Neutral Citation Number: [2025] EWHC 1250 (Ch)

Case Nos: CR-2025-001257 & CR-2025-001258

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

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 20 May 2025

Before:
MR JUSTICE MARCUS SMITH

- -

Between:

IN THE MATTER OF: PETROFAC LIMITED
AND IN THE MATTER OF: PETROFAC INTERNATIONAL (UAE) LLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

Heard on 30 April, 1 and 2 May 2025

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David Allison, KC, **Henry Phillips**, **Ryan Perkins** and **Stefanie Wilkins** (instructed by **Linklaters LLP**) for the **Plan Companies**
Daniel Bayfield, KC (instructed by **Weil, Gotshal & Manges (London) LLP**) for the **Ad Hoc Group**
Andrew Thornton, KC and **Jon Colclough** (instructed by **Mayer Brown International LLP**) for **Saipem and Samsung Opposing Creditors**
Daniel Petrides (instructed by the **Retailer Investor Advocate**) for the **Retailer Investor Advocate**
The PL Insurance Restitutionary Claimants notified the court on 26 February 2025 of their intention not to appear

(the parties are all defined in Annex 1 to the Convening Judgment)

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Approved Judgment

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Remote hand-down: This judgment was handed down remotely at 12:00 midday on 20 May 2025 by circulation to the parties or their representatives by email and release to The National Archives

MR JUSTICE MARCUS SMITH:

A. INTRODUCTION

(1) The Convening Order

1. On 25 March 2025, I made a convening order in these applications (the **Convening Order**), giving Petrofac Limited liberty to convene seven meetings of its creditors and giving Petrofac International (UAE) LLC liberty to convene five meetings of its creditors to consider and, if thought fit, approve the Plan.

2. The Convening Order was consequential upon my judgment (the **Convening Judgment**) published under Neutral Citation Number [2025] EWHC 859 (Ch). This judgment takes the Convening Judgment and the Convening Order as read, and adopts the terms and abbreviations set out in Annex 1 to the Convening Judgment.

(2) The meetings convened and their outcomes

3. The meetings that were permitted under the Convening Order are set out at Convening Judgment at [138]. Those meetings have taken place, with the outcomes set out in the table below.

Classes ordered for the Petrofac Limited Plan		**Classes for the Petrofac International (UAE) LLC Plan**	
[1] The CBG Notes Subscribers	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 16/16	**[8]** The CBG Notes Subscribers	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 16/16
[2] The Senior Secured Funded Creditors other than the CBG Notes Subscribers	**Turnout** 88.41% (by value) **Voting (in favour)** 100% (by those present and voting) 99/99	**[9]** The Senior Secured Funded Creditors other than the CBG Notes Subscribers	**Turnout** 88.41% (by value) **Voting (in favour)** 100% (by those present and voting) 99/99
[3] ABN	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 1/1	**[10]** ABN	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 1/1

[4] Argonaut	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 1/1	**[11]** Argonaut	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 1/1
[5] Thai Oil, the Director Claimants and the PL Insurance Restitutionary Claimants	**Turnout** 99.85% (by value) **Voting (against)** 100% (of those present and voting) 1/1	**[12]** Thai Oil, the JV Partners and PSS BV	**Turnout** 100% (by value) **Voting (in favour)** 100% (by those present and voting) 4/4 (Thai Oil confirming no standing)
[6] The Shareholder Claimants	**Turnout** 100% (by value) **Voting (in favour)** 99.92% (by those present and voting) 266/272		
[7] The JV Partners and PSS BV	**Turnout** 100% (by value) **Voting (against)** 100% (by those present and voting) 4/4		

Table 1: Outcome of the meetings convened

4. As can be seen, most of the meetings assented to the Plan and did so on the basis of sizeable representation and significant majorities. The meetings at which there was dissent were meetings [5], [7] and [12]. The reasons for the dissent in these cases were all the same, and this judgment is concerned with the issues raised by these dissenting creditors.

(3) The assenting creditors

5. The Plan Companies submit that the starting point to the question of sanction of the Plan is to determine whether the Plan should be sanctioned vis-à-vis the assenting creditors. I agree. No-one before the court sought to contend otherwise. That approach is warranted because, in circumstances where there is nothing to suggest an impaired meeting, a court will place significant weight on the judgement of the creditors attending the meeting that has been convened for that very purpose: Re Telewest Communications plc (No 2), [2005] 1 BCLC 772 at [21]-[22] (per David Richards J); Re AGPS Bondco plc, [2024] EWCA Civ 24 ("Adler") at [122]-[128] (per Snowden LJ).

6. In this case, having considered the reports of the various meetings, I am satisfied that the Plan should be sanctioned so far as the assenting creditors are concerned.

(4) Class composition and the fracturing of meetings [2] and [9]

7. As described in the Convening Judgment, there was a dispute as to the composition of meetings [2] and [9]. The Saipem and Samsung Opposing Creditors contended that there should not be single meetings of Senior Secured Funded Creditors, but that the members of the Ad Hoc Group should be extracted from the meetings and the meetings be "fractured" to this extent. For the reasons given in [143] to [159] of the Convening Judgment, I declined to fracture these classes in this way, and the meetings were convened accordingly.

8. I refused the Saipem and Samsung Opposing Creditors permission to appeal for reasons given in the Convening Order. The Court of Appeal gave permission to appeal, but the meetings as directed by me have now taken place with the appeal to the Court of Appeal as yet unheard and so undetermined.

9. There has been no application before me to adjourn the hearing to sanction the Plan; and, had such an application been made, it would have been a difficult one to resolve because the sanctioning of the Plan is business critical to the Plan Companies. They contend, and I accept, that without sanction of the Plan, the Plan Companies are likely to succumb to the Relevant Alternative to the Plan, which (as I shall come to describe) they contended was a disorderly liquidation. That said, were the Court of Appeal to conclude that the meetings had been wrongly convened, on the basis of an incorrect constitution, there is a risk that the jurisdiction underpinning sanction might be lacking, such that any sanction of the Plan might be set aside.

10. Had an application to adjourn the sanction hearing been made, I would have refused it because delay in sanctioning the Plan renders the insolvency risk to the Petrofac Group (which is avoided by sanction) less a risk and more an inevitability, whereas the decision on class composition (i) may be affirmed, not overruled and (ii) even if overruled may be held to be an immaterial error given how the relevant meetings – meetings [2] and [9] – voted. I refer to the following paragraphs of the Plan Companies' written submissions on sanction:

> **[59]**…Saipem and Samsung argued at the convening hearing that the Senior Secured Funded Creditors should vote in two classes (consisting of those who are members of the AHG and those who are not). Marcus Smith J rejected this argument. However, by [21] of the Convening Order, Marcus Smith J directed the Chairperson to "include a breakdown of the voting of the Senior Funded Creditor Classes, identifying attendance and votes cast by members of the Ad Hoc Group, and creditors who are not members of the Ad Hoc Group".

[60] Such a breakdown is set out in the Chairperson's Report. This shows that, even if separate classes of the AHG and non-AHG Senior Secured Funded Creditors had been constituted, the Plans would still have been approved by the requisite statutory majority (with strong turnouts in each of the putative classes). Indeed, the Plans were unanimously approved by the Senior Secured Funded Creditors who cast a vote. It should be borne in mind that the AHG only represents 31.3% of the Senior Secured Funded Creditors (by value). The great majority of the votes were cast by non-AHG members of the class.

[61] The voting outcome is so overwhelmingly in favour of the Plans that, if every non-voting Senior Secured Funded Creditor had voted *against* the Plans *and* the AHG had been excluded from the class, then the Plans would still have been comfortably approved by the requisite statutory majority of 75% in value. This is a consequence of the very high support for the Plans amongst the Senior Secured Funded Creditors who are not members of the AHG.

[62] Furthermore, no Senior Secured Funded Creditor has raised any objection to the Plans, eg on the grounds that the Work Fee or the Backstop Fee are unfair or that the new money is too expensively priced. It is also notable that 25 of the Senior Secured Funded Creditors who voted in favour of the Plans (holding over US$72 million of secured debt) did not elect to participate in the new money.

11. In these circumstances, the question of class composition and the fracturing or non-fracturing of meetings [2] and [9] has all the ring to it of an academic or theoretical point. This jurisdiction is pre-eminently concerned with the rights and wrongs of a restructuring which, if sanctioned, will avoid an insolvency situation which (at least for the Petrofac Group and its employees) would be an unfortunate outcome. I recognise that the Saipem and Samsung Opposing Creditors prefer the insolvency outcome over the sanctioning of the Plan. That is an issue to which I will come, and nothing that I have said in this paragraph about the urgency of this hearing is intended to pre-judge the points raised in opposition to the Plan by the Saipem and Samsung Opposing Creditors.

(5) Cross-class cram-down

12. Each Plan of the Plan Companies thus has a dissenting class of creditor. Moreover, it is common ground that I cannot sensibly approve one Plan and refuse to approve the other: both are intrinsic to the restructuring of the Petrofac Group and both need to be sanctioned. It is for this reason that I refer to a single "Plan", rather than differentiating between two "Plans".

13. Where there is a dissenting class which a plan company wishes to "cram-down". the plan company must persuade the court that it can satisfy conditions A and B under section 901G of the Companies Act 2006. Condition B requires the presence of an assenting class with a genuine economic interest. The Saipem

and Samsung Opposing Creditors accepted that Condition B was satisfied in this case. I agree. I need consider that condition no further.

14. The dispute before me centred on Condition A, which is set out in section 901G, the relevant parts of which provide:

> **(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.
>
> **(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.

15. The Saipem and Samsung Opposing Creditors put the issues that arise in the following way at [38] of their written submissions:

> …the court is required to: (i) identify the relevant alternative; (ii) identify the likely outcome for the members of the dissenting class (here, Saipem and Samsung) in the relevant alternative; and (iii) identify what it is proposed that the members of the dissenting class will receive through the plan. If (ii) is greater than (iii) (ie if a member of the dissenting class is "worse off" under the plan as compared to the relevant alternative), then the court has no jurisdiction to sanction the plan.

B. POINTS IN ISSUE BEFORE ME

(1) The contentions of the Saipem and Samsung Opposing Creditors

16. The Saipem and Samsung Opposing Creditors contended that there could be no cram-down for the following reasons:

    i) The Relevant Alternative was not group-wide insolvency but a different restructuring under which Saipem and Samsung would receive more.

    ii) Even if the Relevant Alternative was group-wide insolvency (as contended by the Plan Companies), Saipem and Samsung would in any event be worse off under the Plan.

    iii) In any event, as a matter of discretion and/or fairness, the Plan should not be sanctioned.

17. These are all alternative points, each of which is sufficient to preclude sanction. The first two points go to jurisdiction: if I am satisfied that the Saipem and Samsung Opposing Creditors are correct on either of these points, then I cannot as a matter of law sanction the Plan. The third point goes to discretion: the contention here is that even if I have jurisdiction to sanction, I should not exercise that jurisdiction on the facts of the present case.

(2) Narrowing of the issues

18. As the Convening Judgment shows, this restructuring is complex. The volume of material before me is considerable, and the time pressure significant. I should say that I do not consider the Plan Companies or their teams to be at fault in this regard. An immense amount of time and effort has been expended in negotiating the Plan with multiple stakeholders, and the picture has been a changing one. Indeed, between the adjourned convening hearing and the actual hearing there were material changes to the Plan, as I will come to describe.

19. The Convening Judgment sought – in advance of this hearing on sanction – to set out the detail of the restructuring so that this judgment could focus on the issues actually between the parties.

20. At the opening of the hearing, I put to Mr Thornton, KC (who appeared for the Saipem and Samsung Opposing Creditors) the proposition that if Saipem and Samsung's three points as set out at [16] all failed, there was no reason not to sanction the Plan; and that I should proceed do so. I also made clear that I considered the three points raised by Saipem and Samsung as going to the heart of the Part 26A regime and, whichever way they were decided, would warrant the attention of the Court of Appeal which given the urgency would have to be moved quickly. Mr Thornton, KC helpfully confirmed (Day 1/pp2-3) that this was the case. It was therefore possible to focus the evidence and the argument on the three issues set out at [16].

(3) The evidence

21. There was a great deal of material before the court, factual and expert, written and oral. I have considered all of this material, and reference those aspects of greatest materiality in the course of this judgment.

22. It is important to stress, however, that there was relatively little by way of pure factual dispute to resolve. The issues before me turned on counter-factual questions, notably: (i) what would happen if the Plan was not approved (ie what was the Relevant Alternative)?; and (ii) if the Plan was approved, would the Saipem and Samsung Opposing Creditors be any worse off?

(4) Overview of the first point: the Relevant Alternative

(i) The options

23. The Plan Companies contended that the Relevant Alternative to the Plan was a Group-wide liquidation ("Liquidation"). The Relevant Alternative was the subject of some discussion at the convening hearing. It was necessary – in order to ensure that the proper evidence was before the court for the purposes of

sanction – to "flush out" any dispute as to Relevant Alternative. As the Convening Judgment records at [127] to [129], at the convening hearing there was no real dispute as to the Relevant Alternative. That is scarcely surprising, given the time pressure everyone was working under. That being said, Mr Smith, KC (counsel for the Saipem and Samsung Opposing Creditors on the adjourned convening hearing) and Mr Colclough (counsel for the Saipem and Samsung Opposing Creditors at the convening hearing) made clear that Saipem and Samsung reserved their position as to whether the Relevant Alternative might be a better version of the Plan.

24. The written submissions of Saipem and Samsung say this about the Relevant Alternative:

> **[40]** On 4 April 2025, Saipem and Samsung sent an open offer to the Plan Companies…The offer remains open. As set out in the open offer, Saipem and Samsung will withdraw their opposition to the Plans in exchange for the following additional consideration:
>
> [40.1] A cash payment of US$25m by 31 December 2027.
>
> [40.2] Additional Tranche 1 Warrants worth, on the basis of the Plan Companies' valuation, US$36m to US$45m.
>
> [40.3] A small number of additional Tranche 2 Warrants which, for the reasons explained above, are of no, or negligible value.
>
> **[41]** The combined value of the additional consideration sought is US$61.1m to US$69.5m.
>
> **[42]** This is, on any view, a generous offer. Indeed, Saipem and Samsung do not consider it to be a "fair" offer (from their own perspective) in that it continues to significantly undervalue the contribution they are making to the restructuring. Nevertheless, they were/are conscious of litigation risk and wished/wish to engage constructively with the Plan Companies on a consensual basis.
>
> **[43]** The effect of the open offer is that there is an opportunity for a consensual restructuring under which Saipem and Samsung will assume c US$1.0bn (and potentially very much more) of the Plan Companies' liabilities in exchange for US$93.6m to US$108.1m, ie the existing consideration of US$32.5m to US$38.6m plus additional consideration of US$61.1m to US$69.5m. This equates to somewhere between 9.3% and 10.8% of the c US$1.0bn of liabilities that Saipem and Samsung will assume.
>
> **[44]** Notwithstanding this, the Plan Companies contend that its supporting creditors do not, and will not, support Saipem and Samsung's proposal. Instead,

it is said that, if the Plans are not sanctioned, the supporting creditors will force the Plan Companies into a group-wide insolvency.

[45] It is submitted that this assertion ought to be rejected. When these Plans were launched, it was said that what was on offer then was the best offer available to the creditors. That turned out to be incorrect. A deal was quickly struck with the Shareholder Claimants following the first convening hearing when it became clear that their objections might prove to be a real problem. The stakeholders are plainly pragmatic (they are sophisticated institutions) and the idea that the senior creditors would force the Plan Companies into a group-wide insolvency makes no economic sense.

I shall refer to this alternative as "Plan B".

25. If the Relevant Alternative is a variant of the Plan, like Plan B, altering the Plan so as to benefit the very creditors opposed to it, then *ex hypothesi* those creditors would be worse off if the Plan (and not Plan B) were sanctioned. Condition A would not be satisfied.

26. The argument before me, therefore, was which of these two options constituted the Relevant Alternative, (i) Liquidation or (ii) Plan B. That obliges me to consider which of these two candidates "would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F".

(ii) The contentions of the parties

27. Saipem and Samsung contended that Plan B was the most likely to occur for the following reasons:

    i) Given what they (Saipem and Samsung) were giving up in order to rescue the Plan Companies, their proposals represented a pragmatic minimum to turn their opposition to the Plan to a form of reluctant consent. They were not asking for much, and the rights they were giving up under both the Plan and Plan B were (i) significant and (ii) a *sine qua non* to both the Plan and Plan B working.

    ii) Liquidation was an undesirable outcome for everyone except the Saipem and Samsung Opposing Creditors. For everyone else, both the Plan and Plan B represented a significantly better outcome. In these circumstances, if faced with a choice between Liquidation and Plan B, it would be irrational for the supporters of the Plan not to press for acceptance of revisions to the Plan so as to avoid Liquidation.

iii) Contentions that there was simply not enough time to effect these revisions to the Plan should be given short-shrift. The Plan had been evolving over many months. Even the Plan presented at the first (abortive) convening hearing was significantly amended when it became clear that there were issues with the Shareholder Claimants. Substantive changes to the Plan between the adjourned convening hearing and the convening hearing itself resulted in the Shareholder Claimants translating from opposing the Plan to supporting it. It was for this reason that I did not need to hear from the Shareholder Claimants either at the convening hearing or at this hearing.

28. The Plan Companies, supported by the Ad Hoc Group, contended that the proposal of Saipem and Samsung represented the deployment, by the last dissenting creditors standing, of the equivalent of a "ransom strip" in real property dealings, whereby greater value was extracted out of all proportion to the true rights and interests of those creditors.

29. The Plan Companies, supported by the Ad Hoc Group, did not accept that it would be irrational for the supporters of the Plan not to sign up to the alternative Plan B. As to this:

i) It was common ground that the Plan was significantly better than the Liquidation alternative. Given that the creditors supporting the Plan thus stood to lose a great deal if the Plan was not sanctioned, the suggestion that they would all give up a little bit more (ie agree to Plan B) might at first sight prove to be compelling.

ii) However, this suggestion was wrong and not compelling for two reasons. First, an asymmetric adjustment of benefits (ie conferring more on one class of creditor than on others, which is what Plan B does) would face difficulties:

a) All creditors might seek a little more from the Plan Companies. The Plan had been hard-negotiated over many months. It could not be assumed that the conferring of additional value on Saipem and Samsung would not result in a largely agreed Plan being re-opened, subjected to further negotiation, whilst the Plan Companies headed towards liquidation.

b) An asymmetric change to the Plan would have to be justified on grounds of fairness. When the Plan was varied between convening hearings so as to accommodate the interests of the Shareholder Claimants, who got more, the Plan was <u>also</u> altered to similarly benefit other, similarly placed, creditors, notably the Saipem and Samsung Opposing Creditors. In other words, the

shift from the Plan to Plan B would have to meet the "fairness" test, and it could not be assumed that all creditors supporting the Plan would continue to support Plan B.

iii) Secondly, the argument that the benefits of the Plan over Liquidation were so great that the giving up of some of those benefits to avoid Liquidation failed to take account of the position of the providers of New Money. Such persons would have a different view of the Liquidation/Plan B alternatives. Such contributors of New Money, because they were not, like existing creditors, bound to the Plan Companies' fate, could be indifferent to what they would lose if Liquidation entailed, because all that they would lose was the benefits that might accrue if the Plan was not sanctioned. Such persons would not be concerned by the delta between Liquidation and the Plan, because they were not exposed to this delta. Their primary concern was the return on New Money being injected into the Petrofac Group, which (given the need for the restructuring) was high risk. The New Money would only be committed if the price was right. Thus, the providers of New Money who were not existing creditors would assess the delta between the Plan and Plan B. Obviously, Plan B would give less than the Plan: it takes more out of the Petrofac Group, which is the generator of the returns to the providers of New Money.[1]

In short, the Plan Companies contended that Liquidation was the true Relevant Alternative, in the sense that it was the most likely alternative to the Plan, and not Plan B.

30. As to the question of how long a re-negotiation would take, the Plan Companies, supported by the Ad Hoc Group, disputed that it would be possible to re-negotiate the Plan quickly enough to stave off Liquidation. This pessimism arose largely out of the factors described in the foregoing paragraph, but there were other factors in play, which I shall come to describe. The truth of the matter is that the terms of the Plan are closely calibrated to what the parties consider the court is likely to do. Thus, when at the adjourned convening hearing, it

[1] For obvious reasons, a distinction is drawn in this judgment between (i) providers of New Money with no exposure to the Petrofac Group's insolvency and (ii) providers of New Money who are existing creditors of the Petrofac Group. The New Money provided in the case of (i) was US$226m. Unfortunately, facts are always slightly messier than the bright-line distinction that one seeks to draw. Thus, one of the contributors to the US$226m was a "New Financial Investor" contributing US$75m. That New Financial Investor in fact holds a relatively small amount of existing debt (US$23.4m), which had been purchased at a material discount to face value. It would therefore be right to say that some of the providers of New Money – like the New Financial Investor – cannot without qualification be said to have no pre-existing exposure to the Petrofac Group. The reality is that such investors are exposed to little or no downside risk as a creditor from the Petrofac Group's Liquidation. Where this judgment draws the distinction between (i) providers of New Money with no exposure to the Petrofac Group's insolvency and (ii) providers of New Money who are existing creditors of the Petrofac Group, it should be borne in mind that the qualification in this footnote applies.

became clear from the submissions of the Shareholder Claimants that they had a point on the question of notice to the class, the Plan Companies took steps to address and eliminate those concerns. The point is that the Plan is regarded by everyone except Saipem and Samsung as one to be sanctioned, and it is only if it were to be clear that there was some factor, previously un-noted, that might place the Plan in jeopardy, that the supporting creditors might have a re-think.

31. This issue is considered and determined in Section D.

(5) Overview of the second point: "no worse off"

(i) The joint venture liabilities

32. The Clean Fuels Project is described at [68]-[74] of the Convening Judgment. The essential facts are these:

i) The Petrofac Group, Saipem and Samsung are joint venture partners in this commercially loss-making project, where the customer is Thai Oil. There is no need to differentiate between the specific entities involved in this joint venture, although when we come to the detail, it will be seen that Samsung is a creditor of both Petrofac Limited and Petrofac International (UAE) LLC, whereas Thai Oil and Saipem are creditors only of Petrofac Limited. In my judgment, nothing turns on this: no-one suggested that anything did.

ii) There is arbitration pending regarding the Clean Fuels Project. No-one wanted to give a cards-on-the-table assessment of what losses might emerge from the project and who would bear them. Given the fact that these issues are being litigated (by way of the arbitration just referred to), that is the responsible and indeed only course that the parties could take before me. In truth, there are a range of possible outcomes, and it is best to proceed by way of a few basic assumptions:

a) The exposure of the JV Partners to Thai Oil is assumed by me to be US$1.5bn. This is a "Goldilocks" figure: the exposure might be much more or much less than this assumed figure. The level of loss was traversed in the evidence, including in cross-examination, but this provided no further clarity: see, for instance, Day 1/pp83-84.

b) Thai Oil has the benefit of a joint and several liability in the JV Partners. It can recover the entirety of its claim – no matter how high that claim might be – from either of Saipem or Samsung. The difficulties of the Petrofac Group are thus a matter of broad indifference to Thai Oil. It was for this reason that Thai Oil did

not appear before me to oppose the Plan: whether the obligations of the Petrofac Group are compromised pursuant to the Plan or rendered valueless by Liquidation does not affect Thai Oil's recovery in regard to the Clean Fuels Project by reason of (i) Saipem's and Samsung's joint and several liability and (ii) their financial standing.

c) Whether the Plan is sanctioned or whether the Petrofac Group goes into Liquidation will not affect the "bottom line" of Saipem or Samsung. Assuming (again, a simplifying assumption, but a helpful one) equal liability under the joint venture, an obligation to pay US$1.5bn would ordinarily be split three-ways (one-third Petrofac: US$500m; one-third Saipem: US$500m; and one-third Samsung: US$500m).

d) But Petrofac will not contribute US$500m, either because it is in Liquidation or because the Plan will compromise its liabilities. Thus, the more likely split will be 50%/50%, with Saipem and Samsung each bearing US$750m under both the Liquidation and the Plan Relevant Alternative scenarios. In fact, some monies will be paid under the Plan in discharge of Petrofac's obligations, but it is de minimis. But there is a not-to-be-forgotten marginal advantage in the Plan's bottom line when compared with Liquidation, even for the Saipem and Samsung Opposing Creditors.

(ii) How no worse off?

33. In these circumstances, it is at first sight difficult to understand how it can plausibly be said by the Saipem and Samsung Opposing Creditors that they will be any worse off under the Plan. It was common ground that comparing payouts in a Liquidation versus the case that would pertain under the Plan, Saipem and Samsung would be marginally <u>better</u> off under the Plan in absolute terms and significantly <u>better</u> off in relative terms (but only because the sums in question are so small). I shall refer to this comparison as a comparison of the "direct financial benefits" of Liquidation as against the Plan. Of course, the question of whether Condition A is limited to a consideration of such factors is the question that is before me.

34. The point made by the Saipem and Samsung Opposing Creditors was that the marginal direct financial benefits to them of the Plan over Liquidation were outweighed by what I shall term as the "indirect economic benefits" to Saipem and Samsung of the Petrofac Group going out of business. The Petrofac Group is a competitor of Saipem and Samsung. It is a fair inference that the absence of

a competitor would enable those remaining in the market (i) to win more business in the market and/or (ii) to charge more for such business.

35. The parties came prepared to argue the economic toss as to the extent to which Petrofac's Liquidation was an indirect economic benefit to Saipem and/or Samsung. It seemed to me, however, that the critical question was not the "factual" question of whether the Saipem and Samsung Opposing Creditors were "worse off" under a Liquidation or under the Plan, but the legal question of whether the indirect economic benefit of the Petrofac Group's Liquidation to Saipem and/or Samsung were relevant to Condition A as a matter of law.

36. Applying a standard of likelihood, which is the currency of Condition A, the departure of a competitor in a significant market can be taken to be of material indirect economic benefit to those remaining in that market. The contrary might be true, but it would take a market investigation to determine the likelihood of this. The same is true if one were to seek to quantify the extent of the indirect economic benefit to Saipem and to Samsung. A market investigation is not something a court is equipped to do in any event, but particularly given the limited temporal gap between the convening and sanction hearings, and the urgency of sanctioning the Plan in this case. In this case, the limited and marginal direct financial benefit to the Saipem and Samsung Opposing Creditors under the Plan is likely to be outweighed over the short to medium term by the indirect economic benefits to the Saipem and Samsung Opposing Creditors of the Petrofac Group going into Liquidation. That much can be said without the benefit of expert evidence on the point.

37. The Plan Companies came prepared to conduct a major cross-examination of the Saipem and Samsung experts on this point. However, given that the essential difference between the two counterfactuals (Liquidation and the Plan) is that Saipem and Samsung's direct financial benefit is only marginally different, but that in one scenario (the Plan) the Petrofac Group stays in business and competes, and that in the other (Liquidation) it does not, the existence of material indirect economic benefit to Saipem and Samsung is obvious and does not (because of the marginal nature of the direct financial benefit under the Plan) need to be quantified with any precision in this case. (Obviously, the bigger the direct financial benefit, the more important the quantification of the indirect economic benefit.)

38. I put this point to the parties at the outset of the hearing. The hearing proceeded on the basis that I would not be assisted by the expert evidence on this point and that the real question to be determined was whether indirect economic benefit was relevant at all when determining whether Condition A was satisfied. I consider this question in Section E.

(6) Overview of the third point: general discretion and/or fairness

39. The court always retains a general discretion in regard to sanction. The question is whether, in all the circumstances, the court should exercise its discretion to sanction the restructuring plan. The relevant principles were stated by the Court of Appeal in Kington SARL v. Thames Water Utilities Holdings Ltd, [2025] EWCA Civ 475, building upon the principles articulated by Snowden LJ in Adler:

> **[99]** Paragraph references in this section are, unless otherwise indicated, to the judgment of Snowden LJ in Adler, with which Nugee LJ and Sir Nicholas Patten agreed.
>
> **[100]** Where there is no cross-class cram-down, the principles established in the context of schemes of arrangement remain applicable ([115] to [117]). Those were summarised by Snowden J in Re Noble Group (No 2) Ltd, [2019] 2 BCLC 548 at [17] as follows:
>
> > "(i) At the first stage, the court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.
> >
> > (ii) At the second stage, the court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.
> >
> > (iii) At the third stage, the court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly, it must be appreciated that the court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme.
> >
> > (iv) At the fourth stage the court must consider whether there is any "blot" or defect in the scheme which would, for example, make it unlawful or in any other way inoperable."
>
> **[101]** The same principles continue to apply within an assenting class, as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class: [128].
>
> **[102]** The first and fourth of those principles continue to apply even where the cross-class cram-down power is engaged: [119].
>
> **[103]** In any case where the cross-class cram-down power is engaged, however, the court cannot simply apply the rationality test (ie the third of the above

principles summarised in Re Noble Group) either (i) as regards voting within the dissenting class or (ii) as regards the overall vote across different classes: [129]. The logic that drives the rationality test in a scheme of arrangement – that a majority of those who share materially the same rights against the debtor are in the best position to consider their own commercial interests – is lacking when the question is whether to impose the plan on one or more of the classes which have not approved the plan by the requisite majority: [126] to [127] and [140] to [141].

[104] Nor is it sufficient to establish that a dissenting class is no worse off under the plan than in the relevant alternative (the so-called vertical comparator test borrowed from CVAs). That is a necessary requirement for the exercise of the cross-class cam-down power, embodied in Condition A in section 901G(3) of the 2006 Act, but is clearly not in itself sufficient to justify the exercise of the power: [153].

[105] It is, however, obviously appropriate to conduct some form of "horizontal comparison" in deciding whether to sanction a plan where the cross-class cram-down power is engaged: [156] to [158].

[106] That requires the court to examine whether the Plan provides for differences in treatment of the different classes of creditors *inter se,* and whether those differences can be justified: [159]. In doing so, an obvious reference point is the treatment of the creditors in the relevant alternative. Departure from that treatment within the Plan is not, however, fatal to the plan, and nor is the exercise to be carried out merely by restating the "no worse off test": [159] to [160].

[107] For example, where a "wind down" plan is proposed as an alternative to a formal insolvency in which the claims of creditors would rank equally for a *pari passu* distribution of the debtor's assets, as in Adler, the Court would normally approve a plan which replicated that *pari passu* distribution, but a departure from the principle of *pari passu* distribution could be approved, provided it was justified, in the sense that there was a good or proper reason for doing so: [165] to [166].

[108] Of particular importance is the following passage from [160]:

> "As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. 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 generating by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups."

[109] One example of a justification for giving a class of creditors some priority or proportionately enhanced share of the benefits is where it has provided some additional benefit or accommodation to assist the achievement of the restructuring in the interests of creditors as a whole: [167]. Put another way, in considering whether there has been a fair distribution of the benefits preserved or generated by the restructuring, it may be relevant to take account of the source of those benefits: [167], endorsing the comment made in Re Houst, [2022] EWHC 1941 (Ch) at [31].

[110] Other examples are where the supply of goods or services from certain creditors is essential to the continuation of the business and thus the success of the plan, which justifies the exclusion of those creditors from impairment under the plan, and the long-standing "salvage" principle, under which liabilities to a creditor in respect of property which is retained and used for the benefit of the insolvent estate are satisfied in full: [170] to [172].

[111] In considering whether the allocation of assets within a plan is fair, in contrast to the approach taken in relation to a scheme of arrangement, the court may be required to consider whether a different allocation would have been possible: [180] to [181].

40. It is important to appreciate that the general discretion or fairness consideration sits within a complex and multi-stage process, in which the same matters may be differently relevant at various stages. The question of discretion/fairness is considered in Section F.

C. RELEVANT FACTS AND FIGURES

(1) Introduction

41. The following data is generally relevant to the questions that arise before me and was uncontroversial in terms of the granular detail. The material was controversial in terms of its significance to the questions before me. It is therefore helpful to set out the material, before proceeding to consider its bearing on the issues before me.

(2) Plan outcome versus Relevant Alternative

42. I was provided with a great deal of data comparing the direct financial benefit of the Plan set against that of the Relevant Alternative, assuming this to be Liquidation. The figures varied over time and are obviously counterfactual, one

set predicating sanction of the Plan and the other set Liquidation. In short, these are predictions, admittedly made by experts, not statements of present fact. That being said, Mr Bennett, a senior managing director at Teneo, who gave evidence as an expert, was an impressive witness, and his projections were not challenged save as to their significance.

43. With these health warnings, I set out below what Mr Bennett projected to be the likely direct financial benefits of the Plan and under a Liquidation as set out in his report dated 2 April 2024. This particular outcome has been prepared assuming an injection of New Money in the amount of US$355m. There are alternative variants of the figures produced at different dates and using different amounts of New Money injection, but there are no material differences in what the data teaches.

[1] Creditor	**[2] Nominal amount of claim**	**[3] Low case (US$)**	**[4] Low case (%)**	**[5] High case (US$)**	**[6] High case (%)**
Direct financial benefit projected under the Plan					
[A] Secured creditors providing New Money	436,618,512	695,915,627	159.4	874,331,536	200.3
[B] Secured creditors not providing New Money	472,986,589	136,227,122	28.8	169,892,081	36.0
[C] ABN	29,912,188	8,579,649	28.7	10,699,884	35.9
[D] Argonaut	34,728,750	2,944,803	8.5	3,672,534	10.6
[E] Samsung[2]	92,800,000	9,465,896	10.2	10,058,217	10.9
[F] Thai Oil	1,627,411,955	22,631,773	1.4	28,265,109	1.7
[G] Saipem	14,456,750	199,775	1.4	249,502	1.7
[H] Samsung	12,255,250	169,353	1.4	211,507	1.7
[I] Director Claims	1	0	1.4	0	1.7
[J] Claw Back Claims	6,009,360	83,798	1.4	104,711	1.7

[2] In regard to Petrofac International (UAE) LLC.

[K] Shareholder Claims	1,245,940,639	23,084,699	1.9	28,830,828	2.3
Direct financial benefit projected under a Liquidation scenario					
[L] Secured creditors providing New Money	436,618,512	106,219,181	24.3	139,203,152	31.9
[M] Secured creditors not providing New Money	472,986,589	115,066,693	24.3	150,798,059	31.9
[N] ABN	29,912,188	7,276,943	24.3	9,536,634	31.9
[O] Argonaut	34,728,750	2,418,269	7.0	3,171,817	9.1
[P] Samsung[3]	92,800,000	6,419,643	6.9	8,605,360	9.3
[Q] Thai Oil	1,627,411,955	386,654	0.0	376,728	0.0
[R] Saipem	14,456,750	3,160	0.0	3,079	0.0
[S] Samsung	12,255,250	2,679	0.0	2,610	0.0
[T] Director Claims	1	0	0.0	0	0.0
[U] Claw Back Claims	6,009,360	1,314	0	1,280	0
[V] Shareholder Claims	1,245,940,639	272,368	0.0	265,376	0.0

Table 2: Direct financial benefit under (i) the Plan and (ii) Liquidation

I have, for ease of reading and where equivalents exist, transposed into Table 2 the creditor descriptions from the Convening Judgment, rather than those used by Mr Bennett. I have used my term "direct financial benefit" in the table (which is not Mr Bennett's term). I have rearranged the presentation of the data, but not its substance. I have omitted the entries regarding "PSS BV" as immaterial.

[3] In regard to Petrofac International (UAE) LLC.

(3) An "enrichment" analysis

(i) Mr Johnston's analysis

44. Mr Johnston, managing director (restructuring) at Alvarez & Marsal, was an expert called by the Saipem and Samsung Opposing Creditors. He produced what he called an "enrichment assessment", which showed the "contributions" all of the creditors were making assuming the Plan were to be sanctioned. Table 3 below derives from the report of Mr Johnston dated 8 April 2025, but I have re-presented the data. The figures were uncontroversial: what they showed, highly controversial, and I will come to Mr Bennett's re-working of this table in due course.

[1] Creditors	[2] Total claim	[3] New Money	[4] Total nominal exposure (ie [2]+[3])	[5] Plan's effect on total nominal exposure	[6] Outcome[4] (likely low case)	[7] Outcome (likely high case)
[A] Secured creditors	437[5]	218	654	923	268 41%	464 71%
[B] New investors	0	226	226	703	477 211%	616 272%
Subtotal [A]+[B]	437	444	880	1,626	745 (85%)	1,079 123%
[C] Other lenders	523	0	523	186	(337) (64%)	(305) (58%)
[D] Other claims	3,144	0	3,144	66	(3,078) (98%)	(3,063) (97%)
Subtotal [C]+[D]	3,667	0	3,667	252	(3,415) (93%)	(3,368) (92%)
Total [A]+[B]+[C]+[D]	4,103	444	4,547	1,878	(2,669) (59%)	(2,289) (50%)

Table 3: Mr Johnston's "enrichment assessment

The following points can, neutrally, be made about Table 3:

i) As in the case of Table 2, the figures have been transposed from Mr Johnston's work without change, but I have changed the presentation and (importantly in this case) a number of the descriptive labels. Thus, whilst Mr Johnston referred to the "contributions" being made by

[4] These are provided in absolute and percentage terms.
[5] Unless qualified by a "%", all figures are in US$m.

creditors to the Plan if sanctioned, I have referred to the creditors' "nominal exposure".

ii) Thus, in column [4], I have not referred to "contributions" pre-restructuring, but rather (using the same figures) to a creditor's exposure. By exposure is meant what a creditor stands to lose if the Petrofac Group goes under and there is no direct financial benefit in a Liquidation at all.

iii) Of course, as Table 2 shows, that is not the case in the Liquidation. There will be a distribution and that distribution will reflect the ranking of the creditors in an insolvency situation. Entirely unsurprisingly, the priority in an insolvency favours the secured creditors. The great benefit of Mr Johnston's work is that it makes clear what everyone's exposure is. What must not be forgotten – and what Table 4 below makes explicit – is the fact that nominal exposure reflects what a creditor will recover where the debtor is solvent, which is not the case here.

iv) It is important in this regard to differentiate between "New Money" and exposure that is "baked-in". The providers of New Money do not have to provide this New Money. They can opt not to participate in the Plan and allow the Petrofac Group to go into Liquidation without downside, because they have no exposure in the Liquidation: this is the point made at [29(iii)]. Column [4] is thus only true once the providers of New Money have either injected it or committed to do so, which is not presently the case. On the other hand, the entirety of the sums under column [2] represent commitments already made which would have to be recovered from the Petrofac Group, and which represents an exposure that cannot be avoided. Unlike the providers of New Money, there is an absence of choice.

(ii) Mr Bennett's approach

45. Mr Bennett took issue not so much with the figures in Table 3 as with their presentation. He produced an alternative assessment of the Plan's "upside" for all creditors, which I set out below:

[1] Creditor	**[2] Direct financial benefit according in Liquidation**	**[3] New Money**	**[4] Total [2]+[3]**	**[5] Plan return (low case)**	**[6] Increase over the Relevant Alternative**
[A] Secured creditors	106,219,181[6]	187,500	293,719,627	883,415,627	200.8%

[6] Unless qualified by a "%", all figures are in US$.

providing New Money					
[B] Secured creditors not providing New Money	115,066,693	0	115,066,693	136,227,122	18.4%
[C] ABN	7,276,943	0	7,276,943	8,579,649	17.9%
[D] Argonaut	2,418,269	0	2,418,269	2,944,803	21.8%
[E] Samsung[7]	6,419,643	0	6,419,643	9,465,896	47.5%
[F] Thai Oil	386,654	0	386,654	22,629,697	5,752.7%
[G] Saipem	3,160	0	3,160	201,026	6,261.0%
[H] Samsung	2,679	0	2,679	170,413	6,261.0%
[I] Director Claims	0	0	0	0	6,261.0%
[J] Claw Back Claims	1,314	0	1,314	83,562	6,261.0%
[K] Shareholder Claims	272,368	0	272,368	23,084,699	8,375.5%

Table 4: Mr Bennett's "enrichment assessment"

The key difference between Table 3 and Table 4, is that column [2] describes the outcome of the Liquidation to creditors, instead of the nominal exposure values used by Mr Johnston. These values – what I term the direct financial benefit of the Liquidation – are then compared with the direct financial benefits generated by the Plan.

D. THE RELEVANT ALTERNATIVE

(1) The issue stated

46. The question is whether the Relevant Alternative is Liquidation (as contended for by the Plan Companies) or the Plan B (as contended for by the Saipem and Samsung Opposing Creditors). Plan B is a variant of the Plan which results in a better outcome for the Saipem and Samsung Opposing Creditors. If this point is decided in favour of the Saipem and Samsung Opposing Creditors, the "no

[7] In regard to Petrofac International (UAE) LLC.

worse off" test in Condition A will not have been met, and there will be no jurisdiction to sanction the Plan.

47. The rival positions of the parties were stated at [23] to [31] above, which paragraphs are not repeated.

(2) Analysis

48. The point made by the Saipem and Samsung Opposing Creditors was that Plan B was too good to miss, and that only an irrational body of creditors would prefer Liquidation over this plan. Liquidation, therefore, could not be the Relevant Alternative. The Condition A assessment had to be conducted by reference to a consideration of the Plan versus Plan B.

49. If one compares the outcomes between Liquidation and the Plan, the upside of the Plan over Liquidation is stark, as Table 2 shows. Everyone benefits. For the unsecured creditors, the upside is marginal: the Table 5 below sets out Saipem's and Samsung's recoveries under the various scenarios, as derived from Table 2:

	[1] Samsung in regard to Petrofac International (UAE) LLC	**[2] Saipem in regard to Petrofac Limited**	**[3] Samsung in regard to Petrofac Limited**	**[4] Thai Oil in regard to Petrofac Limited**
[A] Nominal Claim	92,800,00[8]	14,456,750	12,255,250	1,627,411,955
[B] Plan low case (US$)	9,465,896	199,775	169,353	22,631,773
[C] Plan low case (%)	10.2%	1.4%	1.4%	1.4%
[D] Plan high case (US$)	10,094,444	247,297	209,638	28,015,333
[E] Plan high case (%)	10.8%	1.7%	1.7%	1.7%
[F] Liquidation low case (US$)	6,419,643	3,160	2,679	386,654
[G] Liquidation low case (%)	6.9%	0.0%	0.0%	0.0%
[H]	US$8,605,360	US$3,079	US$2,610	US$376,728

[8] Unless qualified by a "%", all figures are in US$.

Liquidation high case (US$)				
[l] Liquidation high case (%)	9.3%	0.0%	0.0%	0.0%

Table 5: Extract from Table 2 of Thai Oil, Saipem and Samsung outcomes

As to this:

i) It can be seen from row [A] that all of these creditors have significant nominal exposure to the Petrofac Group, and that their direct financial benefit arising out of either the Plan or Liquidation (rows [B], [D], [F] and [H]) is only a small fraction of that exposure.

ii) But, in all cases, the position under the Plan is better than in the Liquidation scenario.

iii) The recoveries for Thai Oil are relevant because they affect the exposure to Thai Oil of the other JV Partners. Put another way, every US$ Thai Oil recovers from the Petrofac Group, US$ for US$ reduces the claim Thai Oil can make against Saipem and Samsung.

50. The position for the secured creditors is not marginal. The upside of the Plan over Liquidation is significant, as can be seen from Tables 2 and 3. The position is particularly beneficial for those providing New Money, as can be seen (in particular) from Table 3.

51. Mr Sousa, the Chief Financial Officer of the Petrofac Group and a director of Petrofac Limited, gave evidence on the question of the Relevant Alternative. Mr Sousa was a measured, careful and clearly very capable CFO, and I accept his evidence. The most onerous aspect of Plan B – the payment of cash before end-2027 – was something that the Petrofac Group could do – not unaffordable, was Mr Sousa's expression (Day 1/p.51). There were no other aspects of the proposed Plan B that could not be met, and my sense of Mr Sousa's evidence was that provided there was general creditor and New Money provider agreement to Plan B, implementing Plan B and doing so quickly presented no real problems.

52. Mr Sousa's view, when presented with a choice between Liquidation and the Revised Plan, was that this was a "no brainer" so far as the Petrofac Group was concerned (Day 1/p.53):

> **Q (Mr Thornton, KC)** …So from the point of view of the company, faced with a choice between a group-wide liquidation, and seeking to implement the modified structure proposed

	by my clients, the 4 April offer, you would do everything you could to implement that alternative structure, wouldn't you?
A (Mr Sousa)	Yes. I have to agree with you on the hypothetical question that you put in front of me. It is not a choice we have.
Q (Mr Thornton, KC)	I agree, it's not a choice – you need someone else's consent too, but from the company's point of view you would be straining every sinew to get that deal done, wouldn't you?
A (Mr Sousa)	If the alternative is a hugely value-destructive insolvency, then of course.

53. Two other factors warrant mention. First, the Plan has been long in the making, and the subject of considerable and hard-fought negotiation. This point cuts both ways. It can be said that there is, for this reason, ample opportunity further to tweak the Plan and convert it to Plan B. But it can also be said that over the course of these complex and difficult negotiations, a delicate compromise has been reached, and that for one party to seek more than is offered at this stage risks upsetting a carefully constructed compromise. This was a point also made by Mr Sousa. Asked about the ability to agree the Plan B, Mr Sousa was pessimistic (Day 1/pp.54-55):

> …I'm not at all convinced that we would be successful. We have over the last 18 months stretched our supply chain and the reason for doing that has been – the reason why they have borne with us has been the expectation that there would be a solvent outcome and successful restructuring.
>
> In addition to that, it's not just the supply chain, we have clients, and in particular TenneT, who are at the end of their tether, if you'll forgive that expression, and have been giving us more and more time to get the restructuring done, but have advised us in no uncertain terms that, given their other commitments and obligations, if there are delays to the Plan, they are likely to exercise their contingency plans. And if they exercise those contingency plans, then there is no prospect of a solvent outcome. I apologise to you for giving an answer to a question you haven't asked, but I think it is important to understand that hypothetical of if that plan [ie the Revised Plan] was available, would we try and shift to it? Yes. But I think the reality is that its very unlikely to be available.

54. I find the financial position of the Petrofac Group to be precarious in the extreme. Not only are there stresses in the upstream (the supply chain to Petrofac), so too are there stresses in the downstream (the markets Petrofac serves). These stresses provide leverage to creditors like Saipem and Samsung – the financial equivalent of the ransom strip. But the pressures also act as an

incentive on the Plan Companies end substantive negotiations and to proceed as rapidly as possible to cram-down those who dissent.

55. The key question is whether, faced with a choice between Liquidation and Plan B, there would be sufficient support for Plan B over Liquidation. Although the differences between the Plan and Plan B might be said to be marginal, the question is whether they are sufficiently great to render Plan B incapable of agreement, whereas the Plan itself is acceptable to all save for the Saipem and Samsung Opposing Creditors.

56. The answer to this question turns on the attitude of two important and overlapping groups: (i) the secured creditors; and (ii) the providers of New Money. These groups are overlapping, but not completely so: some secured creditors are not putting in New Money; and some New Money is being injected by persons who are not at present creditors at all. Both groups are, albeit to different extents, benefiting significantly from the Plan, and have most to lose (if only by way of opportunity cost) if Liquidation entailed. It is that dynamic that drives the contention of the Saipem and Samsung Opposing Creditors that whereas in a choice between the Plan and Plan B, the former will prevail, in a choice between the Plan and Liquidation, the latter will prevail. It is time to address the point head on:

    i) This is a high-risk restructuring, and the rewards to the providers of New Money are considerable. But I consider this to be reflective of risk, not a gouging of a company that is going bust. The key point is that there are some providers of New Money who have no existing exposure to the Petrofac Group's insolvency.[9] Some US$226m is being provided by non-creditors, as can be seen from Table 3.

    ii) There is nothing – beyond the return they expect to gain – to tie these providers of capital to the Plan. The evidence was that further concessions that eroded the return of these providers of capital would not be forthcoming, and that Plan B would fail, and probably bring the Plan down along with it. The evidence of Mr Read, a partner at Mason Capital, a member of the Ad Hoc Group, was that this would be the outcome. Mr Read was, properly, pressed on this by Mr Thornton, KC, in cross-examination (Day 1/pp.122-125), and firmly rejected the suggestion that a tweaking of the Plan was possible. He considered that the only alternative to the Plan was not Plan B but Liquidation.

    iii) This was also Mr Sousa's evidence (Day 1/pp.94-96):

[9] See the qualification at footnote 1.

Q (Mr Allison, KC) …in your answer you mentioned, in addition to creditors, the need for consent from other parties: do you recall that?

A (Mr Sousa) Yes

Q (Mr Allison, KC) And Mr Thornton then didn't ask you about that, but moved topic. Could I ask you about that? When you said "other parties" needing to give their consent to the alternative restructuring, what did you mean by that?

A (Mr Sousa) I mean that the parties providing new funds to the company, including the equity investors, the [Ad Hoc Group]…

Q (Mr Allison, KC) I won't ask you about the Ad Hoc Group because Mr Read will be giving evidence today, but in your evidence just now you mentioned the need for consent from the new financial investor. Could you elaborate on whether, in your view, based on your experience to date, that consent would be forthcoming?

A (Mr Sousa) It certainly would not be forthcoming and they have written to us in terms to tell us that they're not willing to consent to any changes to terms that would transfer value from them or from their prospective value to other parties.

Q (Mr Allison, KC) And without the support of the new financial investor do you have a restructuring in place?

A (Mr Sousa) No, we do not.

Q (Mr Allison, KC) And can I just ask, is there any reason you have not to believe what you've been told by the new financial investor?

A (Mr Sousa) No. And to buttress that, I would say when we made the offer of warrants to the joint venture partners, the new financial investor actually insisted on having the compensatory mechanism for that dilution, so they have already reached a limit of what they're willing to do.

Q (Mr Allison, KC) So sorry, just so I have understood. "They" are already unhappy with the warrants that are actually offered under the terms of the current plan?

A (Mr Sousa) Yes, that is correct.

Q (Mr Allison, KC)	So what do you think their view would be on Samsung and Saipem's request for more warrants under the alternative restructuring?
A (Mr Sousa)	They're not willing to agree to more warrants being granted.
Q (Mr Allison, KC)	And what about a requirement for a US$25m cash payment in 2027 that Samsung and Saipem insist under their deal?
A (Mr Sousa)	The answer is the same: it's value moving from the company to the creditors, in this case Saipem and Samsung, which they're not willing to accept.
Q (Mr Allison, KC)	And then, just rounding up on that, do you believe you would be able to obtain the New Money required on the basis of the alternative restructuring put forward by Samsung and Saipem?
A (Mr Sousa)	No, I don't believe I would be able to do that.

I accept this evidence.

iv) The point is also true, albeit less clear-cut, as regards those senior creditors exposed to the Petrofac Group's insolvency and putting in New Money. These creditors have an exposure of US$437m and are putting in New Money of US$218m. They have a lot to lose, nominally, and one can see that this may not be a case of throwing good money after bad. But although it might appear that such creditors are paying US$1 to rescue US$2 (roughly the ratio between US$218m and US$437m), the point is not a particularly good one. In the first place, a court is singularly ill-placed to judge risk, and it seems to me that I cannot disregard the evidence Mr Read gave in this regard. Moreover, the nominal exposure of these creditors may not reflect the price at which they acquired these exposures: they may have acquired their holdings at distressed rates and so have considerably less to lose in a Liquidation.

57. The revisions to the Plan as it was presented at the adjourned convening hearing were made as a result of the points articulated by the Shareholder Claimants at and around that hearing. This shows the responsiveness of the Plan Companies to points that might cause the Plan either not to be sanctioned at all or for sanction to be delayed, for the improved offering to the Shareholder Claimants was agreed between the adjourned convening hearing and the convening hearing itself. Although the Saipem and Samsung Objecting Creditors relied upon this to show how easily Plan B might be agreed, I have concluded that it in fact shows the reverse:

i) I do not consider that Plan B would be adopted without ensuring fairness across similarly placed classes of creditor. When the offer to the Shareholder Claimants was improved, the offering to other unsecured creditors was also improved. I have described the dangers of an asymmetric variation to the Plan in [29(ii)] and I consider that a shift by the Plan Companies from the Plan to Plan B would simply be the beginning of further negotiation by other creditors.

ii) If that is right, then the cost of Plan B is not limited to the benefits being provided to the Saipem and Samsung Opposing Creditors. The cost is greater if a "symmetric" improvement is made. I do not consider, given the evidence of Mr Sousa and Mr Read, that there is any appetite on the part of the secured creditors and/or the providers of New Money to re-open the Plan.

58. For these reasons, I conclude that the Relevant Alternative, in this case, is Liquidation and not Plan B. It is helpful to note that this conclusion chimes consistently with the decision of Thompsell J in Re Sino Ocean Group Holding Ltd, [2025] EWHC 205 (Ch) at [22]:

> In relation to the question of the relevant alternative, I must agree with the Plan Company for the following 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 relevant 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 relevant alternative. Unless a putative alternative 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 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…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.

59. Although the Saipem and Samsung Opposing Creditors presented Plan B as a fully formed alternative to the Plan, this contention was predicated on a more-or-less immediate acceptance by all other creditors of a variation to the Plan which benefited only limited classes of creditor. For the reasons I have given, I do not consider that there would have been such an immediate and unqualified acceptance of Plan B. Viewed in this light, Plan B is simply a further effort at negotiation in circumstances where a "fully-baked" Plan is now before the court.

E. "NO WORSE OFF"

(1) The question stated

60. For the reasons set out at [32] to [38], this is a question of statutory construction concerning the meaning of the "no worse off" test in Condition A as stated in section 901G(3) of the Companies Act 2006. As I have noted, Condition A is a jurisdictional requirement. Unless it is satisfied, no plan can be sanctioned.

61. The precise wording of the condition is that "none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative" (the relevant parts of section 901G are set out at [14]). The "no worse off" test obliges a comparison between two counterfactual scenarios:

    i) That which would pertain under the compromise or arrangement (here: the Plan); and

    ii) That which would pertain under the relevant alternative (here: Liquidation).

62. The question is how, or by reference to what factors, the outcomes of the two counterfactual scenarios are to be measured. Put another way, and using the terminology at [33] and [34], the question is whether regard is to be had to "direct financial benefits" only (the Plan Companies' position) or whether, additionally, regard is to be had to "indirect economic benefits" (the position of the Saipem and Samsung Opposing Creditors).

(2) The parties' contentions

63. The Saipem and Samsung Opposing Creditors' position was straightforward. There was nothing in the wording of section 901G to suggest that the words "worse off" or "any worse off" were the subject of any kind of implied limitation. The words meant what they said and whilst, obviously, direct

financial benefits had to be assessed and compared, there was nothing to require the exclusion of indirect economic benefits from the court's consideration. In Re Virgin Active Holdings Limited, [2021] EWHC 1246 (Ch), Snowden J said at [106] (with my emphasis):

> The "no worse off" test can be approached, first, by identifying what would be most likely to occur in relation to the Plan Companies if the Plans were not sanctioned; second, determining what would be the outcome or consequences of that for the members of the dissenting classes (primarily, but not exclusively, in terms of their anticipated returns on their claims); and, third, comparing that outcome and those consequences with the outcome and consequences for the members of the dissenting classes if the Plans are sanctioned.

"Anticipated returns" equates to "direct financial benefits". Snowden J was, clearly, leaving the door open to other matters, like (although he did not use this, or any, label) "indirect economic benefits".

64. In Re DeepOcean 1 UK Ltd, [2021] EWHC 138 (Ch) at [35], Trower J said this about this aspect of the "no worse off" test (again with my emphasis):

> Doubtless, the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt. However, the phrase used is "any worse off" which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay.

The door is clearly being left open to matters or consequences other than "direct financial benefits".

65. The Plan Companies contended for a limitation (which they said arose naturally out of the words of the section) based upon a consideration of the position of creditors in that capacity. In their written submissions at [137], the Plan Companies put the point as follows:

> All of the factors identified by Trower J and Snowden J – such as the value of the likely dividend, the timing of any payment, and the security of the covenant to pay – are "incidents of the liability to the creditor concerned". Put another way, these factors relate to the position of the creditors in their capacity as such, and not in any other capacity. Thus, the "no worse off" test is assessed by comparing:
>
> (1) The position of the creditors (in their capacity as such) in the relevant alternative; and
>
> (2) The position of the creditors (in their capacity as such) under the plan.

66. In Re Smile Telecom Holdings Ltd, [2021] EWHC 685 (Ch) at [30], Trower J noted (emphasis added):

> The next question in relation to condition A is whether I am satisfied that, if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than they would in the event of the relevant alternative. In my view, the description of the persons whose position the court is required to consider as "members of the dissenting class" confirms that this condition is concerned with, and only with, those persons in their capacity as members of that class. If they might be worse off in some other capacity as a result of the sanctioning of the plan, that is capable of having an impact on the exercise of the court's discretion, but does not of itself mean that Condition A is not satisfied.

(3) Analysis

67. The "no worse off" test obliges the court to consider and compare the hypothetical consequences of two (obviously counterfactual) scenarios, namely the Plan and the Relevant Alternative to the Plan. Consequences can stretch on to infinity – there are causes of causes, and consequences of consequences. In all cases where a court is obliged to consider such matters, tests evolve to limit and control the ambit of the court's inquiry. A good example is the test for remoteness of damage in the assessment of damage in contract and tort. Such tests do not involve the reading in of new language, but merely an approach that ends and otherwise infinite causal chain.

68. In many cases, "remoteness" will never be an issue. In the case of the "no worse off" test, it is plain that "direct financial benefits" or the "anticipated returns" or the "discount to the par value" will always have to be taken into account amd assessed, and no-one, in this case, suggested otherwise. But, given the statements of Trower and Snowden JJ and the broad wording of section 901G itself, it is clear to me that there will be cases where the inquiry must go further. It is at this point that a concept, like that of remoteness, comes into play.

69. The exclusion from consideration of consequences sustained by creditors other than in their capacity as such (as articulated by Trower J in Re Smile, quoted at [66] above) is a clear-cut example of such a limiting rule. The problem – as adverted to by the Saipem and Samsung Opposing Creditors (see their written submissions at [65]) – is that the "capacity" test is itself somewhat vague or open textured. The Saipem and Samsung Opposing Creditors contended that the indirect economic benefits of the Liquidation – namely the dissolution of the Petrofac Group – did arise in their capacity as creditors. A joint venture like the Clean Fuels Project is a risk-sharing endeavour, where the potential liabilities are shared amongst the joint venturers. Where the joint venturers are competitors, and one of the joint venturers cannot meet their obligations under the joint venture due to insolvency, at least the solvent joint venturers, who will

shoulder additional liabilities, have the benefit of a competitor leaving the market. The Plan undercuts this balanced outcome, by compromising Saipem and Samsung's claims against the Petrofac Group, whilst permitting the Group to stay in business and compete without the burden of the joint venture liabilities. To my mind, it is difficult to say that these consequences are not suffered by Saipem and Samsung as creditors.

70. Nevertheless, I consider that at this jurisdictional stage the indirect economic benefit of Liquidation that I have described does fall out of consideration because it is – for want of a better term – "too remote". I have reached this conclusion for the following reasons:

i) The consequence in question is indirectly sustained and very hard to quantify. As I have described, whilst the implications of the Petrofac Group's exit from the market on Liquidation can be stated in broad terms (as I have done at [34] to [38]), the precise monetary effects of this indirect economic benefit are far harder to state and may very well verge on the speculative. The only reason the point has traction at this, jurisdictional, stage, is because the difference in direct financial benefit between the Plan and Liquidation is – so far as Saipem and Samsung are concerned – marginal. If the direct financial benefit of the Plan were more clear-cut, it would be deeply unsatisfactory for this indirect economic benefit to be a necessary consideration at the jurisdictional, Condition A, stage.

ii) As Trower J made clear in Re Smile (see the quotation at [66] above) factors such as this can and should appropriately be taken into account at the discretionary/fairness stage. Condition A is a jurisdictional requirement, and it needs to be as clear-cut, as binary, as possible. Exposing the court to the need to conduct what would in effect be an open-ended market investigation to see the extent to which a creditor would be better off under the relevant alternative is to cause the court to have to embark upon a wide-ranging, open-ended in time and scope, inquiry in every case.

iii) The statutory test has its focus on the (i) immediate, (ii) direct and (iii) financial consequences of two counterfactuals, looking in the first instance at the bottom-line of a temporally limited process that is (to use the facts of this case) relatively clearly defined. Both the Plan and the Liquidation scenario operate according to clearly defined rules, subject to strict temporal limits. Although even this inquiry has its difficulties, it is at least possible to undertake. That cannot be said of the indirect economic benefit contended for by the Saipem and Samsung Opposing Creditors.

iv) Moreover, the approach advocated for by Saipem and Samsung imports a comparison between incomparables, comparing apples and oranges, instead of apples and apples. If the wider economic implications are to be taken account as relevant to jurisdiction (rather than fairness), then the economic consequences of Petrofac's Liquidation need to be considered in the round (eg effects on employees; effects on markets). Disregarding the benefits of a company being rescued when considering a question of jurisdiction is to degrade the "rescue culture" that Part 26A of the Companies Act 2006 is seeking to accord (as a matter of Parliamentary intent) weight to.

71. Accordingly, I conclude that Condition A is satisfied. Considering the direct financial benefits accruing to Saipem and Samsung under (i) the Plan and (ii) Liquidation, Saipem and Samsung are not "any worse off" if the Plan is sanctioned than if it is not. I reach this conclusion by discounting the indirect economic benefit relied upon by the Saipem and Samsung Opposing Creditors as being too remote. Although the facts of the case are very different, I derive support for this conclusion from the decision of Adam Johnson J in Re Great Annual Savings Co Ltd, [2023] EWHC 1141 (Ch):

> **[85]** …I think Mr Weaver was reading too much into what Trower J said [in Re DeepOcean, quoted at [64] above]. Although Trower J emphasized the broad scope of the words "any worse off", the issue is: *worse off in relation to what?* I think the inquiry Trower J had in mind was whether the relevant class of creditors are likely to be any worse off as regards the existing rights the plan seeks to compromise – hence his reference to "the impact of the restructuring plan on all incidents of the liability to the creditor concerned". I accept that is potentially a broad inquiry, but what it seems to involve is a comparison between the financial value which the creditor's existing rights would be likely to produce in the relevant alternative, and the value of the new or modified rights which the proposer of the plan is offering up under the terms of its proposed compromise, in return for the existing rights being extinguished.
>
> **[86]** The point in this case is that the Company's obligation to pay taxes in the future is not an obligation that arises under the Plan: it arises independently, under the relevant tax legislation, and is not being offered up as part of the package of rights made available by the Company by way of compromise of its existing liabilities. I thus consider that the benefits flowing from such future payments are too remote from the Plan to be relevant in applying the no worse off test.

E. GENERAL DISCRETION AND/OR FAIRNESS

(1) Preliminary matters

72. The question of general discretion and/or fairness sits within a complex, multi-stage, consideration of any Plan: see [39] above, where the approach stated in Thames Water is extensively quoted. It is relevant that: (i) the various

jurisdictional requirements at both the convening and the sanction stages have been met; (ii) the classes convened have (apart from the Saipem and Samsung Opposing Creditors) voted decisively in favour of the Plan; (iii) Conditions A and B have been met, albeit that my consideration of Condition A has thrown up a matter that must be weighed at this stage, namely the indirect economic benefit of the Petrofac Group's Liquidation to the Saipem and Samsung Opposing Creditors.

(2) The Work Fee

73. It was the question of fees, and in particular the Work Fee, that underlay the Saipem and Samsung Opposing Creditors' contentions regarding the "fracturing" of class: see [7] to [8]. But it was also relied upon as going to fairness/discretion. In this regard, the Saipem and Samsung Opposing Creditors made two broad points: (i) that the Work Fees related to work that had been done prior to the agreement as to remuneration for such fees had been concluded; and (ii) that the Work Fees were too high.

74. The first point seems to me to be an unreasonable one. The institutions comprising the Ad Hoc Group do not work for nothing, and formulating and negotiating a restructuring like that contained in the Plan involves massive time and effort that deserves to be and is expected to be remunerated. However, it is difficult to frame how such remuneration is to be calculated and awarded until the process of working towards a plan has commenced. Hence work being done without a formal agreement in place, but with the clear expectation of reward for work done. That is what happened here.

75. The second point is somewhat related to the first. The Work Fee appears high because the Ad Hoc Group has been persuaded to take their remuneration as equity and not up-front payment in cash. What they have received is equity in the amount of the debt that would otherwise have been owed by the Petrofac Group. Because the Plan projects that the Petrofac Group will be successful if the Plan is sanctioned, the equity in the Group will increase in value. That is the point of the Plan, but the Plan is not risk-free. It is perfectly possible for the Group to fail, and if it does so, the Work Fee will be rather less than it presently appears. The reason for payment in equity and not cash is because the Petrofac Group attaches significant importance to liquidity, and wants to hang on to all the liquidity that it can – including in particular cash in the bank.

76. I do not consider that the fairness of the Plan can be impugned on grounds that the fees, in particular the Work Fee (which was the focus of the attack), are too high.

(3) Fairness and indirect economic benefit: the correct approach

(i) The significance of being "out of the money"

77. A creditor is "out of the money" if they would not receive any return in the Relevant Alternative. In this case, the Saipem and Samsung Opposing Creditors are not "out of the money". As Table 5 shows, neither Saipem nor Samsung are completely out of the money: but they are likely to be better off under the Plan, as Table 5 also demonstrates.

78. Prior to the Court of Appeal's decision in Thames Water, the Saipem and Samsung Opposing Creditors contended that the law was as they describe it at [75] of their written submissions:

> Until earlier this month [when the Court of Appeal handed down its decision in Thames Water], there was a body of authority that suggested that the discretionary/fairness stage of the analysis was to be approached in two stages: (i) first, consider whether the dissenting creditor was "in the money" or "out of the money" in the relevant alternative; and (ii) second, if the creditor was "out of the money", then "little or no weight" would be placed on their views. This was the approach adopted in a number of first instance cases…

79. The consequence of this is that satisfaction of Condition A would mean that anyone "beating" the outcome in the Relevant Alternative by way of the Plan was at risk of having their dissenting views substantially discounted. Put in such black-and-white terms, this approach seems remarkably unfair to dissenting creditors, and the Court of Appeal in Thames Water made clear that this was not the law:

> **[123]** At the hearing of the appeal, Mr Smith expressly disavowed the submission attributed to him at [246] [of the first instance judgment in Thames Water]: he agreed that it was putting it too high to say that no issue of fairness can arise because the Class B creditors are out of the money. The correct principle, he submitted, was that when considering issues of fairness, "little or no weight" is to be attached to the views or objections of the out of the money creditors.
>
> **[124]** He nevertheless maintained that a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness, the fact that out of the money creditors get nothing at all counts for nothing. There is in substance little difference between that submission and the submission recorded at [246] of the judgment, which Mr Smith disavowed making.

> **[125]** Mr Smith accepted, in light of the comments of this court in Adler as to the need for give and take in respect of *any* creditor whose rights were compromised by a plan, that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but submitted that this need be no more than *de minimis*. He maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such *de minimis* consideration. He submitted that we are bound to reach this conclusion because of this court's approval, in Adler, of Snowden J's decision in Virgin Active.
>
> **[126]** For the reasons which follow, we do not accept that there is such a hard-edged rule, or that Adler compels us to that conclusion.
>
> …
>
> **[149]** As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are a myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly.

(ii) The wrong approach?

80. Mr Thornton, KC, on behalf of the Saipem and Samsung Opposing Creditors, contended that in framing the Plan the Plan Companies had followed precisely the approach deprecated by the Court of Appeal at [123] to [126] of Thames Water (just quoted) in ensuring that the dissenting creditors got marginally more under the Plan than under the Relevant Alternative of Liquidation; and thereafter disregarded their views.

81. I am not going to be drawn on what was (or was not) the approach of the Plan Companies when negotiating the Plan. That is not relevant for the purpose of this hearing. What is relevant is whether the outcome of the Plan is fair in light of approach set out by the Court of Appeal in Thames Water.

(4) Applying Thames Water to consider the Plan's fairness

(i) Identifying what the restructuring preserves

82. Unlike Thames Water, which was an unusual case of a "bridging" restructuring, where one plan was merely staving-off the relevant alternative, pending the very likely need of a further plan, the Plan in this case is a more typical restructuring, where the expectation is that an insolvent undertaking will be rendered viable by the Plan, and that (if sanctioned) the Petrofac Group will stay in business as a profitable undertaking. There are no guarantees, to be sure. As I have stressed, this is a risky restructuring, requiring the injection of substantial New Money. However, having noted the risks, I base myself on the expectations and projections of the Plan Companies as to the benefits that the Plan will bring.

83. The starting point is Mr Johnston's "enrichment assessment" set out at Table 3. As can be seen from this:

i) The total nominal exposure – assuming that the New Money is committed to the Plan, as it will be, if the Plan is sanctioned – is set out in column [4] and comprises US$4,547m.

ii) Depending on the likely outcome (low: column [6]; high: column [7]), 59% (US$2,669 in nominal value) or 50% (US$2,289 in nominal value) is lost. The restructuring preserves US$1,878m.

84. The question, then, is to consider how the Plan allocates this preserved value amongst competing creditors, including new investors (who will have committed New Money on the hypothesis that the Plan is sanctioned and implemented according to its terms).

(ii) A fair allocation of preserved value: assessing creditors with different priorities

85. Staying, for the moment, with Table 3, and using in that Table the "low" case in column [6] rather than the high case in column [7],[10] the point made by the Saipem and Samsung Opposing Creditors is that the 59% loss in value is unfairly allocated as between the different creditor classes identified in Table 3. Thus:

i) The nominal exposure of the secured creditors (row [A]) is augmented by US$268m or 41%. In other words, the claim (including New Money being injected) of US$654m is increased to an anticipated US$923m.

[10] Using the high case in column [7] makes no material difference. I am using only one case to keep the analysis brief(er), and to avoid too many figures being bandied.

ii) The nominal exposure of the new investors (row [B]) is augmented by US$477m or 211%. The claim (comprising only New Money being injected) of US$226m is increased to an anticipated US$703m.

iii) By contrast, the class of "other claims" – which includes the Shareholder Claims and the claims of Saipem, Samsung and Thai Oil – which comprise US$3,144m are reduced by 93% to US$252m.

86. *Prima facie* a fair allocation of preserved value involves sharing any shortfall (and here the shortfall is a massive US$2,669m, with preserved value of only US$1,878m) rateably or on a *pari passu* basis. A departure from *pari passu* needs to be justified. Here, there is not just a failure to share the shortfall in assets equally (such that everyone's exposure is reduced by 59%) but some (New Money) parties are receiving a return on their exposure (ie what is owed to them), so that they receive multiples of their exposure.

87. The Saipem and Samsung Opposing Creditors put this point in the following way in [5.3.2] of their written submissions:

> The benefits preserved or generated by the restructuring are not being shared fairly or anything like it. The table below[11] summarises just how unfair the proposed distribution is. As between the main stakeholders, it is proposed that Saipem and Samsung will contribute 53.2% of the value but will, in return, receive only 2.0% of the benefits (and potentially very much less depending on the precise scale of the liabilities they will be forced to assume). In contrast, it is proposed that the other stakeholders, most notably [the Ad Hoc Group] of five hedge funds…and the so-called "new" investors (who are mainly existing creditors and shareholders), will receive a (very) disproportionate share of the returns and will in fact make significant profits from the restructuring.

88. Two questions arise: (i) can any departure from *pari passu* be justified; and (ii) if so, is the extent of this departure "fair"? The problem with Table 3 – and this is no criticism, Table 3 is a helpful starting point – is that it considers only nominal exposure, ie the face value of the Petrofac Group's obligations or what would be recovered if the Petrofac Group were solvent and had a surplus of assets over debts: see the points made at [44].

89. In order to understand the justification of a non-*pari passu* allocation of preserved value, it is necessary to differentiate four classes of person: (i) persons who only become creditors of the Petrofac Group by virtue of the Plan, because the Plan commits them to inject New Money;[12] (ii) persons who are secured creditors of the Petrofac Group (ie they have an exposure in the case of shortfall, but rank ahead of unsecured creditors) and who are injecting New Money; (iii) secured creditors who choose not to inject New Money (but had the option to

[11] This is a variant on Table 3, which I do not set out: it adds nothing to the point.
[12] Again, see the qualification at footnote 1.

do so); and (iv) unsecured creditors. These classes of person are treated differently by the Plan. These differences are, in my judgment, defensible and fair for reasons I now turn to:

i) *Contributors of New Money only.* In Table 3, these are the new investors in row [B]. They have no prior involvement in the Petrofac Group, and the Group does not owe them anything. They have nothing to claim, and so nothing to lose. They choose to involve themselves by injecting US$226m of New Money: but only if the Plan is sanctioned, and as has been seen, I have accepted that the Plan sits at the very cusp of providing an acceptable return to these investors. I have accepted Mr Sousa's evidence that Plan B would not be accepted by these new investors. The notion that a new investor, choosing to inject US$226m, should thereby receive a "haircut" of 59% is absurd. But this is the substance of the point made by the Saipem and Samsung Opposing Creditors in the paragraph quoted at [88] above. Obviously these investors must receive a return and – given the risks – that return is going to be substantial. It is not the job of courts to re-write commercial agreements and to impose a price on markets save in the most exceptional of cases. Here, the furthest a court can go, is to say that the reward is disproportionate and so unfair. I decline to reach this conclusion in this instance:

    a) This is a significant cash injection (US$226m) into an organisation that would otherwise fail and go into Liquidation. I see nothing disproportionate in a return of 211%.

    b) I was impressed by the evidence of Mr Sousa. I am satisfied that this return is a competitive one. This is demonstrated by the fact that even a marginal shift from the Plan to Plan B will result in these investors walking away, and the Relevant Alternative of Liquidation obtaining.

    c) The secured creditors had the option of injecting New Money. Some took that option, some did not. If the returns on the injection of New Money were disproportionate in favour of the investor, one would expect greater take up and/or opposition to the Plan.

ii) *Secured creditors not injecting New Money.* I will come to the case of the secured creditors also injecting New Money in due course. It is convenient to consider this class next. Secured creditors rank above unsecured creditors, and that is justification for treating secured creditors differently from unsecured creditors. A *pari passu* distribution of preserved value would be inappropriate and unfair. The next question is

whether the extent of the departure from *pari passu* is disproportionate and unfair. In this case, it is not:

a) Turning to Table 2, these creditors stand to recover 24.3% (low case) or 31.9% (high case) in the event of a Liquidation: see row [M]. This is unsurprisingly the same as the creditors providing New Money (row [L]) because under a Liquidation no New Money is provided by anyone. This level of recovery is more than Saipem (row [R]) and Samsung (rows [P] and [S]) and Thai Oil (row [Q]) precisely because these creditors are unsecured.

b) Under the Plan, the recovery of these creditors increases to 28.8% (low case) or 36.0% (high case): row [B] in Table 2. The recovery of Saipem, Samsung and Thai Oil also increases in the case of the Plan, unsurprisingly given the existence of Condition A.

c) The point here is that whilst the Plan improves the position of both secured creditors and unsecured creditors, it does not disproportionately favour one over the other when the position under the Relevant Alternative (Liquidation) is considered.

d) The same point can be made by reference to Table 4. This shows that the Plan improves the position of these creditors by 18.4% (row [B]). The improvement of the position of Saipem, Samsung and Thai Oil (rows [E], [F] and [G]) is, in percentage terms, enormous, but not disproportionately favouring these creditors because the absolute figures are so low. The Plan does, however, favour unsecured creditors over secured creditors on this metric.

iii) *Secured creditors injecting New Money.* Rightly, in a Liquidation, these creditors are treated exactly as the secured creditors who do not inject New Money: see [90(ii)(a)]. Under the Plan, they recover far more: see Table 4 row [A] and Table 2 row [A]. This is because these creditors are choosing to inject New Money, and the allocation of preserved value is fair for the reasons given in [89(i)].

90. I conclude that the different treatment of different creditors under the Plan cannot be criticised as unfair. The departure from the *pari passu* distribution that is my starting point is justified, including as to its extent.

(iii) A fair allocation of preserved value: assessing creditors with similar priorities

91. An important aspect of fairness is that like cases are treated alike. Unless there is justification, unsecured creditors should recover broadly the same amounts in percentage (not absolute) terms. For the purposes of assessing fairness in the

context of Saipem and Samsung, I will consider their position as against the position of the Shareholder Claimants. Obviously, the claims of these classes are different in nature (save that these are all unsecured claims), but they have been treated as broadly equivalent. When the offering under the Plan to the Shareholder Claimants was improved, it was also improved as regards Saipem and Samsung.

92. Although not identical, the position of these unsecured creditors in Liquidation and under the Plan is broadly the same, as can be seen from the data contained in Tables 2 and 4. The Shareholder Claimants achieve a marginally better percentage recovery than Saipem and Samsung, but this difference is marginal and it is necessary to factor in the recoveries that will be made by Thai Oil, which is relevant for the reasons given in [32] and [49]. I conclude that it cannot be said, looking at the recoveries of the unsecured creditors *inter se*, that the Saipem and Samsung Opposing Creditors are being unfairly treated.

(iv) No worse off

93. But for the fact that the "no worse off" test is an explicit jurisdictional requirement under Condition A, it would have been necessary to consider this as part of a fairness analysis. As it is, I have already concluded that this test is passed.

(v) Does fairness require a specific treatment to take account of the indirect economic benefit?

94. A central point made by the Saipem and Samsung Opposing Creditors was that they were worse off under the Plan because the Plan prevented the indirect economic benefits of the Petrofac Group's Liquidation from accruing to Saipem and Samsung. Those indirect economic benefits were that Saipem and Samsung would benefit from an absence of competition. For the reasons given in [36] to [38], I have concluded that the indirect economic benefit is a real one.

95. Viewed in isolation, the point is an unattractive one. Competitive markets are better for the consumer than uncompetitive markets, and it seems perverse to reward Saipem and Samsung for lost profits arising because of the Petrofac Group's Liquidation. However, the point should not be viewed in insolation: it is closely connected to the loss of the Petrofac Group's contribution to the joint venture losses arising out of the Clean Fuels Project. The point is that Saipem and Samsung should receive some recognition that giving up their claims to contribution enables the Petrofac Group to stay in business.

96. The problem with this argument is that it is necessary for <u>all</u> of the unsecured creditors to give up claims in order for the Plan to work. Everyone is giving or giving up something. As Mr Sousa's evidence made clear, it was necessary for

the Shareholder Claimants to give up their claims for the Plan to work. It is difficult to see why Saipem and Samsung should recover more than the Shareholder Claimants for this reason.

97. Accordingly, my answer to the question of whether special account needed to be taken in the Plan of these indirect economic benefits in order to render the Plan fair is: No.

(4) Conclusion on general discretion/fairness

98. I reject the contention that the Plan should not be sanctioned as a matter of discretion and/or fairness.

F. CONCLUSIONS AND DISPOSITION

99. For the reasons given in this judgment, I conclude that the Plan should be sanctioned.