

Insolvency
Case Law Update
Rosling King LLP



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Across the UK, businesses are feeling the financial strain of COVID-19. The Courts have now, for the first time, considered the restructuring provisions set out in Part 26A of the Companies Act 2006 which could become a useful tool for businesses in the current climate.

Background

DeepOcean Group (the “**Group**”), a sub-sea services provider, proposed a restructuring plan for three Companies within the group – DeepOcean 1 UK Limited, DeepOcean Subsea Cables Limited and Enshore Subsea Limited (together, the “**Companies**”), all of which are incorporated in the UK. The Companies had underperformed for a number of years, due to unfavourable economic conditions, changes in the market and more recently the COVID-19 pandemic and required funding from the Group to continue as a going concern. The Group had decided not to provide further funding, making the operations of the Companies unsustainable.

The Companies proposed four classes of creditors: 1) finance creditors, being the Companies’ lenders and parties to a lock up agreement that supported the restructuring plans; 2) landlords under leases entered into by DeepOcean 1 UK Limited; 3) two creditors of UK vessel owner creditors chartered by DeepOcean 1 UK Limited; and 4) other creditors. Further, the Group would introduce a small amount of cash into the restructuring plan to enhance the dividends that would otherwise be payable.

The Companies would be re-organised under Part 26A of the Companies Act 2006 (the “**Act**”), which was introduced by the Corporate Insolvency and Governance Act 2020. Part 26A has two conditions:

- **Condition A** – a restructuring can only be proposed where a Company has encountered (or is likely to encounter) financial difficulties affecting its ability to carry on business as a going concern; and
- **Condition B** – the plan must involve a compromise or arrangement. The purpose of that compromise must be to eliminate, reduce or prevent, or mitigate the effect of, the financial difficulties that are affecting its ability to carry on business as a going concern.

A question arose whether Condition B of Part 26A of the Act could be satisfied as there was no plan for the Companies to carry on as a going concern.

The Decision

The Court granted the application by the Companies. In his decision, Justice Trower said that the Court should:

- a) Identify what constitutes the effect of the financial difficulties (i.e. the actual or likely financial difficulties must be sufficiently serious to give rise to a possibility that the Company will become unable to carry on business as a going concern); and

- b) Determine whether the compromise has, at its purpose, a lessening or reduction in the gravity or seriousness of the effect of those financial difficulties.

It was determined that the effect of the financial difficulties of the Companies had been a cause in a winding down of their activities and, as such, imperilled their ability to carry on as a going concern. Justice Trower believed that there was no reason why a compromise or arrangement providing for a slightly enhanced dividend on creditors' claims should not be treated as mitigating the effect of those financial difficulties, regardless of whether or not there was any intention to continue in business as a going concern.

Although Part 26A of the Act was focused in part on enhancing the ability of a Company to carry on business as a going concern, there was no reason to consider that this was the only purpose for which relief could be granted. The Court pointed to Section 901C(2)(c) of the Act which enables a liquidator to initiate a restructuring plan.

Commentary

This is the first time Condition B of Part 26A of the Act has been considered by the Courts and confirms that Part 26A of the Act is a useful restructuring tool which will be applied by the Courts. The decision could lead to an increase in the use of Part 26A restructuring plans by Companies, particularly in light of the struggles that many businesses are facing as a result of the COVID-19 pandemic and the likelihood of increased restructuring as the year progresses.

For further information, please contact [Alexander Edwards](#) or the Partner with whom you usually deal.