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Lessons of Hurricane Energy

According to a note by Kirkland & Ellis, the court declined to sanction the Plan because:

- It rejected the company's evidence as to the 'relevant alternative' to the Plan;
- Accordingly, on the facts, it was not satisfied that one of the threshold conditions for cross-class cram-down (the 'no worse off test') had been satisfied. And;
- In any case, the court would not have been willing to exercise its discretion to sanction this Plan.

Kirkland said the Hurricane judgment represents an important test of the parameters of the Plan procedure. It demonstrates that;

- The court will critically assess Plan companies' evidence as to the most likely alternative to the Plan, especially absent a 'burning platform' and where future profitability is inherently uncertain;
- The court will consider other options open to Plan companies to meet any liquidity shortfall;
- Where the 'relevant alternative' is not an immediate liquidation but rather continued trading, it is not necessary for opposing stakeholders to pinpoint what strategy/ies the company is most likely to adopt; rather, the company's possible courses of action are factors to be considered in determining whether there is a realistic possibility the financial outcome for stakeholders would be better than under the Plan;
- In considering whether a Plan fairly allocates value between the different stakeholders, the court will consider potential upside from future trading combined with possible steps to address the repayment of debt upon maturity; and
- Absent a 'burning platform', and where a restructuring could reasonably be undertaken at a later stage, the court may conclude that junior stakeholders should not immediately be deprived of their interests but instead wait and see if actual performance over the coming months improves the outlook for such stakeholders.

Comment

Mark Fine, partner at law firm McDermott Will & Emery, commented:

"This is the first time we have seen the courts refuse to sanction a [Part 26A] Restructuring Plan and the case provides helpful guidance on the cross-class cram-down we have seen developing in DeepOcean and Virgin Active.

"The 'no worse off than' test is a crucial condition to satisfying the ability to utilise the cram-down and in this case, Justice Zacaroli concluded that the group failed to show that none of its shareholders would be any worse off under the plan than in the relevant alternative," said Fine.

"Whilst in the case of Virgin Active, the most likely relevant alternative was a trading administration, here the group is likely, in the short to medium term at least, to continue trading profitably.

"Additionally, even if both statutory conditions are met to effect the cram-down, the court still has the discretion to refuse to sanction a plan and Zacaroli confirmed that, even if he was incorrect on the no worse than test, he would have used such discretion to block the plan," Fine concluded.

You can see the judgment at: <http://www.globalturnaround.com/documents/HurricaneEnergyApprovedJudgment286211204.pdf>

Hurricane Firms & Faces

The company

Hurricane's financial adviser is Evercore, led by **Stephan Chischportich**. It is represented by Dentons, with a team led by **Neil Griffiths**.

In court the company was represented by **Tom Smith QC**, **Matthew Abraham** and **Ryan Perkins** of South Square.

The company has engaged PricewaterhouseCoopers (PwC) to analyse a number of wind-down and subsequent insolvency scenarios – the 'relevant alternative' requirement under the Plan. The PwC team is led by **Jason Higgs**.

The bondholders

An ad hoc committee representing US\$230 million of convertible bonds has hired financial adviser Houlihan Lokey, led by **Chris Foley**.

The committee is represented by Akin Gump, with a team that includes **Liz Osborne** and **James Terry**. It was represented in court by **Stephen Robins** of South Square.

The shareholders

Hurricane's shareholders, led by Crystal Amber Fund, are represented by Rosenblatt.

They are represented in court by **Andrew Thornton QC** and **Ben Shaw** of Erskine Chambers.