Neutral Citation Number: [2021] EWHC 3036 (Ch)

Case No: CR-2018-011034

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGALND AND WALES

COMPANIES LIST (ChD)

Royal Courts of Justice
The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 15 November 2021

Before :

Sir Alastair Norris

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IN THE MATTER of AMICUS FINANCE PLC (In Administration)

And

IN THE MATTER of THE COMPANIES ACT 2006

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- -

Marcus Hayward (instructed by **Pinsent Masons LLP**) for Amicus Finance plc

William Willson (instructed by **Brown Rudnick LLP**) for HGTL Securitisation Limited and the Hartford Entities

Andrew Mace (instructed by **Shakespeare Martineau LLP** for Crowdstacker Corporate Services Limited

Hearing dates: 11 and 12 August 2021

- -

APPROVED JUDGMENT
(subject to editorial corrections)

Sir Alastair Norris :

1. The core business of Amicus Finance plc ("Amicus") was the provision of short-term property finance; but it also offered other secured corporate and development finance, and through its subsidiaries also operated in specialist fields. One such specialist field was asset finance provided to small businesses by way of hire purchase and leasing; this business was conducted through Amicus Asset Finance Group Ltd ("AAF") funded in part by an inter-company loan provided by Amicus.

2. The funding for the main business of Amicus was provided in two ways. First, individual funders (or consortia of funders) underwrote particular loans made by Amicus to its borrowers, and whilst the legal title to the loan belonged to Amicus the benefit of the loan was held under a commercial trust structure by Amicus Mortgage Trustee Ltd for the individual funder or consortium ("the AMT structure"). One such consortium was Omni Partners LLP ("Omni") which also held a 7.5% interest in Amicus. Omni is the investment manager of Hartford Growth Fund Limited ("HGFL"). Mr Steven Clark ("Mr Clark") and Ms Broembsen-Kluever ("Ms Kluever") are members of Omni and directors of Amicus. Mr Clark is also a director of the major shareholder in Amicus. Another such consortium was Capital Bridging Finance No.1 Ltd ("CBFL") where HSBC was the senior funder, an asset management company was the mezzanine funder, and Amicus itself the junior funder.

3. In respect of loans held under the AMT structure Amicus was entitled to origination and service fees (e.g., for managing the loans, collecting instalments, and effecting recoveries): and that was one of the ways in which it made its money.

4. The second means of funding the main business of Amicus was through direct borrowing by Amicus. Here it made its money by differential borrowing and lending margins.

5. Amicus was a borrowing member of the peer-to-peer lending platform operated by Crowdstacker Ltd ("Crowdstacker"). The Crowdstacker platform facilitated lending by 418 individual investors to Amicus; but a Crowdstacker associated company (Crowdstacker Corporate Services Limited or "CCSL") acted as security trustee under a debenture granted by Amicus to secure the loans of the individual Crowdstacker investors.

6. A similar debenture had been granted to HGTL Securitisation Company Limited ("HGTL Securitisation") in respect of loans to Amicus provided or originated by Hartford Growth Trading Limited ("HGTL") as issuer of a funding note: HGTL is a subsidiary of HGFL. An intercreditor agreement reached in 2015 (and varied subsequently) provided that Crowdstacker and HGTL Securitisation should rank first and equally up to the amount of Crowdstackers' secured debt, and that any extra debt due to HGTL Securitisation should be secured but subordinated. The benefit of the HGTL Securitisation debenture and the HGTL funding note now both belong HGFL.

7. In 2018 Amicus suffered financial stress and looked for investment into its main short-term property finance business from a new strategic partner. The proposed investment into the main business envisaged a hive down of AAF by way of a sale to a new holding company for a nominal consideration. Such a hive-down required (amongst other things) Crowdstacker to release the security it held over the AAF

shares by virtue of its debenture. Crowdstacker did so by a Deed of Release dated 12 November 2018. The Deed of Release recited the intended sale of the AAF shares as part of a corporate re-organisation and also recited the intention of AAF to repay the intercompany loan it had received from Amicus.

8. The proposed investment could not be brought to a successful conclusion. On 4 December 2018 the directors of Amicus acknowledged that this made the insolvency of Amicus inevitable. The process of hiving-down AAF nonetheless continued, but in an altered form under which the intercompany loan made by Amicus to AAF (then standing at just short of £12 million) was released (not repaid) and the purchaser of AAF's shares, instead of repaying the intercompany loan, assumed other obligations due from Amicus to a value equal to the released loan. I will call this "the AAF Transaction" and must return to it later. It was approved by the Amicus board on 12 December 2018 and carried into effect by agreements dated 17 December 2018.

9. On 20 December 2018 HGTL Securitisation as holder of a qualifying charge appointed Mark Fry and Kirsty Provan of Begbies Traynor (London) LLP and Jamie Taylor of Begbies Traynor (Central) LLP ("Mr Fry" "Ms Provan" and "Mr Taylor" respectively) to be administrators of Amicus. The objective of the administration was a better return for creditors than if Amicus went into liquidation immediately. That better return derived principally from the ability of Amicus to continue to trade as loan servicer to loans within the AMT trust structure (and thereby earn fees) and to run off the book of loans to which it was beneficially entitled. An administration funding arrangement was made with HGTL.

10. The administration proceeded in accordance with that plan, and it appeared that the secured claims of Crowdstacker would be paid in full: the joint administrators' Statement of Proposals so stated. But by the November 2020 the proposed administration plan encountered difficulties such that administration would no longer achieve a full repayment for the senior secured lenders, who were so informed; and by early 2021 the administration itself was no longer financially viable. There were several contributing factors. Brexit and COVID-19 reduced the value of securities held. Restraint upon possession proceedings rendered difficult the enforcement of securities upon the borrower's default. Loans which are not redeemed on time must continue to be financed by Amicus leading to increased interest charges. The remaining 70 loans ("the legacy loans") were those that presented the greatest difficulty and required the heaviest expenditure upon legal fees. HGTL, whose administration funding was over £1.5 million, was no longer prepared to continue support. Anticipated cash flow was insufficient to fund the administration beyond the end of July: and the only reason that the administration was not actually cashflow insolvent already was because of the forbearance of the administrators and other professionals in not demanding payment of fees accrued due.

11. From January 2021 until April 2021 the administrators canvassed with stakeholders an exit from administration by means of a CVA as an alternative to liquidation: but that proposal did not gain traction with Crowdstacker. So, in April 2021 the administrators decided to pursue a scheme of arrangement under Part 26A of the Companies Act 2006 ("CA 2006") and to amend the purpose of the administration to that identified in para 3(1)(a) of Schedule B1 to the Insolvency Act 1986 ("IA 1986"); namely, rescuing the company as a going concern. By April 2021 the amount of Crowdstacker's secured debt was £4.7 million and that of HGTL Securitisation was

£21.2 million: and this was the principal debt that needed to be restructured. If a restructuring plan was not approved then it was, and has throughout remained, the view of the joint administrators that the liquidation of Amicus must follow.

12. Administrators can only promote a restructuring plan under s.901C(2)(d) CA 2006 if they are of opinion that it is in the interests of the company's creditors as a whole so to do: Insolvency Act 1986 Sched B1 para 3(2)). The proposed restructuring plan therefore addressed all categories of creditor, of which there were four.

13. The first class were creditors whose claims would be treated as an expense of the administration under para.99 of Schedule B1 IA 1986 and/or rule 3.51(2) of the Insolvency Rules 2016 ("IR 2016"). There were 34 such creditors with claims totalling £1.146 million: and, in addition, there was HGTL with a claim of £1.647 million in respect of its administration funding. The restructuring plan proposes the payment of the former in full out of injected funds: but the latter receives payment (anticipated to be in full) only under a "waterfall" arrangement. In a liquidation the administrators consider the dividend would be 62p in the £1 for these creditors.

14. The second class were creditors whose claims were preferential (being in the main claims of employees): they amounted to £110,500. The restructuring plan proposes payment in full out of injected funds. In a liquidation the administrators consider the dividend would be nil for these creditors.

15. The third class were creditors whose claims were secured. These were originally thought to be Crowdstacker (or more accurately CCSL as security trustee for individual lenders on the Crowdstacker platform) and HGTL Securitisation under the arrangements and in the amounts I have described. But examination of the underlying documents by Snowden J (as then was) at the convening hearing raised the possibility the that the individual investors on the Crowdstacker platform might be the true secured creditors: see paras. [27] to [35] of the convening judgment, the neutral reference to which is [2021] EWHC 2255 (Ch) ("the convening judgment").

16. The restructuring plan proposes payment of £75,000 to each of Crowdstacker/its platform users on the one hand and HGTL Securitisation on the other, such payment to be made out of injected funds; and a 50% share each of realisations available under the "waterfall" arrangement to which I have referred. The realisations cannot be guaranteed, of course, but are anticipated to produce a payment of £1.267 million each. On these figures HGTL Securitisation would receive nothing in respect of its subordinated secured claim: but if there are significant recoveries from professional negligence claims arising out of the legacy loans which exceed the anticipated shortfall on the first ranking claims then some payment might be made. In a liquidation the administrators consider the dividend would be nil for the secured creditors.

17. The fourth class were creditors whose claims were unsecured. There are 186 such creditors with claims totalling £2.964 million. The restructuring plan proposes a payment of £75,000 to them out of injected funds. In a liquidation the administrators consider the dividend would be nil.

18. The injected funds are to be provided by Omni (or funds under its management) in the sum of £3.127 million and by Twentyfour Asset Management LLP ("24AM") in the

sum of £640,000 under an existing facility. These injected funds will be used to make the lump sum and other payments to which I have referred, with the balance being used to earn loan service fees, to effect recoveries under the legacy loans to which Amicus is entitled, to obtain repayment under the CBFL junior loan, and to pursue negligence proceedings in relation to the legacy loans, all during the period ending on 31 December 2022. These recoveries will then be distributed under the "waterfall" arrangement to which I have referred.

19. The application of recoveries under the "waterfall" is

a) Payment of any liability under an administrators' indemnity (to which I must return);

b) A retention of a fixed sum of £3.730 million to cover the specific operating costs of Amicus (funded by Omni and 24AM) during the recovery process (though this will not actually be paid until after the restructuring plan end date) with Omni taking the risk that the actual operating costs exceed this sum;

c) A retention in respect of the HGTL expense claim;

d) Distributions to Crowdstacker and HGTL Securitisation for their equal ranking claims;

e) Finally, payment of the HGTL Securitisation subordinated secured claim.

20. In the light of these arrangements, in the convening judgment Snowden J directed the holding of five class meetings: expense creditors, preferential creditors, senior secured creditors (Crowdstacker/individual investors and HGTL Securitisation), HGTL Securitisation as junior secured creditor, and unsecured creditors.

21. The meetings were duly held, and the application now before me is for the sanction of the proposed restructuring plan. On applications under Part 26A there is a natural tendency to focus upon the proposed scheme of arrangement in relation to the dissentient class of creditors. But the assenting classes of creditors must not be overlooked, and the scheme must be considered in relation to them in the same way as a scheme under Part 26. This latter approach is well settled, and I shall follow the established framework by identifying the relevant matters to consideration.

22. In doing so I shall bear in mind that the scheme jurisdiction is not adapted to the final determination of the multiple detailed issues that might lie between the scheme company and its creditors (and the outcome of which might affect persons not before the Court and who have no standing in the scheme jurisdiction). The utility of the jurisdiction in the context of creditor schemes is that it enables realistic scrutiny of the proposed scheme (albeit on limited material and requiring sensible projections) by an independent tribunal within a tight timeframe with the object of producing a fair outcome for creditors of a company in distress. That 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 (particularly, as here, a small or medium enterprise) that is seeking

rescue. That said, it is absolutely essential that a careful balance be maintained between proper scrutiny and a proper outcome within the desire timescale. With that in mind I turn to the matters requiring consideration.

23. First, a review of jurisdictional issues concerning the scheme. This may be disposed of shortly. In paragraphs [65] to [75] of the convening judgement Snowden J undertook a detailed examination of the jurisdiction under s.901A CA 2006 and of the way in which the threshold conditions set out as Condition A and Condition B were satisfied in the instant case. I gratefully adopt his analysis and conclusions. Nothing has occurred subsequently which requires a review of those conclusions. Before me there has been no challenge to them.

24. Second, an examination of whether there has been compliance with the statutory conditions and the terms of the convening order. This, too, may be disposed of shortly. There was no suggestion of a failure to satisfy the statutory conditions set out in s.901D CA 2006 and requiring fulfilment before presentation of a scheme for sanction (though there was criticism of the Explanatory Statement), nor was it submitted that there was a breach of the convening order (though again there was criticism of the voting consequent upon the novation arrangement, to which I will come).

25. Third, a consideration of the constitution of the scheme meetings. In paragraphs [76] to [79] of the convening judgement Snowden J set out the relevant legal principles, and in paragraphs [80] to [92] applied them to the instant case. They do not need to be considered afresh. Two points have pressed which require comment: the actual composition of the class of senior secured creditors, and whether Crowdstacker should have been placed in a separate class. I will examine those in turn.

26. As to the composition of the class of senior secured creditors, the convening order of Snowden J dated 9 July 2021 convened a meeting of "[CCSL]/the Individual Crowdstacker Lenders" and HGTL Securitisation. The alternative formulation of the Crowdstacker interest arose because of Snowden J's view that, contrary to assumptions made, the individual platform investors might be the true creditors. To eradicate that doubt Crowdstacker sought to place itself in the position of having the sole right to attend the scheme meeting (to the exclusion of the 418 Individual Crowdstacker Lenders). It did so by a "novation".

27. Under clause 19.2 of the Terms and Conditions applicable as between Crowdstacker and an individual platform user, if the loan by the individual investor to (in the instant case) Amicus went into default then Crowdstacker notified the individual investor "that the outstanding Loan may be novated to the Security Trustee". The process of novation would mean that the obligations between Amicus and the individual investor would be discharged, and new obligations would arise between Amicus and the Security Trustee. The individual investor would lose the right to recover the loan from Amicus. Instead, the individual investor obtained the benefit of a personal promise by the Security Trustee that it would "pay back to lenders…any funds successfully recovered less its costs incurred during that recovery", though Counsel for Crowdstacker told me that the relationship between individual loan and individual recovery would be broken and that Crowdstacker's promise was to pay a rateable proportion of pooled recoveries. The promise from Amicus to repay each loan was thus replaced by a promise by CCSL to pay a proportion of recoveries less costs. On 7

July 2021 Crowdstacker says that it notified the 418 individual investors of its intention to “novate” their loans in this way, and that same day Mr Patel (as director of Crowdstacker and of CCSL and as agent for 418 individual investors) signed a Novation Agreement which he claims vested the legal and beneficial interest in all 418 loans to Amicus in CCSL.

28. I have my doubts whether Mr Patel is right. I think there is a strong argument that the clause governing the relationship between CCSL and the Individual Crowdstacker Lender in the current circumstances is clause 18 of the Terms and Conditions as between Crowdstacker and an individual investor (which makes CCSL a trustee of recoveries, rather than the beneficial owner of the novated loan and of the recoveries under it). This would mean that the individual Crowdstacker Lenders retained a proprietary right, and, as the ultimate beneficial owners, the right to vote that economic interest at the scheme meeting. But I propose to accept (for the purposes of class composition questions) Mr Patel’s proposition (though I make one qualification and shall apply one caveat).

29. The one qualification is that one individual investor disagreed that the Novation Agreement of 7 July 2021 deprived them of the beneficial ownership of the loan and voted at the scheme meeting in their own right. The chair accepted that vote as valid and I agree that it should be treated as valid.

30. The caveat is this. I am accepting Mr Patel’s proposition because (i) the relevance of clause 18 was not addressed at the hearing; (ii) it is not appropriate to require detailed argument on the issue if a pragmatic alternative can be found; (iii) the pragmatic alternative is to treat Crowdstacker’s objection to the scheme as being the objection of the remaining 417 individual investors (albeit with caution) and to examine whether that should stand in the way of sanction.

31. As to Crowdstacker needing to be in a separate class, this point was founded upon the proposition that, in addition to the secured debt claims of investors on the Crowdstacker platform, CCSL itself had a claim in misrepresentation relating to the Deed of Release which it signed in November 2018 (releasing the AAF shares from its debenture). The misrepresentation was said to be that Crowdstacker had been led to believe that the “hive down” of AAF was necessary to obtain the investment by the “white knight” investor (which would lead to repayment of the Crowdstacker investors’ loans), whereas in truth it arose from the proposed internal re-organisation (which in the event did not lead to repayment). This was said to be a claim separate from the secured debt claim of the type shared with HGTL Securitisation, but which would be compromised by the restructuring plan: and the existence of this separate claim differentiated Crowdstacker as a secured creditor from HGTL Securitisation.

32. I do not consider that this point requires class composition to be readdressed. Although there is a passage in the evidence of Mr Patel of Crowdstacker for the convening hearing which makes a number of points (including that relating to misrepresentation) and which concludes with the words

> “CCSL maintains that it ought to be put in an independent creditor class of its own”

it is not clear how prominent this point was at the convening hearing, and Snowden J clearly did not accept it (probably because the claim in misrepresentation was not a secured claim). Further, as Zacaroli J noted at paragraph [31] of his judgment upon a disclosure issue (see [2021]EWHC 2245N (Ch)) Amicus had offered in advance of the plan meetings to discuss with CCSL "carving out" any misrepresentation claim from the releases under the plan; but CCSL chose not to engage with that proposal at all. That failure to engage should not be deployed as a weapon to attack the scheme meetings. Finally (as will appear) Crowdstacker successfully established its position as a dissentient creditor by the exercise of its vote in the class of secured creditors; that it might also have done so "as an independent creditor class of its own" or as an unsecured creditor in respect of its misrepresentation claim is not material. It is a dissentient creditor and as such raises an obstacle to the sanction of the plan.

33. I turn to the fourth matter requiring consideration, an inquiry whether the statutory majorities were obtained. The meeting of the expense creditors was unanimous in its support of the restructuring plan. So also was the meeting of the preferential creditors. The meeting of the senior secured creditors was split. S. 901F(1) CA 2006 requires approval of the proposal by a number representing 75% by value of the class. Those in favour (HGTL Securitisation and the sole voting Crowdstacker investor) represented 50.02%, of the class by value and Crowdstacker's opposition represented 49.98%. So, the statutory majority was not obtained. The meeting of the junior secured creditors, consisting of HGTL Securitisation alone, approved the restructuring plan. At the meeting of the unsecured creditors those representing 99% by value of those attending approved the plan and one unsecured creditor (constituting 1% by value of those voting) voted against. So, the statutory majorities were obtained in all classes save the senior secured creditors.

34. Fifth, an examination of whether the meetings were fairly representative of the class. In my judgment, the class meetings were fairly representative of the relevant class; but there is one caveat. (i) There were 24 expense creditors whose claims totalled £2.79 million. 11 creditors with claims amounting to £2.70 million voted at the scheme meeting. (ii) There were 49 preferential creditors with claims totalling £110,500. Those with claims totalling £54,598 voted. (iii) The claims of senior secured creditors amounted to £10.64 million, the whole of which was represented at the scheme meeting. The one caveat here is the existence of a degree of doubt whether the views of those with the real economic interest in the Amicus loans made via the Crowdstacker platform were able to be expressed. That is because Crowdstacker took the view that it had compulsorily acquired the beneficial interests in the 418 individual investor loans by the Novation Agreement of 7 July 2021 and informed individual investors of its view that they were not entitled to attend the meeting. (iv) The sole junior secured creditor, HGTL Securitisation, cast its vote: the combined value of its senior and junior secured claims was £21.21 million. (v) There 186 unsecured creditors with total claims of £2.96 million. 16 creditors with claims totalling £1.57 million voted. There was thus a very substantial level of engagement.

35. The sixth matter for consideration is a review of whether the Court can safely rely on the outcome of the meetings. There are three specific issues to be addressed: the Explanatory Statement, the arrangements for holding and ascertaining the wishes of attendees (in person or by proxy), and whether any oppressive conduct occurred. Of these the latter two may be disposed of shortly.

36. The Explanatory Statement had been considered by both Trower J (who identified some deficiencies on 10 June 2021) and by Snowden J (who identified others on 2,5,8 and 9 July 2021). Neither was concerned to approve the form and content of the Explanatory Statement: but it may be taken that after their combined scrutiny there were no glaring deficiencies. The question is whether, in its final form, it sufficiently informed the creditors of the matters for decision, of the essential facts and opinions material to that decision, and of the risks to be considered. It was made available in its final form to creditors on 12 July 2021, and no issue arises as to the sufficiency of time for it to be considered before the scheme meetings to be held on 28 July 2021.

37. But Counsel for Crowdstacker made certain criticisms of the Explanatory Statement.

a) His most fundamental objection was that the Explanatory Statement was so sparse in detail about a prospective liquidation as not to present creditors with any "real alternative" to the scheme, to such an extent that it was not possible for creditors or the Court to undertake any comparison of potential outcomes. He relied heavily upon Sunbird Business Services Ltd [2020] EWHC 2492 (Ch) at [74] in relation to the desirability of providing specific information to support general statements in an Explanatory Statement sufficient to enable scheme creditors to evaluate for themselves in a meaningful way whether the views of the proposers of the scheme were objectively justified. I do not doubt the principle: but it falls to be applied in differing contexts. The context here was that the scheme was proposed by the administrators of a small or medium enterprise, who for two years had been providing detailed financial information to their creditors. Their narrative was simple. The administration could not continue; liquidation was the alternative; liquidation would bring to an end the loan servicing business of Amicus; it would not bring to an end attempts to recover loans beneficially owned by Amicus or to pursue professional negligence proceedings to compensate Amicus for losses incurred by it in relation to legacy and other loans, but in the absence of funding these could not be pursued; obtaining liquidation funding was speculative; the window to avoid liquidation was very narrow. Of course, more specific information could have been provided. But the touchstone is not whether the fullest specific information reasonably obtainable was included in the Explanatory Statement: it is whether what *was* provided was sufficient to enable the creditors to make an informed decision whether to accept the risks inherent in the scheme in place of the risks inherent in a liquidation. In my judgement the Explanatory Statement enabled that to be done.

b) The restructuring plan contains an indemnity provision in favour of the joint administrators: as I have noted, it ranks first in the "waterfall". Paragraph 11.11 of the Explanatory Statement says that this indemnity "is intended to reflect a similar position to the statutory charge that would ordinarily be available to an administrator". Crowdstacker submits this comment is misleading because the terms of the indemnity (which are set out in full in appendix 6 to the Explanatory Statement) are wider than the statutory charge set out in paragraph 99 of Schedule

B1 IA 1986. That might be so, and yet the indemnity still be "similar" to the statutory charge. But whether the adjective "similar" is or is not appropriate the simple fact is that the indemnity was set out in full in the Explanatory Statement and every creditor was able to form a view about its acceptability, assuming they thought it was material to the decision whether to accept payment under the restructuring plan or to run the risk of a nil return in a liquidation. In my judgment the criticism is not justified.

c) The Explanatory Statement contained in appendix 5 an Estimated Outcome Statement ("EOS") showing the expected outcome in a liquidation. Crowdstacker submits that this was misleading in that it proceeds on the footing that the only recoveries in a liquidation would be compensation resulting from successful claims for professional negligence and enforcement of loans within the AMT structure. Crowdstacker argues that in liquidation (i) Amicus would have continued to trade because Omni (the holder of most loans under the AMT structure) could have been held to ransom and would have funded the continued servicing of its loans; (ii) funding would have been available to enable a liquidator to pursue clawback claims relating to the AAF Transaction; and (iii) the purchaser of the AAF shares remained contractually liable to pay £12 million for the AAF shares notwithstanding the altered structure of the AAF Transaction. I shall later have to consider these arguments in more detail: but at present I confine myself to saying that I regard the prospect of recoveries (and it is recoveries, not claims, that are material to scheme creditors) as speculative and the EOS as adequately framing the question for decision.

d) By way of further criticism Crowdstacker submitted that the EOS should have put a value (i) on the goodwill of the "Amicus" name; (ii) on claims against the joint administrators for poor performance in the administration and for failing to challenge the AAF Transaction: and (iii) on claims against the Amicus directors relating to the AAF Transaction. The purpose of the EOS was to provide a realistic assessment of the value of the "liquidation estate". Each of the elements of the alleged omitted "value" is highly contentious as a claim and wholly speculative as a recovery. I do not consider that their absence from the EOS means that the scheme creditors were not properly informed in relation to the decision they had to take.

e) Following the hearings before Trower J and Snowden J additional wording was inserted in the Explanatory Statement recording the view of Crowdstacker that there was a potential £12 million clawback claim arising out of the AAF Transaction. As part of that account paragraph 19.13 of the Explanatory Statement recorded that Crowdstacker had "consensually and unconditionally released" its security over the AAF shares. Counsel submitted that this was misleading and partial because it failed to record that Crowdstacker asserted that it had only released its security on the basis of a misrepresentation. In my judgment there

is nothing in this criticism. An Explanatory Statement is meant to be a concise account of the facts material to the decision that has to be taken. Whether Crowdstacker had a claim in misrepresentation against Amicus and/or its directors was irrelevant to the scheme creditors who were the addressees of the Explanatory Statement because any misrepresentation claim was personal to Crowdstacker and would not enhance the returns to them in the realistic alternative scenario of a liquidation.

f) Also, as part of that account paragraph 19.14 of the Explanatory Statement said that the joint administrators had investigated the AAF Transaction and were satisfied that no clawback claim existed. Crowdstacker submitted that this was misleading because on the very day of their appointment the joint administrators had written a letter saying that they would not challenge the AAF Transaction and thereby signed away any right to make a claim. In my judgment there is nothing in this criticism. An Explanatory Statement is meant to be a concise account of the facts material to the decision that has to be taken. The material fact was the opinion of the joint administrators as to the merit of the claim for the purpose of ascertaining the size of the liquidation estate. It undoubtedly was their view; and when and in what circumstances they formed it, and what were "the ins and outs" of the AAF Transaction itself that they considered did not need to be set out in the Explanatory Statement.

38. I find that the Explanatory Statement was adequate for its purpose, and that the scheme creditors were sufficiently informed as to enable them to reach properly grounded decisions, and that accordingly I may in that respect safely rely on the outcome of the meetings.

39. As to the arrangements for ascertaining the views of scheme creditors, the scheme meetings were held on the Zoom platform and no difficulties were encountered.

40. As to evidence of oppression or of scheme creditors demonstrating bad faith by exercising their votes otherwise than by reference to their interests as class members, there is none: and the report of the chairman of the meetings is to the opposite effect. Counsel for Crowdstacker drew attention to connections between Omni and Amicus and between Omni and "the Hartford entities" and between current directors of Amicus and "the Hartford entities". But he did not develop in what respect these connections could have influenced the expense creditors, the preferential creditors, the unsecured creditors or HGTL Securities to have voted other than in accordance with their ordinary class interests. I will re-address this matter in the next-following section concerning the "fairness" test (which provides an important cross-check).

41. Seventh, I must consider whether the scheme is one that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision from the standpoint of his or her ordinary class interests. Although the "fairness" test does not operate in Part 26A cases in precisely the same way as in Part 26 cases (see Re DeepOcean 1 UK Ltd [2021] BCC 483 at [21] per Trower J) it remains the divining rod by which special interests can be discerned.

42. There can be (and has been) no challenge to the proposition that the only realistic alternative to the scheme was an immediate liquidation. The administration could not continue beyond the end of July 2021. The challenge made by Crowdstacker is that an immediate liquidation offered the real prospect of a better return for creditors than that offered under the scheme. Whether Amicus has done enough to discharge the burden upon it in that regard is the subject of the next matter for consideration. The enquiry here is whether other intelligent and honest creditors addressing matters from the standpoint of their ordinary creditor interests might be expected to share Crowdstacker's view, so that the strong support for the scheme amongst creditors generally derives not from their ordinary class interests but from some other special interest.

43. Creditors are the best judges of their own interests. But they may be expected to act rationally. It seems to me that this scheme is a rational one and that it is understandable why it is attractive to most creditors. It is proposed, not by the directors of Amicus, but by administrators who have held office for two years and must have regard to the interests of the creditors as a whole (a significant feature). Under it, expense creditors and preferential creditors are paid in full out of injected funds. Unsecured creditors receive something (instead of nothing), also out of injected funds. The injected funds are used to sustain trading operations so as to yield a fee income, to effect recovery of legacy loans where Amicus has a beneficial interest, and to pursue professional negligence claims against Amicus' professional advisers. Repayment of those injected funds (subject to any claims under the administrators' indemnity) is a first call on recoveries (as is not unusual with restructuring financing), though not to be paid until the conclusion of the restructuring. It is anticipated (though it cannot be guaranteed) that there will remain a sizeable distributable surplus for the senior secured creditors, who otherwise stood to recover nothing. The junior secured creditor has only a faint hope of recovery in the event that the negligence claims yield so handsomely that senior secured creditors are paid in full. What underpins the scheme is the anticipation that recovery by a trading company will exceed recovery by a company in liquidation. That is a widespread understanding.

44. In undertaking this analysis the Court cannot overlook the connection between some participants. Omni (the provider or arranger of most new money) is a shareholder in Amicus, and two members of Omni are directors of Amicus. As a shareholder Omni plainly sees some commercial advantage in avoiding a liquidation of Amicus which it can justify to its investors (the evidence suggests protection of its own reputation in the investment management market), and so is willing to risk further funding. Omni is the manager of Hartford funds who are lenders to Amicus, and it is a Hartford entity that is the creditor standing to gain least from the scheme. But these connections do not appear to me to warrant the conclusion that any class of creditor has supported the scheme because of this acknowledged "connectedness" rather than because of the merits of the scheme.

45. There is one submission of Counsel for Crowdstacker that I must specifically address. Counsel submitted that the scheme failed the "fairness" test purely and simply because none of the benefits (if any) from future trading accrued to the compromised creditors; the benefits accrued solely to the Amicus shareholders. I have previously expressed some sympathy with this view when considering schemes for the compromise of compensation claims against a company, where it is those who have

been wronged by the company who sacrifice their redress to enable the wrongdoing company to be rescued for the benefit of its shareholders: Re Provident SPV [2021]EWHC 1341 (Ch) at [44]-[46]. But the situation here is very different. Crowdstacker enabled investors using its platform to risk commercial advances to Amicus for reward, advances of which Crowdstacker is now (on its own case) the sole beneficial owner. The context is an entirely straightforward commercial one in which it is very well established that it is not the role of the Court to consider whether the scheme submitted for sanction is the best scheme or the only fair scheme or could be improved in some respect, but rather to assure itself that it is one approved by the requisite majority of properly informed and consulted creditors acting in accordance with their ordinary class interests and not oppressively in pursuit of some special interest: Re Telewest Communications [2004] EWHC 1466 (Ch) at [21]-[22]. For the purpose of this part of the analysis I do not accept the submission of Counsel for Crowdstacker.

46. This brings me eighth question: is it appropriate for the Court to exercise its jurisdiction to override the views of the dissenting class? Two threshold conditions must be satisfied.

47. The first condition ("Condition A") is that the Court must be "satisfied" that if the scheme is sanctioned then Crowdstacker would not be any worse off than it would be in an immediate liquidation (which is the "relevant alternative"). Guidance as to the approach to Condition A was given by Trower J in Re DeepOcean (*supra*) at [28]-[69], by Snowden J in Re Virgin Active Holdings Limited [2021] EWHC 1246 at [106], and by Zacaroli J in Re Hurricane Energy plc [2021] EWHC 1759 at [32]-[34]. I accept and will seek to apply this guidance. This "no worse off" test requires significant further consideration.

48. The second threshold condition ("Condition B") is that the scheme must have been approved by 75% of those voting in any class that would receive a payment in the event of an immediate liquidation or otherwise has a genuine economic interest in the company. This does not require significant further consideration. On the analysis of the Joint Administrators the Expense Creditors are the only class of creditor who would receive a dividend in an immediate liquidation (of approximately 52p in the £1). They were unanimous in their support for the scheme.

49. If the two threshold conditions are satisfied, then the Court has a discretion to sanction the scheme notwithstanding the dissent of Crowdstacker. The statute itself gives no guidance as to the approach to the exercise of the discretion: but guidance can be found in the judgment of Trower J in Re DeepOcean (*supra*) at [44]-[66] and in the judgment of Snowden J in Virgin Active (*supra*) at [218]-[221]. I again accept and intend to follow this guidance.

50. I address first the "no worse off" test. This is (as Trower J said in Re DeepOcean) a broad concept taking into account the impact of the restructuring plan on all incidents of the liability to the creditor, but primarily focused upon on anticipated returns based upon assumptions and projections: and comparing them with a counterfactual based upon the relevant alternative. In the instant case the relevant alternative is an immediate liquidation, and the contested area has been valuation.

51. Before turning to that contested area I must deal with one general point.

52. It is common ground that it is for the administrators (as propounders of the plan) to demonstrate that Crowdstacker in its capacity as a senior secured creditor would not be better off in the relevant alternative of an immediate liquidation: see, for example, Re Hurricane Energy plc (*supra*) at [71]. But there was a difference of view as to the standard to be met. Counsel for the administrators submitted that this outcome had to be established on the balance of probabilities. Counsel for Crowdstacker submitted that the administrators had to demonstrate that there was "no real prospect" or "no realistic possibility" of a better outcome for Crowdstacker.

53. The foundation of this submission was a passage in the judgment of Zacaroli J in Re Hurricane Energy (*supra*) at [74]. To set the passage in context (i) the relevant alternative in that case was not an immediate insolvency, but the continued trading of a profitable business until closer to the time when the relevant bonds were due to mature, and then an assessment of how the shortfall on any outstanding bonds might be addressed; and (ii) the restructuring plan virtually wiped out the shareholder interest (who were the dissentients) immediately. In that context Zacaroli J said (emphasis supplied):-

> "If the relevant alternative was, for example, an immediate liquidation then the question would be whether the shareholders could expect some meaningful return in that liquidation i.e. *whether that was the most likely outcome from the liquidation.* Where, as here, however, the relevant alternative is that the Company carries on trading for at least a further year, I do not think that the analysis is the same. The Company may or may not go into an insolvency process in a year's time, and whether it does, and the resulting outcome for the shareholders, will depend in part upon what happens in the intervening period… The possible courses of action open to the Company over the next year, and beyond, are factors to be considered in determining whether *there is a realistic possibility* that the financial outcome for the shareholders in a year's time will be better than that offered by the Plan. *If there is a realistic possibility of this*, I consider that the shareholders would be better off in the relevant alternative than the less than meaningful return anticipated under the Plan."

54. Later on (at [124]-[125]) he returned to the point:-

> " I return to the essential question whether I can be satisfied that the shareholders would be no better off in the relevant relative than having a 5% equity in the Company which promised a less than meaningful return… For the reasons I set out above, given that the relevant alternative involves on each side's case the Company' continued profitable trading for at least a further year, I do not think that this question requires me to be satisfied - in order to find against the Company - that the most likely outcome from the relevant alternative is that there will be a return to shareholders at some point in the future. In my judgment, the fact that there is a realistic prospect (based on one, or other or a range of possibilities outlined above, …) that

> the Company will be able to discharge its obligations to the Bondholders, leaving assets with at least a potential for exploitation, is enough to refute the contention that the shareholders will be no better off under the relevant alternative than under the plan. "

55. I do not think that these passages justify the submission that Counsel for Crowdstacker based upon it viz. that the burden lies upon the propounder of the scheme to exclude all realistic possibility of a better outcome for a dissentient creditor under the realistic alternative.

56. The starting point must be the words of the statute. Section 109G (3) in Part 26A specifies as Condition A that

> "the court is *satisfied* that, if the compromise or arrangement were to be sanctioned… none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative. "(Emphasis supplied).

Where the court is required to be "satisfied" it is normally so satisfied on the balance of probabilities. For example, where paragraph 11(a) of Schedule B1 IA 1986 says that the court may make an administration order in relation to a company only if "satisfied" that the company is or is likely to become unable to pay its debts, it must be so satisfied on the balance of probabilities. Where the events to be examined are immediately in prospect the probabilities may be examined and assessed with some confidence. That is why Zacaroli J said that where the relevant alternative was an immediate liquidation then the return under the plan fell to be measured against "the most likely outcome" in the liquidation. The dissentient creditor (who bears only an evidential burden of providing a factual basis for his challenge, and does not need to satisfy the Court that the most likely outcome from the relevant alternative is a beneficial return to him) can criticise and seek to undermine what is said to be the more beneficial return to him under the plan. The question then is whether the propounder of the plan can refute that challenge and still satisfy the court on the balance of probabilities that the dissentient creditor would not be any worse off than he would be in the event of the immediate liquidation. The more distant the time at which (or the longer the period over which) the events in question fall to be examined and assessed the more difficult it is to satisfy the court as to the probabilities and the easier it will be "to refute the contention that the [dissentient] will be no better off under the relevant alternative than under the plan".

57. I shall proceed on the footing that the burden lies upon the administrators to satisfy me, in the face of all challenges by Crowdstacker, that on the balance of probabilities Crowdstacker will not be any worse off under the scheme than it would be in the event of an immediate liquidation. I shall also proceed on the footing that that assessment falls to be made by reference to the comparative positions overall.

58. I therefore turn to the challenges made by Crowdstacker to the proposition that the scheme leaves them no worse off (and indeed better off) than an immediate liquidation. In essence the fundamental challenge is that the Estimated Outcome Statement in respect of anticipated immediate liquidation is fundamentally flawed and does not provide a true estimate of the likely return.

59. The most fundamental challenge was that the propounding of the entire scheme and the incorporation of the valuations and estimates provided by the joint administrators ought not even to be considered because the joint administrators were not to be regarded as independent.

60. The relevant facts are these. In October 2018 Amicus engaged BTG Advisory to prepare for a scenario under which Amicus entered administration and to carry out a high-level valuation of AAF for the purpose of a planned sale to a new company. This engagement was disclosed in the "consents to act" of the administrators when subsequently appointed. The partners overseeing this engagement were Mr Fry, Mr Taylor, and Ms Provan. The valuation of AAF made in November 2018 was not undertaken by them but by Mr Dalton, also of BTG Advisory, though Mr Fry signed it off as the lead engagement partner. The BTG valuation took into account matters not taken into account in an earlier KPMG valuation referred to in paragraph 64 below. (I simply point to a difference without expressing a view as to correctness). In the light of that valuation the directors of Amicus (excluding Mr Clark) placed a nominal value on the AAF shares. The intended investment by an outside investor failed. On 4 December 2018 the directors of Amicus engaged the same BTG partners with a view to their appointment as administrators of Amicus. The BTG partners were informed that, as part of the AAF Transaction, the directors were minded to dispose of the AAF shares in return for £1 and to release the intercompany loan due from AAF to Amicus. The prospective administrators indicated (by providing a draft letter) that they approved of the transaction. They were appointed as administrators on 20 December 2018 and immediately provided a letter of ratification. This said that the Joint Administrators had reviewed the AAF Transaction, were satisfied with the circumstances surrounding it and with the consideration paid within the transactions as a whole, and it confirmed that they would not challenge the AAF Transaction as administrators under the powers conferred upon them under the Insolvency Act 1986.

61. Plainly the Joint Administrators could not properly sign such a letter on the very day of their appointment unless they considered that they were completely informed as to the detail of the AAF Transaction; and there is equally plainly a fine line between being completely informed of the detail of a transaction and being so involved as to advise upon the transaction during its negotiation and thereby (as a team) compromise independent scrutiny. Counsel for Crowdstacker relied heavily upon the decision of ICC Judge Jones in Ve Vegas Investors IV LLC v Shinner [2018] EWHC 186 as to the wisdom of removing administrators when "a pre-pack" sale in which their firm has been involved requires investigation. However, an application for the sanction of a scheme is not the same as an application to remove administrators: the focus of the application, the questions to be addressed and the material available with which to address them are entirely different. Simply because the role of the administrators in the formulation of the AAF Transaction may call for examination (and I should make plain that BTG dispute that they were so involved) does not mean that the administrators are unable to propound a scheme which they consider is for the benefit of the creditors as a whole and which will be the subject of consideration by class meetings and the scrutiny by the Court. In so holding I should not be taken to endorse the conduct of the BTG partners. I regard a difference of constitution between a pre-insolvency advisory team and the appointed administration team to be highly desirable in general. I am satisfied that the scheme is not to be dismissed simply

because of the allegation that the administrators were involved in formulating the AAF Transaction or in valuing a key element of it.

62. The second challenge mounted is that the valuations of the Joint Administrators cannot be trusted because the Estimated Outcome Statement in an immediate liquidation fundamentally undervalued recoveries in that it wrongly assumes that no funding would be available to a liquidator to pursue litigation. However, beyond a reference to "litigation funders", Crowdstacker did not suggest the source or amount of that funding, or the terms on which it would be available; and although in response to a question from the bench it was indicated that Crowdstacker might have an appetite for providing such funding it did not in the event make any such proposal. It would be unreasonable to expect Crowdstacker to present a fully-formed litigation funding package as the evidential foundation for its challenge: but it is not unreasonable to expect it to present something more than bare assertion to which the administrators as propounders of the scheme could respond. On the information available it seems to me unlikely that within an immediate liquidation a third-party litigation funder would provide funding for the pursuit of loan recovery or professional negligence claims at the level and on the terms upon which Omni and 24AM are making funds available within the scheme, so as produce material recoveries. The probability is that a third-party funder would require both appropriate insurance against failure (at a cost) and payment of a significant proportion of the recoveries in the event of success.

63. The third challenge was the that the Estimated Outcome Statement in an immediate liquidation failed to take account of the possibility of advancing a "clawback" claim in respect of the AAF Transaction. The exact nature of this "clawback" claim was never clearly articulated (despite Snowden J commenting upon this deficiency at the convening hearing). It is therefore necessary to consider in outline potential claims under s.238 ("undervalue"), s.239 ("preference") and s.423 ("defrauding creditors") of the Insolvency Act 1986. But before doing so it is necessary to point out (i) that whilst I address the *claims* (on which Crowdstacker focused) it is the eventual *net recoveries* which affect the return to Crowdstacker and so which are material to any assessment; (ii) that recoveries in clawback claims accrue to the "liquidation estate" generally (not to a particular victim) so that recoveries do not filter directly and entirely to Crowdstacker; (iii) that the recoveries are not available for the satisfaction of the holders of debentures secured by a floating charge; and (iv) that I cannot (within a scheme sanction hearing) conduct a mini-trial of "clawback" claims without disclosure or evidence and that the sole purpose of examining them is to see whether on their face they raise such a challenge as to prevent the propounder of the scheme from demonstrating that Crowdstacker is probably better off under the scheme.

64. The relevant facts are these. In December 2017 KPMG prepared a draft indicative valuation of AAF ("the KPMG valuation"). There is no evidence that it was "signed off". Based on then current growth forecasts (themselves based on 2017 figures) and certain comparables (but not taking account of the effect of a call option requiring AAF to acquire other interests and the need for any purchaser to provide substitute guarantees) it suggested a forward 2018 exit value of between £3.32m and £3.97m. whilst at the same time noting that at the valuation date the company did not currently make a profit or have a positive book value.

65. In the latter part of 2018 Amicus was negotiating with an intended investor ("Cabot") an injection of capital. The restructuring involved a "hive-down" of AAF. It was to facilitate such a "hive-down" that Crowdstacker released its security over the AAF shares. The "hive-down" would entail addressing three matters. First, AAF's liability to Amicus in relation to the inter-company loan (then standing at just under £12m.) which I mentioned at the outset. Second, guarantees provided by Amicus in relation to the business of AAF. (I have at the start of this judgment briefly described the business of AAF. It is necessary to add that the individual agreements entered into by AAF with its small business customers were bundled up and on sold to third parties ("the Block Discounters") thereby generating funds for AAF to enable it to enter into further finance agreements. The Block Discounters required transferred agreements to be guaranteed by a parental guarantee from Amicus). Third, guarantees provided by AAF in relation to the business of Amicus.

66. The negotiations failed. Amicus therefore faced imminent insolvency. The AAF Transaction was then structured under which (in terms of outcome, ignoring intermediate steps) (i) Amicus sold the AAF shares for £1 to a Holdco of which Mr Clark was a director and shareholder and released the £12m. intercompany loan in return for (ii) Holdco replacing Amicus as guarantor of the Block Discounters rights (along with other guarantees to which Amicus was exposed totalling about £30m) and (iii) HGTL Securitisation reducing its claim against Amicus by £12m. The Minutes of the directors' meeting of 12 December 2018 record a warning by Eversheds that the transaction might be viewed as a transaction at an undervalue or as one intended to put assets beyond the reach of creditors.

67. Counsel for Crowdstacker was inclined to the view that the "clawback" claims were so obvious that they did not need to be spelt out. But they are not.

68. Amicus released the inter-company loan due from AAF: without more that would have constituted a preference since AAF was thereby put in a better position in the event of the liquidation of Amicus than it would have been absent the release. But there was more. As part of the whole transaction Amicus was released from an identical amount of indebtedness which it owed to HGTL Securitisation and released from exposure to about £30m of guarantee liabilities. As Counsel for HGTL Securitisation pointed out, Crowdstacker's submissions ignored this adjustment of guarantees. In any event, on the information available it appears unlikely that AAF could have repaid that inter-company indebtedness to Amicus in full, and indeed Crowdstacker did not so contend: yet the release by HGTL Securitisation of the same amount of indebtedness due from Amicus effectively meant that full value for the AAF loan was obtained.

69. Amicus sold its shares in AAF for a nominal consideration: that raises the possibility that the transfer is to be treated as at an undervalue. But it is not obvious that the AAF shares had value at the date of sale: the BTG valuation did not so suggest, and the draft KPMG valuation itself acknowledged its reliance upon forecasts and comparables (which the directors of Amicus did not consider appropriate) to give enterprise value to a currently unprofitable company with a negative value. (In fact, as at 31 October 2019 the AAF balance sheet still showed a negative value for equity of minus £887,000, and the accounts disclose that AAF had paid no dividends and was substantially in arrear with interest payments due on debt owed to HGTL). The same

difficulty is faced by a claim that the AAF Transaction involved putting assets beyond the reach of Crowdstacker.

70. Each of these avoidance claims will require investigation (which will incur expense and occasion delay) and will then require prosecution (with further attendant expense and delay). Of itself this compares unfavourably with the timing of payments under the proposed plan. Nor is it obvious what relief could be granted that would enhance the assets for distribution. In particular it is difficult to follow Crowdstacker's case that the EOS should be re-written to include repayment of the AAF inter-company loan in the sum of £12m and the restoration to Amicus of its shareholding in AAF with an attributable value of £6m.

71. But although not obvious, there are potential claims that might warrant examination. A sanction hearing is not the occasion to examine the prospects of these claims in detail (notwithstanding the disclosure so far given): and I do not see how any sensible value can be placed upon them. The sole question is whether the propounders of the scheme have demonstrated that Crowdstacker is probably no worse off under the scheme than under an immediate liquidation. The absence of an immediate liquidation means that such "avoidance" claims cannot be examined by a liquidator. But it does not mean the substance of the claims cannot be examined in alternative (if not identical) proceedings. If there are serious avoidance claims which would (if pursued) have yielded a return, then the Joint Administrators would have been in breach of duty in signing the "ratification letter" immediately upon appointment and/or would thereby have unfairly harmed the interests of Crowdstacker (either alone or with others): and the scheme explicitly preserves the right of a compromised creditor to pursue claims under paragraphs 74 and 75 of Schedule B1 to IA 1986. So, in that respect a compromised creditor like Crowdstacker is no worse off under the scheme than in a liquidation.

72. The fourth challenge was that the Estimated Outcome Statement in an immediate liquidation sale failed to attribute any value to goodwill or to the loan book. I do not think this is a significant point. A company in liquidation generally does not (though exceptionally, may) have a marketable goodwill. There is nothing in the facts disclosed here that suggests the name and connection of "Amicus" had any value other than to the shareholders who wish to rescue it: and for them, putting up risk money to rescue the company and its undertaking is a very different proposition from a third party buying a bare name and connection. As to the "loanbook", it will be recalled that this consisted principally of loans of which the AMT was the bare legal owner (save for about 6% of which Amicus was the beneficial owner), and all of which were the difficult legacy loans. Amicus cannot "sell" 94% of its "loanbook": and it cannot "sell" the right to manage that 94% either, since a liquidation would entitle the beneficial owners of the loans to terminate the management agreement. I consider Amicus has resisted that Crowdstacker challenge.

73. The fifth challenge was that Crowdstacker suggested, not that Amicus would trade in liquidation, but that it would be in the interests of Omni to contribute funds to the liquidation in order to enable the liquidator to make recoveries in respect of Omni funded loans. This is pure speculation. It is one thing for a shareholder to risk an injection of funding to rescue the company in which it has a holding: it is quite another for a shareholder to contribute to liquidation funds without any hope of a return. The more probable scenario in a liquidation is that Omni would terminate its

management agreements with Amicus (as it is entitled to do) and find another loan servicing company.

74. Sixth, Crowdstacker submitted that it was worse off under the scheme than it would be in an immediate liquidation by virtue of the terms of the Indemnity being offered to the joint administrators under the scheme (which constitutes the first call under the "waterfall"). Any call on the indemnity is entirely theoretical because none is anticipated. But Crowdstacker queried the scope of the indemnity and the cap on the indemnity. As to the scope of the indemnity Counsel for Crowdstacker did not develop detailed argument as to its perceived excesses but relied on the general submission that it extended to unknown liabilities and claims and thereby rendered the "waterfall" opaque. In that regard it does not differ materially from the statutory indemnity: and as drawn it is limited to claims against the administrators arising out of their appointment as administrators (and so does not relate to pre-insolvency advice or to their performance as plan managers). Counsel for Crowdstacker also submitted that a provision in the indemnity that any call upon it might delay distribution under the "waterfall" was an inappropriate deterrent. I do not agree. It is not at all unusual for a fiduciary not to be obliged to distribute assets to which he is entitled to resort pending the determination of a claim against him. As to the "cap", Clause 2.3 of the proposed Indemnity provides that the indemnifier's "total aggregate liability" under or in connection with any claim under the Deed of Indemnity "shall not exceed an amount equal to [£1 million]". Crowdstacker argued that, properly construed, this permitted £1 million "each and every claim" which put at risk its recoveries under the scheme. I do not think there is anything in this point. Where the Deed provides that "the total aggregate liability" shall not exceed a specified sum it means exactly what it says: and that is what the joint administrators openly accepted in the face of the court. There would be no cap under the statutory indemnity.

75. Seventh, at the hearing Counsel for Crowdstacker advanced an argument not foreshadowed in the evidence or deployed in Crowdstacker's skeleton argument. It was that, notwithstanding the apparently intended outcome of the AAF Transaction, AAF was still obliged to repay the inter-company loan. In the signed share sale agreement (plainly modelled on the intended transaction with Cabot) cl.5.2 does indeed say that the purchaser will repay AAF's indebtedness to Amicus. But this is at odds with another of the suite of completion documents. This is a Deed of Acknowledgement of Indebtedness by which (amongst other loan re-arrangements) HGTL Securitisation agreed to reduce the indebtedness of Amicus by an amount equal to the sum owed by AAF to Amicus. Before the sanction hearing no-one had contended that Amicus was entitled *both* to repayment of £12m by Holdco on behalf of AAF *and* to a reduction of £12m in the amount of its indebtedness to HGTL Securitisation. They were correct not to do so. The transaction documents must be read together and there has plainly been a failure to amend the completion documents in line with the negotiated obligations and payments at completion.

76. Eighth, Crowdstacker argued that, quite apart from the "avoidance" claims, there were other grounds for complaint against the administrators in the conduct of the administration which a liquidator could pursue and which should be accorded value in an immediate liquidation. In my judgment, the answer again is that if these are claims that would yield a return, then they may be pursued under paras 74 and 75 of Sched

B1, and in that regard Crowdstacker is clearly no worse off under the scheme than within an immediate liquidation.

77. Having reviewed each of the challenges raised by Crowdstacker, in my judgment the joint administrators have established that Crowdstacker is no worse off under the scheme than it would be in an immediate liquidation.

78. In the absence of any "blot" or technical defect in the scheme the final matter to address is whether the discretion to "cram down" a dissentient creditor should be exercised. As Trower J observed in DeepOcean (*supra*) at [44] if Condition A and Condition B are both satisfied then the scheme will have "a fair wind". But he did not say that satisfaction of the Conditions was sufficient, and it is still necessary to exercise the discretion taking account of the individual features of the particular scheme. The following features have weighed with me.

a) The scheme has been proposed by administrators who have been in office for some two years and have made their judgment as to the way forward having regard to the interest of the creditors as a whole. I do not consider the allegation (for that is what it is) that their pre-insolvency involvement was such as to make it impossible for them to make an independent judgment to an assessment of the appropriate exit from administration to be an obstacle.

b) The scheme has the overwhelming support of the great majority of creditors.

c) Even within the class of senior secured creditors there was a majority (albeit minute in value terms) in favour of the scheme.

d) Although Crowdstacker has been consistent and active in its opposition to any form of restructuring I have a doubt whether that attitude is truly reflective of the wishes of those who may have the real economic interest in the Crowdstacker platform loans.

e) Crowdstacker would, on the figures contained in the EOS, not obtain any return in an immediate liquidation, and I see no compelling reason to make any significant adjustment to the EOS. From that position Crowdstacker is seeking to prevent those with an actual economic interest in Amicus from re-arranging its affairs (utilising injected resources) to benefit creditors generally.

f) The scheme is one which an honest and intelligent creditor addressing its terms from the standpoint of ordinary class interests could rationally regard as "fair".

g) The scheme is not "unfair" (as Crowdstacker contends) simply because it provides for the payment of expense creditors (some directly out of injected funds and in the case of HGTL under the "waterfall") before there is a return to secured creditors. That reflects the statutory scheme of priorities.

h) The scheme is not "unfair" (as Crowdstacker contends) simply because it provides for specific returns for some creditors, but "only" £75,000 for Crowdstacker leaving it substantially reliant upon returns under the "waterfall". Crowdstacker's treatment in this respect is identical to that of HGTL Securitisation. It is a rational division of benefit because Expense Creditors, Preferential Creditors and Unsecured Creditors did not enter into commercial lending arrangements with Amicus, whereas investors covered by CCSL and by HGTL Securitisation did. Those commercial lending arrangements involved risk, and that degree of risk is reflected in the risk that recoveries under the "waterfall" may not equal the amount of loans outstanding.

i) I do not consider that it is material (as Crowdstacker suggested) that returns under the "waterfall" are uncertain. Returns in an immediate liquidation are even more uncertain (because of the absence of immediately available funding).

j) I do not consider that the terms of the indemnity sought by the administrators to be so onerous as to warrant the refusal of sanction and (as Crowdstacker sought) the making of an immediate winding-up order.

k) I do not consider that Crowdstacker's general complaints that the joint administrators have mismanaged the administration have any bearing upon the exercise of the discretion. The scheme permits Crowdstacker to pursue any such complaints it has.

79. For these reasons I decided shortly after the hearing to approve the scheme and so ordered.