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HURRICANE WARNING FOR THE CROSS-CLASS CRAM DOWN

The cross-class cram down provisions within CIGA 2020 bind dissenting creditors to a restructuring plan, provided two conditions are met:

(A) That the court is satisfied that any dissenting class will not be financially worse off than under the "relevant alternative".

(B) The compromise or arrangement has been agreed by 75% of at least one class of present and voting creditors… who would receive a payment or have a genuine economic interest in the company in the event of the "relevant alternative".

In the recent matter of *Hurricane Energy PLC [2021] EWHC 1759 (Ch),* the court rejected a restructuring proposal which included a cross-class cram down for certain creditors.

Hurricane's creditors comprised primarily unsecured bondholders owed US$230 million. Although interest payments had been met and the company appeared profitable, projections showed that the bondholders would not be repaid in full by the maturity date.

The restructuring plan included proposals that the maturity date for the bonds be extended, the amount owed to bondholders reduced and, crucially, that the bondholders would receive 95% of diluted equity, with existing shareholders receiving just 5% of such equity. Unsurprisingly, the bondholders voted for the plan whilst over 92% of shareholders who attended voted against the plan.

The judgment stated *"there is no doubt that Condition B is satisfied: the Plan was approved by the Bondholder Class and they would clearly receive a payment in the event of the relevant alternative.*

The dispute in this case centres on Condition A, which involves the three step approach outlined in Virgin Active", namely:

- Identifying what would be most likely to occur in relation to the Company if the plan is not sanctioned;
- Determining what would be the outcome or consequences for the shareholders; and
- Comparing that outcome with the outcome and consequences for the shareholders if the plan went ahead.

It was decided that Hurricane would continue to trade profitably in the short to medium term if the restructuring plan was not agreed.

Regarding the second step the judge considered whether, if the restructuring was not agreed, the shareholders would be better off and it was concluded that they could be.

With regard to the third step the judge considered that the plan did not anticipate *"any meaningful return to shareholders and that, even in respect of such less than meaningful return… the current shareholders' interest in it will be limited to 5%".*

Editor's Note

This case demonstrates that the cross-class cram down powers will not be invoked when insolvency is unlikely to be occurring in the near future. The judge stated *"particular care is needed in the application of the cross-class cram-down provision where, as here the Plan would deprive members of the dissenting class of all but a fraction of their interest in the Company".*

Insolvency and Corporate Recovery Team
Jane Golledge Mark Silvester (Editor)
Grant Rechnic Michael Segen

SBP LAW SOLICITORS
Glade House, 52–54 Carter Lane, London EC4V 5EF
Tel: +44 (0)20 7332 2222 • Fax: +44 (0)20 7236 2112 • **DX:** 1030 LDE
email: michael@sbplaw.co.uk grant@sbplaw.co.uk jgolledge@sbplaw.co.uk mark@sbplaw.co.uk