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VALUATION FOR INSOLVENCY PRACTITIONERS

Editors
Prof. Jan Adriaanse
Dr. Marc Broekema RV
Leiden University & Kroll
and
Dr. Sebastiaan van den Berg
RESOR N.V.

INSOL International, 29-30 Ely Place, London, EC1N 6TD
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

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Hans Haanappel
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PRESIDENT’S INTRODUCTION

In the complex landscape of insolvency and restructuring, where financial instability is the norm, the role of valuation is critical. It can act as an important foundation stone, whether charting the course through the complex dance of restructuring negotiations or unlocking value from distressed assets.

This book details the pivotal significance of valuation for practitioners worldwide. From the boardrooms of struggling enterprises to the courtrooms of bankruptcy proceedings, it delves into the core of valuation methodologies, theories, and, importantly, how they are applied in practice.

We recognise that valuation in insolvency and restructuring transcends mere number - crunching; it encompasses the nuanced interplay of financial expertise, legal acumen, and strategic vision and is an area which many say is more art than science. The book, therefore, goes beyond the surface, delving into the strategic subtleties, ethical quandaries, and tactical manoeuvres inherent in the use of valuation analysis within distressed environments.

Furthermore, in an era marked by economic unpredictability and a tumultuous global environment, the importance of understanding valuation within insolvency and restructuring contexts has never been more critical. As businesses navigate the fallout of crises, investors seek opportunities amid chaos, and policymakers confront systemic risks, it is clear that the detailed insights contained within these pages should be considered invaluable.

Publications like this don’t happen without hard work and real effort and I would like to thank the project leaders for their unwavering dedication, time, and expertise in bringing this project to fruition. INSOL International also extends its gratitude to each contributor for giving their time and generously sharing their knowledge and wisdom in crafting the respective chapters.

I trust that you will find this publication both enlightening and practical and that it will help you navigate the intricacies of our ecosystem.

Alastair Beveridge
President, INSOL International

January 2025

FOREWORD

In the complex and ever-evolving landscape of business, the intersection of business valuation and law is a critical juncture where the fate of companies often hangs in the balance. This book, "Valuation for INSOLvency Practitioners," aims to bridge the gap between these two disciplines, providing a comprehensive guide for practitioners who may not have a deep background in finance and valuation.

The impetus for this book arose from the recognition that practitioners play a pivotal role in restructuring and insolvency proceedings. Yet, many find themselves navigating the intricate waters of business valuations with limited in-depth financial expertise. This can lead to challenges in understanding the true value of distressed companies, negotiating fair settlements, and ultimately, achieving successful outcomes for their clients.

To address this need, we have brought together a diverse group of contributors, each an expert in their respective fields. These contributors include seasoned valuation professionals, academics, restructuring advisors, and legal professionals. Their collective insights provide a multifaceted perspective on the valuation issues that arise in the context of restructuring and insolvency.

The chapters in this book cover a wide range of topics, from some fundamental principles of business valuation to the specific methodologies used in distressed scenarios. We delve into the frameworks that govern insolvency proceedings, explore case examples that illustrate real-world applications, and offer practical guidance on how to approach valuation challenges in restructurings with confidence.

Our goal is to equip practitioners with the knowledge and tools they need to effectively engage with valuers, make informed decisions, and advocate for their clients' best interests. Whether you are a seasoned practitioner or new to the field, we hope this book serves as a valuable resource that enhances your understanding of business valuations in the context of restructuring and insolvency.

We extend our deepest gratitude to all the contributors for their invaluable input and dedication to this project, including the staff of INSOL International. Their expertise, commitment and patience have made this book possible. We also thank you as readers for embarking on this journey with us. It is our hope that this book will not only inform but also inspire you to approach your work with renewed insight.

Prof. Jan Adriaanse
Leiden University & Kroll

Dr. Sebastiaan van den Berg
RESOR N.V.

Dr. Marc Broekema RV
Leiden University & Kroll

PRACTICE: BACKGROUND, PRINCIPLES, METHODOLOGIES AND CHALLENGES

JUDICIAL APPROACH TO VALUATIONS

By Philip Hertz, Alice Odolant, Emma Buchanan, Gabrielle Ruiz, and Lewis Cymbal

1. Introduction

This chapter considers how judges in England and Wales have approached evidence requirements regarding a company's valuation in applications for a scheme of arrangement under Part 26 (Scheme) or a restructuring plan under Part 26A (Restructuring Plan) of the Companies Act 2006 (Act). Whilst questions regarding a company's valuation also arise in enforcement and formal insolvencies,[1] this chapter will focus on valuations in Part 26 and Part 26A restructuring processes.

1.1 Schemes and restructuring plans

Schemes can be used to effect a compromise or arrangement between creditors with majority creditor support, being 75% in value and a majority in number of each class of creditors present and voting on the Scheme. This compromise can be imposed on a dissenting minority within a class of creditors provided that the statutory majorities are met. Valuations have long played a significant role in the sanction of Schemes by illustrating the counterfactual comparator, i.e. the position that would apply if the Scheme were not to proceed.[2] When dividing creditors into classes, the two relevant considerations are the rights that creditors would have if the Scheme were implemented and the rights that creditors would have if the Scheme were not implemented. The comparator is a critical piece of evidence that assesses and values the differences between a creditor's existing rights (which are to be released or varied), and the rights which are to be given in their place under the Scheme. Through the comparator, financial advisers and independent experts deliver their analysis of the value of the company, including the amount that is available to creditors at present, and in future scenarios. Such scenario analysis evidences the anticipated outcomes in the event that the Scheme is sanctioned, and in the event that it is not sanctioned (usually with base case, worse case and high case variables). A company's valuation, in showing where the value breaks amongst creditors both in the Scheme and in its counterfactual comparator, is therefore key in assisting a judge's assessment of who should be a party to the Scheme, class and fairness.

Restructuring Plans are modelled on Schemes but are only available to companies in financial distress and can extend the reach of a compromise or arrangement to an entire class of dissenting creditors, by way of the cross-class cram down mechanism. However, to prevent abuse of this mechanism, the legislature[3] has imposed conditions and the judiciary have provided guidance on its operation. The first case to critically assess valuation evidence in the context of cross-class cram down was *Re Virgin Active* [2021] EWHC 1246 (Ch) (*Virgin Active*), where Snowden J (as he then was) set out two conditions:

(a) Condition (A) that dissenting creditors or members are no worse off under the Restructuring Plan than if the Restructuring Plan was not sanctioned; and

(b) Condition (B) that the Restructuring Plan has been agreed by 75% in value of a class of creditors or members, and those voting have a genuine economic interest in the company, in the event of the relevant alternative.

Crucial to both conditions of the Restructuring Plan are valuations. Financial advisers and independent experts prepare valuations to assess the value of the company, and the amount that

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1 See: *Re Saltri III Ltd v MD Mezzanine SA Sicar & Ors* [2012] EWHC 3025, *Mourant & Co Trustees Limited and others v Sixty UK Limited and others* [2010] EWHC 1890 and *Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch) and *Lazari Properties v New Look Retailers* [2021] EWHC 1209 (Ch) (*New Look).* Interestingly the approach in *New* Look, which was a CVA case, was endorsed by the Court of Appeal in *Re Adler* [2024] EWCA Civ 24, para 180. See further below.

2 *MyTravel* [2004] EWHC 2741 and [2004] EWCA Civ 1734 and *Re Bluebrook Ltd* [2009] EWHC 2114. See by way of further example Premier Oil Plc and Premier Oil UK sanction for a scheme of arrangement [2020] ScotCS CSOH_39 (29 April 2020). The valuation evidence in that case was crucial to the Court's assessment and ability to sanction the scheme.

3 See: Section 901G of the Act.

is available to creditors at present, and in the future scenarios of the Restructuring Plan being sanctioned and the Restructuring Plan not being sanctioned. These valuations are presented in what is referred to as the 'Relevant Alternative' report, which assists the judge in determining what is most likely to occur if the Restructuring Plan is not sanctioned.[4] This determination is central to the judge's assessment of whether any dissenting creditors are worse off under the Restructuring Plan (Condition (A)) and whether the creditors that comprise the voting majorities have a genuine economic interest in the company (Condition (B)).

More recently, further judicial insights into the operation and limits of cross-class cram down have been provided at a Court of Appeal level in *Re Adler [2024] EWCA Civ 24* (*Re Adler*) which has also influenced subsequent cases. The Court of Appeal has confirmed that Conditions A and B are minimum requirements for the Court to sanction a Restructuring Plan. They do not establish any presumption that the Court will sanction a Restructuring Plan. The Court of Appeal in *Re Adler* held that the Restructuring Plan departed in a material respect and without justification from the equal treatment that unsecured creditors would have received in an insolvency, which in this case would have been the Relevant Alternative to the Restructuring Plan. Valuation evidence in that case, and how the Court approached that evidence, was fundamental in finding that the dissenting creditors were in fact worse off under the Restructuring Plan. Furthermore, the Court of Appeal held that the first instance judge had applied the wrong approach to the exercise of his discretion to 'cram down' a dissenting class of noteholders. When overriding dissenting creditor classes and exercising its discretion to sanction a Restructuring Plan based upon cross-class cram down, the Court must consider if there is a 'fairer' allocation possible and conduct a horizontal comparison with other creditor classes. The appeal judgment highlights the necessity of comparing the proposed Restructuring Plan with the Relevant Alternative. This will often, but may not always, be insolvency. Where the Relevant Alternative is something other than an insolvency, for example a continuation of the business as a going concern, the valuation exercise will be more complex.

1.2 Valuation methodologies

A variety of valuation methodologies can be used to prepare the counterfactual comparator for a Scheme or the Relevant Alternative report in a Restructuring Plan. For example, in respect of trading entities, comparable multiples, discounted cash flow methods, market testing or leveraged buyout analysis. Judges have taken the approach to not prescribe the methodology that should be used in the comparator or report, appreciating that this decision is fact-sensitive. In some circumstances it is appropriate to demonstrate "*the real world evidence of the marketing and sales process which has taken place*",[5] and in others that a desktop analysis utilising a discounted cash flow methodology would be sufficient.

This is not to say that judges are not alive to the inherent limitations of scenario testing and the potential deficiencies that can arise in each methodology. This was particularly highlighted by Snowden J in *Virgin Active* where he recognised that valuations ultimately provide the Court with "*a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain*".[6] Johnson J has similarly approached the company's valuation evidence with caution in the case *Re Great Annual Savings Company Ltd* [2023] EWHC 1141 (Ch) (*Re GAS*), where it was unclear what independent scrutiny or analysis had been conducted (if any) of the company's valuation evidence and, despite the hypothetical nature of the counterfactual, the company made no allowance for inaccuracy (for example by providing a range of possible recoveries).[7]

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4 The Relevant Alternative in the context of a Restructuring Plan is now defined in section 901G(4) of the Act as "*whatever the courts considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F*". This can be, and often is liquidation, but can also be distressed disposal or solvent wind down, all of which are often perceived as value destructive.

5 Miles J, *In the Matter of Smile Telecoms Holdings Limited* [2022] EWHC 387 (Ch), para 79.

6 Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 108; *Re Deep Ocean 1 UK Limited* [2021] EWHC 138 (Ch) (Deep Ocean).

7 Johnson J, *Re GAS*, paras 70-72.

1.3 Scope of this chapter

Part 2 of this chapter summarises the key reasons why valuations are important for the Court, as well as the company and its stakeholders, in the context of Schemes and Restructuring Plans. This chapter then further explores the role of valuations in:

(a) the exercise of the Court's discretion in sanctioning a Scheme or a Restructuring Plan, notably in ensuring that the fairness and class requirements of both processes are met (see Part 3 below); and

(b) the determination of where the value breaks in the company to safeguard dissenting creditors who remain 'in the money' (see Parts 4 and 5 below).

In Part 6 of this chapter, the practical judicial approaches to valuation evidence are discussed by reference to Scheme and Restructuring Plan case law where the Courts have provided additional guidance clarifying how valuation evidence is to be presented and what information must be disclosed, including: *Hurricane Energy Plc* [2021] EWHC 1759 (Ch); *Re Virgin Active* [2021] EWHC 1246 (Ch); *Re Deep Ocean 1 UK Limited* [2021] EWHC 138 (Ch); *ALL Scheme Limited* [2021] (Ch) EWHC 1401; *In the Matter of Smile Telecoms Holdings Limited* [2022] EWHC 387 (Ch); *Re Adler*; *Re CB&I UK Limited [2024] EWHC 398* (*Re McDermott International); Re Project Lietzenburger Strasse Holdco S.A.R.L. [2024] EWHC 468 (Ch) (Re Aggregate); Re C-Retail* [2024] EWHC 1715(Ch*) (Re Superdry); and Re Cine-UK Ltd & Ors [2024]* EWHC 2475(Ch) (*Re Cineworld UK)*.

This chapter is intended to focus on recent Scheme and Restructuring Plan case law, where more detailed guidance regarding judicial approaches to valuation evidence is provided by judges. It is recognised that judicial approaches to valuations are also shaped by the rules regarding valuation evidence, as set out in the Civil Procedure Rules and Practice Directions, with contested Schemes and Restructuring Plans in many respects being treated as traditional civil litigation. We have seen, for example, parties seeking to rely on traditional litigation techniques when it comes to disclosure, applications for security for costs, and injunctive relief.[8] However, for the purposes of this chapter, these rules are not delved into in further detail, and in turn, the manner in which Courts consider disclosure requirements is not explored. That is a question of fact that turns on the evidence that is presented to the Court and the circumstances of each case, save to say that the Court expects a proportionate approach and is mindful of the fact that it is dealing with businesses in distress. The Court of Appeal decision in *Re Adler* underscores the importance of timing and adequate disclosure in Restructuring Plans. It warns against leaving the Court with insufficient time and thus encourages timely cooperation between parties. This was a point echoed in *Re Cineworld UK*, where challenges by certain landlords as to the inclusion of their leases as part of the compromise under the Restructuring Plan were considered contrary to the principles of efficient and effective case management.

2. Why are valuations important?

Valuation evidence has long been used in Schemes to illustrate the counterfactual comparator so that the judge can assess the fairness of the proposed arrangement and designation of creditor classes. It also presents to the Court the parties who have an economic interest in the company, and who therefore should have a legal right to be consulted in the Scheme, as well as those that may be legitimately excluded.[9] Now with the increased use of the Restructuring Plan, the importance of valuations has been amplified. This is particularly so given the new ability to cram down dissenting creditors, and the ability to exclude creditors entirely, which lay the groundwork for more valuation disputes.[10]

[8] E.g. *Re Super Dry [2024] EWHC 1715 (Ch); Consort Healthcare (Tameside) Plc [2024] EWHC 1702 (Ch); and Re Cine-UK Ltd & Ors [2024] 2475 (Ch).*

[9] *Re MyTravel* [2004] EWHC 2741; *MyTravel* [2004] EWCA Civ 1734 and *Re Bluebrook Ltd* [2009] EWHC 2114, para 25

[10] See section 901C of the Act and *Re Aggregate [2024]EWHC 563 (Ch).*

In light of this renewed focus on valuations, judges have paid particular attention to their significance, referring to the following key reasons why valuations are crucial in the context of Schemes and Restructuring Plans:

(a) to assess where the value breaks amongst creditors both in a Scheme and in its counterfactual comparator, and in turn to:

(i) decide class issues at the Scheme convening stage. For example, if the terms of a Scheme alter the rights of subordinated creditors, a valuation will assist in considering, via analysis of the relative priority of creditors, whether subordinated creditors' consent is required either as a separate class or as members of a class voting with others; and

(ii) consider at sanction whether creditors have been dealt with fairly under the Scheme than in the counterfactual comparator; and

(iii) understand whether there is any "blot" or defect in the Scheme that would make it unlawful or inoperable.

(b) to determine the Relevant Alternative to a Restructuring Plan:

(i) which acts as an equivalent to the "comparator" under a Scheme and assists with the formulation of voting classes for a Restructuring Plan (noting that this analysis will be subject to additional scrutiny where cross-class cram down is contemplated[11]);

(ii) to assess classes which are 'in' and 'out of the money' for voting purposes and in assessing whether to sanction a cram down; and

(iii) to evaluate which classes of creditors are entitled to the "restructuring surplus", being the difference between what a creditor would receive under the Relevant Alternative and under the Restructuring Plan.[12]

3. Exercise of the court's discretion

As set out above, valuations inform the exercise of the Court's discretion in sanctioning a Scheme or a Restructuring Plan. The four steps which govern the exercise of judicial discretion to sanction a Scheme have been clearly set out by Snowden J in *Re Noble Group Ltd* [2018] EWHC 3092 (Ch):

(i) has there been compliance with the statutory requirements;

(ii) was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at a class meeting;

(iii) is the scheme one that an intelligent and honest man, acting in respect of his interest, might reasonably approve; and

(iv) is there some other "blot" or defect in the scheme.[13]

By providing evidence regarding the appropriate comparator, valuations will primarily inform the exercise of judicial discretion at stages (ii) and (iii) of this four-step test, the latter often referred to as the "fairness test". Snowden J in *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) characterised the exercise of the Court's discretion under the "fairness test" noting that at this stage "*it does not mean that the Court is required to form a view of whether the scheme is, in some general sense, or even in the Court's own opinion, the 'fairest' or 'best' scheme*".[14]

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11 *Re Adler [2024] EWCA Civ 24.*

12 *Re Adler [2024] EWCA Civ 24 para 161 where the court is to probe as to whether any creditors getting 'too good a deal (too much unfair value)' and see insights provided by 'The Conceptual Foundation of Cross Class-Cram down' by Sarah Paterson, Professor of law, LSE.*

13 Snowden J, *Re Noble Group Ltd* [2018] EWHC 3092 (Ch), para 17.

14 Snowden J, *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch), para 28.

The exercise of judicial discretion in the context of Restructuring Plans has been approached with caution, particularly in early case law where there were less authorities to draw from. As Trower J explained in *DeepOcean*, this caution was primarily driven by the lack of guidance that is given in the statute as to the factors that are relevant when the Court is exercising its discretion. Snowden J also recognised this lack of guidance in *Virgin Active,* noting that Part 26A "*contains no express test or identification of any factors that should be taken into account, and leaves matters entirely at large*".[15]

The Explanatory Notes to Part 26A do provide that "*as in the case with Part 26 schemes, the Court will always have absolute discretion whether to sanction a restructuring plan. For example, even if the conditions of cross-class cram down are met, the Court may refuse to sanction a restructuring plan on the basis that it is not just and equitable*." Although, in *Re Adler* and *Nasmyth*, Leech J considered these Explanatory Notes and qualified the statement of "absolute discretion" by noting that "*the Court should be mindful that those words do not appear in the section and the Court does not have carte blanche to impose its own views of what is fair or just and equitable as between the parties*".[16]

As more Restructuring Plans have come through the Courts, judges have been able to determine with greater clarity the scope of their judicial discretion. Snowden J in *Virgin Active* agreed with Richards J in *re Telewest Communications No.2 [2005] BCC 36* (a Scheme decision), that the Court cannot "*impose its own views on what is "fair" or "just and equitable"*".[17] However, Snowden J and Leech J have considered that there is equally no presumption where Conditions (A) and (B) are met that the Court should sanction the Restructuring Plan without needing to consider the relevant factors and circumstances, notably "*that all creditors are likely to do better under the scheme or plan than under the likely counterfactual comparator*."[18]

It is clear that judges recognise the sensitivity around the exercise of their judicial discretion in the context of Restructuring Plans, particularly given the power that is granted to the Courts to cram down a dissenting class. Both Trower J in *DeepOcean* and Snowden J in *Virgin Active* agreed that "*the Court should not have the same reluctance to differ from the vote at a class meeting when considering whether to exercise the power to cram down as it would have when considering whether to sanction a scheme under Part 26*."[19] Snowden J explains that this is because, under Part 26, the Court's discretion as to whether to sanction a Scheme presupposes that the majority in each class has voted in favour of the Scheme. Conversely, in the context of Restructuring Plans, the Court needs to consider whether it should differ from the will of the majority of a class that has disapproved its implementation. As Snowden J appreciated "*under Part 26A, the use of the cram down presupposes that a class has either failed to approve the plan by the necessary majority (as in DeepOcean) or contains a majority which has positively expressed disapproval by voting against the plan (as in the instant case).*"[20] This was reiterated in *Re Adler* at the Court of Appeal, where Snowden LJ indicated:

> "*it is clear that to be of real value, the cross-class cram down power should be capable of being deployed swiftly and decisively when a genuine need arises. However, … it must be appreciated that plans under Part 26A, which offer the possibility of cross-class cram down, are capable of exerting an even more formidable compulsion and potential injustice upon dissenting creditors*." [21]

The potential for such injustice was recognised by the Court of Appeal, and resulted in the setting aside of the previously approved Restructuring Plan. In this case, Snowden LJ provided some

[15] Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 213.
[16] Leech J, *In the matter of AGPS BondCo PLC* [2023] EWHC 916 (Ch), para 65 and Snowden J in the same case at the Court of Appeal *Re Adler* [2024] EWCA Civ 24, para 107 and Leech J, *Re Nasmyth Group Limited* [2023] EWHC 988 (Ch) (Nasmyth), para 53.
[17] Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 221.
[18] Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 224, referred to and reinforced *Re Adler* [2024] EWCA Civ 24 at para 153 and also Leech J, *Nasmyth Group Limited [2023] EWHC 988(Ch)*, para 95.
[19] Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 214.
[20] Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 214.
[21] Snowden LJ, *Re Adler*, para 63.

guidance on the exercise of the Court's discretion in the context of cross-class cram down in Restructuring Plans and the disputes that can arise in respect to valuations. For example, he highlights that cross-class cram down creates a potential for more complex disputes:

> "*The introduction of cross-class cram down in Part 26A has only served to accentuate these potential problems. That is because of the statutory requirement to demonstrate that dissenting classes of creditors will be no worse off under the plan than in the relevant alternative, coupled with the question of whether the treatment of assenting and dissenting classes justifies the court in exercising its cross-class cram down power under section 901G. As occurred in the instant case, it is apparent that these additional requirements are increasingly leading to complex valuation disputes which the court is called upon to resolve under considerable time pressure.*"[22]

In setting aside the previously approved Restructuring Plan, the Court of Appeal disagreed with the first instance judge's reliance on the company's valuation evidence. The Court of Appeal held this to be inherently uncertain and therefore considered that there was no guarantee that the dissenting bondholders would be no worse off under the restructuring (see further Part 4 below).

In this way, a judge's ability to exercise their discretion to refuse to sanction a Restructuring Plan, despite the satisfaction of Conditions (A) and (B) and the wishes of the majority of any consenting class, is powerful. It is therefore an important protection for creditors, particularly where their rights are being compromised, that the Court will not sanction the Restructuring Plan where it considers that creditors are worse off under it.

Critical to a judge's assessment of whether creditors would be no worse off under the Restructuring Plan is the valuation evidence provided to the Court to illustrate the Relevant Alternative. Judges rely on valuations as evidence of where the value breaks amongst creditors and what the outcomes are likely to be in each scenario of the Restructuring Plan being sanctioned or refused. This information is key to a judge's determination that creditors are likely to do better under the proposed arrangement than in the Relevant Alternative. In turn, this informs the judge's exercise of his or her discretion to sanction or refuse a Restructuring Plan that may diverge from the will of a dissenting creditor class.

4. Safeguarding dissenting creditors

The principle of a counterfactual comparator or Relevant Alternative extends back to *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, where the Court of Appeal assessed whether to sanction a Scheme for the reconstruction of a banking company under the Joint Stock Companies Arrangement Act 1870. Setting out the principal factors that judges should take into consideration when sanctioning a Scheme to compromise creditor claims, Lindley LJ noted that it is "*absolutely necessary not only to look at the scheme, but to look at the other side*."[23] In taking account of the evidence of the "*other side*", Lindley LJ could assess the creditors' options were the scheme not to be sanctioned. By considering the alternatives, Lindley LJ could conclude that he did "*not believe the creditors can get paid in any other way*", ensuring that the Scheme before him was being sanctioned in the creditors' interests.[24] In fact, Lindley LJ expressly stated that the Scheme would not be sanctioned if its purpose was merely to resuscitate the bank and expropriate value that was owed to creditors.

Although, judges will not simply rely on the counterfactual comparator or Relevant Alternative that is presented to the Court. Judges will critically examine the valuations that present "*the other side*", and, in some cases, this has resulted in judges disagreeing with the evidence presented to the Court. In *Re British Aviation Insurance Co Ltd.* [2005] EWHC 1621 (Ch), Lewison J analysed the valuations put before him and determined that the only realistic alternative to the Scheme was the company continuing solvent run-off, rather than a solvent liquidation as put forward by the company. Lewison J asserted that identifying the appropriate comparator was "*critical*"[25] to

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22 Snowden LJ, *Re Adler*, para 58.
23 Lindley J, *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, page 406.
24 Lindley J, *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, pages 406-407.
25 Lewison J, *Re British Aviation Insurance Co Ltd.* [2005] EWHC 1621 (Ch), para 88.

appropriately assess the risk being borne by creditors as a result of the proposed Scheme, and more generally, whether the benefits from the future growth and value creation consequent of the proposed Scheme or Restructuring Plan are allocated proportionately to the creditors compromising their existing rights. Valuations are seen as a key component of the "*sophisticated principles developed over the decades by UK Courts to protect against intra-class oppression*", and therefore judges are keen to ensure that they accurately represent, on the balance of probabilities, the other side.[26] In the context of cases which rely upon cross-class cram down the importance of valuation becomes even more fundamental.

In a similar way, Miles J in *ALL Scheme Limited (Amigo)* assessed the statements made by the company and its directors that an insolvency process, particularly administration, was the most realistic alternative to the proposed Scheme. Miles J did not consider the statements made by the directors, nor other materials provided to the Court, to be sufficient evidence of the group's financial position and cashflows to allow the Court to adequately test the alternative. Miles J made his concerns clear, stating that the evidence adduced by the company "*does not satisfy me that there is no room for further proposals to be formulated to preserve value for stakeholders*".[27] The decision was no doubt influenced by the UK regulator's objections to that scheme. In fact, *Amigo* proposed subsequent alternative schemes in parallel in 2022 (offering creditors to consider for both a new business scheme and wind down scheme) where the comparator was a distributing administration, and the alternative schemes were successfully approved. The judge in relation to the 2022 schemes was satisfied by the evidence that the comparator was administration and, in particular, considered the reasonableness of the assumptions on which the assets and liabilities were based upon. Especially, the fact that there were financial advisers who had independently reviewed the financial position and estimates and outcomes.

In another case, Zacaroli J also declined to sanction a Restructuring Plan in *Hurricane Energy* due to concerns that the Relevant Alternative of a near-term insolvent liquidation, as asserted by the company and certain creditors on the basis of a company-commissioned report, was not the most likely to occur. This assessment was particularly crucial as the proposed Restructuring Plan sought to apply the cross-class cram down provisions to shareholders, depriving them of all but a fraction of their interest in the company. Zacaroli J therefore recognised that "*particular care*" was required to consider whether the shareholders would be any worse off in the Restructuring Plan than the Relevant Alternative.[28] Having scrutinised the evidence, Zacaroli J departed from the comparator promoted by the company which offered shareholders a "*less-than-meaningful return*", considering that the most likely alternative would be continued profitable trading, and therefore shareholders would be better off in the Relevant Alternative.[29]

Given the nature of valuations, based on future scenarios and assumptions, judges are alive to the fact that values can be manipulated for the gain of certain stakeholders over others, particularly where certain creditors could be excluded from the proposed restructuring. Cognisant of the motivations underpinning an over or under-valuation of a company's business, the approach taken by the judiciary is therefore to ask questions and test information to ensure that not only the judge, but also the relevant creditors, can take an informed view. Johnson J recognised the importance of this approach in the case *Re GAS,* stating that "*an important part of the Court's function*" is to scrutinise the evidence presented by the company to determine whether the burden of proof has been met.[30] In *Re GAS*, Johnson J considered that the company engineered the financial difficulties of the company by applying assumptions that took too pessimistic a view of likely recoveries, which resulted in the company effectively writing off its largest asset.[31] Johnson J was therefore not "*sufficiently persuaded*" by the dramatic reduction of expected recoveries and considered the reasoning "*rather thin and unconvincing*" to be satisfied that the company's evidence proved that,

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[26] Mokal, *The two conditions for the Pt 26A cram down,* Journal of International Banking and Financial Law, December 2020.

[27] Miles J, *ALL Scheme Limited* [2021] EWHC 1401 (Ch), para 97.

[28] Zacaroli J, *Hurricane Energy Plc* [2021] EWHC 1759 (Ch), paras 47-48.

[29] Zacaroli J, *Hurricane Energy Plc* [2021] EWHC 1759 (Ch), para 69.

[30] Johnson J, *Re GAS*, para 62.

[31] Johnson J, *Re GAS*, paras 9 and 83.

on the balance of probabilities, dissenting creditors would not be worse off under the proposed Restructuring Plan.[32]

Being no worse off was, as mentioned above, a key feature of the Court of Appeal's decision in *Re Adler*, where the Court disagreed with the first instance judge that the dissenting class of bondholders in that case would be no worse off under the Restructuring Plan than in the Relevant Alternative (i.e. liquidation). At first instance, the judge had been clearly influenced by the company's valuation evidence which suggested that the dissenting bondholders would be paid in full under the Restructuring Plan. However, upon closer scrutiny at the Court of Appeal level, it was considered that there was not sufficient certainty that that would in fact be the case. This was derived from the fact the valuation evidence relating to property values and their potential future realisation under the Restructuring Plan was by no means certain. The sequential nature of the realisation process and payments to the creditors under the Restructuring Plan meant that the dissenting bondholders with the latest maturity dates under the Restructuring Plan had the greatest risk of non-payment. In the Court of Appeal's view, this compared unfavourably to the *pari pass*u treatment in the Relevant Alternative, which was an insolvent liquidation. In particular, findings on the evidence at first instance did not provide any assurance that the Restructuring Plan would pay the dissenting bondholders in full; even the company's more favourable valuation evidence allowed for only a small margin of error in the projected property valuation forecasts (4.6%). This meant that there was no certainty based upon the company's own valuation evidence that the dissenting bondholders would be paid on a *pari passu* basis with other bondholders whose bonds matured at an earlier date. The Court of Appeal held that the plan provided for a departure from the *pari passu* treatment which would have arisen in the Relevant Alternative and noted that *"sequential payments to creditors from a potentially inadequate common fund were not the same as a rateable distribution"*.[33]

5. Role of the judiciary in disputed valuations

The valuation prepared by the company as evidence of its viable rescue options was closely scrutinised by Snowden J as a result of a creditor challenge in *Virgin Active*. In *Virgin Active,* the company modelled two scenarios (trading administration and liquidation) and presented the estimated returns for creditors in both scenarios. The company determined that the estimated returns in a trading administration, being the most likely outcome if the Restructuring Plan was not implemented, was the most appropriate basis for assessing returns under the Restructuring Plan. Challenging creditors, however, sought to contest the valuations presented on the basis that these were too conservative, excessively discounted and that the downside was overstated. In this case, Snowden J was required to assess the company's evidence in response to the challenging creditors, and consequently conducted a thorough analysis of the valuation evidence. Snowden J accepted the company's evidence, and it is noteworthy that he did so in the absence of "*any compelling reason*" brought by the challenging creditors.[34]

Although it is important to note that it is not an invariable rule that in the absence of sufficient expert evidence from an opposing party, the Court is bound to accept the valuation evidence put forward by the company, as demonstrated in the case *Re GAS.*[35] The Court will accept the company's valuation evidence where it reflects a rational and considered view of the company's board, and there are no compelling reasons for doubting that evidence.[36] A similar approach was taken in the context of *Re Project Verona [2024] EWHC 2080 (Ch)(Re Tasty plc)* where the evidence of the CEO (supported by expert evidence) was that, absent a Restructuring Plan being approved, the business would be placed into administration. This was on the basis that the ability to offer a "better plan" was constrained by the group's available cash position and, in that case, the Court could not be satisfied that there was any practical possibility of a *"better plan"* that would have allocated more

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32 Johnson J, *Re GAS*, paras 65-69.
33 *Re Adler* [2024] EWHC Civ 24, para 189-193.
34 Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 183.
35 Johnson J in *Re GAS* at para [62] also referred to the approach taken by the Court of Appeal in *Griffith v TUI (UK) Ltd* [2021] EWCA Civ 1442 [2022] where opposing parties were not required to adduce their own expert evidence.
36 Trower J, *Re ED&F Mann Holdings Ltd* [2022] EWHC 687 (Ch), para 39 and Leech J, *In the matter of AGPS BondCo PLC* [2023] EWHC 916 (Ch), paras 61-62.

equity value to unsecured creditors. Therefore, it accepted the CEO's unchallenged evidence that the Relevant Alternative in this case is an administration of the group with only restaurants in the group being sold out of that administration in a pre-packaged transaction. [37]

Where creditors have sought to challenge the valuation evidence of the company, it has more often been the case that judges have noted the lack of compelling counter-analysis, determining that challenging-creditors have "*always been in a position to adduce evidence as to what they think they would get in the market*" and that it is therefore their election not to do so.[38] This approach is evidenced by Snowden J in *Virgin Active*, endorsing the approach taken by Miles J in *ALL Scheme Limited* [2021] EWHC 1401 (Ch), which set out the expectation that creditors that intend to challenge valuations should file expert evidence of their own, attend hearings and address arguments for the assistance of the Court, and not to simply shout "from the spectators' seats". Equally, where opposing creditors have filed challenging valuations, these need to be sufficiently robust to withstand cross-examination.

Whilst there are instances where judges question and probe into areas of law or evidence, the general view is that it is not "*realistic, appropriate or fair to judges hearing complex scheme or plan cases, who already carry a heavy burden, to expect the Court itself to descend into the fray*".[39] Miles J took the approach in *ALL Scheme Limited* that judges cannot be expected to conduct a detailed factual investigation into the merits of the valuation evidence, particularly as it is a highly specialist area, and asserted that judges should not be expected to engage in "*vicarious challenges*" on behalf of challenging creditors or members. This position is in accordance with the cautious approach taken by Snowden J in *Virgin Active* due to the inherent uncertainty, and speculative nature, of valuations.

More recently, the Court of Appeal in *Re Adler* questioned and probed into the inherent uncertainty and material risks in the valuation evidence that was presented to the Court. In *Re Adler* the Court of Appeal recognised that, due to the speculative nature of valuations, the asset values and realisations might fall somewhere between the two extremes identified in the company's valuations and the competing valuation evidence.[40] In this case, there was additional uncertainty by the fact that no explanation had been provided as to why the maturity dates remained staggered under the Restructuring Plan (meaning that creditors who had later maturities had a higher risk of non-payment) rather than harmonising the maturity dates akin to the *pari passu* approach in a liquidation, which would have represented a fairer alternative and fairer allocation of value as the Court is required to consider in cross-class cram down cases.[41]

What is a fair allocation of value and whether a fairer Restructuring Plan is available were the subject of further consideration in light of significant challenges that were brought against the company in the recent cases of *Re Aggregate* and *Re McDermott International.* In *Re McDermott International*, the Court, while criticising the voluminous factual evidence and expert evidence provided, accepted the company's evidence on the Relevant Alternative being a liquidation and demonstrating that value broke well into the senior debt, and noted that the directors in that case were 'uniquely placed' to give such evidence. The unsecured creditor in that same case (who dissented from the plan) suggested that the shortfall to secured creditors which ran into the $billions (in both high and low cases) could be made up in full, but this suggestion was determined to be "fanciful". Likewise, in *Re Aggregate* the dissenting creditors suggested an alternative restructuring pursuant to Luxembourg law could be the Relevant Alternative. Yet, this was rejected by the English Court because it required the support of the 'in the money' creditors, which on the evidence in that case was not realistic.

Notably, in *Re Aggregate* and *Re McDermott International* it was envisaged that equity holders were to retain an interest in the business following the restructuring despite creditors' interests being compromised under the Restructuring Plan. The importance of ensuring that creditors are compensated appropriately in exchange for a compromise of their claims to avoid arguments that

[37] *Re Project Verona* [2024] EWHC 2080 (Ch)(Re Tasty), para 16.
[38] Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 191.
[39] Miles J, *ALL Scheme Limited* [2022] EWHC 740 (Ch), para 52.
[40] *Re Adler* [2024] EWHC Civ 24, para 195-199.
[41] *Re Adler* [2024] EWHC Civ 24, para 203.

there had been a confiscation of their rights for no consideration was a key factor providing otherwise 'out of the money' creditors with some modest value in return for the compromise of their claims. In *McDermott International*, a six-day trial had four days dedicated to witnesses of fact and expert evidence, including valuation evidence. After which, the Restructuring Plan was sanctioned following the dissenting creditor who was 'out of the money' being able to agree some value in the context of parallel Dutch proceedings, providing a 19.9% equity share in the restructured parent.

Ensuring that 'out of the money' creditors are allocated a modest amount of value to satisfy the jurisdiction requirement of a Restructuring Plan (i.e. it constitutes a compromise, rather than a mere confiscation of rights) has also been a feature in some recent retail Restructuring Plan cases. For example, unprofitable lease arrangements have been compensated under the Restructuring Plan by reference to an increased percentage of what they might expect to receive in an insolvency or minimum fixed amount (whichever is the greater).[42]

It is also recognised that 'in the money' creditors can influence how the value is allocated.[43] This was a feature of a recent decision *Re Chaptre Finance PLC* [2024] EWHC 2908 (Ch). Here, the dissenting creditors were crammed down on the basis that they were no worse off in the Relevant Alternative. That case provides some excellent practical insights into the role of experts and their importance in valuation disputes. In particular, Miles J underlines the importance of adhering to CPR Part 35 and criticised the company's initial expert evidence for not complying with basic rules such as identifying the authors, qualification, independence and recognising the duty the experts owe to the Court (the dissenting creditors' letter from financial advisers was also found to be non-compliant with CPR 35, and held to be of limited evidential value).[44] The case also underscores the importance of cross-examining witnesses if their evidence is to be challenged;[45] this enables the judge to properly assess that evidence and gives experts an opportunity to explain it and clarify any points.[46] Following examination of the company's valuation evidence, the Court ultimately accepted the company's evidence that indicated that the dissenting creditors were 'out of the money' in the Relevant Alternative. As such, their dissent as to how value was allocated carried little or no weight.[47] So, as we can see from such examples, the role of valuations and the potential for disputes is playing an increasingly significant role as Restructuring Plan cases develop.

6. Disclosure of information

To enable genuine challenges on the valuations presented to Court, judges have principally taken the position of gatekeepers of information, ensuring that creditors are "*properly informed in relation to the decision they had to take*,"[48] whilst respecting the practical burdens in relation to the provision of information and the urgency of proceedings. Zacaroli J summarised this approach in *Hurricane Energy*:

> "*it is important to balance any potential unfairness to the dissenting class as a result of the speed at which the case has been brought on and the difficulties the dissenting class faces in adducing its own evidence and testing the evidence of the plan proponents, against the genuine urgency of the proceedings.*"[49]

In *Re Sunbird Business Services Limited* [2020] EWHC 2493, a decision relating to a Scheme, Snowden J recognised that the reasonable creditor will want to be "*provided with the necessary information to understand how any different groups of creditors and any other relevant stakeholders are treated under the scheme and in any wider restructuring in order that he can*

[42] *Eg. Re Cine-UK Limited & ors [2024] 2475 (Ch), para 75(a); Re C-Retail [2024] EWHC 1715(Ch)*
[43] *Re Adler* [2024] EWHC Civ 24, para 249-252 and followed by way of example in Re Cine-UK Limited & ors [2024] 2475 (Ch), para 75(e).
[44] Re Chaptre Finance PLC [2024] EWHC 2908 (Ch) para 80.
[45] Re Chaptre Finance PLC [2024] EWHC 2908 (Ch) para 81.
[46] In reliance on the Supreme Court in TUI UK Ltd v Griffiths [2023] UKSC 48.
[47] Re Chaptre Finance PLC [2024] EWHC 2908, para 126.
[48] Norris J, *In the matter of Amicus Finance plc* [2021] EWHC 3036 (Ch), para 37.
[49] Zacaroli J, *Hurricane Energy Plc* [2021] EWHC 1759 (Ch), para 49.

reach an informed view upon whether the losses which have been suffered and the available value are being appropriately allocated between stakeholder groups".[50]

Sufficient information is particularly important for creditors to enable them to assess their commercial position and decide whether to support a Scheme or Restructuring Plan. It was in respect of the provision of information that the challenging creditors in *Virgin Active* therefore protested that they were unfairly disadvantaged, asserting that their ability to bring a challenge was hampered as they were not provided with sufficient information to conduct their own market testing or produce their own robust valuations. However, Snowden LJ determined that the provision by the company of the Relevant Alternative report, explanatory statement, independent report, five-year business plan, 13-week cashflow forecasts and breakdown of the group's trading performance was a sufficient volume of information to allow the creditors to be the "judges" of their commercial position and be able to put forwards a compelling competing valuation. As to how such disputes can be addressed, Snowden LJ in *Re Adler* states:

> *"These considerations suggest that to prevent undue delay and expense, a plan company must (subject to the giving of any necessary confidentiality undertakings) make available in a timely manner the relevant material that underlies the valuations upon which it relies. The parties and their advisers and experts must also cooperate to focus and narrow the issues for decision so that sanction hearings are confined to manageable proportions. If sensible agreement is not forthcoming, the Court should exercise its power to order specific disclosure of key information and its other case management powers robustly."* [51]

This approach is indicative that judges will not take an impractical approach, acknowledging the difficulty companies face in providing extensive disclosure at times of genuine urgency, and being cognisant of tight deadlines that may be crucial to the rescue of a company.[52] Snowden J demonstrated in *Virgin Active* that judges are therefore mindful of how additional disclosure requests can impede the efficiency of restructuring processes, a position supported by Alastair Norris J in his statement that "*the utility will be lost if the enquiry is side-tracked into a time-consuming examination of detailed disputes without disclosure or oral evidence, and which has the potential to impose a heavy cost burden upon a company… that is seeking rescue*".[53] A similar position can be seen in the *Virgin Active* and *Hurricane Energy* Restructuring Plans and, more recently, in the *Re Superdry* and *Cineworld UK* decisions. However, in *Re Adler (*as mentioned above) the Court of Appeal expressed concerns about the judges being put under unnecessary time constraints and that parties ought to allow sufficient time for the proper conduct of contested cases.

7. Conclusion

In considering how judges in England and Wales approach valuation evidence in applications for Schemes and Restructuring Plans, it is clear to see how valuations are simultaneously critical to both the judge's assessment of the fairness of the arrangement and the creditors' assessment of whether to support the arrangements. Judges not only rely upon valuation evidence to understand the present and future position of creditors, but also to determine what would likely occur if the compromise or arrangement was not in place. Judges are also mindful of this reliance, and valuation evidence is therefore not approached absent-mindedly. It is critically assessed and approached with particular care to ensure that it produces, on the balance of probabilities, the most realistic alternative.

The case law examined here has demonstrated that judges are mindful of the inherent uncertainties around valuations. Particularly, as they are based on future assumptions and scenario testing, judges will protect against any manipulation for the gain of certain stakeholders. It has also shown that due to these inherent uncertainties, judges will therefore assume a role as a gatekeeper to information, ensuring that creditors are provided with sufficient information to test and adduce their

50 Snowden J, *Re Sunbird Business Services Limited* [2020] EWHC 2493 (Ch), para 60.
51 *Re Adler* [2024] EWHC Civ 24, para 64.
52 Snowden J, *Re Virgin Active* [2021] EWHC 1246 (Ch), para 124.
53 Norris J, *In the matter of Amicus Finance plc* [2021] EWHC 3036 (Ch), para 22.

own competing evidence, whilst acknowledging the urgency and practicalities of an efficient process.

This is notably key in the context of Restructuring Plans, where the Court's decision to sanction the plan could have the effect of compromising the rights of a non-consenting creditor class. Although, that being said, judges do not have a crystal ball and will not engage in vicarious challenges on behalf of creditors where there is not a compelling reason to do so.

Examination of the judicial approach to valuation evidence has also illustrated certain practical considerations for insolvency practitioners and valuers approaching this evidence, notably that:

(a) Ultimately, the rules around disclosure of valuation evidence are regulated by the Civil Procedure Rules and Practice Directions. Both companies and creditors will need to comply with these rules when requesting, sharing and filing such evidence;

(b) experts need to ensure that their evidence is robust and supported by the appropriate methodology and analysis as they may be cross-examined on the detail and asked to provide explanations on the way in which a valuation was approached;

(c) dissenting creditors may adduce their own valuation evidence in compliance with the above rules. However, the nature of such evidence will necessarily be dependent on the level and timeliness of disclosure provided by the company;

(d) judges will also usually be unwilling to reopen the assessment of a Scheme where the requisite majority of creditors have voted in favour, provided creditors have been properly informed in relation to this vote;

(e) judges will pay close scrutiny to valuation issues where cross-class cram down is relied upon to sanction a Restructuring Plan. This recognises the importance that valuations have to play its assessment of whether the statutory conditions have been met, but also in the exercise of its discretion, and determination of whether a better or fairer Restructuring Plan is available.

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BRIPASL Business Recovery and Insolvency Practitioners Association of Sri Lanka
BRP Business Recovery Professionals (Mauritius) Ltd
CAIRP Canadian Association of Insolvency and Restructuring Professionals
CLLA Commercial Law League of America (Bankruptcy and Insolvency Section)
DRA Dutch Restructuring Association
EISAR Bankruptcy Commission (Saudi Arabia)
FGV Câmara de Mediação e Arbitragem / FGV Arbitration and Mediation Chamber
FILA Finnish Insolvency Law Association
GARIA Ghana Association of Restructuring and Insolvency Advisors
GDABA Guangdong Association of Bankruptcy Administrators
HKICPA Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
IAIR International Association of Insurance Receivers
IBR Instituto Brasileiro de Estudos de Recuperação de Empresas
IIDC Instituto Iberoamericano de Derecho Concursal
IIDC Colombia Instituto Iberoamericano de Derecho Concursal – Capitulo Colombiano
IIIPI-ICAI Indian Institute of Insolvency Professionals of the Institute of Chartered Accountants of India
INSOL Europe
INSOL India
IPAM Insolvency Practitioners Association of Malaysia
IPAS Insolvency Practitioners Association of Singapore
IWIRC International Women's Insolvency and Restructuring Confederation
JFIP Japanese Federation of Insolvency Professionals
LCA Law Council of Australia (Business Law Section)
MIA Malaysian Institute of Accountants
MICPA Malaysian Institute of Certified Public Accountants
NAFER National Association of Federal Equity Receivers
NIVD Neue Insolvenzrechtsvereinigung Deutschlands e.V.
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INSOL International
29-30 Ely Place
London
EC1N 6TD
Tel: +44 (0) 20 7248 3333