Neutral Citation Number: [2023] EWHC 1699 (Ch)

Case No: CR-2023-002298

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 29th June 2023

Before:

MR. JUSTICE MICHAEL GREEN

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IN THE MATTER OF FITNESS FIRST CLUBS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

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MR TOM SMITH KC and MS. GEORGINA PETERS (instructed by **DLA Piper UK LLP**) for the **Plan Company**

MR STEFAN RAMEL and MR. JOHN CHURCHILL (instructed by **Freeths LLP**) for **Lazari Properties 1 Limited**

MR. ROBERT AMEY (instructed by **Hogan Lovells International LLP**) for the **HL Landlords**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MICHAEL GREEN:

INTRODUCTION

1. Given my present physical predicament, it is entirely appropriate that I should be dealing with a company that operates a string of gym clubs!

2. This is the application of Fitness First Clubs Limited (the "Company"), for the court's sanction of a Restructuring Plan, (the "Plan") between the Company and certain of its creditors, (the ("Plan Creditors"). Sanction is sought under Part 26A of the Companies Act 2006, (the "Act").

3. The Company seeks to avail itself of the cross-class cram down provisions under section 901G of the Act, as five of the nine classes of creditors did not vote in favour of the Plan, to the requisite 75% majority in value. Those five classes were all of Landlords of premises used by the Company for its business of operating gyms under the name “Fitness First”. The Company is now a relatively small family-owned company with presently 36 open gyms, mainly in London.

4. The Company is represented by Mr. Tom Smith KC leading Ms. Georgina Peters and instructed by DLA Piper UK LLP. There are five Landlords that have appeared before me to oppose the sanction of the Plan. Lazari Properties 1 Limited, ("Lazari"), is a Class B1 Landlord (I will explain in due course the classes of Landlords). It is represented by Mr. Stefan Ramel and Mr. John Churchill, instructed by Freeths LLP. The four other opposing Landlords are all Class B2 Landlords and they are represented by Mr. Robert Amey, instructed by Hogan Lovells International LLP. They are Daejan Investments Limited, the Crown Estate, Vanquish Properties GP Nominee 3 Limited and Vanquish Properties GP Nominee 4 Limited, which together I will refer to as the "HL Landlords". I am grateful to all counsel and their legal teams for their clear and helpful submissions.

5. As is the way with these Plans and Schemes, there is always some urgency to them. Whether there is or is not real urgency is sometimes difficult to discern but, in any event, we had the hearing on Monday and Tuesday of this week and, given my other commitments, in particular starting a 12-day trial today, I thought it best to deliver this judgment as soon as possible today so that the parties know where they stand, but I am delivering it orally to enable that to happen and that inevitably means that it will not be as polished as one might expect from a fully reserved written judgment.

6. By way of short introduction, the Company has encountered significant financial difficulties in recent years. In large part these have been caused by the COVID-19 pandemic and the associated lockdowns and then the subsequent changes in consumer habits. In particular, the Company's portfolio is concentrated in Central London and its membership numbers rely heavily on office workers, a large proportion of whom no longer work and may never again work in the City five days per week. Accordingly, membership numbers have not returned to their pre-pandemic levels and they are taking longer than expected to increase again and are not at a level where the Group can operate profitably. That is the view of the Company's board.

7. The Group has been kept afloat by funding from its major shareholder in recent years in the form of debt of equity. However, that shareholder, who is the Company's only

Secured Creditor now, is not prepared to continue funding the business unless the Plan is sanctioned.

8. The Plan restructures the Company's liabilities principally by reducing the rent payable on its leases. Both the Secured Creditor and HMRC will be hardly impaired by the Plan on the basis that they are, in the jargon of restructuring, the only "in the money" creditors in the event of an insolvency process. The Landlords, however, who are said to be "out of the money", according to the unchallenged valuation evidence put forward by the Company, have been divided into classes and all except one class will be forced to accept a reduced rent for a three-year period or, in some cases, no rent at all. They are, therefore, significantly impaired by the Plan, but the evidence from the Company shows that they will be better off than in the Relevant Alternative. I will obviously come on to consider all these points in detail.

9. There is now a substantial body of authority as to the exercise of this jurisdiction, in particular the magisterial judgment of Snowden J (as he then was) in *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) ("*Virgin Active")* which, not only because it concerned gyms, has strong parallels to the present Plan in the way it treated the Landlords and this Plan really builds on the form of Plan that was approved by Snowden J in that case. Of course, each Plan needs to be scrutinised on its own merits and by reference to the particular facts and context in which it is promoted. There have in recent months been some Plans that have not been sanctioned by my colleagues. This is because the court has an important role to play in ensuring that the broad cram-down powers are being exercised properly and fairly.

10. Mr. Smith maintained that the opposing Landlords are Unsecured Creditors who would be out of the money in the Relevant Alternative to the Plan. As such, on the authorities, he says that their views should carry little or no weight for the purposes of the court's exercise of its discretion. Mr. Ramel, on behalf of Lazari, submitted that his client was not out of the money and that therefore its interests should be considered when the court comes to exercise its discretion as to whether there has been a fair distribution of the Company's assets and the "restructuring surplus", as it is called.

11. Mr. Ramel's other points concerned the lack of engagement and provision of documents and information by the Company. But, more particularly, he focused on the position of Maddox Holdings Limited ("Maddox"), the Company's parent, in respect of a guarantee from Maddox to Lazari of the rent due from the Company but which is being compromised in the Plan. He also sought to query why Maddox is outside of the Plan and the unfairness he said that arose with its debts not being compromised as compared to the Landlords.

12. Mr. Amey, on behalf of the HL Landlords, opposed the Plan by reference to Condition A and whether the Relevant Alternative was really what the Company suggested, namely an administration with an accelerated M&A process. He said that the Company had not proved that it could not have survived outside of an insolvency process and, on the figures, it could have continued to trade utilising a £1.5 million facility that was still available to it. He also submitted that on the discretion point, the Company and its shareholder and Secured Creditor had effectively artificially manipulated the position by requiring the Plan to be sanctioned by 30th June 2023 so as to force the court's hand. Whether that latter point is an accurate characterisation of

what the Company is doing I will consider in due course, but what I can say at this stage is that 30th June date has certainly brought a great deal of pressure on the court to produce a judgment before then, hence my oral delivery of this judgment.

13. I should add that we also managed to squeeze in some oral evidence at the start of the hearing on Monday. Two of the Company's witnesses, a Mr. Anthony Riley, who is the Company's Finance Director, and Mr. Matthew Smith, of Teneo Financial Advisory Limited ("Teneo"), were cross-examined by Mr. Amey. The opposing Landlords decided that they did not want to cross-examine the shareholder or in relation to the valuation evidence adduced by the Company. They must therefore be taken to have accepted that evidence.

BACKGROUND

14. I will now set out some of the essential background to the application. As I have said, the Company is a wholly-owned subsidiary of Maddox. They operate 36 gyms at sites across the UK. The shareholder and Secured Creditor that I have referred to is Ms. Jayne Alison Best. She owns 75.08% of the ordinary share capital of Maddox. The remaining 24.92% is held: by Mr. David Whelan, who is Ms. Best's father, with 9.89%; Mrs. Patricia Whelan, with 5.01% - she is Ms. Best's mother; Scott Best, who is Ms. Best's husband, owns 5.01%; and Mr. Matthew Sharpe, who is Ms. Best's son, owns the remaining 5.01%. Together with Mr. Riley, Mr. Whelan and Mr. Best are the other two directors of the Company. Mr. Best is the Company's Chief Executive.

15. It is clear that the Group is owned and controlled by the Whelan family. It acquired the Company in 2016 through Dave Whelan Sports Limited, ("DWS"). In September 2019, as part of a wider reorganisation, DWS sold the Company to Maddox. DWS subsequently, in August 2020, entered administration, together with certain other members of the Group. This led to the loss of 72 gyms, a very large number of members and the Group's entire retail and e-commerce business.

16. Prior to the COVID-19 pandemic, the Company had operated a profitable business. However, it suffered badly during the pandemic as I have said and the changes in lifestyle that it engendered. There was a dramatic fall in membership fees which is the business's main source of income.

17. On 30th March 2021, the Group took advantage of the Coronavirus Large Business Interruption Loan Scheme and borrowed from HSBC and Barclays by way of two Facility Agreements in the sum of £10 million each. These are called the "CLBILS Facilities".

18. Also Ms. Best made available to Maddox: (1) a committed Liquidity Facility in the sum of £1.5 million, called the "2021 Liquidity Facility"; and (2) a Term Loan in the sum of £1 million, (the "2021 Term Loan").

19. In May 2022, despite this funding and having utilised Government support schemes, the Company forecast that there would be a requirement for further funding in September 2022. As a result, Teneo was engaged to advise the Group on the potential options available to it.

20. In August 2022, Deloitte LLP was engaged and instructed to market the Group for sale with an indicative transaction timeline of 120 days. Deloitte approached 14 potential purchasers. However, no offers were received to purchase the entire Group and, despite final offers being received from two parties for a small number of specific sites and negotiations taking place up to December 2022, neither offer, in the end, proceeded. That M&A process was, therefore, unsuccessful.

21. The funding shortfall that had been identified in May 2022 and was expected to occur in September 2022 would have resulted in an event of default under the HSBC/Barclays CLBILS Facilities. On 11th August 2022, in order to remedy the potential event of default, as well as to provide working capital to enable the Group to continue trading during the M&A process, Ms. Best provided a secured loan in the total sum of £2.5 million by way of two tranches. This is called the "2022 Facilities Agreement". It replaced the 2021 Liquidity Facility.

22. By January 2023, the CLBILS Facilities were outstanding in a total sum of £18 million. Their final maturity date was 30th March 2024 but, in addition, under each of those facilities: (a) a £500,000 partial repayment was due on 28th February 2023; and (b) further instalments were due on 31st May and 31st August 2023, each in the sum of £750,000.

23. The Company's evidence stated that it was forecasting that it would be unable to discharge the repayments and would be in default under the CLBILS Facilities. It also said that the Company was unable to meet the interest repayments due under those facilities as at 31st December 2022. Mr. Riley said, in his witness statement, that it was clear, as at January 2023, that without a restructuring of the Company's financial obligations, it would be forced into an immediate insolvency process.

24. The critical next stage in the process was the provision by Ms. Best of further loan facilities on 30th January 2023. These are the "2023 Facilities Agreement". This was in the total sum of £7.8 million, which is in addition to the £2.5 million 2022 Facilities Agreement. £1.5 million of the 2023 Facilities Agreement remains undrawn and this formed the subject-matter of much debate during the hearing.

25. The 2023 Facilities Agreement has been disclosed in heavily redacted form by the Company. This was criticised by Mr. Amey as he said that it is a key document. The key clause in the 2023 Facilities Agreement is clause 12, which provides for conditions subsequent. These required the company to propose a CVA or Restructuring Plan "in a form and substance satisfactory to" Ms. Best by 31st March 2023 and that the proposed CVA or Restructuring Plan be approved or sanctioned by the long-stop date of 30th June 2023, which is tomorrow, hence the alleged urgency and what Mr. Amey called, quoting from Snowden J "a metaphorical gun to the head". In the event that those dates were not met or the plan not sanctioned, this would be an event of default entitling Ms. Best to cancel the facility, meaning she would not be liable to lend any more under it, including the outstanding £1.5 million and also to accelerate repayment of the loans, together with outstanding interest. I should add that the repayment date in the 2023 Facilities Agreement is 30th January 2028.

26. Even though this was redacted from the copy of the 2023 Facilities Agreement, the main purpose of it was to clear the Barclays/HSBC debt under the CLBILS Facilities.

However, those were in the sum of £18 million and the dissenting creditors have queried how that £18 million was settled utilising a new facility of only £7.8, of which only £6.3 million was drawn down. As Mr. Smith said, maybe it tells you something about what the banks thought of the Company's prospects. But there was a settlement agreement with the banks which is confidential and it has not been disclosed to the creditors although the banks have recently consented to me seeing a copy if it were relevant to do so, but this was not pressed at the hearing. In any event, we know that those debts were settled and the only relevant borrowing by the Company now is from Ms. Best, pursuant to the 2022 and 2023 Facilities Agreements, the latter of which had the condition subsequent that I described.

27. Even though the Company had clearly decided by January 2023 and, indeed, Teneo had been instructed by May 2022 to prepare for a restructuring, there was no engagement with Landlord Creditors until the Practice Statement Letter, ("PSL"), was sent to all creditors on 17th April 2023. During the pandemic there had been negotiations with individual Landlords to try and agree amendments and concessions on the Company's obligations, both sides recognising the difficulties that the pandemic gave rise to. Most Landlords agreed deferrals of rent but only a few agreed to limited rent reductions. Mr. Smith submitted that it was clear to the Company's board that a consensual restructuring would be unlikely and therefore a plan would be necessary. It was recognised all along, given what the Company proposed in relation to the Landlords, that the cram down power was probably going to be needed. Mr. Smith therefore said it was perfectly proper for the Company to follow the established course and it inevitably took some months to put the Plan together. When it had been, a very full PSL was distributed and the creditors have now had quite a long time to gather their evidence, understand what is going on and to decide whether to oppose it.

28. Both Mr. Amey and Mr. Ramel complain about this lack of engagement. It is noted that in *Virgin Active*, there was active engagement with Landlords prior to the PSL and if there had been in this case, they say that similar negotiations could have been beneficial to both parties, bearing in mind the willingness of Landlords to agree rent deferrals and concessions during COVID. In my view, there should have been more effort by the Company to engage with Landlords. It is far more beneficial to seek to cooperate and negotiate rather than assume that there will be hostility and opposition. By approaching it in the way the Company has, it is more likely to arouse suspicion amongst the opposing creditors that things are being hidden from them or that something is being unfairly foisted on them without them being given the opportunity to engage and influence the most beneficial way forward for all concerned.

29. Be that as it may, I have to deal with the Plan and evidence before me and while I have sympathy with the Landlords' predicament, it does not really affect the substantive decision that I have to make as to whether I should approve the Plan or not.

30. Following the issue of the PSL on 17th April 2023, the claim form was issued on 3rd May 2023 and the convening hearing was booked for 10th May 2023. The sanction hearing was also booked at the same time for 12th June 2023 on the basis that the 30th June 2023 deadline was looming shortly thereafter. At the convening hearing, Zacaroli J directed nine meetings of Plan Creditors. There was no application for expedition. Nor did the Company seek a direction under section 901C(4) to

disenfranchise any out of the money creditors, even though it is the contention of the Company now at the sanction stage that it could have done so. As Mr. Smith explained, there could have been doubts or challenges to the valuation evidence at that time and so it could not definitively have been said that creditors were out of the money and, in any event, the Company is perfectly entitled to take the point at the sanction stage in so far as it affects the exercise of discretion.

31. After the issue of the PSL, the HL Landlords made an initial request for detailed cash flow forecasts in advance of the convening hearing. The Company's solicitors responded that the relevant information would be in the Explanatory Statement to be sent in accordance with section 901D following the convening hearing.

32. On 19th May 2023, Hogan Lovells wrote again to ask for information and documentation. On the same day, Freeths, on behalf of Lazari, asked for further information, in particular concerning the intentions of Ms. Best in the event of the Plan not being sanctioned and why she would not waive any consequential default. On 24th May 2023 DLA responded, enclosing a letter from Ms. Best's solicitors, Shoosmiths, in which they said that Ms. Best would not be minded to consent to any request from the Company to waive any such default or to advance any more money to the Company. Freeths wrote on 30th May 2023 to point out that Ms. Best also effectively controls the Company and they also pointed to the artificiality of 30th June deadline, to which the Company's solicitors responded that Ms. Best was only prepared to lend more money to the Company on the condition that the restructuring would take place.

33. In relation to the HL Landlords, the Company says it did try to organise for Teneo to discuss matters with the HL Landlords' financial advisers, who were Alvarez & Marsal Europe LLP ("A&M"), but this foundered on A&M's failure to engage on a non-disclosure agreement in order that commercially sensitive information could be disclosed.

34. The Plan meetings took place on 1st June 2023, and I will describe the details in a moment. But just to follow through the procedural chronology, because of the alleged lack of provision of information and because they said that it was not as urgent as the Company was making out, the opposing Landlords sought an adjournment of the sanction hearing on 12th June 2023 until after 30th June 2023 and well into July. Ms. Best filed a witness statement on 9th June 2023 dealing specifically with the requested adjournment and what she would do if the adjournment was granted.

35. On 12th June 2023, I granted a shorter adjournment to 26th June 2023. I increased the time estimate for the hearing and made certain directions for the filing of evidence and notices of objection. Objection was taken to the filing of Mr. Riley's fourth witness statement on Friday, 23rd June 2023, which exhibited more up-to-date information. It was filed in accordance with my directions, albeit that this meant it was unfortunately after skeleton arguments had been lodged and seemingly some time after it had been drafted. I have allowed it in and Mr. Riley could have been cross-examined on it, even if some of his material was not strictly in answer to other evidence that had been filed.

36. I also directed that requests for further information could be made. Mr. Ramel has particularly complained about the lack of documentation in relation to Maddox, which

I will deal with, and Mr. Amey does continue to complain about the lack of disclosure.

THE PLAN

37. I should now explain the broad details of the Plan. The Plan applies to the following creditors:

(1) The Primary Secured Creditor, i.e., Ms. Best, under the 2022 and 2023 Facilities Agreements.

(2) HMRC in respect of a VAT liability in the sum of £535,930 for the quarter to 31st March 2023. The VAT liability would rank as a preferential claim in the company's administration, pursuant to section 175 of and Schedule 6, Category 9 to the Insolvency Act 1986. HMRC has supported the Plan.

(3) The Landlord Creditors. The leases were divided into six classes reflecting their differential treatment under the Plan, which was itself determined by reference to the different EBITDA contributions made to the business on a site-by-site basis - in other words, their profitability and importance to the business. This form of categorisation of leases has become commonplace in plans involving lease liabilities, see *Virgin Active* [2021] EWHC 814 (Ch) and *Re Listrac Midco Limited* [2023] EWHC 78 (Ch), a decision of Trower J.

(4) The General Property Creditors and Business Rates Creditors. These liabilities owed to the General Property Creditors arise out of various property-related obligations. The Company also has obligations to pay non-domestic rates to various local authorities in respect of premises that it owns or occupies for the current rating year, which commenced on 1st April 2023, pursuant to the Local Government Finance Act 1988 and certain secondary legislation as well as the Rates (Northern Ireland) Order 1977. The business rates liabilities which relate to premises owned by Class C and Class D Landlords will be subject to the Plan.

38. Certain of the company's liabilities are excluded from the Plan because they relate to premises, services or persons which have been deemed critical to the ongoing and future operation of its business. This includes Maddox and Mr. Ramel takes strong exception to its exclusion from the Plan.

39. However, it is well-settled that it is permissible to exclude and pay in full creditors from whom the ongoing supply of goods or services are viewed by the Company as critical to its future ability to trade or the success of the restructuring or with whom it might be impracticable or undesirable to require them to accept a compromise - see *Re Virgin Active* at [261] and *Re Houst Limited* [2022] BCC 1143, at [4] of Zacaroli J's judgment. It was also considered disproportionate to include trade creditors within the Plan and this has not been challenged.

40. Turning to the Plan itself and dealing with each creditor class in turn.

(1) Primary Secured Creditor: Ms Best

41. As to Ms. Best, the Primary Secured Creditor:

(1) The repayment dates of both the 2022 and 2023 Facilities Agreements will be extended from 30th January 2028 to 31st December 2028.

(2) Payment of interest accruing from the restructuring effective date for a period of three years will be waived.

(3) The Company's secured guarantee obligations of Maddox's obligations to Ms. Best will be limited to £5 million plus interest and costs as against the existing amount of the guaranteed liabilities of some £9.8 million as at 17th April 2023.

(4) Ms. Best will waive all defaults or events of default under the facilities agreements that are outstanding or continuing and which arise in connection with a plan-related event.

Mr. Amey submitted that Ms. Best is hardly impaired at all and certainly not by comparison with his clients.

(2) HMRC

42. As for HMRC, the VAT liability which fell due to HMRC on 5th May 2023, that is £535,930, will be paid in full under the Plan, but it will be rescheduled by way of (1) an initial payment of £89,391.84 paid to HMRC on 15th May 2023 and (2) five equal instalments of £89,321.83 to be paid over five months on the 15th day of June, July, August, September and October 2023. Again, Mr. Amey submitted that HMRC was hardly impaired and it is not surprising that it voted in favour of the Plan.

(3) Landlord Creditors

43. As for the Landlords, the position is a bit more complicated and the treatment of each class of lease varies:

(1) For Class A Landlords, 100% of their rent arrears will be paid in six equal monthly instalments following the Restructuring Effective Date and during the three-year Rent Concession Period beginning on the Restructuring Effective Date, full contractual rent, other than turnover rent, will be paid monthly in advance and will revert to their existing terms thereafter.

(2) For the Class B1to Class D Landlords, all outstanding rent arrears will be released and discharged in return for a payment of 120% of their Estimated Administration Return. This is called the "Restructuring Plan Return" or the "Compromised Property Liability Payment" and this is expected to be paid within 12 months.

(3) More specifically, for the Class B1to Class B3 Landlords:

(a) During the Rent Concession Period, rent will be reduced to 70% for Class B1, 60% for Class B2, or 40% for Class B3 of contractual rent, plus any turnover rent, insurance and service charges which will be paid monthly in advance and which will revert to their existing terms thereafter.

(b) There will be an option to serve a notice terminating their lease within 90 days of the Restructuring Effective Date and, if so exercised:

(i) the Class B1 to B3 Landlords will be paid 28 days of contractual rent, plus a payment equal to 120% of that creditor's Estimated Administration Return, (without double-counting for payment of any rent arrears), but subject to the adjustment calculation that is described in paragraphs 2.8(l), 2.9(k) and 2.10(l) of Part B of the Explanatory Statement. This is to ensure that if a Landlord exercises the right to vacate, then their return will still be better than in the relevant alternative of an administration.

(ii) The Company also has the right to exit the premises three years after the Restructuring Effective Date on 120 days' notice, which will entitle the Class B1to Class B3 Landlords to a payment on the same terms as I have just described.

(4) Turning to the Class C Landlords:

(a) During the Rent Concession Period: (i) for the first three months after the Restructuring Effective Date, future rent will be 10% of contractual rent, plus any turnover rent, insurance and service charges, which will be paid monthly in advance; and (ii) for the next three-month period, future rent will be compromised in full, but turnover rent, insurance and service charges will be paid in full, monthly in advance.

(b) Thereafter, with effect from six months after the Class C Second Period, future rent and all other liabilities, such as insurance and service charges will be compromised in full. In exchange, the Class C Landlord will be paid 28 days of contractual rent plus a payment equal to 120% of their Estimated Administration Return, (again, without double-counting for any payment of any rent arrears).

(5) As to the Class D Landlords, all future rent and all other liabilities will be compromised in full in return for payment of the basic Restructuring Plan Return, (with any rent collected by the Company from a sub-tenant being passed on to the Class D Landlord). Such treatment reflects the Company's view that the Class D leases are not financially viable.

(6) Additionally, the Class C and D Landlords will be given a rolling option to serve a Notice to Vacate with different notice periods:

(a) For the Class C Landlords, the rolling break right will be exercisable (i) on 30 days' notice up to the Class C Exit Date and (ii) on seven days' notice after the Class C exit date. In the case of the first period, the Class C Landlord will be paid 28 days of contractual rent plus a payment equal to 120% of their Estimated Administration Return.

(b) The Company also has a rolling exit right on 30 days' notice provided the notice period expires before the Class C Exit Date, which will entitle a Class C Landlord to a payment on the same terms as I have just described.

(c) The Class D Landlords simply have a rolling break right from the Restructuring Effective Date, taking effect immediately on service of the notice.

(7) All the Landlord Creditors retain any right which they would have to take steps to terminate their lease, whether by forfeiture or otherwise. These compromises and amendments were set out in a helpful table at paragraph 9.20 of Part A of the Explanatory Statement.

44. In relation to the Landlord Creditors it is also relevant to consider the compromise of guarantees to them by Maddox. Maddox has guaranteed the Company's obligations under two leases, including the lease held by Lazari. The Plan grants the Company a power of attorney to enter into a Global Property Deed of Variation, pursuant to which Maddox's guarantee obligations to the two Plan Creditors, including Lazari, will be varied in order to bring them into line with the underlying lease obligations as varied by the Plan. The Global Property Deed of Variation contains relevant provisions dealing with these variations.

45. Mr. Ramel relies on this aspect in his arguments as to fairness. I will deal with those arguments in a moment.

46. At this stage is a relevant to point out there is jurisdiction for a scheme or plan to vary rights of scheme Plan Creditors against guarantors and that this is a commonplace feature of many schemes and plans.

(1) There is jurisdiction for a scheme or plan to vary against a third party including a guarantor, see *Re Lehman Brothers International* [2010] BLR 489.

(2) This has been applied in numerous cases, including *Re Gategroup Guarantee Ltd* [2021] EWHC 304, a decision of Zacaroli J, and in *Re Virgin Active*, see [72].

(3) It will be necessary to consider whether the alteration to the creditors' rights against third parties is "... ancillary to the arrangement between the company and its creditors and necessary to ensure the effectiveness of that arrangement ...", [163(4)] of Zacaroli J's judgment in *Re Gategroup Guarantee Ltd*.

(4) General Property Creditors and Business Rates Creditors

47. Turning to this final category of creditor, the Plan will release and discharge the liabilities owed to the General Property Creditors in exchange for which each General Property Creditor will be entitled to the basic Restructuring Plan Return.

48. The business rates payable for the current rating year for Class C and D premises will be compromised under the Plan and the Company intends to exit from the Class C and Class D premises. Teneo has also advised that such sites would likely remain unoccupied in the relevant alternative, because these sites would not form part of the assets sold in any pre-pack sale. Business rates payable in respect of an entire rating year, are a contingent liability to which the Company is subject from the beginning of the rating year, such that the rating authorities are creditors in respect of the entire year's rates and are creditors for the purposes of the Plan jurisdiction.

PLAN MEETINGS

49. The Plan meetings were held in accordance with the convening order in terms of the dispatch of the Plan documentation and the arrangements for the meetings. No issue is taken about the conduct of the meetings or compliance with the convening order.

50. The Plan was approved by the requisite majority, that is over 75% in value of those voting at four of the Plan meetings as follows:

(1) Ms. Best;

(2) HMRC;

(3) the Class A Landlords, who voted unanimously in favour; and

(4) 99% in value of the General Property Creditors and the Business Rates Creditors present and voting approved the Plan.

51. The Plan was not approved by the requisite majority at the five other plan meetings, being the B1, B2, B3, C and D classes of landlord creditors.

(1) 32.04% in value of the Class B1 Landlords present and voting approved the Plan and 67.96% voted against the Plan. This represented one Class B1 Landlord voting in favour of the Plan and one voting against it, out of a total number of three Class B1 Landlords. Lazari was the creditor voting against.

(2) 21.31% in value of the Class B2 Landlords present and voting approved the Plan and 78.69% voted against. This represented one Class B2 Landlord voting in favour and four Class B2 Landlords voting against the Plan out of a total number of five Class B2 Landlords. The four voting against are the HL Landlords.

(3) The Plan was unanimously rejected by the two Class B3 Landlords present and voting out of a total of three Class B3 Landlords.

(4) 29.27% in value of the Class C Landlords present and voting approved the Plan and 70.73% voted against. This represented one Class C Landlord voting in favour of the Plan and four Class C Landlords voting against the Plan out of a total of 12 Class C Landlords; and

(5) the Plan was unanimously rejected by the two Class D Landlords present and voting, and that is out of a total of four Class D Landlords.

<u>THE LAW</u>

52. Turning to the law, there was little dispute on the law, but it is as well to clarify what the court has to consider. Section 901F of the Act provides so far as material 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 ...".

53. Section 901G of the Act empowers the court to exercise its jurisdiction to sanction a plan under section 901F, notwithstanding that the Plan has not been approved by the requisite majority in each meeting of creditors or members. It is titled: "Sanction for compromise or arrangement where one or more classes dissent". There are two statutory pre-conditions to the exercise of the court's discretion under 901G. It provides in material part:

> "(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."

The two statutory conditions A and B are prescribed by sections 901G (3)-(5).

> "(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."

54. There is no dispute that Condition B is met. There is an assenting class, Ms. Best and HMRC, who have a "genuine economic interest in the company in the event of the relevant alternative." The battleground in this application is over Condition A and, more particularly, whether the Company has proved the most likely relevant alternative to which Condition A should be applied. There is no dispute that if the

relevant alternative is as the Company submits, that the dissenting classes would not be worse off under the Plan. That is a consequence of the formula used to calculate the Restructuring Plan Return which is 120% of the return in the relevant alternative.

55. There was also no dispute that the well-established conventional approach to the sanction of schemes under Part 26 of the Act is also applicable to plans under Part 26A. Thus, the familiar four principles by which schemes are tested are set out in numerous authorities but perhaps most conveniently by Snowden J (as he then was) in *KCA Deutag UK Finance PLC* [2020] EWHC 2977 (Ch) at [16], where he said:

> "The relevant questions for the court at the sanction hearing can therefore be summarised as follows:
>
> i) Has there been compliance with the statutory requirements
>
> ii) Was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the class meeting?
>
> iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?
>
> iv) Is there some other 'blot' or defect in the scheme?"

56. In the present case, I do not think there is any suggestion that these four principles were not satisfied. The real battleground, as I have said, lies in the application of the cross-class cram down and the general exercise of discretion but I should perhaps say something about turnout.

57. Two of the assenting classes comprise only one creditor, so that was 100% turnout. The turnout for the Class A Landlords was also significant, being nine out of 13 Class A Landlords. Those nine Class A Landlords together hold 77.58% by value of the outstanding claims in that class.

58. The turnout of the General Property Creditors and Business Rates Creditors was lower, being only four out of 32 such creditors. Together, such creditors hold 5.7% by value of the outstanding claims in that class. This lower turnout is not entirely surprising, representing, as it does, operational creditors. In relation to such creditors, the courts have recognised that a lower turnout than that which might be expected from financial creditors is "not particularly surprising", see Trower J, at [55] of *Re DeepOcean 1 UK Limited* [2021] EWHC 183 (Ch). Likewise, in *Re Listrac Midco Limited* [2023] EWHC 460 (Ch) Adam Johnson J explained a low turnout by the fact that such creditors were out of the money and had no real economic interest in the relevant alternative, explaining their apparent passivity. This could have been the case for the General Property Creditors and Business Rates Creditors.

59. So far as concerns the dissenting parties, the turnout was reasonably high especially having regard to the relatively small number of landlord creditors in each such class.

60. Thus, in my view, the Plan Creditors were fairly represented at each of the nine plan meetings.

61. The points in issue concern Condition A and the exercise of discretion. As to Condition A- the "no worse off test" - Snowden J described in *Virgin Active* at [106], a three-step process for considering the '"no worse off' test":

> "The 'no worse off' test can be approached, first, by identifying what would be most likely to occur in relation to the Plan Companies if the Plans were not sanctioned; second, determining what would be the outcome or consequences of that for the members of the dissenting classes (primarily, but not exclusively in terms of their anticipated returns on their claims); and third, comparing that outcome and those consequences with the outcome and consequences for the members of the dissenting classes if the Plans are sanctioned."

62. Snowden J expanded on the meaning of "most likely to occur" at [107]:

> "It is important to appreciate that under the first stage of this approach, the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than not that a particular alternative outcome would occur. The critical words in the section are what is 'most likely' to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two."

63. In identifying the relevant alternative, the directors of the Company, being advised by their professional advisers, are normally in the best position to identify what will happen if a Scheme or Plan fails. This has been stated on numerous occasions, most recently by Leech J in *Re AGPS Bondco plc* [2023] EWHC 916 (Ch) at [61]-[62].

64. As to the second step, the outcome for the dissenting creditors is to be assessed primarily by reference to the anticipated returns on their claims, but not exclusively. In *Re DeepOcean*, Trower J identified matters such as timing of distribution and the security of any covenant to pay as examples of other incidents of the liability to the creditor concerned of which account may need to be taken when deciding whether the creditor is no worse off under the Plan.

65. Snowden J also described in *Virgin Active* the estimated outcomes analysis as a familiar but inherently uncertain exercise. At [108], he said:

> "Having identified the relevant alternative scenario, the Court is also required to identify its consequences for the members of the dissenting classes. This exercise is inherently uncertain because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain. It is, however, a familiar exercise."

66. The burden of satisfying these conditions is on the Company. It must demonstrate that creditors will not be any better off if the Plan is not sanctioned. Mr. Amey referred to Zacaroli J's judgment in *Hurricane Energy* [2021] BCC 989 at [71]-[74],

and submitted that the Plan will fail as long as there is a realistic possibility of the dissenting classes being better off if the Plan is not sanctioned. Mr. Smith said that the situation in *Hurricane Energy* is readily distinguishable from the present, as it was a solvent company where it was agreed that it could continue trading for at least a year without going into an insolvency process. Mr. Amey countered by saying that it is the HL Landlords' case that the Company does not need to go into a terminal insolvency process with a pre-pack sale. It seems to me that this debate is really about what the Company has to prove and there is little doubt that the Company must prove that what it says is the relevant alternative is most likely to occur if the Plan is not sanctioned.

67. As to the discharge of that burden, Mr. Smith asserted that there is an evidential burden on dissenting creditors to provide a factual basis for their challenge. However, this must be considered in context and in the light of the difficulties that such creditors will face in adducing such evidence, including potentially expert evidence. As Sir Alastair Norris said in *Re Amicus Finance plc* [2022] BLR 86 at [56]:

> " 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.."

68. Mr. Amey also referred to what Adam Johnson J recently said in *Great Annual Savings Company* [2023] EWHC 1141 (Ch) that the nature and extent of any evidence that should be adduced by the dissentients depends on the nature of their dissent and the specific context and that such creditors are entitled simply to challenge the evidence put forward by the Company. The relevant inquiry is always whether the Company has discharged the burden on it. After endorsing what Sir Alastair Norris had said, Adam Johnson J said at [64]:

> "If, on the face of the materials put forward by the proposer, there are manifest errors, inconsistencies or matters which are not properly explained, it must be open to the Court, having regard to such matters, to conclude that the proposer has not discharged the evidential burden which rests on its shoulders."

69. In that case, the court noted that the expert evidence was based upon information provided by the company which had not been "checked or audited or otherwise subjected to scrutiny" and "that the figures put forward appear in most cases to be the Company’s figures, unfiltered by any independent scrutiny or analysis". The court therefore considered that the company's evidence was insufficient to demonstrate that Condition A was satisfied in respect of HMRC, notwithstanding that HMRC had adduced no expert evidence of its own.

70. So far as concerns the principles which the court will apply when exercising its cram-down jurisdiction, these have been considered in at least 10 reported cases to date and the principles were helpfully distilled by Zacaroli J in *Re Houst Limited* [2022] BCC 1143 at [22]-[31].

71. Where creditors would receive no payment or have no economic interest in the Company in the event of the relevant alternative, then little or no weight is to be paid to their views: see *Virgin Active* at [266] and *Re Houst* at [27]. That is not least because any out of the money class of creditors may be excluded from voting to consider the Plan under section 901C(4) of the Act. Whether the Plan provides for a fair distribution of the benefits of the restructuring is relevant to the exercise of discretion and the level of support for the Plan is a relevant factor although not a decisive one.

72. When considering if a Plan fairly allocates value between the different creditor classes, which is an analysis that necessarily depends on the facts of each case, the courts have identified a number of relevant factors. The exercise is closely analogous to that required under the horizontal comparator test in a CVA in that, the court is required to see whether the Plan provides for differential treatment of creditors *inter se* and, if so, whether such differences are justified: see *Re DeepOcean* at [63]; *Re Houst Limited* at [28]; and *Re Great Annual Savings Company* at [105].

73. In identifying differences in treatment between different creditor groups a relevant reference point is the treatment of creditors in the relevant alternative. The court will consider whether the priority as between the different creditor groups which applies in the relevant alternative is reflected in the distributions under the Plan. However, a departure from that priority is not in itself fatal to the success of the Plan. The source of the benefits to be received under the restructuring, for example whether they derive from assets of the Plan Company or third parties willing to support the restructuring, will be a relevant factor and it is principally for an "in the money" class to determine how to divide up any value or potential future benefits which might be generated following implementation of a Restructuring Plan.

74. That obviously brings into play whether Landlord Creditors are “out of the money” and Mr. Ramel's case that they are not. If they are out of the money, the authorities are fairly clear that their votes "should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the Plan and cram them down": see [249] of *Virgin Active*. The fact the dissenting creditors are "out of the money" “means that a horizontal comparison is of much less significance than might otherwise be the case. There are no assets from which they would derive benefit in the absence of the Restructuring Plan and it is difficult to identify any legal basis on which they can complain about [the apportionment of those benefits]”: see [64] of *Re DeepOcean Limited.*

RELEVANT ALTERNATIVE

75. The first point that I really need to analyse is the suggested relevant alternative put forward by the Company. We spent some time on this at the hearing, in particular, looking at the cash flow forecasts both as to what they showed and also as to whether they were reliable or not.

76. The Company's position is as follows. It says that without the Plan the Company and Maddox will have to go into administration. It says that the Group is already unable to discharge its liabilities and it has been managing its creditors and being forced to withhold payment of certain liabilities. It says that insolvency has only been averted to date by virtue of the significant financial assistance provided by Ms. Best, but that is conditional on the Plan being implemented. If the Plan is not approved, it says that Ms. Best's evidence is clear, and it was not challenged by cross-examination, that she will not make further funding available, including the £1.5 million that is still undrawn under the 2023 Facilities Agreement.

77. Teneo has considered two possible scenarios which would be likely to occur in the administration:

(1) Scenario 1 is the Company would seek a small amount of additional funding from Ms. Best to enable it to conduct a four-week accelerated M&A process, the likely outcome of which would be a pre-packaged administration sale of part of the Company's business and assets; or

(2) Scenario 2 where Ms. Best did not provide the requisite cash funding and no alternative source of funding could be found, the Company would have to enter administration immediately and the administrators would close all sites and the business would be wound down.

78. These two Scenarios were addressed in Teneo's Comparator Report, dated 3rd May 2023. So far as concerns the two Scenarios anticipated by Teneo, the Board of the Company has concluded that Scenario 1 is the most likely outcome in an administration and that it is, therefore, the relevant alternative for the purposes of the Plan.

79. A valuation of the Company's business on the basis of the pre-pack sale from the administration contemplated in Scenario 1 was undertaken by FRP Advisory Trading Limited, ("FRP"), on 19th April 2023. The FRP valuation estimates the value of the Company as being in the range of £4.5 million-£7 million as at 31st March 2023. Mr. Riley confirmed the Board's view that this represented a fair and accurate valuation of the Company. This is clearly well below Ms. Best's aggregate indebtedness of approximately £18.7 million, which includes £9.9 million owed by Maddox but which has been guaranteed by the Company.

80. In an administration, HMRC would rank ahead of the floating charge part of Ms. Best's claim. However, Mr. Smith submitted that it shows that, apart from Ms. Best and HMRC, all other creditors of the Company are out of the money. The value breaks within the secured debt and the unsecured creditors are therefore out of the money. The unsecured creditors would receive nothing more than a share of the prescribed part. As I have said, this is challenged by Mr. Ramel. It should be stated that all unsecured Plan Creditors will receive the prescribed part distribution in the relevant alternative, but that does not disturb the conclusion that all such dissenting Plan Creditors would be out of the money in the relevant alternative: see *Virgin Active* at [53], [199], [229]-[230] and [254].

81. In this case, the prescribed part is estimated to be 0.80 p/£ and it is not disputed that this is minimal and should be disregarded in assessing whether such creditors are out

of the money in an administration of the Company. The FRP valuation is unchallenged and the dissenting creditors accept that it should be accepted by the court as a valuation in the event of an administration and pre-pack sale.

82. Mr. Amey focused on the cash flow forecasts. First of all, he maintained that they were prepared by the Company, both the short-term and the medium-term forecasts for the Group and the Company. Teneo, in its Comparator Report, makes clear that the information supplied by the Company had not been independently verified or audited. In his oral evidence, Mr. Smith, of Teneo said that "verified" and "audited" had specific meanings and it was correct to say that they had not done those things, which would have entailed scrutinising the underlying documentation and assumptions. He also said in the report that Teneo had "not reviewed any underlying assumptions to the financial data provided to us". But in his oral evidence he rather rowed back from that and suggested that they did perform some sort of “sense-checking” of the assumptions to make sure they appeared reasonable.

83. Mr. Smith KC (rather than Mr. Smith from Teneo) referred to paragraph 33 of Mr. Riley's fourth witness statement in which he also suggested that Teneo had been sense-checking the cash flow forecasts. This was the witness statement that was provided the working day before the hearing. However, I think it is preferable to rely on what Teneo itself said in the report and the fact that these are essentially the Company's own figures that have not been independently verified, audited or had the assumptions reviewed.

84. I do not accept, however, that the Company's cash flow forecasts are unreliable. There will inevitably be changes when actual figures come in. That is the nature of forecasts which are inevitably proved wrong by actual figures.

85. The forecasts in the Comparator Report show that the Group was anticipated to have a cash shortfall of £741,000 on 23rd June 2023, rising to a peak shortfall of £1.593 million in February 2024. After that, the medium-term forecast predicts a steadily improving position to March 2025 with a cash-positive position of £268,000 then. This is on the basis that the Plan is not approved and the £1.5 million is not drawn down from the 2023 Facilities Agreement.

86. Mr. Amey queried why the Group did not simply draw down the £1.5 million, which would go a long way to getting over its temporary liquidity problems. He also said these were Group forecasts which therefore included Maddox and, as Maddox was loss-making, it should be assumed that the Company's cash position was better. Mr. Smith countered the latter point by saying that Maddox was only loss making because of a depreciation charge in its P&L account and it was not necessarily in a cash-negative position. In fact, there are short-term cash flow forecasts for Maddox which show it having a cash shortfall throughout July.

87. On 19th May 2023, the Company produced revised updated short-term forecasts which included actual figures up to the end of April 2023. Mr. Amey said that these showed an improved position as follows: the shortfall of £741,000 on 23rd June 2023 had become £460,000; the cash shortfall of £168,000 on 30th June 2023 had become £58,000; and the shortfall of £314,000 in July 2023 had become £182,000.

88. Since the adjournment of the sanction hearing, further cash flow forecasts had been provided, including actual figures up to 13th June 2023. These show there will be a peak shortfall of £929,000 on 14th July, reducing to £375,585 on 31st July. Mr. Riley explained in his evidence that the end-of-month figure is not really telling you the true position because there are always a lot of outgoings, particularly rent, in the early part of the month. This can be seen in the daily forecasts that we have for June and July and it is also referred to in the Teneo Comparator Report. What it means is the medium-term forecast, which is only done by month-end, will necessarily underestimate the actual cash shortfall. So, for instance, Mr. Riley said that the peak shortfall in February 2024 of just under £1.6 million is likely to be an underestimate. He also said that there are other liabilities such as in respect of dilapidations that have not been taken into account. Furthermore, he gave evidence for the first time orally that even if the £1.5 million were taken, it would still not be enough to meet the Company's liabilities at the beginning of August 2023.

89. Mr. Amey criticised that evidence for only coming out at the hearing, but nevertheless, as Mr. Smith said, it was his sworn evidence and there is no real basis for disbelieving him on that. Mr. Amey said that the changes in the short term figures show their unreliability. I do not accept that. Forecasts are inherently uncertain, but decisions have to be made and they are the best evidence upon which to base such decisions. He also criticised the Company for not producing updated medium-term forecasts based on the updated short-term forecasts. But again, I am not sure that criticism is justified where the relatively small fluctuations in the short-term forecast will probably have little impact on the medium-term figures.

90. In his oral submissions, Mr. Amey invited me to make three findings of fact:

(1) that Ms. Best would not declare an event of default or withdraw the facilities if the Plan was not approved;

(2) that on balance the Board would be more likely than not to utilise the £1.5 million facility or so much of it as it needs to satisfy the Company's ongoing cash needs; and

(3) that that facility will cover the Company's existing cash needs until at least February 2024, by which time the situation may have improved.

91. That is quite an ask because it appears to be contrary to the evidence filed on behalf of the Company and in particular because Ms. Best was not cross-examined. Mr. Amey said it would be the only commercially rational thing for Ms. Best and the Company to do and that Ms. Best had previously waived the default on 31st March 2023 and if the Company had a chance of surviving without going into administration, and Ms. Best and the Company being essentially one and the same thing, it would be make sense to behave this way. He said that Ms. Best's witness statement was very carefully worded and one should not read into it things that are not stated expressly. He said what it does not say is that if the Company had requested the £1.5 million before 30th June 2023 deadline, she would not have honoured that obligation.

92. I think this is really splitting hairs. Ms. Best's witness statement was dealing specifically with the creditors' request for an adjournment until after 30th June 2023. She makes clear that she will fund the Company over the adjournment if granted, but

she then goes on to say that if the Plan is not sanctioned, she would only fund an accelerated M&A process and she would not provide further funding to the Company.

93. Mr. Smith of Teneo said that it was commercially rational for her not to want to put any more money into the Company in the circumstances. For whatever reason, she and the Company resolved in January, when she entered the 2023 Facilities Agreement, that it would pursue the Restructuring Plan and that that was the basis for her continuing to fund the Company. She is perfectly entitled to adopt that course. In any event, she has not been challenged on the course she did adopt. While it might seem, on the face of it, surprising that they chose this course, it was on the back of expert professional advice and it would seem unlikely that they would have done so, incurring substantial fees in the process, if they did not genuinely consider that this was their only option.

94. In my view, Mr. Amey's suggested alternative factual findings, which involve the Company being able to and actually using the £1.5 million to tide it over its peak cash shortfalls is unsustainable on the factual evidence before me. Ms. Best would not pay the £1.5 million over without the right Restructuring Plan in place. Nor would the Company be able to demand that she do so even if it were minded to try to do so. Accordingly, there is no real evidential basis for Mr. Amey's assertion this would be the most likely course of events if the Plan was not approved.

95. In my view the relevant alternative for the purposes of section 901G(f) is most likely to be what the Company has asserted, namely an administration with an accelerated M&A process leading to a pre-pack sale.

ESTIMATED OUTCOMES

96. The Teneo Report contains an Estimated Outcome Statement which estimates the outcomes for Plan Creditors in the relevant alternative. These are guaranteed to be better than the relevant alternative, because they are a straight uplift on the outcome in the relevant alternative.

97. In the relevant alternative, the Landlords would also likely receive returns from sources other than the Comp'ny's assets and those likely returns have also been taken into account in formulating the Plan. In particular:

(1) under the relevant alternative it is assumed that the Class A to C Landlords would benefit from an additional 28 days of contractual rent after the administration had commenced whilst the accelerated M&A process was carried out. This would be funded by further funding of approximately £900,000 introduced by Ms. Best as part of the administration process to enable the M&A process to take place. (2)in
addition, the Class A to B3 Landlords would benefit from a further 90 days of contractual payments from a purchaser under a licence to occupy while negotiations with a purchaser and the relevant Landlords to assign the impacted leases are progressed.

It is also assumed that in the case of the Class A Landlords, the rent arrears will be paid by a purchaser.

98. As to returns under the Plan, as already explained, the Compromised Property Liability Payment which may be payable under the Plan to certain Landlord Creditors and to the General Property and Business Rates Creditors is calculated by multiplying the creditors allowed claim by the Restructuring Plan Dividend Rate. The Restructuring Plan Dividend Rate is 120% of the Estimated Administration Dividend Rate, which Teneo has calculated in its statement to be 0.80 p/£. Accordingly, the Estimated Restructuring Plan Dividend Rate will be 0.96 p/£.

99. This forms the basis for the returns under the Plan to all Plan Creditors except Ms. Best, HMRC and the Class A Landlords and ensures that, at a minimum, they will receive a material uplift on their returns in the relevant alternative.

100. Based on the Estimated Outcome Statement as summarised in Mr. Riley's first witness statement:

(1) Ms. Best is estimated to recover 35.11 p/£ in the relevant alternative, but will be paid in full under the Plan.

(2) HMRC will be paid in full in the relevant alternative and under the Plan. Teneo has advised that the payment schedule under the Plan will enable HMRC to be paid in a much shorter timescale than it would in an administration, which would be likely to be up to 12-18 months.

(3) The estimated returns to the Landlord creditors in each class will depend on the specific components of its Plan claim, such as the contractual rent term, the assumed ERV and void and rent-free periods for each lease. Teneo has, however, aggregated the total estimated returns for each Landlord creditor and it shows the following average returns: (i) The Class A Landlords will receive 100 p/£ in both the Plan and the relevant alternative; (ii) Class B1 Landlords will receive 38.14 p/£ under the Plan, and only 5.49 p/£ under the relevant alternative; (iii) Class B2 Landlords will receive 71.30 p/£ under the Plan, as compared to 11.50 p/£ under the relevant alternative; (iv) Class B3 Landlords will receive 40.47 p/£ under the Plan as compared to 9.09 p/£ under the relevant alternative; (v) Class C will receive 5.21 p/£ under the Plan and 3.18 p/£ under the relevant alternative; (vi) Class D Landlords will receive the minimum 0.96 p/£ under the Plan whereas that would have been 0.80 p/£ under the relevant alternative.

101. The General Property Creditors are estimated to recover 0.80 p/£ in the relevant alternative and 0.96 p/£ under the Plan. The Business Rates Creditors are estimated to recover 15.24 p/£ in the relevant alternative and 15.40 p/£ under the Plan.

102. Accordingly, even taking into account sources of recovery other than the Company's own assets, as at the date of commencement of the administration, the recoveries for all Plan Creditors are higher or, in the case of HMRC, materially faster under the Plan than in the relevant alternative. In the case of Ms. Best and the Class B1, B2 and B3 Landlords the returns under the Plan are significantly higher than in the relevant alternative.

103. As I said, these figures have not been challenged. As I have found that the correct relevant alternative was applied by the Company, it follows inevitably that Condition

A is satisfied because, for all dissenting classes, the returns under the Plan are significantly higher than in the relevant alternative.

104. I have already said there is no issue as to Condition B being satisfied.

DISCRETION

105. I therefore turn to the exercise of my discretion.

106. First of all, it is important to recognise that the conditions prescribed by Parliament for cramming down have both been satisfied. As Zacaroli J put it in *Re Houst* at [28], that gives the Company a "fair wind" on discretion, although this may have been diluted somewhat in recent cases and there is certainly no presumption in favour of sanction if the conditions are satisfied: see, for example, Leech J in *Re Nasmyth* [2023] EWHC 988 (Ch) at [95].

107. I then need to deal with this question of whether Lazari is "out of the money" or not. If it is, it is fairly clear on the authorities that little weight will be given to its views on the question of fairness of the distribution of the benefits of the Plan.

108. Mr. Ramel's argument on this is based on the points that I have just been through in relation to the estimated outcomes for creditors in both the relevant alternative and the Plan. As I explained in relation to the Landlords, Teneo also took into account what they would get in the course of the administration and the M&A process from persons other than the Company. This led to the Landlords being estimated to receive far more than the prescribed part which has led Mr. Ramel to submit that they should therefore be considered to be in the money.

109. In Lazari's case it is said to receive 5.49 p/£ in the relevant alternative rather than the 0.80 p/£ from the prescribed part. Mr Ramel said it did not matter if the payment comes from a third party such as Ms. Best or the prospective purchaser. It is still derived from an asset of the Company which is said to be the right to occupy the premises in question.

110. I have to say that I had initially some sympathy with this point as it did not seem to me to be logical to say that a creditor was out of the money for the purposes of considering discretion, but in the money when looking at whether they would be worse off under Condition A. Both Mr. Smith and Mr. Ramel took me to *Virgin Active*, where there were similar points arising in relation to the classes of Landlords. At [242], Snowden J said:

> "That established approach in relation to scheme cases reflects the view that where the only alternative to a scheme is a formal insolvency in which the business and assets of the debtor company would be held on the statutory trusts for realisation and distribution to creditors, that business and assets in essence belongs to those creditors who would receive a distribution in the formal insolvency. The authorities take the view that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which use of

such business and assets might generate following the restructuring (the restructuring surplus)."

111. Snowden J then looked at the background to the cram down provisions and then equated the relevant test as to whether a creditor was in or out of the money with that in section 901C(3) whereby those creditors who have: "... no genuine economic interest in the company ..." can be disenfranchised. He concluded in [249] by saying, effectively, that that is the test. If those with no genuine economic interest in the company can be deprived of a vote on the Plan, then it is clear that their interests should not carry any real weight when the court comes to exercise its discretion.

112. It seems to me that Mr. Ramel is perhaps confusing two different concepts. The estimated outcome in the relevant alternative is only looking at the relevant alternative for the purposes of Condition A and whether the creditor is no worse off under the Plan. The out of the money test is looking at whether the creditor has any genuine economic interest in the company itself in the event of insolvency, where, as Snowden J put it, the statutory trust, based on the insolvency priority rules, arises. For instance, if a creditor had a guarantee, the prospect of recovering from the third party guarantor would not affect whatever distribution the creditor might get from the company in administration. It cannot therefore, it seems to me, affect whether the creditor is in the money vis-à-vis the company.

113. I therefore think that Mr. Smith is right to categorise all creditors other than Ms. Best and HMRC as being out of the money. As such, what they have to say on discretion, with all other conditions and hurdles having been satisfied, will, I am afraid, carry little weight.

114. Mr. Ramel's further points concern the position of Maddox. They are twofold: first in relation to the guarantee that Lazari holds for Maddox but which is being compromised by the Plan; and, second, as to the fairness of Maddox being outside the Plan and not having its debts compromised in any way.

115. As to the guarantee, I have already said that it is common and within the jurisdiction to compromise third party guarantees, normally to prevent ricochet claims. However, in this case there could not be a ricochet claim because Maddox's claim against the company is compromised by the Plan. The Teneo Comparator Report asserts that Maddox has no material assets other than its shareholding in the Company and relies entirely on its Management Services Agreement with the Company for its income to pay its liabilities, which are far more extensive that the amounts owed under the guarantees. Therefore, in the relevant alternative, Maddox will be highly likely to enter into an insolvency process and any guarantee claims would have no value. Mr. Smith submitted that the compromise of the guarantee liabilities is therefore a compromise of rights that are worthless.

116. Lazari asserted that the compromise of the guarantee is not necessary to give legal or commercial effect to the Plan. However, Mr. Smith responded to this as follows:

(1) he said that it was obvious that any claims against Maddox which it is unable to pay must be compromised to ensure that the Group is not at risk of an uncompromised claim against an insolvent parent which (at lowest) could result in enforcement action being taken against Maddox. Of itself, he said this is a sufficient commercial reason

for the guarantee to be compromised. (2) he said that Maddox performs an essential role in providing services to the Company and acts as a conduit through which such services are provided. The Board considers that the provision of services will be placed at risk if Maddox were to be presented with a demand which it could not discharge.

(3) any such demand or enforcement action against Maddox could also undermine the basis on which the Group is intended to operate post- restructuring as well as posing a risk to the Company's ability to continue as a going concern. That is because: (i) as the sole shareholder in the Company, Maddox is integral to the corporate structure of the Group post- restructuring being the entity in which the shareholders hold their shareholdings in the Group and the sole shareholder of the Company; and (ii) critically, if Maddox were to enter administration then it is likely that an office holder would seek to try and realise any value in its principal asset, namely its shareholding in the Company, which would at the lowest seriously destabilise the Group.

(4) in the light of the proximity of the connection between the Company and its parent, which is commercially dependent on the Company to generate revenue would simply not be commercially justifiable nor make any commercial sense to allow two Plan Creditors to retain their uncompromised guarantee claims against the insolvent parent (and might otherwise give rise to complaint by other Plan Creditors that they would be receiving favourable treatment under the Plan which is not justified by the financial position of Maddox).

117. In my view, there is no answer to these points which justify the compromise of the guarantees to safeguard the success of the Plan. In terms of discretion, I do not see that it gives rise to any substantial unfairness in the overall context of the Plan and Lazari's position as an out of the money creditor.

118. As to the point about Maddox being outside the Plan, this is said to be unfair because Maddox will continue to receive full payment from the Company under the Management Services Agreement, whether or not the services being provided are critical or not, whereas the Landlords are being crammed down for the provision of leased gym space to the Company. The payments to Maddox each month were estimated in the Plan to be about £500,000. It is only because Freeths on behalf of Lazari have continually be pressing for more information about the recharge that more information has emerged as to what it is for. Indeed, it was only at the end of the day on Tuesday in Mr. Smith's reply submissions that it was confirmed that an item on the invoices in respect of exceptional professional fees was actually the fees in relation to the Plan, although it was a little difficult to understand why these were being paid through the recharge.

119. I know that Lazari feels that there is a great injustice here but its attempt to drill down on every last item and to ask for every single document that might explain the basis for Maddox's exclusion from the Plan seems to me to have been somewhat disproportionate.

120. The evidence shows that Maddox provides critical services to the Company on a centralised basis. The services are described in Schedule 2 to the Management Services Agreement and include general administration, marketing, finance, treasury,

HR, procurement, taxation, legal and safety, health, environmental and quality services. They are provided both by Maddox directly employing around 50 employees whose services are provided to the Company and procuring the services of third parties. In other words, Maddox recharges the Company for the services of its employees and third party service providers, effectively acting as a conduit.

121. The invoices that have been disclosed show Maddox's actual costs that are being recharged. In addition to the recharge of employee third party costs, Maddox is entitled to charge a management fee of 5% of the costs that it incurs. The fee is intended to reflect the value of the management services provided by it under the Management Services Agreement and it was agreed by the parties as being "the rate that would be charged between two unconnected third parties for the same services".

122. That 5% was questioned by Mr. Ramel and the Company has explained how that amount has been used as follows:

(1) there are payments to both Mr. Best and Mr. Matthew Sharpe which are in fact made in lieu of Mr. Best receiving no salary from the Company for his role as the Company's chief executive, and Mr. Sharpe receiving a significantly reduced salary from the Company as its business development director.

(2) Mr. Riley's evidence is that the amount paid to both Mr. Best and Mr. Sharpe are reasonable, having regard to both individuals' contributions to the business and that it is appropriate and fair that those sums continue to be paid on their current terms.

(3) in respect of loan repayments to Mr. David Sharpe and Ms. Brett, who are two other members of the Whelan family, the Board considered the objections to these payments that have been made by Freeths and has agreed that, if the Plan sanctioned, the monthly sum of £11,000, will not be paid for the duration of the Rent Concession Period. The Company says this change will be implemented by way of a modification of the Plan pursuant to clause 19.2

123. Again, with that reasonable concession, I cannot see that the continued payments to Maddox undermines the fairness of the Plan and should cause me not to exercise my discretion to sanction it. The Board has deemed the services provided by Maddox as critical to the trading of the Company's business and it is fairly clear that at least the bulk of these costs would be incurred by the Company anyway if they were not provided and sourced by Maddox. Given also that Lazari is out of the money, its objections on the grounds of unfairness carry little weight.

124. More generally, it is for Ms. Best, as the economic owner of the business, to determine how to divide up any value or potential future benefits which might be generated following the implementation of the Plan. The Plan reflects the priority that would pertain in the relevant alternative with Ms. Best ranking in priority to all except HMRC, which is being paid in full. The other creditors have no real entitlement to share in the restructuring surplus and cannot really sustain a complaint that it is all unfair.

125. Mr. Amey's point on discretion was that this was deliberately artificially generated by the Company and Ms. Best to leave the court with no option but to sanction the scheme. He said that the cash flow shortfall is in reality not so bad and if they had

instead used the money they spent on the Plan, said to be around £1.4 million, and also utilised the remaining £1.5 million from Ms. Best, the Company could have survived without any form of insolvency.

126. Mr. Ramel made similar points and I was at one stage minded to agree that it did look odd that the Company had embarked on this process if it seemingly had enough cash to survive without it.

127. But as Mr. Smith said, the Company has realised for some time that it did not have enough money to survive and that it needed to restructure its liabilities in order to survive and in the interests of its creditors. Ms. Best agreed to put new money into the Company in January, but on condition that the Plan goes through. That was the way they decided to proceed from January 2023 onwards and, in my judgment, that was not unreasonable either for the Company or for Ms. Best. Legitimate complaint can be made as to the lack of engagement with the Landlords and the resistance to the provision of information.

128. But at the end of the day I have to look at what is being proposed and whether it is fair as between the creditors, taking into account their economic interests in the Company and the fact that Parliament has decreed that where creditors are no worse off under the Plan than the relevant alternative, those creditors' opposition to the Plan can be overridden.

129. I have decided that the relevant alternative is an administration, together with an accelerated M&A process and not, as Mr. Amey suggested, continued trading outside of an insolvency. As such, I did not think this position was artificially contrived by Ms. Best and the Company. Rather, they decided on a particular course, they have established the necessary conditions for the sanction of such a plan and in my judgment I should exercise my discretion in favour of sanctioning the scheme. That is what I propose to do in the terms of the draft order in the bundle, unless anyone wants to tell me that there should be any changes to that draft order.

130. That is the end of my judgment and I am grateful to you all for sitting there patiently listening to me going on for an hour and a half, it seems.

(For proceedings after judgment: please see separate transcript)

131. I am going to make no order for costs in relation to the costs in this case. It seems to me that the objections that were taken were not frivolous and they have assisted the court, but what should have been appreciated by the opposing creditors is that their core points, namely in relation to Mr. Amey's client, what the relevant alternative was, and in relation to Mr. Ramel and Mr. Churchill's clients, that their argument in relation to discretion was facing serious difficulties by virtue of the fact that they were out of the money. So their persistence in objecting and essentially failing on those points, whilst I understand the point that we are not within the normal jurisdiction under CPR 44.2 and recognising that there has been assistance given to the court and there has also been a certain lack of reasonableness on the part of the Company in responding to requests for information, at the end of the day, I do not think the objections have been substantial enough to justify making an order for costs against the Company and in favour of the objecting Landlords. I will make no order for costs.

(For continuation of proceedings after judgment: please see separate transcript)

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