Ref. CR-2023-000238

Neutral Citation Number: [2023] EWHC 696 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INSOLVENCY AND COMPANIES COURT (ChD)

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

14th FEBRUARY 2023

Before
MR JUSTICE LEECH

IN THE MATTER OF:

NASMYTH GROUP LIMITED

MR M HAYWOOD and **MS S WILKINS** appeared on behalf of the Company
MS C COOKE appeared on behalf of HMRC
MR FYFE and **MR SMITH** appeared in Person

APPROVED JUDGMENT

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE LEECH:

1. By Claim Form dated 17 January 2023 Nasmyth Group Ltd (the "**Company**") applies for an order for directions for the convening and conduct of meetings of certain of the Company's creditors (the "**Plan Meetings**") for the purposes of considering and if thought fit approving a proposed restructuring plan (the "**Restructuring Plan**") under Part 26A of the Companies Act 2006. If the Court is prepared to make the convening order and the creditors approve it, the Company will in due course seek an order sanctioning the Restructuring Plan. The Practice Statement dated 26 January 2020 (the "**Practice Statement**") provides that the Applicant, in this case the Company, must draw the Court's attention to a range of matters at the convening hearing stage. However, it is not the function of the Court at this stage to consider or assess the merits of the Restructuring Plan but to consider the issues which might arise at the sanction stage and how best to address them both procedurally and in more general terms.

2. I begin therefore by setting out the documents which I have considered in advance of the convening hearing before going on to describe the background to the application. Mr Marcus Haywood and Ms Stefanie Wilkins appeared on behalf of the Company, instructed by Pinsent Masons, Ms Charlotte Cooke appeared on behalf of HMRC (which is both a preferential and an unsecured creditor) and two creditors, Mr Fyfe and Mr Smith, appeared in person. I am grateful to them all for their assistance which they gave the court.

3. For the purposes of the convening hearing I have read both Skeleton Arguments and the following documents:

   (1) The "Practice Statement" letter dated 8 December 2022 together with the updates dated 19 January 2023, 27 January 2023 and 31 January 2023;

   (2) The First and Second Witness Statements of Mr Nicholas Robins dated 6 February 2023 and 10 February 2023 respectively on behalf of the Company;

   (3) The report prepared by Begbies Traynor London LLP (the "**BTG** Report"), the Company's financial advisors;

(4) Parts A to C of the Explanatory Statement;

(5) The Restructuring Plan;

(6) Certain correspondence between the company and Mr Smith and Mr Fyfe and their solicitors;

(7) The Witness Statement of Mr Luke Mallin on behalf of HMRC.

4. I take the background principally from the evidence of Mr Robins. The Company is an SME and was incorporated in England and Wales on 15 October 2003 for the purposes of manufacturing and selling machinery plant tools and other products relating to the aerospace industry. In December 2003 it changed its name to Nasmyth Group Ltd. In 2022 the shares in the Company were sold to Letvel Ltd ("**Letvel**"), which is a special purpose vehicle established by Rcapital Ltd ("**Rcapital**") for the purpose of acquiring its shares. Rcapital is a specialist investor in "turn-around" situations and 80 per cent of the shares in Letvel are held by Rcapital, 10 per cent by Mr Smith, 5 per cent by Mr Fyfe, and 5 per cent by a Mr Simon Beech. Mr Smith, Mr Beech and Mr Fyfe were all directors of the company before the 2022 sale. Mr Smith and Mr Beech, as well as a trust associated with Mr Smith, were also shareholders.

5. The current directors of the Company are Mr Robins, Mr Beech, Mr Anthony Upton, and W1S Directors Ltd ("**W1S**"). Mr Robins and Mr Upton were both appointed after the 2022 sale, Mr Beech has been a director for over 20 years and W1S is a corporate director nominated by Rcapital which shares directors and beneficial owners with JCP5 Ltd ("**JCP**"), one of the company's secured creditors.

6. The principal activity of the Company is to act as a holding company in respect of its subsidiaries both in the UK and elsewhere. It also provides administrative and treasury functions as well as service functions for the rest of the group. The Company's subsidiaries provide specialist precision engineering services to the aerospace, defence and related industries, and I will refer to the Company and all of it subsidiaries together as the "**Group**". The Group is headquartered in the UK and currently employs

approximately 453 people world-wide. Mr Robins has identified eleven principal trading subsidiaries.

7. In 2020 the Group began to experience financial difficulties predominantly as a result of the Covid 19 pandemic and its effect on the civil aviation industry. In November 2021 Kroll Advisory Ltd ("**Kroll**") was engaged to assist the Group in arranging a debt refinancing or equity sale in an attempt to give the company's business a stable foundation going forward. Both exercises were run in parallel but owing to a number of external factors (including the emergence of the Omicron variant) and a failure by the group's largest customer to file its statutory accounts, the debt refinancing process fell away and the focus turned to an equity sale.

8. Between November 2021 and February 2022 Kroll carried out a marketing exercise which provided evidence that the equity value of the group at that time was not more than £2 million. The equity sale process ultimately led to the sale of the shares in the company to Letvel and on 21 February 2022 both the Company and the Group entered into new long term debt facilities with Secure Trust Bank ("**STB**"), which is a UK retail and commercial banking group. At the same time the Company also entered into long term debt facilities with JCP (an affiliate of Rcapital). On 21 February 2022 members of the Group entered into an asset lending agreement under which STB made available a receivable finance facility of £15 million and an additional payment facility of £5 million. The Company itself is not a borrower and the facilities are not available to it. But it is a guarantor.

9. On 21 February 2022 members of the Group also entered into a secured working capital loan agreement with JCP, which provided for an initial advance of £5,500,000, and a total discretionary commitment of £15,500,000 On the same day, namely, 21 February 2022, the Group drew down the initial advance of 5.5 million. Mr Haywood took me to the agreement and showed me that the continuing advances are purely discretionary and that, although JCP has committed to make available a further £1 million, that committed facility will only become available for drawdown immediately after the Restructuring Plan is sanctioned. The members of the group and certain US subsidiaries also guaranteed this facility and granted both STB and JCP fixed and floating charges over their assets.

10. Finally, on 21 February 2022 SGB and JCP entered into a deed of priority and a subordination deed, which provided that STB was to rank in priority to JCP. However, the subordination deed also restricts intra-group payments until the secured creditors have been paid in full. This is relevant to class composition. It is Mr Robins' evidence that since the 2022 sale, there has been a further marked deterioration in both the Group's and the Company's financial position and business prospects. His evidence is that the Group has significantly under-performed the forecasts presented by its former management before the sale took place and has recorded a loss before tax in the period from May 2022 to September 2022 of approximately £2,500,000 (as against a forecast loss at the time of the sale of approximately £1,000,000 for the same period). He states that the reasons for this include the following:

(1) There is ongoing disruption to the Group's supply chains because of wider macro-economic factors (including the conflict in Ukraine).

(2) There has been significant delay to customer orders.

(3) There has been a reduced availability of skilled labour, resulting in a reduction of service levels.

(4) Inflationary pressures have affected the businesses operated by the Group.

(5) Recent movements in the US Sterling exchange rate have affected the Group's financial performance.

(6) Independently of all of these, the forecast presented by the former management before the sale has proved to be incorrect.

11. Mr Robins has described these events in detail and it is unnecessary for me to set out that detail in this judgment. However it is important for me to note that the foreign exchange movements (which I have described) triggered margin calls under the Company's forward foreign exchange contract with Western Union and on 31 January 2023 Western Union served a statutory demand for £164,849.83 (although Mr

Haywood told me that Western Union has agreed not to present a winding up petition against the company except on seven days' notice).

12. I also record that JCP has had to make additional drawdowns of approximately £2 million available to the Group, which were not originally forecast at the time of the sale. Finally, Mr Smith has issued a claim for wrongful dismissal against the company in the High Court for £8,167,700. He has also made a claim for unfair dismissal and discrimination on the basis of age and disability in the employment tribunal for £829,294. I add that all of these claims are disputed.

13. I turn next to the company's current financial position, which is set out in the BTG Report. In the Executive Summary BTG summarised the Company's financial position in five bullet points:

- "Absent the restructuring plan process management forecasts indicate that the group has a requirement for immediate funding from late January 2023, rising to over £1M in April 2023, with significant other commercial risks overhanging the company.
- As a result of the group position, and given the immediate liabilities that are due and cannot be paid, the company is currently insolvent on a cash flow basis.
- Without additional support from JCP which is not available absent the approval of the Restructuring Plan, and given the commercial risks noted in this report, the company faces significant financial difficulty and will likely enter into administration.
- The Restructuring Plan is therefore presented as an alternative to a formal insolvency of the company, i.e. administration.
- In the event that a restructuring plan is approved, there remains a significant medium term funding requirement for the group. However, should a restructuring plan be approved, JCP have agreed to provide the required level of funding, i.e. £1M, and will remain supportive of the business plan of the business post Restructuring Plan."

14. I should say that Mr Fyfe advanced a number of reasons why I should approach the statements made by BTG in their report with some caution. I deal with that issue in the context of the Explanatory Statement and information to be provided by the company to its creditors.

15. It is also Mr Robins' evidence that, as well as being insolvent on a cash flow basis, the Company is in default of its arrangements with its two secured creditors, STB and JCP, and he has set out the various contractual provisions and their consequences in Robins 1. Both lenders have agreed to stand still arrangements for the time being, and pending the launch and sanction of the Restructuring Plan (although the Western Union statutory demand is not covered by the standstill agreement).

16. Finally, it is Mr Robins' evidence that STB and JCP are prepared to release their security over certain of the group's property assets, to meet certain of its funding requirements. On 7 November 2022 JCP also provided an additional £900,000 under its facility to enable the Company to bridge until the sale of a particular property. However, it is also his evidence that neither secured lender is prepared to provide further funding, and that there is no other alternative source of funding available to the Company. An additional degree of urgency is also required because the Group is in default in filing its statutory accounts for the year ended 31 January 2022. The urgency is not quite as pressing as it was, however, because I was told by Mr Haywood that Companies House has agreed to extend the date for filing those accounts until 30 April 2022.

17. I turn next to the Restructuring Plan. Mr Haywood and Ms Wilkins state in their Skeleton Argument that the principal objectives of the plan are to facilitate the continuation of lending into the group from JCP and to compromise certain liabilities of the Company, which will allow it to be returned to solvency. It is the Company's case that STB and JCP and the secured creditors are the only creditors who hold any economic interest in the Company and that they will receive more under the Restructuring Plan than they would if the company is put into its administration. It is also the company's case that its out of the money creditors, i.e. those creditors who do not have a genuine economic interest in the company, will as a minimum be no worse off under the restructuring plan than if the company were to go into administration, and the creditors of the company are critical to the future operation of the company's business will not be affected by the restructuring plan and will be paid in full.

18. In their skeleton argument Mr Haywood and Ms Wilkins set out the effect of the proposed restructuring plan creditors, both in tabular and narrative form. I gratefully

adopt their narrative summary in this judgment (which I will attempt to make as brief as possible):

(1) *STB:* is the senior creditor and the total amount owed to it as at 31 October 2022 was approximately £13.3 million. STB has a guaranteed claim against the company and other cross-guarantors or obligors of the Group. It also holds fixed and floating charges over the assets of the Company, and those companies and its debt and security rank in priority to that of JCP. The Company and the principal debtors in the Group are in default. Under the Restructuring Plan STB will waive existing defaults and will be unable to take any enforcement action against the Company for a period of three months following sanction in relation to matters arising directly or indirectly from the Restructuring Plan to allow it to take effect. The quantum of STB's debt and security will not be compromised. But STB will not receive any immediate payment on implementation of the Restructuring Plan, The Company submits that a scheme may provide for this kind of arrangement because it is "necessary to give legal or commercial effect to the compromise or arrangement between the scheme company and its creditors": see *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 (Ch), at [63] (Snowden J) and other authorities to the same effect.

(2) *JCP*: is the junior secured creditor the total amount owed to it as at 31 October 2022 was approximately £7.5 million. JCP has a guaranteed claim against the Company and the other obligors in the Group and it also holds fixed and floating charges over the assets of the Company, and those other companies. But its debt and security rank junior to that of STB under the deed of priority and the subordination agreement. The Company and the principal debtors are also in default of these arrangements. But under the terms of the Restructuring Plan they will be amended to make more favourable provision for the Company and the Group. In particular, their current facilities are repayable in full on 21 February 2024 but under the plan the repayment date will be extended by five years to 21 February 2029. JCP is not presently obliged to make any further sums available to the Company but if the plan is sanctioned, JCP will make available to the company the balance of its £15.5

million facility (approximately £8 million) on its existing terms, and the £1 million committed facility will be available to draw down in line with the forecast funding requirements. The JCP facility will also be amended to include new covenants and it will waive existing defaults and will be unable to take any enforcement action against the company for three months following sanction in relation to matters arising directly or indirectly from the Restructuring Plan itself and to enable it to take effect.

(3) *Preferential Creditors*: The only preferential creditor is HMRC which has preferential claims totalling £209,703 as at 27 January 2023 which comprises outstanding VAT and PAYE. It is also owed £236,154.22 as an unsecured creditor and owed £2,561,499.38 by Group subsidiaries. Under the Restructuring Plan its preferential debts against the Company (although not against the subsidiaries) will be compromised in full in return for the payment of the sum of £10,000. I add that the evidence before me is that HMRC is currently considering further standstill agreements (or time to pay arrangements) in relation to Group subsidiaries but that no concluded view has yet been taken. I return to this point again in the context of potential roadblocks to sanction.

(4) *Unsecured Creditors*: These creditors (excluding preferential claims, inter-company claims or claims by critical suppliers) include the claims of Mr Smith, the claim brought in the employment tribunal by Mr Christopher Henson, which the company quantifies at £160,000 (but considers to be without merit) and the sum of £860,000 owed to Mr Fyfe under the terms of his settlement agreement. It also includes the unsecured debt owed to HMRC, foreign exchange hedging liabilities to Western Union, which total approximately £230,000, and miscellaneous debts which total approximately £16,000. There are therefore five or possibly six unsecured creditors, who have substantial claims against the Group, including both Mr Smith, Mr Fyfe and HMRC. Under the Restructuring Plan, the claims of unsecured creditors will be compromised in full in return for the payment of a sum of £10,000 to be distributed amongst them on a pari passu basis.

(5) *Inter-company Creditors*: comprise those creditors who have intra group claims against the Company and total £3,479,035 (after set off). Under the Restructuring Plan the claims of the inter-company creditors will be compromised in full for no consideration and they have expressly consented to this compromise. I add that Mr Fyfe challenged the position in relation to inter- company creditors and pointed out that in the BTG Report the Company appeared to be owed money by its subsidiaries rather than the reverse. Moreover, he was concerned that this demonstrated that the Company itself was funding its subsidiaries in circumstances where it was seeking a court sanction to a cram down under the Restructuring Plan.

(6) *Critical Supply Creditors*: These creditors, as their description suggests, are those unsecured creditors who are said to be critical to the future operation of the Company and the Group's business. They include operational suppliers, critical employees, insurance and energy suppliers, and professional advisors who have provided legal and accountancy advice (including advice in relation to claims made by former managers, and in connection with the Restructuring Plan). The claims of critical supply creditors will not be affected by the plan and will be paid in full. In her Skeleton Argument and oral submissions Ms Cooke raised concerns on behalf of HMRC about the lack of information about these creditors and whether they were truly critical to the future operation of the business.

(7) *Members*: The Restructuring Plan will not affect any changes to the rights of members. But if it is sanctioned on the current terms, the shares in the Company will be transferred to W5SD Ltd (the company associated with Rcapital) for consideration of £1. In the course of correspondence, Mr Fyfe's solicitors have pointed out that they would be entitled to obtain an injunction to restrain the company from the transfer of shares in this way.

19. Mr Robins compares these terms with administration. In that event STB will be paid in full, JCP will obtain a return of £0.53 pence and all of the other creditors will obtain no return at all. His evidence is that administration is the only realistic alternative to the Restructuring Plan.

20. In his oral submissions Mr Haywood suggested to me that the issues which have to be considered by the Court in the context of a convening hearing like this are conveniently set out in *Re Deepocean UK Ltd* [2021] EWHC 138 (Ch) at [29] (Trower J):

(1) One, jurisdictional requirements;

(2) Conditions A and B;

(3) Class composition;

(4) any other issues not going to merits or fairness which might cause the court to refuse to sanction the restructuring plan; and

(5) Practical issues regarding the adequacy of notice documentation, and proposal for the meetings of creditors.

21. Mr Haywood also drew my attention to *Re Apcoa Parking (UK) Ltd* [2014] EWHC 997 (Ch) at [12] to [18] (Hildyard J). I will not quote that passage but I have it well in mind. I remind myself that this is not the occasion for determining the fairness or otherwise of the scheme and that the only purpose of today's hearing is to determine whether the classes selected for consideration are appropriate and whether there are any apparent impediments to the scheme which demonstrate even at this preliminary stage that the court could not properly sanction the scheme whatever the decisions of the class meetings.

(1) Jurisdictional Requirements

22. With that guidance in mind I turn to consider each of the five matters identified by Trower J in *Re Deepocean*. I begin with the jurisdictional requirement. Section 901A of the Companies Act 2006 defines the term company as both a company within the meaning of the Act itself and also as liable to be wound up under the Insolvency Act 1986. The company is incorporated in England and Wales and, accordingly, liable to be

wound up under 1986. There are no other obvious issues going to jurisdiction, and I am satisfied that the Court has jurisdiction to sanction the Restructuring Plan.

(2) Threshold Conditions A and B

23. Section 901(2) and (3) imposes the following two threshold conditions for the applications of Part 26A:

> "(2) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
>
> (3) Condition B is that— (a) a compromise or arrangement is proposed between the company and— (i) its creditors, or any class of them, or (ii) its members, or any class of them, and (b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2)."

24. On the basis of the evidence before me I am currently satisfied that condition A is met. The Company is cash flow insolvent and has been served with a statutory demand which its officers consider that it is unable to pay. It is also in default of both facility agreements with its secured creditors, and is unable to file its accounts on a going concern basis unless and until the Restructuring Plan is sanctioned. Mr Smith and Mr Fyfe have raised concerns whether the Company is truly insolvent or unable to trade and Mr Fyfe articulated those concerns before me eloquently today. But in my judgment, there is no real dispute that the Company is insolvent and will have to go into administration if Western Union is able to present a winding up petition or it is unable to file its accounts.

25. On the basis of the evidence before me I am also currently satisfied that condition B is met. The terms of the Restructuring Plan involve a compromise of their claims by all of its creditors and there is give and take by both them and the Company with the exception of inter-company creditors, who have expressly consented to the Restructuring Plan. I am also satisfied that the purpose of the plan is to eliminate, reduce, prevent or mitigate the effect of its financial difficulties. Although HMRC and a number of creditors have raised doubts about the Restructuring Plan itself (and its

fairness), I am satisfied that those concerns go to the merits of the plan itself, and not to the threshold conditions A and B.

26. I add that concerns have been raised about notification to creditors and the completeness of the information with which they have been provided and I deal with these issues notification under heading (5) (below). In response to these complaints the Company has conceded that the creditors may raise issues at the sanction hearing which they have not raised at the convening hearing. In the light of this concession, therefore, I will permit any secured creditors to make further representations in relation to the threshold conditions or indeed jurisdiction at the sanction hearing (even though they have not appeared or taken any objections at the convening hearing). In relation to those creditors who have appeared and taken objections at the convening hearing, I will also permit them to raise those objections at the sanction hearing.

27. This also gives rise to a point which I briefly debated with Mr Haywood in relation to the threshold conditions. If creditors may continue to oppose the scheme on the basis that the threshold conditions are not satisfied, what is the appropriate for the Court to apply at the convening hearing? In my judgment, the appropriate test to apply is to consider whether they are satisfied on the basis of the evidence before the Court at the convening meeting and, if they, are to order the class meetings to be convened. This gives both the Company and the creditors the opportunity to put in further evidence on that issue and, if necessary, both conditions can be debated again at the sanction hearing if there remains any objection to the scheme on the basis that they have not been satisfied. This is the test which I have applied (above) in deciding whether the two threshold conditions are met.

(3) Class Composition

28. Mr Haywood and Ms Wilkins remind me that the test for class composition focuses on the rights of creditors rather than their interests. Mr Haywood cited a number of authorities. But it is sufficient for present purposes to refer to the helpful summary given by Zacaroli J in *Re Gatehouse Group Ltd* [2021] EWHC 304 (Ch) at [183]:

"(1) The creditors' rights that fall to be considered are both their existing rights against the company and the rights conferred by the scheme/plan;

(2) The existing rights must be assessed in the context of the relevant comparator, described by Hildyard J in *Re APCOA Parking (UK) Ltd* [2014] EWHC 997 (Ch), at [32], as "what would be the alternative if the scheme does not proceed";

(3) It is rights, not interests, that fall to be taken into account for the purposes of class composition. Without attempting an exhaustive definition, rights of the creditors against third parties (for example against guarantors for the company's debts) will generally constitute interests as opposed to rights; differences in interests may be relevant to the discretion to sanction the scheme/plan;

(4) Even if there are differences in rights as between different groups of creditors, that is not necessarily fatal to them being placed in the same class: it is still necessary to consider whether the differences are such that it is impossible for them to consult together with a view to their common interest. This has been expressed (for example by David Richards J in *Re Telewest Communications plc* [2004] BCC 342 at [40]) as whether there is more to unite than to divide the relevant creditors."

29. Zacaroli J also added two further comments. First, in relation to schemes, it has been often said that the court should be careful to avoid unnecessary proliferation of classes because by ordering separate meetings the court might give a veto to a minority group. *Secondly*, Part 26A deploys the concept of the "relevant alternative" in section 901G of the 2006 Act for the purposes of cross-class cram-down. It is there defined as "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". He also stated (without deciding the point) that it was intended to mirror the test for identifying the appropriate comparator for the purposes of class composition. I am prepared to adopt the same approach.

30. In relation to the relevant alternative, Ms Cooke floated the possibility that the Company might have entered into a CVA rather than gone into administration and Mr Haywood gave four reasons why the CVA would not have taken place: First, it is wholly unclear what terms a voluntary arrangement insolvency professional would have been able to offer on a CVA. Secondly, it would have required the consent of the HMRC. Thirdly, 75% of unsecured creditors would have needed to consent to it whereas one of the advantages of a restructuring plan is the ability to achieve a "cross class cram down". Fourthly, a CVA would inevitably have led to the termination of the company's energy supply arrangements which were essential to its continuing trading.

31. In my judgment, and based on the evidence before me, the alternative event which is most likely to occur in relation to the Company if the Restructuring Plan is not sanctioned under section 901F is an administration and I must deal with the class composition on the basis that it is the relevant alternative. Mr Haywood submits that the Court should make an order convening five classes of creditors, STB as the senior creditor, JCP as the junior secured creditor, HMRC as the only preferential creditor, the inter company creditors who have consented to the restructuring plan, who will receive no consideration, and unsecured creditors. In my judgment there can be little argument in relation to the first three classes. They have different rights now and would have different rights under the relevant alternative, namely the administration. I also accept that it is appropriate to differentiate the fourth class of inter-company creditors from other unsecured creditors both because they have different rights under the subordination deed from other unsecured creditors and because they will have materially different rights under the Restructuring Plan. Initially, I was sceptical about distinguishing them from other unsecured creditors but Mr Haywood's analysis convinces me that they should be treated as a separate class of creditors.

32. This leaves the question of other unsecured creditors and whether they should be treated as a single class. Mr Haywood submits that they each have materially the same rights against the Company because each holds an unsecured claim but would rank pari passu in the relevant alternative. In the event that the Restructuring Plan becomes effective, the claim of each creditor will be compromised in the same manner. Mr Fyfe objected to Mr Haywood's analysis on the basis that he had a three-way arrangement with the Company. He submitted that the share sale agreement under which he was due to receive £860,000 contained warranties and that in the event of a warranty claim (might well arise given the current financial information provided by the Group), he would be entitled to set off any claim for breach of warranty against his entitlement under the share purchase agreement. He submitted, therefore that he and Mr Smith (who is in a very similar position) ought to be treated as a separate class.

33. There was some debate about whether this was an issue which I had to decide now. But I am satisfied it can be left for the sanction hearing. Mr Haywood accepted that the Company took the risk that if the Court took a different view of the rights and obligations of Mr Fyfe and Mr Smith under their various agreements with the Company

at the sanction hearing and found that they had different rights from other unsecured creditors, then this might lead to a dismissal of the application to sanction the Scheme and an order for the plan meetings to be held again.

34. I add that at first sight Mr Haywood's analysis appears to me to be right and that Mr Fyfe and Mr Smith's rights as givers of warranties and receivers of covenants by third parties are interests and not separate rights. In *Re Gatehouse Group Ltd*. In that case Zacaroli J described the rights of creditors against third parties, e.g., against guarantors of the scheme company's debt, will generally constitute interests as opposed to rights. However that may be, it is unnecessary for me to decide the point at this stage and I record that it remains open to Mr Fyfe and to Mr Smith to argue again that they should be treated as a separate class of creditors at the sanction hearing.

(4) Roadblocks

35. Mr Haywood identified two potential roadblocks. The first was the threat of an injunction by Mr Smith. Mr Hayward submitted that given that Mr Smith has not issued or obtained an injunction and has not expressed a direct intention to issue such an application this was not a roadblock which should prevent me making a convening order. I accept that submission. It may be that Mr Smith is entitled to restrain the transfer of his shares in the Company and that the effect of such an injunction will be to prevent the Restructuring Plan going forward. But at the date of this hearing it is not something which he has issued or indicated to me that he intends to pursue and the Court should not anticipate that he will.

36. The second potential roadblock was the "time to pay" arrangements which HMRC was considering in relation to the relevant Group subsidiaries. It is possible that the failure to enter into those arrangements might prevent the Restructuring Plan taking effect. But, again, at this stage the evidence is that the HMRC has not taken a concluded view about whether to enter into such arrangements and therefore this is not a roadblock which should prevent the sanction hearing going ahead or indeed the approval or sanction of the Restructuring Plan.

(5) Practical Issues

37. The 2020 Practice Statement requires that notice should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed, take appropriate advice, and if so advised to attend the convening meeting. It also states that what is adequate notice will depend on all of the circumstances. There is therefore no prescriptive requirement for notice. In *Re ED&F Man Treasury Management plc* [2020] EWHC 2290 (Ch) Zacaroli J stated that the following factors are relevant at [8]:

> "There is no hard and fast rule as to the appropriate notice period, but in reaching a view in a particular case, the following factors are relevant: the urgency of the case as a result of the financial condition of the Company, not as a result of the delay in the Company getting to this point; the extent to which there has been prior engagement with creditors; the likely degree of sophistication of the creditors; and the complexity of the scheme and of the issues raised for consideration at the convening hearing."

38. In the present case Mr Smith and Mr Fyfe have raised concerns about the adequacy of notice in writing and made requests for information. Mr Haywood has indicated that the Company will continue to engage with them both and the lively debate which occurred in front of me suggests that that engagement will ultimately lead to the provision of a greater level of information. The Company also accepts that scheme creditors who failed to raise matters at the convening hearing should be entitled to appear and raise any such objections at the sanction hearing, and invited the court to make an order in those terms.

39. Ms Cooke pointed out that HMRC was not served with the Practice Letter dated 8 December 2022 until 22 December 2022 although it was sent to creditors earlier. She also pointed out that the Restructuring Plan has changed three times – the last time being on 31 January 2023 – and that HMRC was only served with Robins 1 on 6 February. 2023. Finally, she pointed out that that this was the first time that HMRC had seen the BTG Report and that Robins 2 was served late on 10 February 2023. She submitted that in those circumstances HMRC has had insufficient time to review all of the information and to consider fully its position with its advisors.

40. I am satisfied that adequate notice has been given to creditors given the urgency and the concession made by the Company that creditors may raise issues at the sanction hearing which were not raised at the convening hearing and that they may continue to maintain the positions which they had taken before me. In particular, I am satisfied that the default in its principal funding agreements, the risk of Western Union presenting a winding up petition and the need by the Company to file its statutory accounts within the next two months justifies a degree of urgency which might not be required in other cases. The concession made also gives creditors sufficient time to consider all of the relevant information and to take advice before the sanction hearing. I also point out that the Company takes the risk that the Court will not sanction the Restructuring Plan if they have not engaged with their creditors and their advisors between now and the sanction hearing or answered their queries in sufficient time to enable them to properly prepare.

41. This leaves the only other practical issue debated before me which was the form of the Explanatory Statement. Ms Cooke objected to the lack of detail in relation to the list of critical creditors, all of whom are entitled to be paid in full. She gave two examples in the form of Mr Beech (who is a director of the company) and in relation to miscellaneous accruals (which are difficult to understand without more detail). She also submitted that they should be dealt with in the Explanatory Statement. I agree. In my judgment, the creditors should be entitled to see a full explanation for the critical supply creditors. They are, after all to be paid in full, on the express basis that they are critical to the continued operation of the Group. All other creditors and, in particular, HMRC are entitled to be satisfied that they are genuinely critical to the operation of the Group and, indeed, that the Group is liable for all of the debts set out in that list.

42. So far as other information issues are concerned, Mr Fyfe raised a number of concerns about the financial information provided by the Company and, in particular, the material contained in the BTG report. He was concerned by the absence of up-to-date figures, given that the historic numbers upon which the Company relies are now six months out of date. He also raised concerns about the cash flow forecast put forward by BTG which suggests that the Group and its holding company are funding the trading subsidiaries. In my judgment, it is not necessary for those issues to be dealt with in the Explanatory Statement. However, the Company should be required to answer the

points raised by Mr Fyfe. But they can do it either in the form of additional evidence or in correspondence and pursuant to their continuing duty to engage with creditors.

43. In the same way Mr Smith raised concerns about the availability of management accounts after the board meeting on 28 February 2022. He also submitted that in relation to critical supply creditors, it is important to identify those creditors who are affiliated to or connected with the company. In relation to management accounts, that is also a matter which can be dealt with in correspondence or in evidence rather than in the Explanatory Statement. But in my judgment, the Company should identify all of those critical creditors who are connected or affiliated to the Company in the Explanatory Statement.

44. That leaves two issues which were raised before me but which I do not propose to require the Company to resolve at this stage. The first issue was raised by HMRC and related to what Ms Cooke described as the "restructuring surplus" which was available to the company and to JCP as a result of the cram down of HMRC's debts. The second issue was raised by Mr Fyfe and Mr Smith. Both maintained that no attempt had been made to find an alternative solution to their claims either by settlement or compromise or even by alternative dispute resolution. Both suggested that if the Company had entered into negotiations with them or raised the possibility of settlement, then they would have been receptive. They also they suggested that a negotiated settlement would have been a better alternative to a restructuring plan. It is clear that the first issue is one of principle which HMRC wish to take before the Court in relation to a Part 26 or Part 26A application for the first time. But both issues go to the overall fairness of the scheme and the Company should be ready to address them both at the sanction hearing.

45. Subject to these observations, I am satisfied that the Explanatory Statement is in a suitable form to be circulated to creditors. As Mr Haywood described it to me, the Restructuring Plan is relatively simple and the Explanatory Statement is in the standard form for plans of this kind. On the basis that the changes which I have identified are made to the Explanatory Statement and the Company addresses the issues that I have set out in this judgment, I will make an order in the form of the draft put forward by Mr Haywood, subject to two changes. The first is that I will give the Company a further 48

hours to consider the form of the Explanatory Statement, and any other issues arising out of this Judgment. The second is that in paragraph 9 of the Order I will order that the sanction hearing should be listed on an expedited basis, on a day to be fixed if possible before 30 April 2023, with an estimated length of the hearing of two to three days.
