice for the company*" as was said by Miles J at [126] in *UK Commercial Finance Holding Ltd v Cine UK Ltd* [2024] EWHC 2475 (Ch). Instead, as Snowden J put it in *Re Co-operative Bank Plc* [2017] EWHC 2269 (Ch) at [38]:

> "it ought to have a rational commercial justification other than simply a desire to arrange matters so as to achieve the required statutory majorities of those who are included".

ii) The Class A Debt is governed by Hong Kong law. As a consequence, Long Corridor argues, it cannot be effectively compromised under the Plan - Hong Kong is a jurisdiction which applies the rule in *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 ("***Gibbs***"), that is that the question of whether an obligation has been discharged is governed by its proper law so that a compromise of Hong Kong law debt under English law will not be given effect outside of the jurisdiction – except to the extent that creditors have submitted to the jurisdiction of the English court.

iii) As a result of the rule in *Gibbs* a compromise of the Class A Debt pursuant to the Hong Kong Scheme will be effective both in Hong Kong and elsewhere (including in the United Kingdom). These features of the Class A Debt mean that its inclusion in the Plan as a separate class is unnecessary. There is no need for Class A to be included in the Plan given the Class A Debt is being compromised through the Hong Kong Scheme.

iv) It is also (Long Corridor alleges) entirely unprecedented that the compromise of a debt with such features would be used as a cramming class in a Plan. Long Corridor alleges that the Plan Company (with the support of the committee of creditors supporting the Plan ("**CoCom**") has included the Class A Debt purely to ensure that there is a cramming class.

v) To rely on that class as the basis to cram down dissenting creditors would be wholly unprecedented, manifestly unfair, and contrary to principle, irrespective of the general merits, or otherwise, of the Plan.

37. I agree with the Plan Company that this objection is misconceived.

> The matter needs to be considered first in relation to the plain words of Part 26A. The Class A creditors are "*creditors*" who are parties to the "*arrangement*" with the Plan Company constituted by the Plan and, I consider, whose rights are affected by the Plan. As such, they are entitled to be convened to a meeting to consider and, if thought fit, approve the Plan.

> Moreover, the Class A creditors constitute an assenting class for the purpose of section 901G(5) since they would receive a payment, or have a genuine economic interest, in the Plan Company in the event of the relevant alternative.

38. Long Corridor argues that the Class A creditors are not affected by the Plan as it is the Hong Kong Scheme, not the Plan that has the effect of binding them as a class: a decision by the English court cannot affect the Class A creditors and it is unprecedented and unjustified to allow a class that is not itself (as a class) bound by the Plan to cram down other classes.

39. A good part of the reason why Long Corridor says that this is objectionable is the idea that there is a lack of reciprocity if the Class A creditors can use their votes to cram down other classes but are not susceptible themselves of being crammed down since they cannot be bound by the English law proceedings. I do not consider this correctly summarises the position.

40. The *Gibbs* rule is not absolute. As per *(Re OJSC International Bank of Azerbaijan* [2019] Bus LR 1130 at [28]) (which, according to expert evidence would be followed in Hong Kong):

> "[T]here is an exception to the [*Gibbs*] rule if the relevant creditor submits to the foreign insolvency proceeding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding".

41. For these purposes, voting on the Plan (whether for or against) would constitute submission. The overwhelming majority of the members of Class A have agreed under the terms of the RSA to support both the Plan and the Hong Kong Scheme, and in voting to support the Plan have submitted to the jurisdiction of the English courts. Having so voted they are bound by English law and in a way that would be recognised by Hong Kong law by the Plan. It is not true then that the Plan has no effect on those who have voted – they are bound by English law, and this means that the Plan has a substantial effect on the Class A creditors.

42. Furthermore, the fact that these creditors are bound by the RSA to vote in favour of it also means that it is inevitable that the Hong Kong Scheme will take effect.

43. The position, therefore, is really no different to the position where a class of creditors is constituted where the members of the class have already committed themselves to vote in favour of a restructuring plan. As can be seen from a number of cases there is no objection to such a class of creditors being constituted. The argument that creditors who have already committed themselves to a restructuring plan are not affected by the plan is not one that has found any favour with the court.

44. A key authority on this point is *Houst* [2022] BCC 1143. In that case, Zacaroli J sanctioned a plan which crammed down HMRC in reliance on an assenting class consisting of a single secured creditor (the Bank). The Bank ultimately consented to the plan, which meant that it did not need to be a plan creditor at all (save for the purposes of acting as an assenting class and thereby facilitating a cross-class cram down). One

of the issues before the Court was whether the inclusion of the Bank as an assenting class was artificial or abusive. Zacaroli J answered this question in the negative. At [19]-[21], Zacaroli J said:

> "I note that in Virgin Atlantic Airways Ltd [2020] EWHC 2376 (Ch), at [49]-[50], Snowden J left open the question whether the power to cram down a dissenting class under section 901G can be activated by including within a plan a class of creditors who would otherwise all have been prepared to enter into consensual arrangements to give effect to the restructuring of their rights. I sought submissions from Counsel on this point following the hearing, and I am grateful to Mr Haywood for his speedy response to that request.
>
> Clearly, attempts artificially to create an in-the-money class for the purposes of providing the anchor to activate the cross-class cram down power should be resisted, particularly where such a class is not impaired by the plan. Where, as here, however, the in-the-money class of creditors is undoubtedly adversely affected by the Company's insolvency and is substantially impaired under the plan, then I do not think that the mere fact that 100% of that class is prepared to support the plan is a reason to prevent the cross-class cram-down power being exercised. I do not think there is a relevant distinction between a case where all but a small minority of the class are in favour, and one where the merits of the plan have persuaded the whole of the class to support the plan. Nor do I think it makes a difference, as a matter of jurisdiction to exercise the cross-class cram-down power, that there is only one creditor within the class.

45. As Zacaroli J explained at [20], there is nothing inherently abusive in the inclusion of an assenting class within a plan, even where this has the effect of facilitating a cross-class cram down. Rather, the Court will consider whether the assenting class is "*adversely affected by the Company's insolvency*" and is "*substantially impaired under the plan*". Put simply, the Court will ask whether the plan has a meaningful impact on the assenting class. If the plan has a meaningful impact on the assenting class, then the inclusion of the assenting class cannot be described as abusive (or artificial or unjustified).

46. *Houst* was very recently followed by Edwin Johnson J and Miles J in *Re Cine-UK Ltd.* This was a case where a restructuring plan was unanimously approved at meetings of a single intercompany lender and meetings of the term loan lenders (who had committed to support the plans in advance by signing a restructuring support agreement). In the unreported convening judgment, Edwin Johnson J cited and approved the decision of Zacaroli J in *Re Houst* and held that there was no objectionable artificiality. In the sanction judgment (reported as [2024] Bus LR 1944), Miles J likewise approved the decision of Zacaroli J in *Houst* and held that there was no objectionable artificiality.

47. Further, there have been a number of other cases where creditors (particularly secured creditors) have been included in plans and treated as assenting classes (alongside other assenting classes), even though the relevant classes unanimously supported the plan.

48. In practice, where a cross-class cram down is required, a deal is frequently reached with all or a very substantial majority of the members of the assenting class, and that class is included in the plan for the purpose of enabling a cross-class cram down to be sanctioned by the Court. If a cross-class cram down were unnecessary, then the inclusion of the assenting class in the plan would often be unnecessary: the assenting class could instead be compromised outside of the plan (e.g. on a consensual basis, whether on a bilateral basis or by using a majority consent procedure in the finance documents). This does not mean that the inclusion of the assenting class in the plan is artificial or unjustified. If the position were otherwise, then Part 26A would be deprived of its intended purpose.

49. In my view, there is nothing artificial, and no whiff of impermissible forum-shopping in the constitution of the Class A creditors as a class of creditor in the Plan. For the purposes of this analysis, it is appropriate to look at the entirety of the Reorganisation including the Plan and the Hong Kong Scheme, and taken as a whole the arrangements are ones that affect all classes, including Class A. Certainly the over 80% of Class A that voted in favour are clearly affected by the Plan.

50. If Long Corridor's contention on this point were to be accepted, this would militate against the will of Parliament in adopting Part 26A CA 2006, in that it would deny companies that were operating internationally the ability to deal holistically with the different classes of their creditors in accordance with Part 26A if they had classes of debt in a jurisdiction like Hong Kong where some separate scheme was needed to ensure that all those debtors were to be included. In fact, the use of foreign schemes or plans to assist with the effectiveness of an English scheme or plan is commonplace. This was the case with *Re Drax Holdings Ltd* [2004] 1 WLR 1049 where parallel schemes were proposed in England, Jersey and the Cayman Islands to compromise a range of financial liabilities, some of which were not governed by English law. This was also the position in *Re Hong Kong Airlines Ltd* [2023] BCC 477, where an English plan was proposed in parallel with a Hong Kong scheme of arrangement. The English plan compromised three classes of debt (governed by a combination of English, and Hong Kong law and that of the People's Republic of China ("**PRC**")), whereas the parallel scheme in Hong Kong compromised only the Hong Kong and PRC law debt. Sir Alastair Norris explained (at [9] that:

> "… the plan cannot of itself achieve a compromise in relation to any liability governed by Hong Kong law, because Hong Kong is a jurisdiction which applies The Rule in Gibbs (Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux (1890) 25 Q.B.D. 399). There is therefore a parallel scheme of arrangement under the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance in the same terms (save that it does not deal with the English law debt, principally the PNs) as the proposed plan."

51. I therefore agree with the Plan Company's contention that the fact that the Hong Kong Scheme is being used in order to ensure that the Plan and restructuring are effective in relation to the small remainder of the Class A creditors who have note voted in relation to the Plan, is not any reason for disregarding or discounting the Class A creditors as a cramming class.

52. As to the proposition that this finding is unprecedented, that contention depends on a very narrow construction of the circumstances here. As I have mentioned there have been other cases where debt that is governed by the law of another jurisdiction, including in the case of *Re Hong Kong Airlines*, one that adopts *Gibbs* and one that makes use of an overseas scheme of arrangement. The only feature here which I think can be said to be unprecedented, is the point that the Class A Debt ranks *pari passu* with the debt in the other classes (other than Class D) and neither side has shown me a case where a class comprised of overseas debt, and subject to an overseas scheme, and ranking *pari passu*, has been used as a cramming class.

53. It is unsurprising that there would be no such precedent, since the usual position would be that debt ranking *pari passu* would be offered the same consideration in the restructuring plan and would form a single class. In this case, there were good reasons why a differentiation was made between the Plan Consideration offered to the different classes, based on trying to give them a similar multiple of the returns that they would obtain in the relative alternative and, as I found at the Convening Hearing, this has led to a necessity for the Plan to recognise a multiplicity of classes. This is unusual, but I do not think this unusual feature provides any reason not to recognise Class A as being a *bona fide* cramming class. If this means that I am making a decision without the benefit of a precedent, then I can only say that there must always be a first time.

Condition B in relation to Class C

54. Long Corridor also objects to the Plan Company's reliance on the results of the Class C meeting as creating a cramming class for the purposes of Condition B. It argues, that the necessary 75% majority was achieved only by the inclusion of the votes of a creditor, China Life Franklin Asset Management Co. Limited ("**China Life Franklin**") an affiliate of one of the shareholders. China Life. China Life stands to benefit substantially (and Long Corridor would say, unfairly) from the terms of the Plan which will, as we have seen, allow shareholders to retain substantial equity, despite the fact that their claims are inferior to those of the different classes of creditor, and they would get nothing in the relevant alternative.

55. The results of the Class C meeting were as follows:

    i) Turnout by value: 42.5% (excluding China Life Franklin), 84.5% (including China Franklin).

    ii) The percentage voting for (by value) was 63.1% (excluding China Life Franklin), 81.5% (including China Life Franklin).

56. The Class C meeting therefore approved the Plan by the necessary minimum percentage of 75% only by reason of the affirmative votes cast in respect of existing debt instruments held on behalf of China Life Franklin.

57. Long Corridor argues that the votes of China Life's affiliate~~s~~ in favour of the Plan was most likely motivated by an extraneous interest (namely, the promotion of China Life's interests as shareholder) and that this was an interest adverse to the interests of the class. In those circumstances, the votes obtained in the Class C meeting cannot be relied on as creating a "cramming class" under section 901G(5).

58. Where the court is invited to sanction a plan under Part 26A that involves a "cross class cram down" it must first consider the position of the putative assenting classes before turning to consider whether it is appropriate, in all the circumstances, to exercise its discretion to impose the plan on the dissenting classes (see *Re AGPS Bondco* [2024] EWCA Civ 24, [2024] Bus LR 745 ("***AGPS Bondco***") at [118]-[120] and [128]).

59. In relation to an assenting class, the court will apply the principles that are applied where a court is asked to exercise its discretion to sanction a scheme of arrangement under Part 26 CA 2006. They are summarised in what David Richards J described, in *Re Telewest Communications (No 2)* [2004] EWHC 1466 at [20], as the "classic formulation" of applicable principles in the judgment of Plowman J in *Re National Bank Limited* [1966] 1 WLR at page 819. This involves (in addition to the court being satisfied that the statutory requirements have been met) 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".

60. The requirement that members of the majority have voted in the interests of the class as a whole is critical for safeguarding the integrity and fairness of the statutory regime. One of the key functions of the court in considering whether to sanction a scheme is to:

> "see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce": *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 per Lindley LJ at p.239.

61. *In Re Lehman Brothers International (Europe)* [2019] Bus LR 1012, ("***Lehman Brothers***") Hildyard J summarised the issues at play where there is a challenge to the representative nature of a vote.

62. First, (as mentioned at [89]) there must be a special interest held by a sub-group of creditors within a class,

> "which is adverse to, or clashes with, the interests of the class as a whole" at [89].

A special interest which simply provides an *additional* reason for supporting the scheme (without clashing or conflicting with the interests of the class as a whole) will not undermine the representative nature of a vote.

63. Second, that special interest must be the "predominant cause" for that sub-group voting in favour of the arrangement see at [88(b)]. As mentioned at [90] and [91], this is an objective test requiring:

> "a strong and direct causative link between the creditor's decision to support the scheme and the creditor's adverse interest such that it is the adverse interest which drives the creditor's voting decision".

64. In applying that approach, however, the court should not be circumscribed by inflexible rules (e.g. by the application of a rigid "but for test"). The ultimate question is whether the special interest creditor has voted with a view to the interests of the class or not.

65. Third, the vote of the sub-group must be material in obtaining the requisite majority at the class meeting.

66. If the court is satisfied that the statutory majority has been obtained by reason of votes cast otherwise than in the interests of the class as a whole, the court has a discretion either to discount the weight given to the majority vote and consider the fairness of the scheme without adopting any particular presumption in favour of the majority or altogether disregard the relevant votes of "special interest" creditors so that the relevant votes are void, and do not count at all towards the statutory majority, in which case if the requisite majorities are not achieved, the scheme must fail (see *Lehman Brothers* at [109]).

67. Long Corridor argues that the votes of China Life's affiliate~~s~~ should be disregarded as China Life Franklin clearly has a "special interest" by reason of its status as an affiliate of the shareholder. That special interest is "adverse" to or (at the very least) "clashes with" the interests of the Class C creditors as a whole. This is because a central consideration for Class C creditors at the Plan Meeting was whether the proposed distribution of the benefits of the restructuring is fair and, in particular, whether the retention of at least 53.8% of the Plan Company's equity by existing shareholders is properly justified. China Life is the Plan Company's largest shareholder and, following implementation of the Plan, will retain 15.91% of the Plan Company's equity, which, as we have seen, the Plan Company estimates will be worth between US$7.3m and US$9.1m. Long Corridor argues that it is obvious that the interests of China Life Franklin in its affiliate retaining equity in the restructured Group (and in minimising its dilution) is in conflict with the interests of Class C creditors in maximising their returns as creditors and that the court should also conclude that the special interest was the "predominant cause" for this affiliate of China Life to vote in favour of the Plan.

68. At the commencement of the hearing, the Plan Company had not adduced any evidence to explain China Life Franklin's reasons for voting in favour of the Plan. However, before the hearing ended, some evidence was produced in the form of a further witness statement from Mr Sum and a letter from China Life Franklin explaining their process for dealing with the matter.

69. Whilst it would be much better to have had a witness statement from the investment manager concerned (and to have had this much earlier in the process), the evidence adduced is, I consider, something that the court can take into account. In effect, that evidence was that China Life Franklin is a regulated investment manager and constitutes a joint venture between China Life, China Life Overseas Company Limited ("**China Life Overseas**") (a sister company to China Life) and an otherwise unconnected party, Franklin Templeton Strategic Investments Ltd. China Life Franklin had a discretionary asset management mandate in relation to the relevant Class C notes (which it held on behalf of China Life Overseas). It had exercised its discretion in voting on the Plan in accordance with what it considered to be the best interests of its client, specifically as the Plan was far better for its client than the alternative of an insolvent liquidation. It made this decision in accordance with a strict conflict-of-interest policy which would not allow it to take into account its own interest as an affiliate of China Life.

70. This evidence, I consider, casts very substantial doubt on the presumption argued for by Long Corridor that it was voting in the interests of its affiliate China Life. It directly contradicts the contention that (to use the words used in *Lehman Brothers*) there was a strong and direct causative link between the creditor's decision to support the Plan and the creditor's adverse interest such that it is the adverse interest which drives the creditor's voting decision.

71. There is therefore a very strong argument that this evidence concludes the question as to whether these votes were influenced by a consideration that was adverse to the interests of the class.

72. However, I will also consider the possibility that this evidence does not conclude the matter. To the extent that there remains any suggestion that this vote was influenced by a desire to benefit China Life, I need to consider whether that desire is likely to have been a *predominant* reason for voting in favour of the Plan, or whether this was merely an *additional* reason.

73. I think there are three good arguments why, if the decision (contrary to what evidence we have) was influenced by any motivation to assist China Life, that motivation should be regarded as an additional reason rather than the predominant reason.

74. The first such reason is that to make a decision having primary regard to this point would be a breach of the standards expected by a regulated investment firm, and I see no reason to doubt that the firm would have had a conflict-of-interest policy which would prevent this.

75. The second reason is that, even excluding the votes of China Life Franklin, a majority (some 63.1%) of the other Class C creditors who voted, voted in favour, so clearly the Plan as it related to this Class was one that someone without the putative competing interest could approve.

76. As to this second reason, Long Corridor argues that this support is, in any event, an unreliable indicator of creditors' assessment of the merits. This is on two bases. The first is that the Explanatory Statement was flawed in failing to contain a clear or sufficient explanation of the benefits accruing to existing shareholders under the Plan. The second is that certain key documents, including documents that confirmed (it

seems, although this is the subject of argument, on a non-binding basis) the financial and operational support that China Life intended to provide the Plan Company were not made available to Plan Creditors until after votes had been cast.

77. I do not accept these points.

78. It is true that the value of the interest that China Life (and the other existing shareholders) would have as a result of implementation of the Plan was not given the prominence in the Explanatory Statement that I had suggested in the Convening Judgment that it should be given. I understand that this is because the Convening Judgment was received after the Explanatory Statement had been sent out. Nevertheless, it was clear in the Explanatory Statement that it would be retaining a substantial shareholding (and would receive nothing in the relevant alternative), and it was clear from other financial documents that were made available to the Plan Creditors what the valuation of this holding would be. Given the sophistication of the Plan Creditors, it seems very likely that they would have understood this point.

79. As regards the documents relating to support from China Life, having those documents could only be an additional reason for Plan Creditors to favour China Life continuing to hold a specific shareholding, not a reason to discount the value of China Life's involvement. The absence of this information therefore is unlikely to have influenced a vote in favour.

80. The third reason is that there were at least two rational bases on which a member of Class C could make a decision to approve the Plan, even if it considered that the Plan unduly rewarded shareholders:

i) first, as has been argued by the Plan Company and illustrated by the financial projections made in reports by FTI Consulting, and as I discuss further below, because allowing shareholders to retain shares such that there were two shareholders owned by the PRC state each with at least a 15% interest would benefit the Plan Company as it would reduce the perceived risks in the Plan Company, which should be reflected in a lower discount rate affecting the value of the securities that they would hold under the Plan; and

ii) secondly, even if the Plan was unfair, it was better than the alternative of a liquidation.

81. Having regard to all the above points, there is no reason why the court should discount or disregard the votes of China Life Franklin. It seems far more likely that the decision was made entirely with a view to providing the maximum return for its client, rather than favouring its affiliate. Even if this was not the case, I consider that the benefit to an affiliate would have been at most an additional reason rather than a predominant reason.

Conclusion in relation to Condition B

82. As I consider that there is no reason not to accept either Class A or Class C as cramming classes, I consider that Condition B is met.

4. THE OBJECTION THAT SHAREHOLDERS WERE NOT INCLUDED AS A CLASS

83. Long Corridor pursued one more technical objection to the effectiveness of the Plan. This was that a meeting of the shareholders should have been convened to vote on the Plan – and that, absent such a meeting, the court has no jurisdiction to sanction the Plan.

84. The argument relies on section 901C(3), which provides that "*every creditor or member of the company* ***whose rights are affected by the compromise or arrangement must be permitted*** *to participate in a meeting ordered to be summoned under subsection (1)*" (emphasis added).

85. It was highly unsatisfactory that this point was being raised at the Sanction Hearing. It was properly a point to be raised at the Convening Hearing. Neither party raised the question of the need for a shareholder class to be included in the Plan at the Convening Hearing, but nevertheless I did consider the point and in the Convening Judgment dealt with it (at [33]) as follows:

> "First, it may be asked why the shareholders of the Company, who are affected by these arrangements are not parties. I have already explained above why the Company does not consider this to be necessary. I note that under paragraph 2 of the Practice Statement, it is the responsibility of the applicant (in this case the Plan Company) to determine whether more than one meeting of creditors and/or members is required by a scheme and if so to ensure that those meetings are properly constituted. If the Company has decided that it does not need to bind its shareholders into the Plan, I do not think it is for the court to decide that they should be so bound, unless their not being so bound poses a threat to the viability of the Plan. In this case I am content to follow the Company's assessment that it does not."

86. Long Corridor now makes the argument that the shareholders must be included, and gives as its reason for not dealing with this point earlier the point that they had not thought of it earlier.

87. Long Corridor's argument runs that *In Re Hurricane Energy Plc* [2021] EWHC 1418 ("***Re Hurricane***"), Zacaroli J held (at [27]-[34]) that a plan involving a debt-for-equity swap, which resulted in shareholders' interests being diluted, was within the meaning of a "compromise or arrangement" which "affects" shareholders' rights in the relevant sense. He held (at [28]) that the shareholders were affected by the issue of new shares under the Plan in that case "*in at least two ways*":

> "First their pre-emption rights and rights relating to approval of allotments by directors (under the Articles and sections 549(1) and 561(1) CA 2006) are overridden by the Plan".

The judge was here referring to the effect of section 566A CA 2006, which disapplies shareholders' pre-emption rights in the context of a restructuring plan. He went on to explain a second way in which shareholders' rights were being affected:

> "Second, their shareholding will, as a result of the Plan, be diluted to 5% of its current value".

88. Whilst he saw some force in an argument made on behalf of the plan company in that case that the contractual rights of the shareholders against that company are not altered by the dilution of their shareholding under the Restructuring plan, it is merely their economic value that has changed, the judge was not persuaded by this argument. He held (at [33]) that:

> ""Affected by" is a phrase of broad ambit. It is far broader, for example, than "amended by" or "altered by"

and (at [34]) that the better view was:

> "that the rights of shareholders (who are taken to have an economic interest in the company) to participate in the capital and profits of a company are "affected by" a Plan that would dilute such participation".

89. As the Plan in this case also involves a dilution of members' shareholding interests since it provides for Plan Creditors to be issued MCBs in return for a compromise of their debt, Long Corridor considers that the rights of shareholders are affected in this case also.

90. In response to this point, the Plan Company draws a distinction between the position in *Re Hurricane* where it was the effect of the plan itself, in conjunction with the provisions of s.566A CA 2006 , to disapply the rights of shareholders under the plan company's articles that caused shareholders to be "affected by the Plan", whereas in the current case the Plan will not disapply any of the ordinary rights of the shareholders under the Plan Company's articles and the Hong Kong Companies Ordinance. This, I agree, is a crucial distinction.

91. Long Corridor argues that this distinction does not provide a full answer in that it ignores the fact that in *Re Hurricane* the court held that the rights of shareholders affected by the issue of new shares under the Restructuring Plan were not only by the loss of their pre-emption rights and rights to approve allotments but also through the dilution of shareholders' equity. Whilst the former point is not a feature of the Plan, the second is.

92. I am not persuaded by this argument. In the current case (unlike *Re Hurricane*) shareholders were required to pass (and did pass) a shareholders' resolution at an extraordinary general meeting ("EGM") approving the issuance of the MCBs. I agree that it is the passing of that resolution (in exercise of the shareholders' rights and in accordance with Hong Kong law) which will cause the dilution of the equity held by the existing shareholders through the issuance of the MCBs.

93. Long Corridor argues that this is not entirely accurate - the EGM permitted the Plan Company to issue MCBs under the Plan, but it remains the case that they will in fact be issued under the Plan, in return for a compromise of Plan Creditors' claims. The shareholder vote has made shareholder dilution possible but it is the compromise of creditors' rights under the Plan which will effect that dilution.

94. Long Corridor has put the question succinctly in its skeleton argument. The essential question is whether:

i) shareholders' rights "are affected" by the Plan, which involves issuing instruments to creditors in a manner which will significantly dilute shareholders' interests: in which case, the requirements of Part 26A have not been met; or

ii) shareholders' rights are not so affected, by reason of the fact that they have approved the issuance of those instruments at an EGM.

95. In my view the answer is clearly (ii), having regard to both the wording of the Plan and considering the matter as one of principle.

96. As regards the wording of the Plan, the chief effective provision of the Plan is included in clause 7.1. This has the effect of releasing the existing claims of Plan Creditors "*subject to the conditions set out herein*". These conditions include receipt of the Plan Consideration including the new MCBs. The point is backed up by Clause 12 under which the Plan Creditors give releases and provide a further assurance, backed up by a power of attorney in favour of the Plan Company, in relation to anything that is necessary or desirable to affect the release of any released claims. The Plan Company is therefore able to argue that the Plan does not actually of itself bring about the issue of the MCBs (any more than the shareholders' resolution brings about the issue of the MCBs), it creates a structure whereby the Plan Company through a separate act, acting on the authority already given by shareholders, issues the MCBs in order to satisfy a condition precedent to the release of existing claims.

97. I see some force in this textual argument, but there is an objection that I suspect that the same point likely could have been made in *Re Hurricane Energy* as the drafting of plans tends to follow a similar form.

98. A further argument that could be made is that the MCBs (unlike the direct issue of shares contemplated in *Re Hurricane Energy*) do not directly dilute the rights of shareholders – that dilution comes only where the MCBs are converted into shares. There is no doubt an immediate effect on the trading value of shares but not, as there was in *Re Hurricane Energy*, a direct and immediate change in the quantum of the existing shareholders rights, for example, to vote.

99. The point is that it is a combination of various different acts that gives rise to the dilution that shareholders will face. A diluting share issue has or will require in this case: (i) the issuance of the MCBs being approved by the shareholders (which has already happened); (ii) the Plan being sanctioned; (iii) the directors of the Plan Company issuing the MCBs and executing the relevant instruments; and (iv) the Plan Company or the holders of the MCBs converting them to shares. Any of these steps could be regarded as causing the dilution, (as but for each step no dilution would occur) but none of them by themselves is sufficient to bring about the dilution.

100. The question posed at [94] above, cannot therefore be answered by just considering whether approval of the Plan is a necessary or sufficient step in bringing about the dilution. The question needs to be considered having regard to the aims of section 901C(3), which very clearly are to prevent shareholders and creditors being bound into a plan without their consent.

101. The decision in *Re Hurricane Energy* was clearly a correct one. Shareholders, with no opportunity to vote were being affected directly by the Plan, both through losing their right to approve the issuance of more shares and issuance on a non-pre-emptive basis and, as a result of that, suffering dilution of their share rights. The judge was correct in identifying those types of effects, but it went without saying in that case that the second effect (dilution) was a direct consequence of the first (the loss of the ability to block the share issues giving rise to that dilution). In such circumstances (and especially where the matter is being dealt with, as it was in that case, at the convening hearing) it is clear that section 901C(3) should be engaged.

102. The question is very different when the shareholders have already voted and chosen to approve the issue of the MCBs, and their issuance on a non-pre-emptive basis, and have done so in full knowledge of the terms of the Plan. In that case it is artificial to say that their rights are being affected by the compromise or arrangement. Their rights have been fully respected and they have accepted the dilution of shareholding implicit in the Plan. It is hardly surprising that they shall have done so, as whilst the Plan does involve a dilution of their percentage shareholdings, this leads to an increase rather than a decrease in the value of those shareholdings.

103. In the current case, there would be no point in joining shareholders as a class to approve the Plan as they have already approved it in relation to the manner in which it has any effect on their rights - or rather the only point of doing so would be to create them as an extra potential cramming class – and had this been attempted I am quite sure that Long Corridor would have objected.

104. In my view *Re Hurricane Energy* should not be read outside its context where shareholders are being deprived of an ability to veto a non-pre-emptive issue of shares. Certainly, it has no application in the current case.

105. Having dealt with Condition A and Condition B, and having dismissed the late challenge to the composition of the classes, we have reached a position where it is open to me as the judge to sanction the Plan. Whether I should do so is the subject of the next section.

5. SHOULD THE PLAN BE SANCTIONED?

106. Both sides of the argument agreed that *AGPS Bondco* represented the best guidance as to how the court should approach its decision whether to implement a cross-class cram down.

107. It was held in that case, that the established principles that guide a court in the exercise of discretion to sanction a scheme of arrangement under Part 26 of the Companies Act 2006, in which all classes of creditors had voted in favour of the scheme, also applied where a restructuring plan under Part 26A had been approved by the required majority in each class meeting. Therefore in those circumstances, whilst, for the purposes of assessing the fairness of the plan, the court would conduct a rationality check based on whether an honest and intelligent person might approve the plan as regards any class that had voted in favour, almost invariably that question would be answered by the very fact of the vote in favour at each class meeting (absent any reason why there was any suggestion that any members in the class were voting otherwise than in the interest of

their class (for reasons such as those that I have considered but dismissed in relation to China Life Franklin)).

108. However, where the cram down power in section 901G of the 2006 Act was sought to be invoked, the dissimilarity of interests meant (as Snowden LJ put it at [133]):

> "the mere fact that one or more classes of creditors might have acted in their own separate interests in voting in favour of the plan said nothing about the commercial merits of the plan for a dissenting class or the fairness of imposing the plan on them."

109. The court could not therefore apply a rationality test based on overall levels of support across all voting classes. Instead, the court had to look at questions of what has been referred to as "horizontal comparability". As Snowden LJ went on to say at [159]:

> "…a key issue for the court in exercising its discretion to impose a plan upon a dissenting class is to identify whether the plan provides for differences in treatment of the different classes of creditors *inter se* and, if so, whether those differences can be justified. I also agree with Zacaroli J that an obvious reference point for this exercise must be the position of the creditors in the relevant alternative."

and at [160]

> "…In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.

110. For these purposes, the Court is entitled to ask whether a better or fairer plan is available: see *AGPS* at [180]-[182].

111. A court would normally approve a plan which provides a *pari passu* distribution in relation to the benefits of the restructuring over and above the distributions that could be expected in the relevant alternative. However, departure from the principle of *pari passu* distribution of the benefits of the restructuring is permissible and can be approved by the court provided that there is a good reason or proper basis for that departure.

112. As between the different creditor groups in the case before me, it seems to me that the Plan Company has done its best to allocate fairly the value preserved or generated by the Plan over and above the relevant alternative. Whilst this has led to different groups of creditors who have (except for Class D) *pari passu* rights against the Plan Company receiving different values of Plan Consideration, this is explained by the fact that in the relevant alternative, the different classes would have different rights against other companies in the Plan Company's Group and so would be anticipated to receive different recoveries. The Plan Company has tried to ensure that each class of creditor obtains a similar multiple of those recoveries as the value that it receives by way of Plan Consideration. As between the creditors of the different classes, I consider therefore

that this departure is justified in that it produces what is sometimes referred to as a fair distribution of the benefits of the restructuring.

113. When I come to look at the effect of the Plan on shareholders, however, it is clear that they are obtaining disproportionate value out of the restructuring, since they would receive nothing in the relevant alternative, but are left holding a very substantial percentage of the shares which are reckoned to have a value as noted above. It may be considered then that they are getting "too good a deal" (to adopt the phrase used by Mann J in *re Bluebrook Ltd* [2010] 1 BCLC 338). The question arises whether there is any justification for this.

114. Long Corridor suggests that case law has identified only two matters which would justify this.

115. The first is the "gifting justification" – this is the justification that it is the wish of all classes of the "in the money" creditors that shareholders retain their equity. This justification proceeds on the basis that the "in the money" creditors are to be regarded as the economic owners of the business, such that it is up to them to determine how to divide up any value or potential future benefits which might be generated following implementation of a plan.

116. The second is the "new money justification" – this is where shareholders are providing some new money for the benefit of the restructuring.

117. I disagree that these two justifications that have been identified exhaust the possibilities of what may be a good justification. In *AGPS Bondco* Snowden LJ found that a departure from the principle of *pari passu* distribution of the benefits of a restructuring is permissible and can be approved by the court provided that there is a good reason or proper basis for that departure. As regards the question of what is a good reason or a proper basis he said (at [167]):

> "In my judgment, it is neither possible nor advisable to attempt to prescribe an exhaustive list of the criteria that might qualify".

118. Further, in *AGPS Bondco* another example was given of a position where there might be a good reason for a plan to depart from treating everybody in the same way that they would be treated under the relevant alternative – it was considered (at [170]) that it could be justifiable for trade creditors not to be subjected to the same reduction of their claims as other unsecured creditors with whom they would rank equally in a formal insolvency as the continued supply of goods or services from those creditors might be regarded as essential for the continuation of the company's business. Snowden LJ also considered (at [171] and [172]) that it was appropriate to consider analogies with established principles of insolvency law which might, for example, allow an administrator to make a payment to a creditor in full otherwise than in accordance with statutory rules if the administrator thinks it likely to assist the achievement of the purposes of the administration, or allow liabilities in respect of a property of a creditor (such as land leased to the company) to be treated as if they were expenses of the liquidation, and so have priority and be paid in full.

119. It can be seen from the examples put forward by Snowden LJ that, in considering whether there is a good reason or proper basis for departing from a division of the benefits of a restructuring plan that is strictly proportionate to how the different classes of creditor and shareholder would fare in the relevant alternative, the court takes a pragmatic view, focused on the overall interests of creditors.

120. In the case before me the Plan Company has put forward a justification for treating the shareholders substantially better than they would do in the relevant alternative (and disproportionately so in relation to the classes of creditors). This is that it considers that it is important that its two largest shareholders, China Life and Dajia Life Insurance Co. Ltd. (together the "**SOE Shareholders**"), both companies owned or controlled by the PRC should retain minimum holdings of 15% each, on the grounds that this would cause the Plan Company to continue to be regarded as a state-owned entity ("**SOE**"). This, the Plan Company argues, would provide various benefits to the Plan Company including receiving a more helpful reception by state organisations, for example in relation to planning matters and importantly a perception in the debt markets of being lower risk than a privately owned entity ("**POE**").

121. This latter point is of great significance in relation to the valuation to be put on the Plan Consideration. It is argued that, as a SOE, the Plan Company would be able to avail itself of lower interest rates in the market than a POE (the term used to refer to entities that are regarded as not being SOEs). I will refer to this phenomenon as the "**SOE/POE spread**". This in turn has an effect on the valuation of the Plan Consideration.

122. According to the Plan Company's valuation expert, Mr Ben Johnson, the Plan Consideration is best valued, and would essentially in the market be valued, according to the discounted cash flow method. This method involves modelling the future cash flow expected in terms of interest payments and repayments of capital, and then discounting those numbers by an appropriate discount rate to arrive at a net present value ("**NPV**") of this cashflow. According to Mr Johnson there would be a very substantial reduction in the discount rate to be used in calculating the NPV of the cash flow expected from the new debt obligations comprising the Plan Consideration. Mr Johnson considered that, if the Chinese-government-owned shareholders were diluted to below (or substantially below) the 15% each proposed under the Plan, the loss of this reduction in the discount rate would substantially reduce the current value of the Plan Consideration such that the returns for all classes of creditor would be considerably worse than the returns under the Plan – even if they were to receive more equity as proposed in Long Corridor's Alternative Plan.

123. In Mr Johnson's view, a suitable discount rate in the context of the Alternative Proposal (reflecting the SOE/POE spread, which he considered to be in the order of 5%) is in the range of 20% to 23%. Once the increased discount rate is applied, the NPV of the new debt instruments is materially reduced. In Mr Johnson's view, the NPV of the new debt instruments under the Alternative Proposal would be US$615 million to US$728 million (with a mid-point of US$671.5 million). In contrast, under the Plan, the mid-point NPV of the new debt instruments is US$857 million – a difference of US$185.5 million. In effect, therefore, the Alternative Proposal (and any other proposal involving a substantially greater dilution of the SOE shareholders) reduces the real value of the new debt instruments by US$185.5 million.

124. Long Corridor objects to this analysis, and has drawn the attention of the court to various different official definitions of what is an SOE, and has advanced a suggestion that the SOE/POE spread applies only where the relevant SOE has a real prospect of being bailed out by the state.

125. Long Corridor produced expert evidence by Dr Shiyao Liu backing up these points. I did not find the evidence of this expert very helpful. It was based essentially on a textual analysis of a particular study and on analysing particular official uses of the term SOE, rather than on any sort of market expertise. I found the expert evidence of Mr Johnson to be far more helpful, as his analysis was based on market perceptions rather than on a particular statutory definition. His observations also chimed with common sense that operating within a jurisdiction like the PRC there would be advantages in being perceived as being a company in which the PRC had a significant interest.

126. It is important in this regard to consider what would happen if the SOE/POE spread is not 5% but instead some lower figure. Mr Johnson has modelled this point and has calculated that a SOE/POE spread of as low as 1% would also produce a worse outcome than the Plan.

127. Mr Johnson was cross examined on these points and proved a very credible witness. I accept his view that under the Plan the valuation of the Plan Consideration would be higher, as a result of the SOE/POE spread than under any alternative plan which involved issuing more shares, or more instruments convertible into shares to the creditors with the effect of diluting the existing shareholders down to a very small percentage of the shares.

128. In my view this point provides a good reason or proper basis for departing from a division of the benefits of a restructuring plan that is strictly proportionate to how the different classes of creditor and shareholder would fare in the relevant alternative. The evidence is that the Plan proposed is better for creditors than any alternative plan that would involve a substantially greater dilution of the existing shareholders.

129. I should, however, before leaving this topic deal with some further points raised by Long Corridor.

130. First, Long Corridor points out that it is not only the SOE Shareholders that benefit unduly under the Plan, but also the other existing shareholders who also retain a greater percentage of the shares than is warranted by comparison with how they would fare under the relevant alternative.

131. The Plan Company answers this point by saying that they have not been able to find any way in which these shareholders would be further diluted which would not also affect the SOE Shareholders, and for the reasons already discussed it is necessary to maintain a minimum 15% stake for the two SOE Shareholders. I can see the point in this and in my view this point does not affect the pragmatic reasons for retaining a minimum 15% each for the two SOE Shareholders.

132. Secondly, Long Corridor has made the point that under the terms of the Plan, if the share price were to increase before the MCBs were converted, it is possible that the shareholders could retain an even greater percentage of the equity, and no good reason has been put forward for this.

133. During the course of the hearing, I evinced sympathy for this point. In response the Plan Company has proposed a small amendment to the proposed draft order to include an undertaking by the Plan Company, the effect of which will be to prevent this possibility arising. This, I consider, deals satisfactorily with this point.

134. Thirdly, Long Corridor suggests that in an alternative plan where creditors are given substantially more equity, because some creditors are themselves SOEs the SOE/POE spread will anyway be maintained. I agree with the Plan Company that this is unlikely as the relevant creditors have evinced no appetite to hold equity and their elections under the Plan demonstrate this.

135. Finally, Long Corridor makes the point that, whilst the Plan Company is inviting creditors, and the court, to take account of the value of the SOE/POE spread as a reason to allow shareholders to retain more equity than is fair, there is no feature of the Plan that requires the SOE Shareholders to retain their shareholding for any period.

136. In response to this point, the Plan Company has argued that it has no reason to believe that the SOE Shareholders would not continue to retain their shareholdings, and the Plan Company will under the Plan undertake to use reasonable endeavours to request SOE Shareholders will do so.

137. I agree that this point is not particularly satisfactory and have been considering whether to impose a condition on approval of the court's sanction of the Plan that an undertaking is obtained by the SOE Shareholders that they will retain their shares for a minimum period.

138. Since the hearing it has transpired that the SOE Shareholders are willing to provide such an undertaking, and indeed have provided such undertakings to the Plan Company. They each have agreed (conditional on the Restructuring going ahead by the Longstop Date as defined in the Plan) to retain their existing shares (but not any further shares that they might acquire in the Plan Company) for a period ending two years after the Restructuring Effective Date as defined in the Plan.

139. Long Corridor, whilst maintaining its principal position that the Plan should not be sanctioned at all, argues that the court should not approve the Plan unless undertakings are obtained lasting ten years rather than two.

140. Whilst I understand the logic of this stance, I consider that the undertaking provided goes a very long way towards persuading the court, and will go a long way towards persuading the market, that the SOE Shareholders will continue to support the Plan Company. It substantially mitigates the risk that they will, to use a hackneyed phrase, take the money and run.

141. In this regard, I note that the valuation evidence before the court valued the Plan Consideration on a basis assuming an SOE/POE spread would apply and must have reached this view without reliance on any undertaking that the SOE Shareholders would hold on to their shares for any period. The likelihood of the continuance of the SOE/POE spread at least for a minimum for two years is now greater than could have been assumed as part of that valuation.

142. In considering the effect of the Plan, the court is primarily concerned with the immediate effects of the Plan on affected creditors – there are limits on how far the court can look ahead. In this case, the combination of the valuation evidence and these undertakings is such that the court should accept that a valuation of the Plan Consideration should reflect the SOE/POE spread and that there is no significant imminent risk that this position will be falsified. Assuming that there is a market for the securities comprising the Plan Consideration, the Plan Creditors should be able to deal in the market at prices reflecting the SOE/POE spread.

6. CONCLUSION

143. Where there are dissenting classes, as well as checking that the formalities of the Plan have been observed, and that Conditions A and B as to the use of the cross-class cram down are satisfied, the court needs to decide whether to exercise its general discretion to sanction the restructuring plan.

144. I have no doubt in this case that the value split is substantially fair as regards the split between all the classes of creditors in the Plan.

145. The Plan may be seen as being unduly generous towards shareholders but there is a good reason for this. The continued retention of the two SOE Shareholders with a stake of 15% actually increases the value of the Plan to each class of Plan Creditors beyond that which they would enjoy in any alternative Plan not including this feature.

146. When considering whether the plan involves a fair distribution of the benefits of the restructuring the court is entitled to ask whether a better or fairer plan is available (in which regard, I refer again to *AGPS* at [180]-[182]). Certainly, the position now, where the evidence is that the Plan Company has only weeks before, in the absence of approval of the Plan it must go into insolvent liquidation is that there is no alternative. However, even if one goes back to the period before the Plan was finalised, on the evidence before me there is no plan which could have been put forward which would provide a better return to creditors by giving them substantially more equity, given my acceptance of the evidence relating to the importance of the SOE/POE spread.

147. The most that can be said is that it would have been better if the SOE/POE spread could have been better locked in for the full period of 10 years. However, I consider that the undertakings provided to hold the shares for two years goes sufficiently far to ensure that creditors will benefit from the SOE/POE spread for at least a substantial period. Those creditors who worry about the possibility that the SOE Shareholders will reduce their commitment to the Plan Company after two years will have ample time in which to sell any Plan Consideration that they obtain while an SOE/POE spread still applies.

148. I have had to ask myself whether the absence of longer assurances is by itself a reason not to approve the Plan. Against the background that the SOE Shareholders have undertaken to continue to hold their shares for at least two years and that there is no reason to believe that the SOE Shareholders will not retain their interest and support for the Plan Company for longer and having regard to the potentially disastrous consequences for all concerned of the Plan failing, I do not think that it is.

149. I do consider however that the draft order will need to be amended to include an undertaking by the Plan Company to the court to use all reasonable endeavours to enforce the undertakings provided by the SOE Shareholders.

150. With that caveat, I will approve the Plan.