Neutral Citation Number: [2023] EWHC 78 (Ch)

Case Nos: CR-2023-000160, CR-2023-000161, CR-2023-000162, CR-2023-000163, CR2023-000164, CR-2023-000165, CR-2023-000166

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

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

Date: 23 January 2023

Before :

MR JUSTICE TROWER

IN THE MATTER OF LISTRAC MIDCO LIMITED
AND IN THE MATTER OF LISTRAC BIDCO LIMITED
AND IN THE MATTER OF LIFEWAYS FINANCE LIMITED
AND IN THE MATTER OF LIFEWAYS COMMUNITY CARE LIMITED
AND IN THE MATTER OF LIVING AMBITIONS LIMITED
AND IN THE MATTER OF AUTISM CARE (UK) LIMITED
AND IN THE MATTER OF VITAVIA PROPERTY MANAGEMENT LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

Tom Smith KC, Paul Fradley and Annabelle Wang (instructed by **Willkie Farr & Gallagher (UK) LLP) for** the **Applicant Companies**

Tina Kyriakides (instructed by **Harrison Clark Rickerbys Limited**) for **Mr Justin Tydeman**

Hearing date: 17 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives

(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

....

MR JUSTICE TROWER

Mr Justice Trower:

1. This judgment is concerned with an application by seven companies (the "Plan companies") forming part of the Lifeways group (the "group") for orders that meetings of creditors be summoned under section 901C(1) of the Companies Act 2006 ("CA 2006") for the purpose of agreeing restructuring plans (the "Plans") under Part 26A of CA 2006. At the end of the hearing, I said that I would make the order sought by the Plan companies. I indicated that I would give my reasons in writing because the application raised a point on the application of section 901C(3) of CA 2006 which might prove to be of more general interest.

2. The group of which each of the Plan companies forms part is the leading supported living specialist in the UK, providing specialist residential support and care services for around 4,200 adults with complex needs. It has approximately 10,000 employees.

3. It is not necessary for me to explain the group structure in any detail for the purposes of this judgment. It suffices to say that four of the Plan companies Lifeways Community Care Ltd ("LCC"), Living Ambitions Limited ("LAL"), Autism Care (UK) Limited ("ACUKL") and Vitavia Property Management Limited ("VML") are subsidiaries of Lifeways Finance Limited ("LFL"). LFL is itself a subsidiary of Listrac Bidco Limited ("Bidco") and Bidco is itself a subsidiary of Listrac Midco Limited ("Midco"). Bidco and Midco are intermediate holding companies within the group.

4. Midco has two classes of issued shares: class A ordinary shares and class B ordinary shares. Its majority A shareholder is Listrac Intermediate Holdings Limited ("Intermediate Holdings"). The B shares were issued to existing and former members of the group's management as part of a 2019 management incentive plan (the "MIP"), which was put in place in order to incentivise the management team, with the consent of the existing secured creditors, to deliver a sale of the group. There is a put option associated with the B shares to which I will revert later in this judgment.

5. The evidence contains a detailed description of the target group's current financial difficulties. In broad terms, the Plan companies' case is that those difficulties have been caused by onerous obligations under some of its leases, nomination agreements and other liabilities in its residential supported living sectors, together with an unsustainable level of secured debt. The context in which those onerous lease liabilities have been incurred is that they relate primarily to properties which are either empty, or unfit for future occupation by service users, or on rents which are higher than market rates and on long and inflexible terms.

6. The Plans are proposed as part of a broader restructuring designed to ensure the continued operation of Bidco and its subsidiaries (the "target group") by putting in place a sustainable capital structure. The intention is that an improved quality of care services will thereby be enabled for the benefit of all of the target group's stakeholders. Continuity of care is said to be a crucial concern for the Plan companies.

7. The essence of the proposal is that the secured creditors of the target group will acquire ownership in exchange for the reduction of their secured indebtedness. It is also proposed that they will provide further liquidity under a new super priority secured loan facility on the condition that the target group's onerous lease and other contractual liabilities are

reduced or released. LCC is the tenant of most of the leases sought to be compromised. Midco, as the top Plan company in the group, will then be wound down on a solvent basis.

8. The Plan companies' evidence is that, if the Plans are not put in place, the group will run out of cash by the 28 February 2023. It is said that new capital is highly unlikely to be available from any party other than the existing secured creditors.

9. The primary financing for the group has been advanced under a secured facilities agreement of which Bidco, LFL and LCC are borrowers with the remaining Plan companies as guarantors. The amount currently outstanding is in excess of £190 million, repayment of which has been temporarily deferred. These temporary deferrals and waivers have been extended for the duration of a lockup agreement. They can be terminated at the option of the secured creditors if the Plans are not sanctioned, or will terminate automatically on the occurrence of a 28 February 2023 longstop date.

10. The current beneficial owner of the group is a corporation forming part of the Ontario Municipal Employees Retirement Scheme ("OMERS") which acquired the group in 2012. It will cease to be the beneficial owner of the target group as a result of the restructuring of which the proposed Plans form part. The group is also indebted to OMERS in a sum of just under £10 million which is subordinated to the senior facilities agreement and remains outstanding. OMERS has made clear that it will not provide any further financial support to the group.

11. There are two broad categories of non-finance creditor whose claims against the Plan companies are also proposed to be compromised by the Plans. Four of the seven Plan companies (LCC, LAL, ACUKL and VML) are party between them to approximately 77 leases of care homes and offices, the vast majority of which benefit from guarantees granted by another Plan company (in almost all cases LFL). The liabilities in respect of 27 of these leases are proposed to be compromised under the Plans. They are typically on terms of 20 years or more and were identified having regard to an estimated rental value or ERV analysis.

12. So far as the landlords under these 27 leases are concerned, they are divided into class A landlord creditors, class B1 landlord creditors and class B2 landlord creditors.

    a. Class A landlord creditors are those in respect of whose premises the ERV analysis determined that the contractual rent payable was approximately 40% above ERV in respect of the properties let to one of the Plan companies and 20% above ERV in respect of the properties let to another. Those leases are considered by the relevant Plan company to be uneconomic on current terms. The proposal is that they will have their rents reduced for a compromised period of three years.

    b. The leases of class B1 landlord creditors are not currently viable for the target group and could not be so even if the contractual rent payable under them were to be reduced. In part this is because their leases are uneconomic, and the premises are empty or wholly unsuited for any future use even at market rent levels. It is proposed that the claims of these landlords will be compromised in full.

c. So far as class B2 landlords are concerned, they are in the same position as class B1 landlord creditors, but the premises to which their claims relate have been sublet by LCC to a third party.

13. The second broad category of creditor comprises unsecured creditors with certain miscellaneous types of claims, including those arising under seven of what are called the nomination agreements, those made by former advisers and those made by former senior management executives. The liabilities under the nomination agreements arise because LFL is required to pay what are called void costs to landlords in lieu of the rent which the landlord would otherwise have received directly from a resident individual requiring supported living services. There are also superior landlords who are contingent creditors of LFL in respect of such obligations, the liability to whom may arise if the landlord's own lease is forfeited by the superior landlord.

14. In all instances in which claims in this second broad category are compromised, they will be released in full in return for the receipt of 110% of each creditor's estimated insolvency return on the amount of its allowed claim against the relevant Plan company, or its claim as admitted under the Plans as the case may be. The estimated insolvency return is a figure computed by EY based on work done by FRP Advisory ("FRP") and is intended to represent the best-case valuation of creditors' returns in the relevant alternative (as to which see section 901G(4) of CA 2006), which is said to be an administration for all but two of the companies and a liquidation for Bidco and Midco. It is the Plan companies' case that an optimistic valuation of the achievable sale price has been used and that the actual returns to creditors in an administration sale may be materially lower.

15. A number of the target group's liabilities are unaffected by the Plans. Amongst these are obligations under the group's defined benefit pension schemes of which LCC is the scheme employer, liabilities to trade creditors which are essential to the ongoing group trading, business rates, tax liabilities and employee-related liabilities except for the former executive management claims. The target group's liabilities under many of its leases and nomination agreements are also excluded. The theme which is said to characterise all of these exclusions is that their compromise would adversely impact the survival and future development of the target group's businesses as going concerns. The test which is described in the evidence as having been applied is whether the liabilities to be excluded are critical to the continuing business operations of the target group. In the case of intra-group liabilities between Plan companies, they are being released as part of the wider restructuring.

16. The group's initial response to its financial difficulties was to engage in a sales and marketing process led by DC Advisory in order to find a purchaser. This took place between October 2021 and May 2022. 48 potential bidders were approached, but there was limited interest, primarily because of the negative impact of the onerous lease and nomination agreement liabilities on the group's EBITDA. The two bids that have been submitted were non-binding offers at figures that were substantially less than the amount of the secured debt under the senior facilities agreement.

17. It is of some relevance to understand the form that these offers took. Offer A was received as a result of the first stage in the M&A process. It comprised an upfront cash amount of £40.1 million, a rollover of £90 million of the existing facility agreement and

deferred consideration of contingent value rights with a maximum value of £55.4 million. It transpired during the course of the hearing that the form of this offer was not accurately described in the draft Explanatory statement. The Plan companies have agreed to amend the description in order to explain the true position.

18. Offer B was made after a further approach was made to three trade parties. This offer did little more than identify an indicative enterprise value for the group of £125 million to £130 million and was not regarded as capable of acceptance. As with offer A, it was set at a figure that was substantially less than the amount of the secured debt under the senior facilities agreement.

19. The consequence of this situation is that the Plan companies have proceeded to negotiate with their secured creditors, culminating in the proposed transaction which is intended to be consummated through the implementation of the Plans. It is intended that the secured creditors will acquire ownership of Midco's shares in Bidco in exchange for amending the secured debt arrangements under the facilities agreement and providing new money to support the target group's future operations (£15 million, of which £5 million has already been made available).

20. The rearrangement of the secured debt will involve the release of c.£100 million of the existing debt and the reinstatement of the remaining c.£90 million (including accrued interest) to rank junior to the new money. The shares in Bidco will be transferred by Midco to a new secured creditor-owned vehicle for a nominal £1 on the basis that the shares themselves are worthless. This is supported by FRP's opinion that the enterprise value of the group is between £117 million and £135 million computed on a discounted cash flow basis, which is therefore substantially below the level required to repay the secured creditors in full.

21. This proposed transaction is conditional on the discharge of certain onerous lease and contractual obligations under the nomination agreements. Initially attempts were made to reach a consensual compromise of the Plan companies' liabilities to a small number of institutional landlords (the major landlords) who comprise the vast majority of its lessors. By the end of the week commencing 21 November 2022, it had become apparent to the directors of the Plan companies that not enough of the major landlords were willing to accept a settlement amount that was either economically viable for the group or acceptable to the secured creditors. In these circumstances, the directors determined to proceed with the current application for the purposes of obtaining the approval and sanction of the Plan.

22. Each of the Plan companies (other than Midco) and its directors is satisfied that the most likely relevant alternative to the plans is an entry into insolvent administration. In the case of Midco (and possibly Bidco), it is more likely to be an insolvent liquidation. The basis for their conclusion is that the Plan companies are at imminent risk of formal insolvency and their only realistic alternative to formal insolvency proceedings is an arrangement (in the form of the Plans) under which the current secured creditors acquire the target group. They are the only parties currently willing to do so, but they have indicated that they are only willing to do so if the onerous lease and other obligations are compromised, a position which the directors are satisfied can only be achieved through the implementation of the proposed Plans because the negotiations with the major landlords have so far proved unsuccessful.

23. In describing what is likely to happen if each of the companies were to go into a formal insolvency process, the directors have explained that the most likely approach to be adopted would be through a pre-packaged administration sale in which the secured creditors would credit bid by way of releasing that debt for a substantial portion of the purchase price. It is said that the prospects of any third party offering an amount sufficient to repay such debt in full, or to exceed the amount that the secured creditors could use to credit bid, are very low.

24. The directors' views as to this likely outcome if the Plans were not to be agreed and sanctioned is supported by a relevant alternative report which has been prepared by EY. This takes into account the work by FRP which produced the valuation range of £117 million to £135 million. The role of the secured creditors as the most likely successful bidders is evidenced by the failure of the M&A process that has already occurred with the consequence that additional secured creditor funding is unlikely to be forthcoming to enable continued trading while an additional M&A process is taking place.

25. It is of some relevance (for reasons to which I will come shortly) that the evidence, which I accept, is that much the most likely means by which the consideration would be paid is through credit bidding by the secured creditors of their existing debt. The likelihood is that the bid will only include sufficient cash to fund the prescribed part and preferential claims.

26. As is well established, the function of the court at the convening hearing for a Part 26A restructuring plan is not to consider the merits or fairness of the proposed plan. This issue is for consideration at the future sanction hearing if the plan is approved by the statutory majority of creditors: see e.g., *Re Smile Telecoms Holdings Ltd* [2021] BCC 587 at [18].

27. Rather the purpose of the convening hearing is to consider a number of matters that must be determined before the proposal is put to creditors at a plan meeting and before the court subsequently proceeds to consider whether or not the relevant plan or plans should be sanctioned. In that context, the Practice Statement (Companies: Schemes of Arrangement) [2020] 1 WLR 4493 provides that applicants must draw to the attention of the court, any issues which may arise as to the constitution of meetings of creditors and any issues as to the existence of the court's jurisdiction to sanction the plan. To that end, they are required to take all reasonable steps to notify any persons affected by the plan that it is being promoted, the purpose which the plan is designed to achieve and the meetings which the plan companies consider will be appropriate.

28. So far as notification is concerned, there have been a number of cases in which the court has considered the issue of whether sufficient notice has been given to plan creditors to enable them to consider the position and if so advised to attend the convening hearing and make representations. The current case is not one in which there is any real doubt that adequate notice has been given and so it is not necessary for me to consider the law in any detail. Suffice it to say that periods of three weeks are commonplace, although both longer and shorter periods have been considered appropriate as well. The factors to which the court will have regard are helpfully summarised in the judgment of Norris J in *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch).

29. In the present case there is evidence of what was done to identify and serve each Plan creditor. This was complicated given the several different categories of Plan creditor and is set out in a witness statement from Mr Graham Lane, a partner in Willkie Farr and Gallagher. There were some delays and difficulties, but the Practice Statement Letter ("PSL") was sent on the 9 December 2022, which amounts to more than five weeks' notice of this convening hearing. I have read the PSL and I am satisfied that its contents comply with the terms of the Practice Statement and that five weeks was sufficient time to ensure compliance with the Plan companies' obligation to take all reasonable steps to notify those affected by the Plans of what is proposed.

30. Amongst the Plan creditors sent the PSL on 9 December was the group's former CEO, Mr Justin Tydeman. He is treated as a creditor in respect of a (disputed) claim arising out of his dismissal. It was also sent to him for a second time on 30 December 2022 after the Plan companies had determined that it was appropriate for the PSL to be sent to Midco's B shareholders who had certain rights under the MIP. The Plan companies did so in the interests of transparency, even though they did not accept Mr Tydeman's assertion either that the B shareholders were Plan creditors or that they were affected by the Plans in a manner which entitled them to be summoned to a Plan meeting. This is a point to which I will return.

31. The next issue is whether there are any jurisdictional questions which arise. The first of these is whether each of the Plan companies is a company for the purposes of Part 26A of CA 2006. For these purposes, the court is required to be satisfied that each is a company liable to be wound up under the Insolvency Act 1986 (section 901A(4)(b) of CA 2006). Each of the Plan companies is incorporated in England and I am satisfied that they are each a company for these purposes. No cross-border issues, such as the sufficiency of the Plan companies' connection to this jurisdiction, arise.

32. The next question is whether the conditions A and B set out in sections 901A(2) and 901A(3) of CA 2006 are met. If they are not, Part 26A does not apply at all and so the court is not empowered to order a meeting of creditors or members to be summoned under section 901C.

33. Condition A is that the relevant Plan 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. This condition describes in qualitative terms the nature of the financial difficulties from which the Plan company is said to be suffering before the provisions of Part 26A can apply. In short, they must be sufficiently serious to give rise to a possibility that the company will become unable to carry on business as a going concern. But as Zacaroli J remarked in *Re Hurricane Energy Plc* [2021] EWHC 1418 (Ch) at [22], the threshold is relatively low.

34. I am satisfied that condition A is satisfied in the present case. It is clear that the Plan companies are unable to pay the sums presently due to secured creditors under the senior facilities agreement and that, in the absence of the temporary waivers and deferrals (which are due to terminate before the end of February 2023), they would be both cash flow and balance sheet insolvent and would not be able to carry on business as a going concern. This is substantiated not just by the Plan companies' own evidence but also by the EY report to which I have already referred and by the failed M&A process.

35. So far as condition B is concerned, the court must be satisfied (a) that a compromise or arrangement is proposed between each Plan company and some class of its creditors or members and (b) that the purpose of the compromise or arrangement is to eliminate reduce or prevent or mitigate the effect of any of the financial difficulties previously referred to.

36. As to the first part of condition B, the authorities establish that the word arrangement is of wide import and that the concept is to be construed in a broad manner. Ultimately the question is whether there is a sufficient element of give and take. In a case such as the present, where it is the Plan companies' case that creditors are to be offered terms which provide a better return for them than they would otherwise receive in the relevant alternative, the court can be satisfied that this element of condition B is met. Whether those terms are sufficient to justify the proposed rearrangement of rights is a matter for the Plan creditors at their Plan meetings, as reviewed by the court at the sanction hearing. It does not give rise to a question of jurisdiction for consideration at the convening hearing.

37. However, each of the Plan companies accepts that there is a further issue that arises in a case such as the present because an arrangement can only affect a Plan company's creditors in their capacity as such. This means that the rearrangement can only affect (a) claims against third parties where they can properly be described as ancillary to the creditor's claim against the company and (b) proprietary rights such as security where they are an incident of the debt or parasitic upon it: *Re Lehman Brothers International (Europe)* [2010] Bus LR 489 at [63], [65] and [82].

38. Where a compromise or arrangement is proposed as between a plan company and its landlords, this principle has important consequences. In his comprehensive review of the law in *Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch), Zacaroli J explained that this means that the right of the landlord to forfeit the lease can only be varied in respect of the pecuniary obligations modified by the scheme, while by the same token the landlord cannot have an enforced surrender of the lease imposed upon him. It follows that the court can only sanction a Part 26 scheme (and the same principle applies in relation to a Part 26A restructuring plan) to the extent that those proprietary rights are preserved.

39. In the present case the proposal provides for the landlords whose rights are affected by the proposed Plan to have an option to terminate their leases if they elect to do so. This was the approach adopted in *Re Virgin Active Holdings Limited* [2021] EWHC 814 (Ch) at [36]. Like Snowden J in that case, on the basis of the information now before the court, I consider that the proposals for the Plans now advanced adopt an appropriate approach to this issue.

40. As to the second part of condition B, the purpose of the compromise or arrangement must be to eliminate reduce or prevent or mitigate the effect of any of the financial difficulties. This is broad language intended to be expansively construed. In my view, this jurisdictional element is likely to be satisfied where an enhanced dividend to creditors is provided for over and above that which would be obtained in the relevant alternative.

41. In the present case, the evidence adduced by the Plan companies is that the restructuring will provide for an enhanced dividend for each Plan creditor compared to the relevant alternative and will place the group on a firm financial footing by dealing with liabilities

to secured creditors, providing for new financing and dealing with onerous lease and other liabilities which are affecting the group's ability to trade. It is not intended that Midco will continue as a going concern, but as I explained in *Re Deep Ocean 1 UK Limited* [2021] Bus LR 632 at [48], that is not a necessary prerequisite for the exercise of the jurisdiction.

42. The next jurisdictional question for consideration is the issue of class composition. As to this, similar principles apply to the well-established approach to class composition for the purposes of a scheme of arrangement promulgated under Part 26 of CA 2006: *Re Gategroup Guarantee Limited* [2021] BCC 549 at [181]-[182]. The basic rule is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult with a view to their common interest. As Chadwick LJ said in *Re Hawk Insurance Company Limited* [2022] BCC 300 at [30] the question for the court is to analyse and compare the rights which are to be released or varied under the scheme and the new rights if any which the scheme gives by way of compromise or arrangement.

43. In carrying out that exercise, the court looks at the reality of the existing rights and, where a company is insolvent, that will often (but not always) be a formal insolvency process. The exercise on which the court is engaged is an assessment of what in reality will happen if the Plan is not approved and sanctioned. As Snowden J explained in *Re Virgin Active Holdings Limited* [2021] EWHC 814 (Ch) at [69], the counterfactual comparator for class purposes and the statutory relevant alternative (s.901G(4) of CA 2006) are clearly equivalent concepts.

44. In the present case, the Plan creditors have been divided into a number of broad categories. The first for each of the Plan companies is its secured creditors. Their existing rights are secured rights, but the claims of all secured creditors against each of the Plan companies are the same in the sense that they rank *pari passu* amongst themselves and each benefit from the same joint and several guarantees granted by another Plan company.

45. It is also the case that each of the secured creditors had entered into a lockup agreement. To that further extent and more generally the rights of each of the secured creditors are affected by the Plans in the same way. Each of the secured creditors has been offered the same opportunity to participate in the new facilities pro rata to their existing holding of debt under the existing facilities agreement and each of them has elected to do so.

46. I have given consideration to the question of fees that are payable to the secured creditors' professional and legal advisors. I am satisfied that they do not in themselves create any class issues because those advisers have provided services to all members of the relevant class and are payable directly to them.

47. So far as the landlord creditors are concerned, their rights are different to those of the secured creditors because they do not have the benefit of security provided by any of the Plan companies. They have the proprietary rights of a lessor, and so to that extent have different rights from the other unsecured creditors, but the extent of those proprietary rights is different from those of the secured creditors. In my judgment the Plan companies are therefore correct to place the landlord creditors in a different class from both the secured creditors and the other unsecured creditors.

48. So far as concerns the landlord creditors as between themselves, their existing rights are in broad terms sufficiently similar to mean that it would have been appropriate for them to be placed in the same class if their rights under the Plans had been treated in the same way. However, I agree with the Plan companies' submission that the treatment of the class A landlords, the class B1 landlords and the class B2 landlords under the Plans are all sufficiently different to make it appropriate for them to be placed in different classes.

49. The reason for this can be summarised as follows;

    a. So far as the class A landlords are concerned, the premises to which their claims relate are currently over rented and require rent reductions to have a reasonable prospect of long term viability. The solution for them under the Plans is to reduce the rent in line with estimated rental values during the rent concession period, and then pay the higher of contractual rent and market rent going forward.

    b. So far as the class B1 landlords are concerned, the premises to which their claims relate are unsuitable for future use even at market rental rates. Accordingly, the proposed Plans provide for a reduction of rent under those leases to zero and gives a rolling break right to the landlords.

    c. So far as the class B2 landlords are concerned, their rights-out are different from those of class B1 landlords because the relevant plan company is required to turnover to the landlord any amounts received from the sub tenant, which is not a position that pertains in relation to any class B1 landlord.

50. The next proposed class is the landlord guarantee creditors whose claims are only relevant to the LFL Plan. They do not have the proprietary rights of landlord creditors, but the question is whether they should be placed in a different class from the remaining unsecured creditors because their lease guarantees will be amended to reflect the terms of the Plans in respect of the corresponding lease. They will not therefore have their claims released in full in return for a payment of 110% of the estimated insolvency return which is the proposal for all other unsecured creditors whose rights are to be compromised by the Plans. In my view LFL is correct to say that, in the light of this treatment, their rights-out under the proposed Plans are all sufficiently distinct from those of the other unsecured creditors to mean that it is not possible for them to consult together with a view to their common interest.

51. The next question is whether the other unsecured creditors of each Plan company should form a single class. I agree that their rights are sufficiently similar for these purposes. They each have an unsecured actual or contingent claim against the Plan companies which is provable as such in an administration or liquidation, that being the proper comparator for class purposes (and also what would occur in the relevant alternative). I agree that such differences as there are between the other unsecured creditors based on such matters as whether the claims are actual or contingent and the nature of the underlying contract do not alter the fact that each of them would be treated in the same way in the relevant alternative. The essence of their rights-out, i.e., their rights under the Plans, are the same in the sense that each claim is to be discharged in full in return for a payment of 110% of its estimated insolvency return.

52. At the hearing, Mr Justin Tydeman was represented by counsel (Ms Tina Kyriakides). Not only was Mr Tydeman the former CEO of the group, he was also a director of each of the Plan companies, a position from which he resigned in August 2022. He was employed by LCC but was dismissed as an employee in October 2022. Mr Tydeman has a claim for unfair dismissal arising in respect of his dismissal and has lodged two pre-conciliation claims with ACAS. He also asserts an entitlement to sums in relation to the MIP.

53. So far as Mr Tydeman's claim for unfair dismissal is concerned, it would appear to fall within the classification of a former executive management claim under the LCC Plan, which means that it falls within the category of other unsecured creditor claims which will entitle him to 110% of his estimated insolvency return. The terms of the Plans provide for his claim to be determined by EY as the Plan administrator with an ability to dispute any rejection of the claim and have the matter determined by an independent chartered accountant.

54. Mr Tydeman submitted that his claim should be excluded from the Plans because of its nature (which was his position in a letter he wrote to the court before the hearing). Alternatively, he said that he should not be put in the same class as other unsecured creditors because there were material differences in rights (which was the position adopted in Ms Kyriakides' skeleton argument).

55. I have no doubt that the first way of putting the point is not a matter which ought to be finally determined at today's convening hearing. It is well established that the question of identifying the creditors with whom a scheme or plan company wishes to seek to enforce a compromise is a matter for the company (*Re Noble Group Limited* [2019] BCC 349 at [7]) and the exclusion of a particular group will not give rise to a class issue, anyway where it is done for good commercial reasons (*Re Telewest Communications Plc* [2004] BCC 342 at [57]). On the face of it, the good commercial reasons test is satisfied in the present case but, if there were to be some policy objection to the inclusion in (or indeed exclusion from) the Plan of a particular category of claim, that is a matter for determination at the sanction stage: see the discussion by Snowden J in the sanction judgment in *Re Virgin Atlantic Airways Limited* [2020] BCC at [55ff]. If there were to be any identifiable unfairness in the compulsory compromise of Mr Tydeman's claim for any of the reasons put forward by him, that is not a matter for determination at this stage.

56. As to the class question, Ms Kyriakides submitted that the rights of Mr Tydeman which the Plan seeks to compromise go further than his rights to a monetary payment. She submitted that he also has a right to pursue declaratory relief regarding the unlawfulness of his dismissal and to obtain findings from the court concerning the allegations made against him, which the Plan will prevent. This is important to Mr Tydeman because he wishes to preserve his ability to take proceedings to vindicate his reputation, and it is said that there are public policy reasons why he should be able to do so. It is also said that some part of his claim may be preferential in respect of which he will be entitled to rank above the unsecured creditors in the event of the relevant alternative.

57. So far as the question of Mr Tydeman's claim as a preferential creditor is concerned, Mr Smith KC said during the course of the hearing that the Plans would be amended to exclude any preferential element from the compromise. He said that this would deal with

any class issue flowing from this point, and Ms Kyriakides did not submit to the contrary. I agree.

58. So far as the claims for non-monetary relief are concerned, for present purposes I assume that the Plans will have the effect in accordance with their terms of interfering with the conduct of such proceedings. I think that the claim for a declaration is probably ancillary to such monetary claim as Mr Tydeman may have and is capable of compromise under the LCC Plan (see the passages from *Re Lehman Brothers International (Europe)* cited above). In my judgment, however, that does not mean that he falls into a separate class. The material question is the nature of the creditor claim that he has in the relevant alternative, which in the context of the Plan is the proper comparator for class purposes. So far as his claim against LCC is concerned, it would be determined and paid a dividend in the insolvent administration or liquidation of LCC like any other unsecured claim.

59. In my view, the fact that Mr Tydeman might also be able to persuade a court to grant declaratory relief, even in the context of the appropriate comparator, is neither here nor there so far as his creditor rights against LCC are concerned. I accept that he may have a legitimate desire to take steps to vindicate his reputation, but whether it is arguable that it can only adequately be vindicated by legal proceedings for a declaration, rather than through success in the dispute resolution procedure for which the Plan makes provision, is a moot point for consideration at the sanction hearing. Even if the point is a legitimate one, in my view it represents a personal characteristic applicable to Mr Tydeman, constituting what amounts to a separate interest associated with his monetary claim as an unsecured creditor. This would not serve to fracture the class (see e.g, *Re Nostrum Oil & Gas Plc* [2022] EWHC 1646 (Ch) at [40] as a recent example of the many cases in which this principle has been discussed). In all the circumstances, I think that it is possible for Mr Tydeman to consult with the other unsecured creditors in respect of his unsecured claim against LCC qua employee.

60. The other claim flowing from Mr Tydeman's rights under the MIP and Midco's articles requires a little more explanation and gives rise to a question of some difficulty. It relates not just to his own position, but also to the position of Midco's other B shareholders.

61. Under the terms of Midco's Articles, the B shareholders have rights flowing from the grant of a put option over their shares. The put option entitles each B shareholder to require the majority A shareholder, which is Intermediate Holdings as Midco's immediate parent, to purchase their B shares at a price calculated in accordance with article 38 if what is called an 'Exit' occurs. A disposal in the form of a transfer of Bidco to the new bidco, which will be acquiring the shares for the secured creditors at a nominal value as part of the restructuring, would constitute an Exit, but the sanction of the Plan would not. The put option must be exercised within 10 days of Exit, after which it expires.

62. The way in which the option amount is calculated is at the core of Ms Kyriakides' submissions. It is a nominal sum of £1 where the Total Lender Repayments are less than the First Hurdle Amount, which the evidence established to be £116,707,285 (computed as 70% of what is called the Outstanding Lender Principal Amount, being the principal amount of the loans and credit facilities outstanding under the secured facilities as at a date in 2019). The effect is that, if the amount of the Total Lender Repayments does not achieve the 70% target at the time of Exit, the put option right will have no more than a nominal value. If, however, the Total Lender Repayments exceed the First Hurdle

Amount, the option amount increases to figures that are substantially more than nominal, the quantification of which depends on whether they total more or less than 100% of the Outstanding Lender Principal Amount.

63. The definition of Total Lender Repayments is important. They are defined as:

> "the total amount of the Outstanding Lender Principal Amount which is repaid to the Lenders, including, without limitation, any amount repaid in connection with any Exit…and, for the avoidance of doubt, taking into account any Option Amount payable to the B Ordinary Shareholders".

64. The B shareholders are also given rights under an intercreditor agreement in relation to the option amount. This provides that all amounts received or recovered in connection with the realisation or enforcement of any part of the transaction security is to be applied in an order of priority which itself provides for the liabilities to the B shareholders following an Exit (or following the exercise of the put option on an Exit) to be paid in priority to the secured creditors.

65. The Plan companies contend that this structure gives no relevant creditor rights to the B shareholders because the obligor under the put option is Intermediate Holdings, which is not a Plan company. In my view this is plainly correct. But Mr Tydeman goes on to submit that a class meeting should nonetheless be ordered for the B shareholders in their capacity as such (i.e., as shareholders of Midco as one of the Plan companies), having regard to the fact that their bundle of rights include their contingent entitlement to their claims against the majority A shareholder. Even if they are not entitled to meet in their capacity as creditors of any of the Plan companies for the option price, it is submitted that they are entitled to meet in their capacity as shareholders of Midco affected by the Plan. Ms Kyriakides submitted that this right flowed from section 901C(3) of CA 2006, which provides that:

> "Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be subsection (1)"

66. She said that the B shareholders were members of Midco whose rights will be affected by the compromise or arrangement given effect by the terms of the Midco Plan so as to engage the right to participate in a meeting conferred by section 901C(3). In support of this submission, Ms Kyriakides relied on the judgment of Zacaroli J in *Re Hurricane Energy plc* [2021] EWHC 1418 ("*Re Hurricane*") at [27] to [34].

67. In *Re Hurricane*, there were real question marks over the validity of the evidence adduced by the plan company ("Hurricane") as to the true extent of its financial predicament. Nonetheless, the proposed plan involved the release of $50 million of Hurricane's bonds in exchange for the allotment of sufficient shares to give the bondholders 95% of Hurricane's entire issued share capital following the allotment. Zacaroli J explained that the shareholders were affected by the proposed plan in at least two ways. The first was that their pre-emption rights under the articles and sections 549 and 561 of CA 2006 were overridden by the plan. The second was that their shareholdings would be diluted to 5% of their current value as a result of the plan. Zacaroli J did not accept either of the two arguments advanced by Hurricane as to why section 901C(3) was not therefore engaged.

68. The first is not of any real relevance for present purposes. Zacaroli J did not accept that the pre-emption rights were removed by operation of CA 2006 rather than the plan on the basis of section 566A of CA 2006 which provides that "Section 561(1) (existing shareholders' right of pre-emption) does not apply to an allotment of equity securities that is carried out as part of a compromise or arrangement sanctioned in accordance with Part 26A (arrangements and reconstructions: companies in financial difficulty)." As he said at [31], it is the plan which triggers the disapplication of the statutory pre-emption rights, not section 566A, which only potentially does so if the plan is sanctioned.

69. Zacaroli J's rejection of the second argument was said by Ms Kyriakides to be of greater relevance to the present case. Hurricane's argument (as described by Zacaroli J) was that:

> "section 901C(3) applies only where the "rights" of shareholders are affected, and rights are to be interpreted in the same way as in the authorities concerned with class composition – that is, rights against the Company as opposed to mere interests … the contractual rights of the shareholders against the Company are not altered by the dilution of their shareholding under the Plan, it is merely their economic value that has changed."

70. Zacaroli J then explained at [33] to [34] why this argument was wrong. He said:

> "33. "Affected by" is a phrase of broad ambit. It is far broader, for example, than "amended by" or "altered by". It does not form any part of the class composition test (which focuses on the *differences* in existing rights of creditors/members and the rights conferred on them by the Plan). It is an important part of the context of section 901C(3) that the fact that members are permitted to participate in a meeting summoned under that section does not mean that the Plan is dependent on a positive vote, by the requisite statutory majority, of those attending that meeting. That is because of the cross-class cram-down power under section 901G. It is also an important part of the context that section 901C does not apply to any group of creditors or shareholders who have no economic interest in the company: see section 901C(4). (While it is the Company's case that the shareholders would receive nothing in the relevant alternative, it does not submit that if – contrary to its primary contention – the shareholders' rights are affected by the Plan, they have no economic interest in the Company so as to engage section 901C(4)).
>
> 34. In this context, I consider the better view to be that the rights of shareholders (who are taken to have an economic interest in the company) to participate in the capital and profits of a company are "affected by" a Plan that would dilute such participation. This construction ensures that the views of shareholders whose economic interest in the company is directly and potentially significantly affected by the Plan are taken into account in the process mandated by Part 26A."

71. For present purposes, the important point is that, even though the shareholders' contractual rights against the company were unaffected by the dilution of their shareholdings, the effect of the plan in *Hurricane* was to affect the economic value of those rights because their shareholder rights to participate in the capital and profits of the company were diluted and it was not contended that the shareholders had no economic

interest in the company so as to engage section 901C(4) of CA 2006. This was sufficient therefore to engage their entitlement to participate at a meeting under section 901C(3).

72. Based on this authority, Ms Kyriakides submitted that the B shareholders' rights affected by the Plan within the meaning of section 901C(3) of CA 2006 would be their entitlement to require Intermediate Holdings to purchase their shares for the option amount on the occurrence of an event constituting an Exit. It is common ground that an Exit will occur as part of the implementation of the terms of the Plan, viz. when Midco's shares in Bidco are transferred to the secured creditor-owned new bidco. The option must be exercised within 10 days of an Exit after which it will lapse.

73. It was then submitted by Ms Kyriakides, adopting what Zacaroli J said in *Hurricane* about the broad ambit of the words "affected by", that the B shareholders' rights are affected by the Midco Plan. Although structured as a release, she said that the substance of the transaction to be given effect by the Plan is a sale of Midco's shares in Bidco for the sum of £100 million, with the price being set-off against the liability of Midco to the secured creditors. It is said that the secured creditors have engineered a situation whereby the shares in Bidco are transferred to them as set out in the Plans by refusing to consent to the release of their security when offers in the region of £130 million were received for the shares. If such offers had been accepted, the rights of the B shareholders under article 38 would have been triggered and the resulting proceeds of sale from the shares would have been used to discharge the amounts payable to them in priority to the secured lenders pursuant to their rights under the intercreditor deed.

74. It was further submitted that, because the shares in Bidco have been valued by FRP at between about £117 million and £130 million, the sale proposed to be made to the secured creditors under the Plans is a sale at an undervalue. It follows, so Mr Tydeman submitted, that the B shareholders' economic interest in Midco, which is reflected in the value of their shares on the exercise of the option following a sale of Midco's shares in Bidco, is materially affected by the Plans. Likewise it is said that those parts of the Plans which require the shares in Bidco to be sold to the secured creditors in the way proposed, prevent the B shareholders from benefiting from their contractual rights under the intercreditor deed. The consequence is that the proposed amendments to the agreements with the secured creditors without the consent of the B shareholders deprive them of their contractual rights either to agree or refuse to agree those amendments.

75. Despite the elegance with which these submissions were made, I do not think they are correct. The starting point is that I do not think that the concept of repayment in article 38 is capable of having the meaning suggested by Mr Tydeman. The concept of repayment is quite different from the concept of release, and the fact that it was used in article 38 is consistent with the fact that the MIP was introduced at a time the group and the secured creditors were seeking to achieve a market sale to a third party. In my view it is not arguable that the structure which was put forward either by the offerors or as is proposed under the Plans involves a repayment of the Outstanding Lender Principal Amount which comes even close to the First Hurdle Amount as contemplated by the definition of Total Lender Repayments in article 38.

76. In order for there to be Total Lender Repayments capable of amounting to at least the First Hurdle Amount, there must be a repayment of at least c.£116 million to the secured creditors. That is not going to occur under the Plans but nor was it ever going to occur

outside the Plans in the relevant alternative, or indeed in any other counterfactual. To suggest that it might have done so is to misunderstand that the valuation produced by FRP was an enterprise value for the group, not a valuation of the Bidco shares as Mr Tydeman wrongly assumed to be the case.

77. The evidence to that effect was given strong corroboration by the terms and structures of such offers as were made during the course of the unsuccessful M&A process. In particular, there is no evidence that either Offer A or Offer B would have led to a repayment of the Outstanding Lender Principal Amount which would have led to anything more than a nominal payment on exercise of the put option. In fact I think it is clear that neither would have done so. The only cash element in Offer A that might have been available to effect a repayment was £40 million and Offer B was never sufficiently far advanced to identify how much would have been put forward as cash out of which a repayment could have been made. Likewise, an application of the comparator or relevant alternative would have led to the same result. The evidence in the EY relevant alternative report was clear that, if the Plans were not to proceed, the likely outcome would be a successful credit bid of their claims by the secured creditors. This too would not have involved a repayment within the contemplation of article 38.

78. It follows that I do not think that Ms Kyriakides was correct to say that, if the offers had been accepted, the rights of the B shareholders under article 38 would have been triggered and the resulting proceeds of sale from the shares would have been used to discharge the amount payable to them in priority to the secured lenders. Nor do I think that there is any basis for concluding that those article 38 rights had any value that was capable of being affected by the Plans or their implementation. I therefore do not consider that the B shareholders' rights to exercise the put option on Exit, being a right which terminates in any event 10 days after Exit occurs whether as a result of the implementation of the Plans or on a disposal in the counterfactual, has any economic value sufficient to mean that those rights will be affected by the Plans (as contemplated by Zacaroli J's reasoning in *Re Hurricane*).

79. As to the point made by Ms Kyriakides on the intercreditor agreement, I agree with the submission made by Mr Smith that it is incorrect for the reasons he gave. The old intercreditor agreement is not being varied without the B shareholders' consent. All that is proposed is that there should be a new intercreditor agreement which governs the question of priority going forward. Such rights as the B shareholders have would continue to be governed by the old intercreditor agreement, but this is wholly theoretical because their rights to exercise the option crystallise and then lapse on the implementation of that part of the Plans which amount to an Exit and will not, whether under the Plans or in the counterfactual, generate any payment entitlement to which it might apply.

80. In short, I think it is clear that neither the contractual terms of the rights themselves nor their economic value will be affected by the Plans so as to engage section 901C(3) of CA 2006:

    a. The Plans do not vary any of the B shareholders' existing rights under the articles. All that they do is to give effect to the existing rights, which for present purposes means a working out of the rights which flow from the fact that an event

amounting to an Exit occurs as one of the steps in the implementation of the Plan, viz. the disposal by Midco of its shares in Bidco for a nominal consideration.

b. It also follows not just that the B shareholders' rights themselves are unaffected by the Plans, but so too are their economic value unaffected. The Plans provide for Midco's shares in Bidco to be sold for a nominal figure, and for the secured lenders to waive repayment of the sum of £100 million, being part of the debt owed to them by the Plan companies. Contrary to Ms Kyriakides' submissions that does not mean that the economic value of the B shareholders rights are being affected by the Plans. They are worthless in the counterfactual both because it is clear that even the enterprise value of the group is very substantially less than the amount of the secured debt, and because the contractual right of the B shareholders to receive a distribution under the intercreditor agreement on exercise of the option was never going to be engaged, just as it will not be engaged under the terms of the Plans.

81. I should record that a further reason why Mr Tydeman's rights as a B shareholder may have had no economic value was not pursued and would not in any event have applied to all of the B shareholders. Between September and November 2022, a majority of the B shareholders including Mr Tydeman either left or had their employment terminated. They thereupon became bad leavers (because they left for a reason other than their death) within the meaning of article 48 of Midco's articles with the consequence that they were then only entitled to participate on exercise of the put option to the extent of a nominal £1 in any event. However, this would not provide a complete answer, because there are still B shareholders who continue to be employed by a Plan company to which this provision does not apply.

82. Finally, the court is required to consider at the convening hearing the arrangements made by the Plan companies for the planning, timing and conduct of the Plan meetings. The proposal is that the meetings themselves be held on 9 February 2023 with a voting record time as at which claims are to be determined of 6 February 2023. This will give creditors three weeks to consider the explanatory statement. I am satisfied that the explanatory statement is in a form which is fit for consideration by the Plan creditors and that, in all the circumstances of the case, the arrangements that have been made for the Plan meetings are appropriate.