Neutral Citation Number: [2022] EWHC 1941 (Ch)

Case No: CR-2022-001644

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

IN THE MATTER OF HOUST LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Rolls Building
7 Fetter Lane
London EC4A 1NL

Date: 22 July 2022

Before :

MR JUSTICE ZACAROLI

Marcus Haywood (instructed by Irwin Mitchell LLP) for the applicant company, **Houst Limited**

Hearing date: 15 July 2022
Further evidence and submissions: 18 and 20 July 2022

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APPROVED JUDGMENT

Mr Justice Zacaroli:

1. This is an application to sanction a restructuring plan under Part 26A of the Companies Act 2006 in respect of Houst Limited (the "Company").

2. The relevant background is succinctly set out in the judgment of Adam Johnson J dated 14 June 2022 giving reasons for convening meetings of creditors and shareholders: [2022] EWHC 1765 (Ch). The following is a summary only of the matters relevant to this application.

3. The Company's business is the provision of property management services for short term/holiday lets. Property owners who wish to let their properties to guests on a short-term basis sign up to the Company's online platform. The Company lists their properties on various websites and manages the bookings and logistics. It earns revenue from a share of the amounts paid by customers for booking the properties.

4. The Company's business was severely affected by the Covid-19 pandemic. It is both cash flow and balance sheet insolvent. Three creditors have threatened winding-up petitions, and the Company is not in a position to pay the debts claimed by them. The evidence as to the Company's financial position consists principally of a report prepared by Begbies Traynor ("BT"), who are the proposed plan administrators, dated April 2022. Their conclusion is that if the restructuring plan does not proceed, then there would most likely be an accelerated marketing process leading to a sale in administration (i.e. a pre-pack administration). I will refer to this, consistent with the terminology in Part 26A, as the relevant alternative. BT's report summarises the likely value of the Company's assets and likely distribution to creditors in that event.

    1) The Company's assets subject to a fixed charge in favour Clydesdale Bank Plc (the "Bank") consist of intangibles and goodwill and investments. These are estimated to realise £300,000 in the relevant alternative. This is based on a comparable transaction entered into by the Company itself in February 2020, when it purchased the "Hostmaker" business out of administration. This is considered by BT to be a more reliable guide to value than a discounted cashflow analysis, since the significant level of distress of an accelerated sale process would not lead prospective buyers to consider value based on the latter.

    2) The Company's assets subject to a floating charge consist primarily of debts due from other group entities, trade debtors, balances with payment service providers, prepayments and an R&D tax debtor. The book value of these, leaving aside inter-company debts, is in the region of £1 million. For reasons set out in BT's report, these are estimated to release substantially less (approximately £180,000) in the relevant alternative.

    3) Inter-company debts have a book value of £6,159,000, but are estimated to realise only £83,000. At the hearing this was supported by a one page table summarising the likely recovery from each of the debtor companies in the group. After the hearing a more detailed analysis of the likely value of these debts (and the other assets of the Company) was provided by BT.

    4) No consideration was given in BT's report to the possibility of any value being realised from claims against third parties in the relevant alternative. I was

assured at the hearing that consideration had been given to this, and that there was no reason to believe that there would be any such claims. This has been confirmed in further evidence provided by BT following the hearing. I am satisfied that the Company's dire financial position is a direct consequence of events outside its control – principally the pandemic and its effect on the market – and that there is no reason to suspect that the creditors would benefit in the relevant alternative by reason of claims against third parties.

5) The Company's liabilities consist of the following:

a) £2,779,000 owed to the Bank.

b) £1,775,000 owed to HMRC. This would rank as a preferential debt in the relevant alternative.

c) £3,298,000 owed to convertible loan note holders.

d) £1,643,000 owed to trade creditors.

e) £326,000 owed to critical suppliers.

f) £494,000 owed to a connected creditor.

g) £658,000 of customer liabilities.

5. The Company has two classes of shareholders: ordinary unsecured shares and Series A preferential shares. These are held by a relatively small group of people and institutions.

6. In the relevant alternative there would only be two creditors who would receive any recovery. The Bank has a fixed and floating charge over the Company's assets and undertaking. It would be likely to recover (after costs of realisation) approximately £225,000 from the sale of assets subject to a fixed charge, resulting in a dividend on its debt of 7p/£. HMRC's preferential debt has priority in respect of the remaining assets, subject to the Bank's floating charge. They would be likely to receive a dividend of 15p/£ on the realisation of all other assets, leaving nothing to satisfy the rest of the debt due to the Bank or the claims of any other creditors.

7. No creditor has sought to challenge the evidence or conclusions in BT's report. In the absence of such challenge, and with the benefit of the clarification provided by the evidence filed following the hearing, I am satisfied that BT's report fairly summarises the likely outcome for all creditors in the relevant alternative.

The plan

8. The restructuring plan is relatively straightforward, and involves the following elements:

1) The shareholders have been invited to participate in a capital injection. Certain of them have agreed to advance a minimum of £500,000 (with a potential increase to £750,000 within three months). In return the Company will issue new preference shares which will have the effect of diluting all existing shares

(both the ordinary unsecured shares and the Series A preferential shares, all of which will be converted into ordinary unsecured shares) to approximately 5% of their current participation in the overall equity of the Company;

2) The Bank's debt will be reduced to £750,000, of which £250,000 will be repaid within two weeks of the effective date, and the remainder repaid over three years (resulting in a dividend of approximately 27p/£);

3) The Company will make monthly contributions into two funds:

a) A secondary preferential creditor payment fund, at the rate of £12,000 per month for a year, and then £20,000 for a further two years). This will be used to fund a dividend payment to HMRC of 20p/£;

b) An unsecured creditor payment fund, at the rate of £8,000 per month for a year, and then £21,000 per month for a further two years). This will be used to fund a dividend payment of 5p/£ to all unsecured creditors entitled to receive a payment.

4) Liabilities owed to customers, critical suppliers and employees are to be excluded from the plan, and paid in full. That is because, in each case, the Company considers that non-payment would have a significant negative impact on the ability of the Company to trade and thus its ability to generate cash to contribute to the two creditor funds.

5) Loanholders will have the option to convert their debt into pre-dilution equity (in accordance with their existing rights), or to participate in the dividend to unsecured creditors. To the extent that loanholders opt to convert their debt into equity, the size of the unsecured creditor payment fund will be reduced so as to maintain a fixed dividend of 5p/£ to all of the creditors participating in it.

6) The inter-company creditor will receive nothing under the plan.

7) If the Company fails to make any of the monthly contributions to the two creditor funds, the plan administrators have the right to terminate the plan, in which case the rights of all creditors revert to what they would have been had the plan not been sanctioned.

8) There are provisions for agreeing claims of creditors, and for the reference of disputes to an expert.

The plan meetings

9. Adam Johnson J convened six class meetings, the outcomes of which were as follows:

1) The secured creditor meeting. The Bank is the only member of this class, and it voted in favour of the plan.

2) The secondary preferential creditor meeting. HMRC are the only members of this class, and they voted against the plan. I consider the position of HMRC in more detail below.

3) The trade creditors meeting. Six trade creditors, constituting approximately 15% of the total amount owed to trade creditors, voted at this meeting. Five of them, constituting 78% by value of those voting, voted in favour of the plan. The claim of the creditor who voted against the plan ("Laundryheap") was accepted only as to part. Had it been accepted in full, then the vote in favour of the plan would have been reduced to 57% by value of those voting. I consider the position of Laundryheap in more detail below.

4) The loan holders meeting. Two loan holders, constituting approximately 15% of the loan holders by value, voted at this meeting, and voted in favour. The proxy of a third loan holder was rejected for technical reason. It too was supportive of the plan and had its vote been counted then the meeting would have been attended by loan holders holding 59% of the total amount by value of loan holders.

5) A meeting of the connected party, who voted in favour.

6) A meeting of members. Notwithstanding that there were two classes of shares (series A preferred shares and ordinary shares), Adam Johnson J was satisfied that they formed a single class for voting purposes. The shareholders who voted at the meeting represented 74% of the total amount of series A preferential shares and 61% of the total amount of ordinary shares. 100% of those voting voted in favour.

The law

10. The law applicable to the convening of meetings of creditors and shareholders is summarised at §26-28 of the judgment of Adam Johnson J. The sanction of a restructuring plan is governed by sections 901F and 901G of the Companies Act 2006.

11. Section 901F provides as follows:

> "(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.
>
> (2) Subsection (1) is subject to—
>
> (a) section 901G (sanction for compromise or arrangement where one or more classes dissent) ...
>
> …
>
> (5) A compromise or arrangement sanctioned by the court is binding—
>
> (a) on all creditors or the class of creditors or on the members or class of members (as the case may be), and

> (b) on the company or, in the case of a company in the course of being wound up, the liquidator and contributories of the company…"

12. Where, as here, one or more meetings of creditors or members has not approved the plan by the requisite majority, the court is empowered nevertheless to sanction the plan, by using the cross-class cram-down power under Section 901G. This provides as follows:

> "(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (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 (see subsection (4)).
>
> (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.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

13. Where the Court is asked to sanction a plan by using the cross-class cram-down power, therefore, three questions must be considered by the Court (see *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) at §104):

> "Condition A: If the restructuring plan is sanctioned, would any members of the dissenting class be any worse off than they would be in the event of the relevant alternative? This is often described as the "no worse off" test.
>
> Condition B: Has the restructuring plan been approved by 75% of those voting in any class that would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative?

> General Discretion: In all the circumstances, should the Court exercise its discretion to sanction the restructuring plan?"

Conditions A and B

14. I am satisfied that both of these conditions are satisfied in this case.

15. As to Condition A, the dissenting class consists solely of HMRC. On the basis of BT's report, the conclusions of which I accept, HMRC are likely to receive a greater dividend under the plan than in the relevant alternative. HMRC's recovery under the plan is in a fixed amount which will represent a dividend of 20p/£. Their recovery under the relevant alternative is inherently less certain, but on the basis of BT's report is likely to be in the region of 15p/£. While it may recover more, or less, in the relevant alternative, I am satisfied that it is likely to be no worse off under the plan.

16. HMRC's reasons for voting against the plan were set out in their email of 22 June 2022, having referred to its preferential status:

> "HMRC will not relinquish this status in order to provide a dividend to unsecured creditors. We appreciate that this may be problematic with regards to creditors of this category, and we understand that our dividend is likely to be less in liquidation. However, with the reinstatement of HMRC as a secondary preferential creditor at the end of 2020, this is a position we are not willing to compromise on and will insist this be honoured in all circumstances, regardless of whether this disadvantages unsecured creditors."

17. As noted by Snowden LJ in *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch), at §53, if a creditor or member wishes to oppose a plan based upon a contention that the company's valuation evidence as to the outcome for creditors in the relevant alternative is wrong, it is for them to produce their own evidence, including where necessary expert evidence. Not only have HMRC not sought to do so, but it appears from their email that they accept that they will be better off under the plan than in the relevant alternative.

18. As to Condition B, the only creditor that would receive a payment, or have a genuine economic interest in the Company in the event of the relevant alternative is the Bank. Its vote in favour of the plan satisfies this condition.

19. I note that in *Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch), at §49-50, Snowden J left open the question whether the power to cram down a dissenting class under section 901G can be activated by including within a plan a class of creditors who would otherwise all have been prepared to enter into consensual arrangements to give effect to the restructuring of their rights. I sought submissions from Counsel on this point following the hearing, and am grateful to Mr Haywood for his speedy response to that request.

20. Clearly, attempts artificially to create an in-the-money class for the purposes of providing the anchor to activate the cross-class cram down power should be resisted, particularly where such a class is not impaired by the plan. Where, as here, however,

the in-the-money class of creditors is undoubtedly adversely affected by the Company's insolvency and is substantially impaired under the plan, then I do not think that the mere fact that 100% of that class is prepared to support the plan is a reason to prevent the cross-class cram-down power being exercised. I do not think there is a relevant distinction between a case where all but a small minority of the class are in favour, and one where the merits of the plan have persuaded the whole of the class to support the plan. Nor do I think it makes a difference, as a matter of jurisdiction to exercise the cross-class cram-down power, that there is only one creditor within the class.

21. Moreover, Mr Haywood pointed out that in this case there was no certainty as to the Bank's position in advance of the application to convene meetings of creditors to consider the plan. While it was known to be broadly supportive, it had not entered into any lock-up agreement or signed any support agreement in advance of the meeting (c.f. the position in *Virgin Atlantic*, at §72). The Bank could have withdrawn its support at any point.

Discretion

22. The court has a general discretion to sanction a restructuring plan: see *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at §45. The words of the statute provide little guidance on how that discretion is to be exercised.

23. The Explanatory Notes to the statute refer to the court having, as with Part 26 schemes, an "absolute discretion" over whether to refuse to sanction a plan, even though the necessary procedural requirements have been met, "…for example, because a plan is not just and equitable". As Snowden J pointed out in *Virgin Active* (above) at §219, those words do not appear in the section and, without a frame of reference by which to assess what is (or is not) just and equitable, such a test would be meaningless.

24. Given the similarities between a restructuring plan under Part 26A of CA 2006 and a scheme of arrangement under Part 26 of CA 2006, the approach to the exercise of discretion in sanctioning a scheme of arrangement remains relevant, albeit with modifications to account for the differences between the regimes, particularly where the cross-class cram-down power is engaged: *Virgin Atlantic* (above) at §45; *Re DeepOcean I UK Ltd* [2021] EWHC 138 (Ch), per Trower J at §44.

25. The approach to the discretion to be exercised under Part 26 was originally formulated in the 19th century and has remained largely the same since then. It can be summarised in the following four points (per Snowden J in *Re Noble Group Limited* [2018] EWHC 3092 (Ch), at §17:

> "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 that would, for example, make it unlawful or in any other way inoperable."

26. A principal point of difference between the two regimes is the extent to which the court might be slow to differ from the views of creditors as expressed by their votes at the class meetings. This is an important factor in schemes of arrangement: see, for example, *Re Telewest Communications Plc (No.2)* [2004] EWHC 1466 (Ch), per David Richards J at §20. As Trower J pointed out in *DeepOcean* (above), at §46, this cannot have the same place in the court's approach to sanctioning a restructuring plan where the court is required to override the wishes of one or more groups of creditors.

27. Where creditors or members would receive no payment or have no economic interest in the Company in the event of the relevant alternative, then little regard is to be paid to their views. That was the view taken by Snowden J, in discounting the fact that classes of "out of the money" creditors had voted against the restructuring in *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch). That was particularly so, because any out-of-the money class of creditors or members may be excluded from the meeting to consider the plan: section 901C of CA 2006. For the same reasons, I consider that little if any weight is to be given to a vote in favour of the plan by a class or classes of out of the money creditors or members.

28. While Conditions A and B are necessary for the exercise of discretion to be engaged, so in themselves are not a sufficient reason for sanctioning a plan, it has been said that the plan company will have a "fair wind" behind it if those conditions are satisfied: *Re DeepOcean* (above), per Trower J at §48. The lack of any active opposition to the sanction of the plan – for example where no creditor produces its own evidence to challenge that of the plan company or attends the hearing to oppose the application – is also a relevant factor: *Re E D & F Man Holdings Limited* [2022] EWHC 687, per Trower J at §39.

29. Finally, an important factor – particularly in considering sanction where the cross-class cram-down power is engaged – is whether the plan provides a fair distribution of the benefits generated of the restructuring (or, per Dr Riz Mokal, the "the restructuring surplus": see for example "*The Two Conditions for the Part 26A Cram Downi"* (2020) 11 JIBL 730 and *The Court's Discretion in Relation to the Pt 26A Cram Down"* (2021) 1 JIBL 12) between those classes who have agreed and those that have not. In *Re DeepOcean* (above), Trower J pointed out at §63 that this raises similar issues to the "horizontal comparator" in a company voluntary arrangement. The court is required to see whether the plan provides for differences in treatment of creditors inter se and, if so, whether the differences are justified.

30. In doing so, a relevant reference point is the treatment of the creditors in the relevant alternative. The court will look to see whether the priority, as among different creditor

groups, applicable in the relevant alternative is reflected in the distributions under the plan. A departure from that priority is not in itself, unlike the position in the closest equivalent procedure in United States federal bankruptcy law, the Chapter 11 plan, fatal to the success of the plan. The US Chapter 11 procedure contains an "absolute priority rule" so that, in essence, no junior class should recover until a senior class has recovered in full, and no senior class should recover more than it is owed. As pointed out in a paper published by Sarah Patterson of the London School of Economics (*Judicial Discretion in Part 26A Restructuring Plan Procedures*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4016519), given that consideration was given by the UK government to including a modified form of the absolute priority rule in Part 26A (see also *Virgin Active*, above, at §289), its exclusion must be taken to have been deliberate.

31. In considering whether there has been a fair distribution of the benefits of the restructuring, it may be relevant to take account of the source of the benefits to be received under the restructuring, for example whether they come from the assets of the Company or from third parties willing to support the restructuring: see *DeepOcean*, at §64.

32. Turning first to the factors to be considered in any scheme of arrangement:

(1) I am satisfied that the provisions of the statute have been complied with. There is no reason to revisit the conclusions as to class composition reached by Adam Johnson J. I raised an issue during the hearing in relation to certain "Incentive Shares" which are to be awarded to one of the shareholders, and the Company's founder, Mr James Jenkins-Yates. These are intended to incentivise him to drive growth in the business, to the benefit of those investing new money. Having received further elaboration on this point, I am satisfied that it does not affect the class analysis. While Mr Jenkins-Yates may have an additional motivation to vote in favour of the plan, all other shareholders have a similar incentive in view of the outcome in the relevant alternative, as demonstrated by the unanimous support for the plan from a high percentage of shareholders.

(2) Although I have also sought, and received, further elaboration on certain other issues, the explanation of the plan given to creditors and shareholders was, in all the circumstances, adequate. I note that the covering letter sending notice of the plan meetings, while referring to the right *date*, referred to the wrong *day*. The notice itself was correct and since all those who participated in the meeting did so by proxy (and there is no evidence that anyone sought to attend the meeting in person on the wrong date) this error was immaterial.

(3) The statutory majority was obtained in all but the one dissenting class (HMRC). So far as the unsecured creditors are concerned, the requisite majority would not have been obtained if Laundryheap's claim had been admitted in the full amount for voting purposes. I was referred by Mr Haywood to the correspondence between Laundryheap and the Company, in which Laundryheap's objections were set out. Since the unsecured creditor class would be out of the money in the relevant alternative, I place little if any weight on the vote of that class (whether it is a vote in favour of or against the plan). Accordingly, even if Laundryheap's vote was wrongly excluded so that the requisite majority of that would not have been reached,

I do not think that would have provided any reason to refuse to sanction the plan. In any event, on the basis of the information before the chair of the meeting, I consider that she acted fairly and within the discretion afforded to her (see, for example, *Re Dee Valley Group plc* [2018] Ch 55, per Sir Geoffrey Vos C at §50-51) in refusing to admit the claim for the full amount.

(4) There is no question that the two in-the-money classes were fairly represented, since they each comprised only one creditor, who in each case attended and voted. As to the other classes, I am satisfied that they were fairly represented, but since they would all be out of the money in the relevant alternative, I place little if any weight on their votes.

33. In considering the fairness of the scheme more generally, particularly in the context of the exercise of the cross-class cram-down power, the present case involves a clear departure from the order of priority between creditors that would exist in the relevant alternative. In the relevant alternative, there would only be two creditors in the money: HMRC and the Bank. As I have noted above, although HMRC would rank second to the Bank in its capacity as holder of fixed charge security, there is little value in the assets subject to fixed charge security, so that HMRC would receive the largest dividend (approximately 15p/£) as compared to a dividend of 7p/£ for the Bank.

34. In contrast, under the plan, although HMRC can expect to receive a higher dividend than in the relevant alternative (an additional 5p/£), the Bank is to receive a significantly higher increase on its dividend (an additional 20p/£), ordinary unsecured creditors will receive a dividend of 5p/£, the shareholders have the prospect of, over time, owning an interest (albeit a very heavily diluted interest) in a solvent company, and the class of critical creditors will receive payment in full.

35. I am satisfied that the better treatment afforded to critical creditors is justified on the basis that the Company's ability to generate additional funds to pay an enhanced dividend to HMRC, and to other unsecured creditors, depends on its continued trading and that without paying critical creditors, the Company would be unable to trade.

36. So far as the shareholders are concerned, it is the new shareholders who will enjoy by far the largest part of the benefits of ownership. That is not merely because of the diluting effect of the issue of the new shares on the existing shares, but also because on a liquidation of the Company the new shares are entitled to preferential distribution at a rate of four times the amount paid for each new share. Since it is the new shareholders who are providing the capital injection without which the Company could not survive, I consider it is fair that they will share in the potential upside of the restructuring by reason of the Company being returned to solvency.

37. The explanation for the enhanced dividend payable to the Bank is that, following extensive negotiations, the amount to be paid to the Bank is the least that it is prepared to accept in order to support the restructuring. The explanation for paying any dividend at all to unsecured creditors and loanholders is that these include creditors with whom the Company will need to trade, or is likely to look to for potential future funding, and that it was therefore important to offer these creditors a better outcome than under the relevant alternative.

38. These offer, in my view, only a weak basis for depriving HMRC of the priority they would have in the relevant alternative. This is not a case where the Company is dependent on the Bank to be able to continue trading. While it is true that no plan could be achieved without *one* of the Company's in-the-money creditors voting in favour of it, there seems to be no reason in principle why that could not have been HMRC. With HMRC's support, the cross-class cram-down power could have been exercised so as to impose a different plan on the Bank against its wishes.

39. As against this, however, I balance the following factors.

40. First, the new value generated as a result of the plan comes principally from the capital injection from members. This does two things. First, it provides a fund from which a substantial part of the restructured debt due to the Bank can be paid down. Second, it provides essential liquidity to enable the Company to continue trading so as to generate funds to pay dividends to HMRC and to the ordinary unsecured creditors. This is not, therefore, a case where assets that would have been available in the administration of the Company are being applied in a manner inconsistent with the order of priorities applicable in that administration.

41. To some extent, the relinquishment of the greater part of their debt by all creditors also contributes to the value created by the plan. That is because it is only by relieving the Company of all but approximately 25% of the debt due to the Bank, 20% of the debt due to HMRC and 5% of the debt due to ordinary unsecured creditors that the Company is able to continue trading so as to generate funds to pay a higher dividend to the Bank and HMRC, to pay anything at all to ordinary unsecured creditors, and ultimately to generate value for shareholders. This point is of limited strength, however, where there are no circumstances in which the Company could realistically pay any part of the relinquished debt.

42. Second, the only creditor who is disadvantaged – in the sense only that they will receive a smaller share of the distributions in the plan than they would have been entitled to if the order of priorities in administration had been respected – is HMRC. HMRC are a sophisticated creditor able to look after their own interests. They have had full notice of the plan and, although they voted against it, they have not attended the hearing to oppose the plan, or presented any arguments against sanctioning the plan.

43. Third, even HMRC stand to receive a better outcome if the plan is sanctioned than in the relevant alternative. As I have noted above, the only explanation I have for their vote against the plan is that contained in their email of 22 June 2022, i.e. they would not agree to relinquish their preferential status. It appears, from that email, that this was a decision reflecting a general policy, or at least not a decision taken with specific regard to the circumstances of this particular case. HMRC have not otherwise engaged with the Company or with the members who have agreed to inject new capital. They have not sought, for example, to negotiate an alternative deal.

44. Accordingly, the issue facing me is a binary one; to sanction the plan, or not. While it would in theory be possible to require the Company to start again and seek to negotiate with HMRC, that is highly undesirable, where the costs and delay in requiring it do so would impose a disproportionate burden on the Company, a small to medium

enterprise. In any event, without knowing what HMRC's position would be, it may be that nothing at all would be gained by requiring the Company to start again.

45. If I refuse to sanction the plan, then the evidence indicates that all creditors, including HMRC, will be worse off. As HMRC have not opposed the sanction of the plan, I do not know that they would wish – of the two options open to me – to choose that one. In some cases, a creditor (particularly one with an interest in many company insolvencies such as HMRC) might be concerned to ensure that the debtor is placed into a formal insolvency process such as liquidation or administration to enable investigations to be carried out in relation to the directors' management of the business or potential claims against third parties. As I have already noted, the Company's financial difficulties appear to be a consequence of the pandemic, rather than anything which might justify such investigations. HMRC have certainly not suggested that this is a case where they would prefer a formal insolvency process for that reason. Aside from that, I would expect HMRC's interest to be in recovering more, rather than less, tax and, as such, in relation to the binary choice that faces me, their interests lie in sanctioning the plan.

46. In these circumstances, I am prepared to exercise my discretion so as to sanction the plan.