OUTER HOUSE, COURT OF SESSION

[2024] CSOH 111

P948/24

OPINION OF LORD BRAID

In the Petition of

DOBBIES GARDEN CENTRES LIMITED

Petitioner

for

sanction of a compromise or arrangement under Part 26A of the Companies Act 2006

Petitioner: Delibegovic-Broome KC, Roxburgh; Burness Paull LLP

20 December 2024

Introduction

[1] The petitioner, Dobbies Garden Centres Limited (the "company") is a well-known company which operates garden centres. In this petition under Part 26A of the Companies Act 2006, it asks the court to sanction a Restructuring Plan between the company and seven classes of its creditors, the purpose of which is to alleviate certain financial difficulties which the company has encountered, to enable it to continue trading. It seeks to do that by amending and extending its existing secured loan facilities in exchange for the addition of new financial covenants; and by amending and comprising, in each case in exchange for a payment greater than the relevant creditor's outcome in the most likely alternative to the

Restructuring Plan (administration), some of its obligations, being those due under certain Leases and general property arrangements; certain guarantees; and business rates.

[2] At the first hearing on 18 October 2024, I gave detailed directions allowing the company to summon and hold meetings (the court meetings) of each of the seven classes of creditors for the purpose of considering and, if thought fit, approving, the Restructuring Plan. I also appointed Mr Adrian Bell WS, solicitor, to report on the facts and circumstances set forth in the petition and the regularity of the proceedings.

[3] As will be seen, the court meetings took place on 13 November 2024. The Restructuring Plan was approved by only one class of creditors - the secured creditors. It was not approved by any of the other classes. Thus, although I also have to be satisfied on other matters, the key decision for the court is whether the decision of the secured creditors ought to be imposed upon the other classes through the operation of what has become universally known as cross-class cram down, provided for in section 901G of the 2006 Act.

[4] On 14 November 2024 I issued a further interlocutor allowing advertisement of the petition in various publications, and appointing any person claiming an interest to lodge answers within 14 days of the last of such advertisements. Advertisements were subsequently placed in the relevant publications on 15, 18 and 19 November 2023. (There was a minor error in one of the advertisements, in that it mis-stated, by one day, the anticipated last date for lodging answers. However, nothing turns on that, given that no creditor has attempted to lodge answers; no prejudice was caused).

[5] The final hearing - commonly referred to as the sanction hearing - called before me on 9 December 2024. Although a small number of creditors have raised informal objections, no answers were lodged in opposition to the petition, nor did any creditor appear at the hearing. I also had the benefit of Mr Bell's comprehensive, and very helpful report.

[6] At the sanction hearing, senior counsel adopted her written submissions, which she amplified in oral argument in moving that the petition be granted. I granted sanction but, since I was told that this was only the second petition in Scotland under Part 26A of the 2006 Act (and the first was not written on), and since the present case involves a point of general principle in relation to what constitutes a meeting (where I have differed from English authority), I intimated that I would issue a written opinion giving full reasons.

The approach to considering sanction

[7] As with schemes of arrangement under Part 26 of the 2006 Act, the court has a general discretion as to whether to sanction a restructuring plan under Part 26A. Although there are important differences between schemes of arrangement under Part 26 and restructuring plans under Part 26A, the court may draw on Part 26 case law in considering a Part 26A application: *Re Virgin Atlantic Airways Ltd* [2020] BCC 997, Trower J at [45]. Further, this court may draw on English and Welsh jurisprudence: *Sportech Plc, Petitioner* 2012 SLT 895, Lord Hodge at [12].

[8] The important differences between the two types of scheme are as follows:

(i) Section 901A contains two threshold conditions which must be satisfied: (see below, paras [15] to [18]). The use of Part 26A is therefore restricted to companies which are likely to be, or about to become, insolvent (in contrast to schemes of arrangement under Part 26).

(ii) Under Part 26A, it is possible to exclude any class of creditors from being summoned to a meeting where the court is satisfied that none of the members of that class has a genuine economic interest in the company (section 901C (3)

and (4): those provisions are not prayed in aid in the present case, although arguably they might have been).

(iii) Under Part 26A, the court may sanction a plan approved by 75% in value of those present and voting at the class meeting or meetings: section 901F(1) (see below, para [22]), whereas under Part 26 there is an additional requirement to obtain a majority in number of those present and voting at each class meeting. Consequently, the cross-class cram down provisions do not apply to Part 26.

[9] The approach in a Part 26A petition, where cross-class cram down is invoked, as here, was recently helpfully summarised by the Court of Appeal in *Re AGPS Bondco plc ("Adler")* [2024] BCC 302, Snowden LJ, from para [155], from which I take the following:

(i) At the first stage, the court must consider whether the provisions of the 2006 Act have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate statutory statement was distributed to creditors.

(ii) At the second stage, as regards each assenting class, the court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent. The court will therefore need to be satisfied that those who attended and voted in favour at the meeting were a true reflection of the class as a whole and that the majority had not voted in favour in order to promote interests adverse to the class of which they formed part.

(iii) At the third stage, the court must consider whether the plan which is to be imposed on dissenting creditors is fair to the creditors as a whole. The

question is whether the plan provides for a fair distribution of the restructuring surplus to the creditors as a whole.

(iv) At the fourth stage, the court must consider whether there is any "blot" or defect in the scheme that would, for example, make it unlawful or in any other way inoperable.

[10] The first and second stages subsume a number of different questions, all of which must be answered in the affirmative if sanction is to be granted. Applying all of that to this case, and modifying slightly the list suggested by senior counsel, it seems to me that the matters on which I must be satisfied in this case (where no question of coercion of a minority within an assenting class arises) are as follows:

(i) that the court has jurisdiction (on which I am satisfied: see para [14];

(ii) that the threshold conditions in section 901A of the 2006 Act have been met (on which I am satisfied: see paras [15] to [18]);

(iii) that there is a proper basis for excluding any creditors who are not included in the Restructuring Plan (on which I am satisfied: see paras [67] to [78]);

(iv) that the classes identified for the court meetings were appropriate (on which I am satisfied: see paras [79] to [97]);

(v) that the explanatory statement was adequate (on which I am satisfied: see paras [100] to [104])

(vi) that the court meetings were properly convened (on which I am satisfied: see paras [105] to [106]);

(vii) that the petition was properly advertised; (I am satisfied: see para [4]);

(viii) that the jurisdictional requirements for exercise of the cross-class cram down power, contained in section 901G of the 2006 Act; (viz, conditions A and B,

discussed fully below) have been met (on which I am satisfied: see paras [122] to [124];

(ix) that the Restructuring Plan is fair to the creditors as a whole (including consideration of whether there is a better plan available) (on which I am satisfied: see paras [125] to [127]);

(x) that there is no blot or defect (on which I am satisfied: see para [128]); and

(xi) that it is appropriate, in all the circumstances, including the informal objections which have been made, to exercise the cross-class cram down power contained in section 901G of the 2006 Act and to sanction the plan (discussed at para [129]).

[11] At this stage I would mention briefly the two informal objections. The first is an objection by ABC Adventure Golf Ltd, which asserts that it ought to have been included in a separate class rather than placed in the class comprising general property creditors; and, moreover, that it will not be no worse off under the plan than under the "relevant alternative". The second is a suggestion from Peterborough City Council in relation to the ability of a restructuring plan to compromise liabilities in respect of local authority rates.

[12] I shall consider all of these matters in the course of this opinion.

The legislative policy behind Part 26A of the 2006 Act

[13] As the reporter has helpfully observed, the compromise of creditors' rights is always a matter to be approached with seriousness, particularly where, as here, that compromise may be imposed on creditors or classes of creditors who have not assented to, or indeed, have opposed, that compromise. Part 26A forms part of a long term public policy push towards preventative insolvency measures emulating those provided for in the EU, albeit it

was introduced as an emergency measure at the outset of the Covid pandemic. The high level policy objective of Part 26A is to maximise the survival prospects of viable companies and to:

- address the scenario where a secured creditor can block a company rescue, despite the proposals being well supported by other creditors;
- enable courts to sanction restructuring plans where it is fair and equitable to do so;
- enable companies with viable businesses that are struggling to meet debt obligations to restructure with limited disruption to their operations; and
- provide an alternative measure to a Part 26 scheme in cases where the agreement of all classes of creditors is unlikely.

The policy behind Part 26A therefore recognises that, to save viable companies, compromises may need to be imposed on non-assenting creditors.

Jurisdiction

[14] The company has both its registered office and its centre of main interests in Scotland, as its central affairs are managed from its office at Melville Nursery, Lasswade. This court therefore has exclusive jurisdiction by virtue of: (i) sections 901A and 1156(1)(b) of the 2006 Act and section 120(1) of the Insolvency Act 1986; and (ii) section 21(1)(b) of, and paragraph 5 of Schedule 9 to, the Civil Jurisdiction and Judgments Act 1982.

Part 26A of the Companies Act 2006

The threshold conditions – section 901A

[15] In terms of section 901A of the 2006 Act, Part 26A of the Act applies where two conditions, A and B, are met in relation to a company. Insofar as relevant to this case, 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. Condition B is that (a) a compromise or arrangement is proposed between the company and its creditors 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 those financial difficulties.

[16] As described more fully below, I am satisfied, first, that the company's financial difficulties are such that, absent some intervention, the company will not be able to continue trading beyond week commencing 16 December 2024. There is no doubt, on the material produced, that the company will be unable to continue trading without the injection of additional funding. The secured creditors, through their agent Ares Management Ltd, have confirmed in a letter dated 27 November 2024 that if the plan is not sanctioned no additional funding will be provided. There is no reason not to take that letter at face value. One of the company's directors, Ms Debbie Harding, has stated in her affidavit of 5 December 2024 that an updated cash flow forecast prepared on 2 December 2024 reconfirms that the company will have insufficient cash to meet its debts as they fall due on or around week commencing 16 December 2024. No creditor has taken issue with the extent of the company's financial difficulties as prayed in aid by the company.

[17] The reporter has also considered this issue, drawing attention to the approach of the Companies Court in England to the threshold conditions. In *Hurricane Energy Plc* [2021]

EWHC 1418 (Ch), Zacaroli J pointed out that the threshold for condition A was relatively low, and that (as section 901A(2) expressly states) it is enough that the company is likely to encounter financial difficulties that may affect its ability to carry on business as a going concern; which approach was broadly supported by Trower J in *Re LIstrac Midco Ltd & Ors* [2023] EWHC 78 (Ch). I am satisfied on all of the material I have, including the report, and the revised short term case flow prepared as at 2 December 2024, that this limb of the statutory test is met, and that the company is encountering financial difficulties that are affecting or may affect its ability to carry on business as a going concern.

[18] As regards threshold condition B, there are two limbs to it: that the company proposes a compromise or arrangement between it and its creditors or certain classes of its creditors; and that the purpose of that arrangement is to alleviate the company's financial difficulties. As regards the latter, as the petition makes clear, the object of the Restructuring Plan is to return the company to financial stability and secure its long term future by restructuring its unsecured liabilities and making changes to its secured liabilities in order to access new funding, thus enabling it to avoid entry into an insolvency process in the imminent future. As regards whether the plan is a compromise or arrangement, the courts have consistently interpreted the term "arrangement" broadly (see, for example, *Re Listrac Midco Ltd*, above, Trower J at [36] where he expressed the view that where creditors were to be offered terms which provided a better return for them than they would otherwise receive in the relevant alternative, the court could be satisfied that this element of condition B was met); *Premier Oil Plc* v *Fund III Investment Cayman Ltd* 2020 CSOH 39, Lady Wolffe at [86]. I am satisfied that the Restructuring Plan is a compromise or arrangement within the meaning of the Act with certain classes of the company's creditors (the Plan Creditors), and that the plan provides the necessary degree of "give and take", inasmuch as the Plan

Creditors (including those who are "out of the money") are to receive consideration in the form of compromised payments under the plan. I am therefore satisfied that the second limb of the threshold condition is also met. Again, no creditor has suggested otherwise.

Section 901C

[19] Section 901C of the 2006 Act provides that the court may order a meeting, or meetings, of the creditors, or class of creditors, at which every creditor whose rights are affected by a proposed compromise or arrangement must be permitted to participate.

Section 901D

[20] Section 901D of the Act provides that, where a meeting is convened under section 901C, a statement complying with section 901D must be prepared by the plan company and the notice summoning the meeting must either be accompanied by that statement or state where and how creditors entitled to attend the meeting may obtain it. Such a statement must explain the effect of the compromise or arrangement and, in particular, state (i) any material interests of the directors of the company (whether as directors, members, creditors or otherwise) and (ii) the effect on those interests of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons.

Section 901E

[21] Section 901E of the Act provides, insofar as material, that it is the duty of any director of the company to give notice to the company of such matters relating to that director as may be necessary for the purposes of section 901D.

Section 901F

[22] Section 901F of the Act, insofar as material, provides:

"**901F Court sanction for compromise or arrangement**

(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

(2) Subsection (1) is subject to—
(a) section 901G (sanction for compromise or arrangement where one or more classes dissent), ...

(3) An application under this section may be made by—
(a) the company
...

(5) A compromise or arrangement sanctioned by the court is binding—
(a) on all creditors or the class of creditors or on the members or class of members (as the case may be), and
(b) on the company ...

(6) The court's order has no effect until a copy of it has been—
...
(b) ... delivered to the registrar."

Section 901G – the "cross-class cram down" provision

[23] Section 901G, insofar as material, provides:

"**901G -Sanction for compromise or arrangement where one or more classes dissent**

(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ('the dissenting class'), present and voting either in person or by proxy at the meeting summoned under section 901C.

(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.

(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).

(4) For the purposes of this section 'the relevant alternative' is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

..."

[24] That provision provides for "cross-class cram down": in other words, the proposed scheme may be approved by the court and imposed upon dissenting classes of creditors, provided that at least one class meeting has approved the scheme by the statutory majority, and provided, also, that none of the members of the dissenting classes would be any worse off under the scheme than they would be if the scheme were not sanctioned. That latter condition involves consideration of the "relevant alternative", namely, the counterfactual situation which would exist if sanction were refused. As already observed, the company is necessarily relying upon cross-class cram down in this case, because of the seven class meetings which were summoned, at only one was the scheme approved by the requisite majority of creditors. The relevant alternative is said to be that the company would enter administration and a number of other group entities would enter either administration or liquidation, such processes commencing on or around 16 December 2024; I revert to this at paras [39] to [40].

Background to the Restructuring Plan

[25] The company forms part of a group, comprising in total nine companies. The ultimate holding company of the group is DanAtAugusta EquityCo Limited ("EquityCo"), a Jersey-registered company. The entire share capital of EquityCo is held by entities managed by Ares Management Limited (the "Ares Funds"), who are also the secured creditors. Dobbies Garden Centres Group Limited (the "Parent"), a company registered in England and Wales, is an indirect subsidiary of EquityCo. The Parent's direct subsidiary is DanAtAugusta Bidco Limited ("Bidco"). The issued share capital of the company as at 27 June 2024 (the date of last confirmation statement) is £1,703,850.90 divided into 17,038,509 ordinary shares of £0.10 each, all of which are fully paid up. Ms Harding has confirmed in her affidavit that there has been no subsequent change in the company's share capital and that there are no warrants in issue. All of the shares in the company are held by Bidco.

[26] The company is the principal operating company for the group's business, which is the operation of a chain of garden centres under the "Dobbies" brand. This involves: (i) the sale of horticultural, food, homewares and seasonal products; (ii) the operation of restaurants and cafes from the garden centres; and (iii) the granting of concessions to third party retailers who trade from the garden centres. The group also operated, until recently, small retail stores in urban locations under the "Little Dobbies" brand, but due to the company's financial difficulties, these have all now ceased trading.

[27] As at the date of presentation of the petition, the company operated and traded from 77 garden centres and urban stores across the United Kingdom, of which one was owned by the company and 76 were occupied under Leases. The company considers that 28 of those Leases were unsustainable at their current level of rent (two Leases have been surrendered since the presentation of the petition, taking the number down to 26). Thirteen of the

premises operated by the company are located in Scotland, two in Northern Ireland, one in Wales and 61 in England. All of the group's employees are employed by the company. The company has about 3,600 employees, of whom around 1,400 are employed full time.

The financial position of the company and the group

Introduction

[28] The company has encountered financial difficulties, partly due to unsustainable Lease arrangements dating back to 2016. The company's management team has prepared a short-term cash flow forecast for the company and the group for the period 16 September 2024 to 2 March 2025. The forecast was updated as at 2 December 2024. Both forecasts show that if the Restructuring Plan is not sanctioned and new funding, conditional on the sanction of the Restructuring Plan, is not received, the company was expected to have insufficient cash to meet its obligations starting on or around the week commencing 16 December 2024. The company was able to trade to the date of the sanction hearing only because additional financial support was provided by its secured creditors.

[29] The company's financial position for the financial years ending 1 March 2020 through to 5 March 2023 (respectively, "FY20", "FY21", "FY22" and "FY23"), derived from the company's audited financial statements for those financial years, is as follows:

Historical Plan company income statements for the company

	FY20	FY21	FY22	FY23
Turnover (£,000)	234,989	215,957	303,609	278,682
Cost of sales (£,000)	(114,927)	(109,767)	(152,422)	(156,466)
Gross profit (£,000)	120,062	106,190	151,187	122,216
Operating profit/(loss) (£,000)	519	11,398	17,736	(96,045)
Profit/(loss) before tax (£,000)	(22,942)	(13,976)	(7,045)	(105,220)

Historical Plan company balance sheet

	FY20	FY21	FY22	FY23
Non-current assets (£,000)	707,931	712,761	771,829	694,828
Current assets (£,000)	98,630	128,647	72,832	73,930
Total assets/(liabilities) (£,000)	806,561	841,408	844,661	768,758
Total assets less current liabilities (£,000)	669,978	673,834	674,808	591,212
Net assets/(liabilities (£,000)	134,498	124,785	112,905	22,610

The group's updated financial position

[30] Since the 2023 accounts, the group's cash flow and trading position has deteriorated. The next accounts which the company is required to lodge with the Registrar of Companies are its financial statements for the period ending 28 February 2024, due by 28 February 2025. Those accounts have not yet been finalised because the company's auditors cannot finalise their opinion on them until it is known whether the Restructuring Plan will be approved.

The company's key financing arrangements with secured creditors

[31] The principal financing arrangement that the company has entered into is a facilities agreement with its secured creditors, which sets out the terms upon which the secured creditors have made available existing facilities to Bidco as the borrower. In essence, as at the date of presentation of the petition, there were nine term loan facilities (named Accordion Facility A to I), for a total of £66.5 million. In the case of Accordion Facilities A, B, G, H and I, interest is charged and is capitalised at the end of each interest period rather than paid in cash. In the case of Accordion Facilities C, D, E and F, no interest is charged but an arrangement fee is due to be paid when the existing facilities are repaid. Each of the existing facilities is fully drawn (other than Accordion Facility I which was expected to be fully drawn in the week commencing 21 October 2024) and is repayable on 31 August 2025. Subsequently, another Accordion Facility, K, has been entered into, in the sum £1 million. (Accordion Facility J relates to the remaining £23 million which the secured lenders are to advance upon the Restructuring Plan becoming effective.)

[32] The company has guaranteed the obligations of Bidco and other obligors (which include the Parent, and three other group companies: DanAtAugusta Propco1 Limited, ("Propco1"): DanAtAugusta Propco2 Limited,("Propco2"): and DanAtAugusta Propco3 Limited, ("Propco3") (the group obligors) under the facilities agreement and other relevant finance documents. The company thus has a primary obligation to pay and discharge the obligations of the group obligors. As at 30 September 2024 the secured creditors were owed £97,068,198.79. By mid-November 2024, the secured creditors' claim, for voting purposes, had risen to £105,606,826.

The company's unsecured liabilities

Leases

[33] Apart from the facilities agreement, the company's main obligations are under its Leases. The 76 Leases under which the company is or was tenant fall into broadly three categories:

- 47 are arm's length commercial Leases with third-party non-group Landlords;
- three are with third-party non-group Landlords for a peppercorn rent; and
- 26 are ones in which Propco3 is the Landlord (the "Propco3 Leases").

[34] As at the end of September 2024, the outstanding rent liabilities were £54.5 million, excluding the Propco3 Leases (which are not included in the Restructuring Plan for the reasons set out below). Including those Leases, that figure was £215.7 million.

[35] The company considers that, to be sustainable, each of its stores must generate EBITDA (earnings before interest, taxation, depreciation and amortisation) in excess of £120,000. The Leases which met that criteria have not been included in the Restructuring Plan, nor have the Leases of premises in Tewkesbury and in Beaconsfield. Although those Leases do not meet the economic criteria, both are considered to be of sufficient strategic importance to the group for them to be considered sustainable regardless.

[36] Of the remaining Leases, 26 are to be compromised or amended under the terms of the plan. (References to Leases hereafter are to those Leases). Eleven of the Leases are the subject of a guarantee granted by the Parent (the "guarantee Leases"). The plan also seeks to compromise and amend the terms of those guarantees in order to prevent any "ricochet" claims; such claims might arise if the compromise of the guarantee Leases led to a demand against the Parent under one or more guarantees, which would ultimately result in the Parent having a claim against the company in respect of any sums it had to pay under the

terms of the guarantees, potentially destabilising the financial position of the company and undermining the purposes of the Restructuring Plan.

[37] The company has not granted any securities in relation to its obligations under the Leases. Two of the Leases relate to premises in Scotland. The Landlords of those properties would benefit from the Landlord's hypothec if there were arrears of rent due to them at the date the company entered insolvency and there were moveable assets owned by the company located at the relevant leased properties. It is anticipated that only one of those would have arrears of rent at the relevant date. The likely return to that Landlord would be relatively low in the context of its claim as a whole.

Other creditors

[38] The company's other key creditors are: local authorities owed business rates; third parties with licences to occupy or sub-leases of premises occupied by the company; various other property related liabilities; HMRC in relation to value added tax; trade creditors and suppliers; employees; intra-group creditors; Barclays Bank plc; and customer claims.

The "relevant alternative" – what will happen if the plan is not approved?

[39] As already noted, the company's position is that if the proposed plan does not become effective, the company will be unable to pay its debts on or around the week commencing 16 December 2024. The updated cash flow forecast reflects the additional funding provided by the secured creditors to ensure that the group had sufficient liquidity for trading purposes until the time of the sanction hearing, but also reflects the secured creditors' unwillingness to provide further funding beyond that, in the absence of the sanction and implementation of the Restructuring Plan and wider turnaround measures. As

a result, the directors were of the view that, if the Restructuring Plan were not sanctioned, the most likely outcome (and therefore the relevant alternative to the Restructuring Plan) is that the company and some other entities in the group would enter into formal insolvency processes. While the precise timing of the relevant alternative is dependent on a number of factors, it would most likely occur during the week commencing 16 December 2024. The company obtained a report from Grant Thornton which opined on: (i) the most likely outcome for the company if the Restructuring Plan were not approved (the "relevant alternative"); and (ii) the value of the company's business in that relevant alternative. In summary, the Grant Thornton report, having considered and rejected other possible scenarios, including sale of the company as a going concern, additional lender funding, liquidation and consensual restructuring, concluded that, if the Restructuring Plan were not sanctioned, the most likely outcome would be for the company to enter administration. It also concluded that the administrators would seek to progress a sale of the business of the company on an accelerated basis. Grant Thornton considered that:

- any sale of the business would involve 48 of the sites operated by the company. This would include sites where another member of the group is the Landlord. It would also include sites which provide an EBITDA in excess of £120,000 or where rent cover is in excess of 1.5x.
- The administrators would be likely to trade from all of the sites for a period of 3 weeks. Thereafter, driven by a lack of cash, they would require to cease trading from those stores which were not to be included within any sale (that is, all of the leased premises which are included in the Plan). At that stage, the administrators would cease occupation of those stores.

- The administrators would trade from the stores to be sold for a further 4 weeks to finalise the sales process, following which the purchasers would occupy the sites they wished to acquire under a licence to occupy, granted by the administrators. This would allow them time to negotiate an assignment of the Lease or agree a new Lease with the relevant Landlord.
- The market value of the sold sites would be between £40.4 million and £52.3 million, which is materially less than the sum due to the secured creditors.

[40] The company obtained a further report from FTI Consulting LLP (FTI), showing the recoveries which creditors would be likely to receive in the relevant alternative posited by Grant Thornton. FTI prepared an Estimated Outcome Statement identifying the way in which the funds realised in the relevant alternative would be distributed amongst the company's creditors. In summary, the FTI report identified that in the relevant alternative:

(i) there would be insufficient funds to make repayment in full to the secured creditors;

(ii) the preferential creditors (including HMRC as secondary preferential creditors) would be paid in full;

(iii) the unsecured creditors of the company would receive a return of around 0.2p in the £1.00 under the prescribed part available from floating charge assets;

(iv) the creditors who benefit from Parent guarantees would see a further dividend from the liquidation of the Parent. The level of this dividend would be 0.03p in the £1.00;

(v) the one Landlord likely to have a hypothec claim would receive an additional dividend of 0.95p in the £1.00 in respect of that claim.

Weight to be attached to the Grant Thornton and FTI reports

[41] It is appropriate that I say a little more about the Grant Thornton and FTI reports, since one of the creditors which has informally objected to the Restructuring Plan, ABC Adventure Golf Ltd, has in correspondence complained that the Grant Thornton report did not constitute an audit and did not provide an independent valuation of the company; and the reporter has also drawn the court's attention to the recent English case of *Re Chaptre Finance plc* [2014] EWHC 2908 (Ch), in which Miles J was critical of the reports lodged in that case, both by the petitioning company and by opposing creditors, which did not comply with the requirements of the Civil Procedure Rules (CPR) Part 35. CPR Part 35 has no application in Scotland, although the duties owed by an expert here are broadly similar to the duties under it. The reporter has ascertained that the practice in England and Wales prior to *Chaptre* was, in the first instance, to obtain reports which did not comply with Part 35, due to cost considerations. The Grant Thornton and FTI reports were instructed pre-*Chaptre.* Be that as it may, my attention was drawn to the letters of engagement sent to Grant Thornton and FTI respectively, and to certain other correspondence. On the basis of those, it is apparent that Grant Thornton: had full access to the company's books and records and the full co-operation of its directors and senior management; required a written representation from the company's directors to confirm the factual accuracy of the information provided to it; acted in the engagement as if it were instructed as an expert witness; and confirmed that it was independent of the company and had no conflict of interest. For its part, FTI also had full access to the company's books and records; received a written representation from the company's directors to confirm the factual accuracy of the information provided to it; and acted in the engagement as though it would be performing

the role of an expert witness. In both cases, the individuals who prepared the respective reports were identified.

[42] I can easily distinguish the reports in this case from those which attracted criticism in *Chaptre.* Most importantly, the authors of the Grant Thornton and FTI reports were identified, and, additionally, they confirmed that they recognised their duties to the court, both features which were lacking in *Chaptre.*

[43] In the absence of any competing opinion evidence, I therefore accept and proceed upon the conclusions of the Grant Thornton and FTI reports, being the only reliable evidence I have as to what the relevant alternative is; and what the outcome would be for each class of creditors in that relevant alternative.

The Restructuring Plan

Introduction

[44] There is nothing in the company's articles of association which might affect the company's ability to enter into, and give effect to, the Restructuring Plan. At a board meeting on 14 October 2024, the company's directors resolved in favour of the plan. There are three directors: Ms Harding (who was appointed on 21 August 2023), Mr David Robinson (who was appointed on 24 July 2023) and Mr Jonathan Wass (who was appointed on 16 April 2024). They are also directors of the Parent. The directors have an aggregate interest in 10% of the equity in DanAtAugusta Holdo Limited ("Holdco") held as part of a management incentive plan. Holdco is a subsidiary of EquityCo. Otherwise, none of the directors has any material interest (whether as a director, member, creditor or otherwise) in the company or the Parent. The only other interest which the directors have in the Restructuring Plan arises from the terms of the Global Deed of Release, which discharges

them (subject to certain conventional exceptions) from any liability arising from the Restructuring Plan.

An outline of the Restructuring Plan

[45] The purpose of the plan is to enable the company to address its financial difficulties, and avoid the consequences of the relevant alternative. The plan proposes a compromise or arrangement with some (but not all) of the company's creditors (the Plan Creditors). The company believes that the plan will ensure the continuing operations of the group for the benefit of all Plan Creditors, and other stakeholders, providing a platform to enable the company to recover from its current financial difficulties and return to sustainable profitability. The objective of the plan, which is said to perform a critical role in a wider restructuring and operational turnaround strategy, is to return the company to financial stability and secure the long-term future of the group, which it seeks to achieve principally by restructuring the company's unsecured liabilities, predominantly relating to its underperforming sites, in order to access new funding from the secured lenders conditional on the plan being approved.

[46] The key components of the Restructuring Plan are:

- obligations under the secured facilities will be amended and extended;
- obligations under certain Leases and certain general property agreements will be amended and compromised in exchange for a payment greater than the relevant creditors would receive in the relevant alternative.
- certain parent company guarantees granted in respect of obligations of the company will be amended and compromised in exchange for a payment

greater than the relevant creditors would receive were the relevant guarantees to be enforced following the guarantor entering liquidation; and

- business rates owed to local authorities will be compromised in exchange for a payment greater than the relevant local authority would receive in the relevant alternative.

[47] In addition, separate to the Restructuring Plan, but contingent upon its approval, is the provision of a new loan facility by the company's secured creditors. In terms of the original plan this was to have been a facility of £24 million. As was confirmed in the First Update to Plan Creditors dated 1 November 2024, the secured lenders provided a £1 million of additional funding to the company in advance of the sanction hearing, pursuant to a further accordion facility, in order to provide the group with sufficient liquidity to meet its liabilities until that hearing; as a result, the amount of additional funding to be made available pursuant to the plan being sanctioned has been reduced to £23 million.

[48] Finally, certain intercompany liabilities totalling in the region of £130,000,000 owed by the company to group entities, will, subject to the Restructuring Plan being sanctioned, be released and discharged in full pursuant to a deed of waiver entered into by the company and the relevant members of the group.

[49] As regards the turnaround strategy of which the plan and additional funding are said to form a critical part, in addition to operational efficiencies which are already underway, the group is also planning to implement changes to its central operations and cost reduction measures together with other strategic initiatives.

Restructuring Plan Creditors

[50] The company proposes, that, for the purposes of sections 901C (1) and 901F (1) of the 2006 Act, the Plan Creditors are to be divided into seven classes, as follows: (i) secured creditors; (ii) four classes of Landlord creditors, namely: Class B1 Landlords; Class B2 Landlords; Class B3 Landlords; and Class C Landlords; (iii) General Property Liabilities Creditors; and (iv) Business Rates Creditors.

How Plan Creditors are treated by the Restructuring Plan

Secured creditors

[51] There are 11 secured creditors (being the Ares Funds pursuant to the Facilities Agreement). Pursuant to the Restructuring Plan, an amendment agreement will take effect between the secured creditors, the company and the other group obligors, under which various amendments to the facilities agreement will be made, conditional upon, and with effect from, the Restructuring Effective Date. These include: the extension of the final repayment date in respect of loans made under the facilities agreement until at least 31 December 2027; the addition of financial covenants requiring the group obligors to maintain certain minimum liquidity and, from the financial year ending on or around 28 February 2026, certain EBITDA levels; the removal of the group obligors' current obligation to maintain certain net leverage levels; and the permanent waiver by the secured creditors of all defaults or events of default under the existing facilities and their consent to any real estate transactions which are contemplated by the Restructuring Plan. Separately, the Parent (as agent for a number of the group obligors, including the company) and the secured creditors have entered into a new term loan facility under which Bidco may borrow up to a further £23 million from the secured creditors on a *pro rata* basis in proportion to

their existing commitments under the facilities agreement, provided that the plan is sanctioned and becomes effective. That additional facility is on terms consistent with the terms of the existing facilities, including compliance with certain financial covenants, and has an interest rate of 6% per annum, "paid in kind" by being capitalised rather than paid in cash; and will be secured by the existing security and guarantees.

Class B1 Landlords

[52] The Class B1 Landlords are the Landlords under those Leases which the company considers would be sustainable if the rent were reduced to 75% of the contractual rate. There are five Class B1 Landlords. The key effects of the plan on the Class B1 Landlords are that: all liabilities for rent arrears shall be discharged; during the "Rent Concession Period", (a period of up to 36 months) rent will be paid monthly in advance, and will be the aggregate of: (i) 75% of the applicable contractual rent and (ii) the contractual insurance and service charge applicable to that Class B1 Lease; any rent review provisions will not apply during the Rent Concession Period; at the end of that period, payments will revert to be made in accordance with the existing terms of the relevant Class B1 Lease. Each Class B1 Landlord will be entitled to terminate the relevant Lease on 30 days' notice within 60 days of the Restructuring Effective Date; and the company may exit a Class B1 premises on the third anniversary of the Restructuring Effective Date on giving not less than 120 days' prior notice to the Landlord. Upon such termination, or exercise of the company's exit right, no past, present or future rent, service charge, insurance or other liabilities will be payable under the Lease and the company will no longer have any obligations under it; and any dilapidations claims shall be compromised and released in full. Any Parent guarantee applicable to a Class B1 Lease will be varied such that it guarantees the obligations of the

company under the relevant Class B1 Lease as varied by the plan. Any obligation on the Parent to take on a new Lease or to pay amounts in lieu of rent will be waived and released.

[53] In exchange for the foregoing compromises to the Class B1 Leases, the company will pay each Class B1 Landlord a payment which will be the aggregate of: (a) an amount equal to the lower of (i) 3 weeks' worth of that Landlord's contractual rent and (ii) contractual rent for the remainder of the contractual term; plus (b) an amount equal to 150% of that Landlord's Estimated Insolvency Return (as calculated under the Restructuring Plan), less any payments received pursuant to the Restructuring Plan, subject to a minimum payment of £1,000 (where there is no Parent guarantee) or £2,000 (where there is a Parent guarantee). For those Class B1 Landlords which benefit from a Parent guarantee, the Estimated Insolvency Return includes their estimated return in the administration of the company and the liquidation of the Parent. That payment will be made either on the first anniversary of the Restructuring Effective Date or on the date falling 39 months after that date, depending on when a claim is made by the Landlord in question.

Class B2 Landlords

[54] Class B2 Landlords, of whom there are two, are the Landlords under those Leases which the company considers would be sustainable if rent were reduced to 55% of the contractual rate. The key effects of the plan for the Class B2 Landlords are the same as for the Class B1 Landlords, other than that the amount of rent during the Rent Concession Period will be the aggregate of: (i) 55% of the applicable contractual rent and (ii) the contractual insurance and service charge applicable to that Class B2 Lease.

Class B3 Landlords

[55] Class B3 Landlords, of whom there are two, are the Landlords under those Leases which the company considers would be sustainable if rent were reduced to 45% of the contractual rate. The key effects of the plan for the Class B3 Landlords are the same as for the Class B1 Landlords, other than that the amount of rent during the Rent Concession Period will be the aggregate of: (i) 45% of the applicable contractual rent and (ii) the contractual insurance and service charge applicable to that Class B3 Lease.

Class C Landlords

[56] The Class C Landlords are the Landlords under leases which the company does not consider it possible to continue to trade from sustainably even if the contractual rate was reduced to 45%. There are now 16 Class C Landlords within the plan. (Originally, there were 18 but one Class C Lease, for the Cheltenham, premises, has been surrendered and another, Clifton, Bristol, has been assigned.) The key effects of the Restructuring Plan on the Class C Landlords are that: all liabilities of the company to each Class C Landlord for rent arrears shall be discharged; the amount payable in respect of rent shall be compromised in full and the company shall have no obligation to pay any rent under the Class C Leases on or after the Restructuring Effective Date; whilst any Class C Lease remains in effect, any contractual insurance and service charge will be paid monthly in advance after the Restructuring Effective Date; any rent review provision will cease to apply. After the Restructuring Effective Date, (a) each Class C Landlord will be entitled to terminate the relevant Class C Lease on 30 days' notice; and (b) the company may exit a Class C premises on giving not less than 30 days' notice. In either event, no past, present or future rent, service charge, insurance or other liabilities will be payable under the Lease and the

company will no longer have any obligations under it. All dilapidations claims will be compromised and released in full. Any Parent guarantee applicable to a Class C Lease shall be irrevocably and unconditionally discharged in full on the Restructuring Effective Date, and any obligation on the Parent to take on a new Lease or to pay amounts in lieu of rent will be waived and released. In exchange for those compromises, the company will pay each Class C Landlord a payment which will be calculated as the aggregate of: an amount equal to the lower of (i) 3 weeks' worth of the contractual rent and (ii) contractual rent for the remainder of the contractual term; plus an amount equal to 150% of that Class C Landlord's Estimated Insolvency Return (as that amount is calculated under the Restructuring Plan); less any payments received pursuant to the Restructuring Plan, provided that a such payment shall be not less than £1,000 or £2,000, depending on whether or not the Class C Landlord benefits from a Parent guarantee.

General Property Liabilities Creditors

[57] There are three categories of general unsecured property liabilities that will be compromised pursuant to the Restructuring Plan. These liabilities are:

(i) liabilities in respect of any forfeited Leases;

(ii) liabilities in respect of compromised concession agreements; and

(iii) liabilities in respect of a contract to construct a garden centre in Reading, entered into on or about 30 September 2022 (the "Reading Works Agreement").

[58] It is possible that a Landlord creditor may exercise a right to forfeit, irritate or terminate under an applicable Lease. If such a right is successfully exercised, the relevant Lease will terminate and the Landlord creditor will instead have an unsecured claim against the company, in which case they will be treated as a general property liabilities creditor.

[59] Further, the company is a party to various concession agreements, as lessor, licensor or grantor of a concession or occupation right (or similar capacity). Under the Restructuring Plan, the company seeks to compromise its liabilities under some of those agreements, the counterparties under which are retailers who operate concessions and stores, and providers of charging terminals for electric vehicles. If a Lease is terminated under the terms of the Restructuring Plan, then the company may be unable to comply with some or all of the covenants under the terms of a concession agreement relating to the same premises, and will therefore seek to compromise it.

[60] The Reading Works Agreement obliges the company to construct a garden centre at Grovelands Garden Centre, in Shinfield, Reading. The Parent has guaranteed the company’s obligations under that agreement. Carrying out the construction project required by that agreement would require a significant capital expenditure by the company, which the company does not consider it can afford at all, or at least not without seriously threatening the financial stability of the group.

[61] Under the terms of the Restructuring Plan, the General Property Liabilities will be irrevocably and unconditionally compromised, released, terminated and discharged. To the extent permitted by law, each Compromised Concession Agreement shall be terminated, as between the company and the relevant counterparty, upon the occurrence of a determination event in respect of the relevant premises.

[62] To the extent permitted by law, all General Property Creditor Liabilities, other than the Compromised Concession Agreements, shall be terminated as between the company and the relevant General Property Creditor on the Restructuring Effective Date. This includes termination of the Reading Works Agreement and a release of the company’s liabilities and obligations thereunder.

[63] In addition, each Parent guarantee in favour of a General Property Creditor shall be irrevocably and unconditionally compromised and released in full.

[64] In exchange for the foregoing compromises, the company will pay each General Property Creditor who makes a claim a compromised payment, calculated as an amount equal to 150% of that creditor's Estimated Insolvency Return, without double-counting for any payments previously received pursuant to the Restructuring Plan.

Business Rates Creditors

[65] The company has liabilities in relation to payment of non-domestic rates for the purposes of the applicable legislation for non-domestic rates to the relevant councils in the areas where it holds Leases. Each Business Rates Creditor has the same principal right against the company in the relevant alternative, namely an actual or contingent unsecured claim for payment. In all cases, the Restructuring Plan seeks to irrevocably and unconditionally compromise all Business Rates Liabilities relating to payment arrears. In relation to a Business Rates Creditor whose claim relates to occupation under one of the Leases, the plan also seeks to compromise all Business Rates Liabilities for the Rates Concession Period, as that term is defined in the Restructuring Plan (which period ends on 31 March 2025, at the latest). This reflects the fact that the premises would be vacant during this period in the relevant alternative and so no rates would be payable.

[66] In exchange for those compromises, the company will pay each Business Rates Creditor a compromised payment, calculated as an amount equal to 150% of the Business Rates Creditor's Estimated Insolvency Return, without double-counting for any payments previously received pursuant to the Restructuring Plan.

[67] This is as good a place as any to deal with the informal objection by Peterborough City Council that rates liabilities cannot be compromised. The important point to note here is that the plan seeks to compromise rates liabilities only in respect of (a) arrears and (b) rates liabilities which will arise between the Restructuring Effective Date and the end of the current rates tax year on 31 March 2025. Arrears which already exist are a debt like any other, which can be compromised. Further, it has been held that business rates payable in respect of an entire rating year are a contingent liability to which the Plan Company is subject from the beginning of the rating year, such that the rating authorities are creditors in respect of the entire year's rates and are creditors for the purposes of the plan (*Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch) at [48]); and plans involving the compromise of business rates have previously been sanctioned. Accordingly, I do not find there to be any merit in this informal objection.

Restructuring Plan Creditors as shareholders

[68] The Ares Funds, as shareholders of EquityCo, will not be compromised by the Restructuring Plan, nor will their shareholdings be diluted as a result of the Restructuring Plan. The Ares Funds are also the secured creditors. Accordingly, compromising or diluting the Ares Funds ultimate shareholding in the group would risk alienating the Ares Funds and losing their support as the secured creditors which is necessary to implement the Restructuring Plan and for the members of the group to continue as a going concern. As set out in the Explanatory Statement, the Ares Funds have already provided considerable support to the group. The shares in EquityCo held by the Ares Funds currently do not have any value due to the level of indebtedness incurred by the group.

The creditors not included in the Restructuring Plan

[69] Certain liabilities of the company will not be compromised by the plan. The main categories of excluded liabilities are: liabilities owed under the Leases which are not included in the plan; liabilities owed to any trade creditor or supplier; liabilities owed to customers; employee related liabilities (however so described and including any pension contributions); liabilities owed by the company to HMRC; liabilities owed to Barclays Bank plc; and liabilities owned other members of the group.

[70] It is well settled that a company may propose a scheme or restructuring plan which varies the rights of only some of its creditors. This has been described as one of the most flexible and valuable features of the jurisdiction: *Re Virgin Atlantic Airways Ltd*, above Snowden J at [60]. As the reporter has commented, at para [15] of the report, it is a feature of many restructuring plans which have been sanctioned that certain classes of creditor are excluded. However, there are two key requirements: first, there must be a good reason or proper basis for doing so (*Adler*, above, at [166]); and second, if creditors are being treated more favourably outside the scheme or plan, this must be fully explained to those who are being included in the plan, in order that they can assess whether they are being fairly treated: *Virgin Atlantic*, above, Snowden J at [63].

[71] Examples of reasons which have been accepted as a good reason, or to give a proper basis, for excluding creditors are:

(i) where the support of the creditors in question is essential for the beneficial continuation of company's business under the plan; for example, trade creditors and employees (see *Adler* at [170]). It can also include the Landlords of premises which are critical to the ongoing and future operation of the

company's business (see *Fitness First Clubs Limited* [2023] EWHC 1699 (Ch) at [39])

(ii) where the relevant creditor would be repaid in full in the relevant alternative; for example, HMRC, where the priority status accorded to the debts would result in their being paid in full in the relevant alternative (see for example *Re Cine-UK Ltd* [2024] EWHC 2475 (Ch) at [44(h)]);

(iii) where inclusion of those creditors would be detrimental to the company's brand and so its future performance; for example, liabilities owed to customers (particularly individual consumers) who the company will want to continue to trade with in the future (see *Re C-Retail Limited* [2024] EWHC 1715 (Ch) at [30]); and

(iv) where the liabilities owed to the creditor(s) in question have been compromised, or are to be compromised, pursuant to arrangements outside the restructuring plan (see for example *Virgin Atlantic*, above, Snowden J at [21]).

[72] No creditor has objected to the plan on the basis either that they, or another creditor, should not have been excluded. However, commenting on each exclusion in turn:

Liabilities under Leases not included in the Restructuring Plan

[73] These liabilities fall into two categories: liabilities under the Propoco3 Leases and liabilities under so-called "Sustainable Leases". The company's liabilities under the Propco3 Leases are not being compromised under the Restructuring Plan as the Propco3 Leases are intra-group and so compromising the Propco3 Leases by themselves would not improve the financial stability of the group. The Sustainable Leases (with the exception of the Leases of the Tewkesbury premises and the Beaconsfield premises) are leases of garden centres which

already make a sustainable EBITDA contribution to the company's business, without any reduction in the contractual rent being needed. The Tewkesbury premises and the Beaconsfield premises are both of strategic importance to the company. Due to the Sustainable Leases' existing EBITDA contribution, or strategic importance, if they were included within the scope of the Restructuring Plan the Sustainable Lease Landlords would have been treated as a separate class of Plan Creditors; and no reduction in the contractual rent owed to the Sustainable Lease Landlords would have been imposed pursuant to the Restructuring Plan. Accordingly, the company considers that compromising the liabilities under the Sustainable Leases pursuant to the Restructuring Plan would only have achieved minimal working capital benefits for the company and would not have led to any increases in the company's profitability. It would also have risked the Landlords of the Sustainable Leases taking steps to terminate those Leases which would have been detrimental to the company's business.

Trade creditors

[74] The liabilities of the company to any trade creditors and suppliers will not be compromised by the Restructuring Plan because the continued supply of goods and services is essential for and is required for the day-to-day operation of, the group's business.

Customers

[75] The liabilities owed to customers by the company are principally in respect of gift cards which have been purchased, but not yet used. Liabilities are also owed to customers in respect of loyalty redemptions and points. Any attempt to compromise liabilities owed to customers would cause considerable damage to the brand and so the business of the

company. Accordingly, the company does not consider it practical or appropriate to compromise liabilities owed to its customers.

Employee related liabilities

[76] The liabilities of the company to any employees will not be compromised by the Restructuring Plan. The company does not consider it practical or appropriate to compromise employee claims and related liabilities (which include pension contributions and other contractual benefits as well as salary payments), given the business-critical nature of these payments. Were such claims to be compromised, employees would then be likely to withdraw their services which are necessary for the company to continue in business.

Liabilities owed to HMRC

[77] HMRC would rank as secondary preferential creditors in the relevant alternative, and it is expected that it would be paid in full. Accordingly, the company does not consider it would be able to compromise HMRC under the Restructuring Plan in a way which would leave HMRC no worse off than it would be in the relevant alternative.

Liabilities owed to Barclays

[78] Barclays provide the group with operational banking services, including corporate credit cards. The liabilities of the company owed to Barclays will not be compromised by the Restructuring Plan as the continued supply of these banking services is critical for day-to-day financial operation of the group's business. In any event, Barclays has the benefit of a fixed charge over a bank account and a credit balance of £300,000 deposited in that bank account. This provides cash collateral to secure the company's liabilities to

Barclays (principally under the corporate credit cards issued by Barclays to the company). Consequently, the company expects that Barclays would be repaid in full and that, therefore, it will not be possible to compromise Barclays under the Restructuring Plan without leaving Barclays worse off than it would be in the relevant alternative.

Intercompany liabilities

[79] The company has incurred the following intercompany balances to other members of the group: an intercompany balance of approximately £89.4m owed to Propco3; and an intercompany balance of approximately £30.5m owed to Bidco. Those Intercompany Liabilities will not be directly compromised by the Restructuring Plan, nor are Propco3 or Bidco Plan Creditors in respect of the Intercompany Liabilities. Instead, the Intercompany Liabilities will be compromised in full pursuant to an intragroup deed of waiver which was entered into by the company, Propco3 and Bidco on 27 September 2024 and which will take effect on the Restructuring Effective Date. The compromise will discharge and eliminate the Intercompany Liabilities. For the purposes of calculating the Estimated Insolvency Return in the relevant alternative, it has been assumed that Propco3 and Bidco will not prove for the Intercompany Liabilities in an administration of the plan company. This results in an increase the amount of the Compromised Property Liability Payment payable to the Compromised Property Liability Creditors.

Reasonableness of the exclusions

[80] I am satisfied in each case that there are good reasons for the exclusion of the above categories of creditors from the plan. Either the plan would be of limited or no effect on

their rights, or the commercial interests of the company are best served by its not seeking to compromise their liabilities.

Class composition

[81] The next issue which arises is the class composition of the Plan Meetings. Unlike England, where class composition is considered at the outset (at the so-called convening hearing, the equivalent of the first hearing in Scottish procedure), there has been no prior judicial consideration of whether the classes proposed by the petitioner are fair and appropriate. There are many authorities on the issue of class composition, although many of those relate to Part 26 (rather than 26A) situations. The Court of Appeal in *Adler*, above, recently summarised what it considered to be the proper approach to class composition under Part 26A. As the only appellate authority in the UK on the application of Part 26A, I accept it as an accurate, and convenient, overview of the law and the relevant considerations. The basic principles (per Snowden LJ at [109] to [112]) are as follows. A class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. The application of this test requires an exercise of judgment depending on the facts of each case. The authorities show that a broad approach is to be taken and that differences in rights may be material, without leading to separate classes. In considering dissimilarity of rights, the court must analyse (i) the rights which are to be released or varied under the scheme and (ii) the new rights (if any) which the scheme gives by way of compromise or arrangement to those whose rights are to be released or varied. Further, where a scheme is proposed as an alternative to a formal insolvency procedure, the court must identify the rights that the

creditors would have in the insolvency proceeding, rather than the rights that they would have if the company were to carry on its business in ordinary course.

The company's analysis of the classes

[82] The company's reasoning underlying the proposed class composition is as follows.

Secured creditors

[83] The rights of the secured creditors are sufficiently dissimilar from those of other creditors that they form a separate class. In contrast to the other Plan Creditors, they hold securities, including a floating charge, for the sums due to them by the company. In the relevant alternative, the secured creditors would be expected to receive between 51.97p in the £1.00 from the group. Of this, 45.4p in the £1.00 would come from the company. By contrast, with the exception of preferential creditors who are not included within the Restructuring Plan, all the other creditors would recover considerably less than this. The secured creditors are sufficiently similar to enable them to consult together with a view to their common interest. In particular, they are all parties to the facilities agreement, and they all benefit from a common guarantee and security package.

Landlord creditors

[84] The rights of the Landlords as a whole are sufficiently dissimilar from those of the other creditors that they form a separate class. They have different rights from the secured creditors, after whose claims their claims would rank in the relevant alternative. They also have different rights to the general property creditors and to the business rates creditors. Both the nature of their rights and the manner in which they are to be revised mean that

they could not consult together in the same class. Further, the rights of the Landlord creditors under the Restructuring Plan are sufficiently dissimilar from each other that they could not consult in one class together. In particular: the Class B1 Landlords, the Class B2 Landlords, the Class B3 Landlords and the Class C Landlords receive different treatment under the plan. There is a significant difference in the reduction that each proposed class will receive in the rent payable to them under the plan. As within each of the four classes of Landlord creditors, the rights of the Landlord creditors are sufficiently similar to enable them to consult together with a view to their common interest. The Landlord creditors all have proprietary rights pursuant to the Leases. There are certain differences in the rights of the Landlord creditors under their respective Leases. The plan does not propose to align the terms or duration of the Leases. It follows that this might be said to result in different rights under the plan. However, the petitioner submits that that is not sufficient to result in their being unable to consult together with a view to their common interest.

[85] The fact that eleven of the Landlord creditors hold guarantees from the Parent in relation to the company's obligations does not mean that they could not consult together with a view to their common interest. The FTI Report has identified that a party who has the benefit of a Parent guarantee would expect to receive an additional dividend of 0.03p in the £1.00 in the relevant alternative under the Parent guarantee. This difference is accounted for in the returns under the Restructuring Plan. The petitioner submits that this difference is not sufficient to require the creation of further classes.

[86] Two of the Class C Landlords would benefit from a Landlord's hypothec in the relevant alternative. Of those, only one is expected to have arrears of rent at the relevant time. The total sum which that Landlord would be expected to receive under the hypothec would be £3,612.90. That is equivalent to an additional dividend of 0.95p in the £1.00. This

difference is accounted for in the returns under the plan. The petitioner submits that this difference is not sufficient to require the creation of a further class.

General property creditors

[87] The rights of the general property creditors are sufficiently dissimilar from those of the other creditors that they form a separate class. They have different rights from the secured creditors as they do not have securities over the assets of the company. They also have different rights from the Landlord creditors because they do not have the benefit of proprietary rights pursuant to the Leases. The rights of the general property creditors are sufficiently similar to enable them to consult together with a view to their common interest. The company does not consider that it would be appropriate to sub-divide the class further despite the fact that the types of rights held by the three different categories of general property creditors are not identical. In particular, in the relevant alternative, each general property creditor would have an unsecured claim against the company. Those claims would rank *pari passu* among themselves. The general property creditors would have the same rights against the company in respect of their unsecured claims.

[88] The Reading Works Agreement is secured by a guarantee provided by the Parent which, according to the FTI Report, as already noted, would result in an additional 0.03p in the £1.00 in the relevant alternative. This difference is accounted for in the returns under the Restructuring Plan. As with those Landlord creditors who hold a Parent guarantee, the company submits that this difference is not such as to require the creation of a further class and that it would be impractical and unworkable for the general property creditors to be sub-divided further. In particular, it would not be possible to identify an alternative class formulation which would not result in a proliferation of classes.

Business Rates Creditors

[89] The rights of the Business Rates Creditors are sufficiently dissimilar from those of the other creditors that they form a separate class. They have different rights from the secured creditors as they do not have securities over the assets of the company. They have different rights from the Landlord creditors because they do not have the benefit of proprietary rights pursuant to the Leases. They also have different rights from the general property creditors on the basis that:

(i) In the relevant alternative the Business Rates Creditors would receive full repayment of business rates for the period during which the administrators of the company caused the company to occupy the premises for the purposes of the administration; and

(ii) The Business Rates Creditors are involuntary creditors who cannot take commercial or other measures to mitigate the risk of their credit exposure to the company.

[90] The rights of the business rates creditors are sufficiently similar to enable them to consult together for their common interest. In particular, the nature of their claims are the same.

Is the proposed classification of creditors justified?

[91] The company submits, and I agree, that the proposed division of the Plan Creditors into the above seven classes is justified by an analysis of the respective creditors' rights both under the plan and in the relevant alternative; and because, in particular:

- the secured creditors all benefit from the same amendments to the Facilities Agreement; and their rights are sufficiently dissimilar to those of all other creditors;
- the four classes of Landlords all benefit from:
  - (i) the inclusion of a break clause in the Leases to enable the Landlords the option to terminate their Leases if they so elect; and
  - (ii) the payment of a sum which represents at least 150% of the return that would have been received in the relevant alternative.
- the General Property Creditors all benefit from a payment which represents at least 150% of the return that would have been received in the relevant alternative.
- the Business Rates Creditors all benefit from a payment which represents at least 150% of the return that would have been received in the relevant alternative.

[92] As regards the division of the Landlord creditors into four separate classes treated differently under the plan, which is driven essentially by reference to the different EBITDA contributions made to the business on a site-by-site basis and on the contribution made to the business by each site, such an approach has been accepted by the courts in England and Wales in a number of Part 26A cases, for example *In the matter of C-Retail* Limited, above, at [8]; *Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch).

[93] For completeness, in the event that the company enters an insolvency process within 3 years of the Restructuring Effective Date, the Plan Creditors' rights against the company in that process will be calculated by reference to their pre-Restructuring Plan rights as more fully described in clause 8 of the Restructuring Plan.

[94] In consideration of approving the Restructuring Plan, the Plan Creditors will receive the rights and economic benefits, which are described above. Those rights and economic benefits will result in a better return for all Plan Creditors than they would receive in the relevant alternative.

[95] The Restructuring Plan will not otherwise have a very clear, or a materially different, effect, in commercial, or economic, terms, on each Plan Creditor in one class, from the commercial, or economic, effect which it will have on other Plan Creditors in the same class.

[96] Finally under this chapter, I must deal with the assertion, in correspondence, by ABC Adventure Golf Ltd, a concessionaire at the company's premises in Wyton, which operates a miniature golf course there, that it should not have been treated as a General Property Creditor but that it should have been placed in a class of its own. The reason advanced is that it is in a unique position because, unlike other concessionaires, it is unable to remove its stock, principally being the miniature golf course, which had incurred fit-out costs of £300,000.

[97] As should be clear from the foregoing discussion, and as senior counsel for the company submitted, the composition of any particular class must be in accordance with the comparative rights of the creditors in that class in the relevant alternative, rather than the impact of the plan upon them. Further, as is made clear in *Adler*, even where rights differ, the interests of the creditors may be sufficiently similar that they are able to consult together. ABC does not benefit from any security. Accordingly, in the relevant alternative it would rank as an unsecured creditor, *pari passu* with the other General Property Creditors. Like those creditors, it would be entitled to be paid a Compromised Liability Payment of an amount equal to 150% of the estimated return on its unsecured claim in an administration of the company in the relevant alternative. I therefore consider that it was correctly classified

as a General Property Creditor, although I would observe that the point is of little practical significance given that ABC voted against the plan at the court meeting of General Property Creditors, with the result that only 10% in value of those present and voting approved the plan; and so ABC is in a dissenting class of creditor in any event.

[98] Further, and for completeness, I should record that the company does not accept that ABC is in a unique factual position, pointing out that other General Property Creditors also have structures, including electric vehicle charging points and garden buildings, which it may be challenging to remove; and that another such creditor also has a miniature golf course which it is already in the process of dismantling and removing.

[99] Finally in relation to ABC, the company has put it in touch with the Landlords of the premises, and it may be able to negotiate a direct Lease.

The first hearing

[100] A first hearing in the petition took place on 18 October 2024. In advance of it, in accordance with the practice and procedure in England and Wales, and in accordance with its general approach of engaging with Plan Creditors as fully and as early as possible, the group gave notice of the Restructuring Plan and of the first hearing by way of a letter dated 30 September 2024 to the Plan Creditors. Such a practice statement letter is not a requirement in this jurisdiction but the company considered it was appropriate to issue one, in order to keep creditors informed of the company's intended course of action. It prompted correspondence from a small number of Plan Creditors, which included requests for further information in relation to the plan.

[101] At the hearing, the company sought an order for the convening a meeting of each of the seven classes of the Plan Creditors, in terms of section 901C of the 2006 Act. I granted

that order, which also gave detailed directions as to the procedure regulating the summoning, and conduct, of those meetings.

The Explanatory Statement and other information provided by the company

[102] In accordance with the requirement in section 901D of the 2006 Act the company prepared an Explanatory Statement which was distributed to Plan Creditors on 18 October 2024. The statement, *inter alia*:

- set out in full the terms of the Restructuring Plan;
- explained the effects of the Restructuring Plan on the Plan Creditors and on the interests of the directors (described above at para [44]; and
- incorporated a composite notice of the court meetings.

[103] The company subsequently distributed an update to Plan Creditors on 5 November 2024, bringing to Plan Creditors' attention (a) certain developments with regard to certain Leases; (b) the advance of £1 million by the secured creditors, referred to above, with the consequent reduction in the new facility from £24 million to £23 million; (c) a clarification in relation to inclusion of sums received as an expense of the administration under the relevant alternative in a Plan Creditor's Estimated Insolvency Return; and (d) the correction of a typographical error in the Explanatory Statement. A further update to creditors was distributed on 21 November 2024, notifying Plan Creditors of certain further developments, including consensual arrangements agreed between the company and the Landlords of premises in Antrim; the surrender of the Cheltenham Lease; and the assignation of the Clifton Lease.

[104] I am satisfied that the Explanatory Statement complied with the provisions of section 901D. It contained all of the required information and all reasonable steps were

taken to bring it to the attention of Plan Creditors. Ms Harding has confirmed in her affidavit that each director was aware of the obligation under section 901E of the Act to give notice of any material interest of the directors, and of the effect on those interests of the compromise or arrangement insofar as it is different from the effect on the like interests of other persons. The Explanatory Statement is, of necessity, a lengthy document dealing with complex arrangements between the company and the Plan Creditors and as the reporter observes its scale would be intimidating to many readers. Nonetheless, the reporter has advised that from the perspective of a Plan Creditor whose principal interest will be the reasons for the plan (including the financial position of the company), its effect on that Plan Creditor and what that Plan Creditor must do to indicate whether or not it agrees to the plan or whether it wishes to object to it, it is adequately clear. I agree.

[105] The company also appointed FTI as an "information agent" to circulate information on the Restructuring Plan. FTI established a website for the Restructuring Plan which is referred to in the Restructuring Plan itself.

[106] The website includes the following:

- the Explanatory Statement;
- the Restructuring Plan document;
- a Proxy Form;
- an email address, which was specified in the Explanatory Statement, for obtaining certain information about the Restructuring Plan and requesting a paper copy of the Explanatory Statement; and
- the anticipated date of the first hearing and that of the sanction hearing. The website, and the process for obtaining access to it, were also be referred to in the notice. The covering letters to the Practice Statement Letter also provided

each Plan Creditor with unique log-in details for the website for that Plan Creditor. The Explanatory Statement has continued to be available on the website until the Restructuring Effective Date.

The court meetings

[107] The court meetings took place on 13 November 2024, on a period of notice of 21 days. The meetings were advertised once in each of the Edinburgh Gazette, The Metro and the Financial Times, in accordance with the interlocutor of 18 October 2024. The meetings were conducted *via* Microsoft Teams which, given that the Plan Creditors are located throughout the United Kingdom, was the fairest and most convenient means of holding them. Provision was made for creditors to vote through a proxy. The chairperson at each of the meetings was Ms Lindsay Hallam of FTI. She is a licensed insolvency practitioner who has experience of acting as a chairperson in meetings of this type. The value of the plan claims was determined for voting purposes by the chairperson as at what is referred to in the Restructuring Plan as the "Voting Record Time", being 5.00pm on 12 November 2024.

[108] The calling of the court meetings, the conduct of the meetings and their outcome is described by Ms Hallam in an affidavit dated 14 November 2024. The reporter was able to attend each of the meetings and has reported that they were all conducted properly. I am satisfied that the meetings were convened, and conducted, properly.

[109] Each meeting considered, and voted on, the following resolution:

> "THAT this Court Meeting approves, with or subject to any modification, addition or condition approved or imposed by the Court, the restructuring plan under Part 26A of the Companies Act 2006 between Dobbies Garden Centres Limited and the Plan Creditors as set out in the Explanatory Statement dated 18 October 2024 and published by Dobbies Garden Centres Limited and as amended by the update to Plan Creditors dated 5 November 2024, a copy of which has been submitted to this Court Meeting."

[110] The outcome of the court meetings, as reported by Ms Hallam as Chairperson, is shown in tabular form as follows:

Meeting No	**Class of plan creditor**	**Number of Plan Creditors present and voting (either in person or by proxy)at the Court Meeting**	**Percentage of number of the relevant Class of Plan Creditors present and voting (either in person or by proxy)at the Court Meeting to approve the plan**	**Percentage in value of the relevant Class of Plan Creditors present and voting (either in person or by proxy) at the Court Meeting to approve the plan**	**Approved/ Not Approved**
1	Secured creditors	9	100%	100%	Approved
2	Class B1 Landlords	5	60%	51%	Not approved
3	Class B2 Landlords	2	50%	33%	Not approved
4	Class B3 Landlords	1	0%	0%	Not approved
5	Class C Landlords	11	27%	20%	Not approved
6	General Property Creditors	9	78%	10%	Not approved
7	Business Rates Creditors	7	71%	63%	Not approved

[111] The following table records the attendance of Plan Creditors in person or by proxy (where either a vote for, a vote against or an abstention was received) at the court meetings in percentage terms both by value and number (the number of creditors attending being shown in parenthesis in the second column):

Meeting No.	Class of Plan Creditor (and number present and voting either in person or by proxy)	Attendance at the Court Meetings	
		Attendees as a percentage by value of the relevant Class of Plan Creditors	Attendees as a percentage by number of the relevant Class of Plan Creditors
1	Secured creditors (9)	100%	100%
2	Class B1 Landlord (5) creditors	100%	100%
3	Class B2 Landlord (2) creditors	100%	100%
4	Class B3 Landlord (1) creditors	12%	50%
5	Class C Landlord (11) creditors	54%	65%
6	General Property (9) creditors	46%	17%
7	Business Rates (7) creditors	7%	10%

[112] As can be seen, each meeting was attended by at least two Plan Creditors (either in person or by proxy (including where the chairperson was appointed as proxy)), other than the meeting of the Class B3 Landlords, which was attended by a single Plan Creditor attending by proxy. For the meetings of the secured creditors, and the Class B2 Landlords, only the chairperson as proxy (for at least two Plan Creditors) was in attendance.

[113] The reporter has raised the issue of whether the Class B3 Landlords can be treated as having held a meeting at all, where only one creditor attended the meeting. Additionally, senior counsel addressed the related but separate issue of whether a meeting can take place where the only person attending is the chairperson holding proxies for more than one creditor. The first issue is largely academic since whether or not the B3 Landlords met, they did not vote in favour of the plan, and so, either way, are to be treated as a dissenting class, in respect of which the cross-class cram down power is available: see *Re Listrac Midco Ltd*

and Others [2023] EWHC 460 (Ch), Adam Johnson J at [33] to [40]. However, the second issue is of critical importance in relation to the secured creditors the only assenting class, since, if they did not hold a meeting, the resolution purportedly passed would be of no effect and the cross-class cram power could not be exercised.

[114] Both issues raise the question: what is a meeting? Does it always require the coming together of two or more persons? The preponderance of English authority is that it does. In *Re Attitude Scaffolding Ltd* [2006] EWHC 1401 (Ch), David Richards J, after reviewing the authorities as to what constitutes a meeting (in the context of an application under what is now Part 26) held that the conventional legal meaning of meeting in the context of companies was an assembly or the coming together of two or more persons; and where Parliament had used the word "meeting", there was no real basis for concluding that it was intended to have anything but its ordinary legal meaning (para [18]).

[115] I confess that I have some sympathy with the unsuccessful arguments advanced in that case, one of which (adapting it so as to apply to the present case) is to the effect that, at least for the purposes of Part 26A, it is enough to constitute it a meeting within the meaning of the provision that a meeting was convened on proper notice, thereby giving all members of the class the opportunity to consult together, and that a meeting was held in the sense that the resolution was put to a vote at the time and place specified in the notice. If that were not so, then, at least in theory, if there was a class consisting of only two creditors, one holding 95% in value of the claims who favoured the plan, the other holding 5% who did not, the latter could potentially thwart the operation of section 901G by the simple device of not attending the meeting in person or by proxy. Or, if there were, say, only two classes, each consisting of only one creditor, it would be impossible for the scheme ever to be approved. Another argument is that the Act does not provide for a quorum, and the

structure of the section makes the decision of the meeting only a threshold to the exercise by the court of its discretion.

[116] I also note that section 318 of the 2006 Act provides that in the case of a company which has only one member, one qualifying person present at a meeting is a quorum, which rather suggests that Parliament was of the view that the presence of one person *could* constitute a meeting (otherwise, one might have expected Parliament to have deemed what would otherwise not have been a meeting, to be a meeting).

[117] That all said, I have not heard full argument on the issue, and I recognise the force of David Richard J's observation that the foregoing submissions involved not an exception to the ordinary meaning of meeting, but its complete replacement; and he also found it significant that express provision was made in other parts of the Companies Act for meetings to be attended by only one person.

[118] Other cases have considered the issue. In *Listrac Midco*, above, Adam Johnson J cited *Attitude Scaffolding* with approval, holding that a meeting attended only by one creditor was not a meeting in the "strict" sense. In *Chaptre*, above, the issue also arose, in that of the class comprising two Hedging Banks in that case, one cast a vote at the meeting, in favour of the scheme, but the other did not attend. Miles J discussed the issue at paras [90] to [93], observing that in a traditional scheme of arrangement under Part 26 of the Act, such a meeting would be regarded as defective, which would be fatal to the scheme; but he went on to say, at paragraph 92, that under Part 26A the position is different, since "even if" the meeting is "technically" defective the court could still cram down the relevant class under section 901G, as I have observed above. The Hedging Banks could be treated as a dissenting class (although no dissenting votes were actually cast). Thus, he appeared to leave open the

possibility that a meeting of only one might not be defective, but did not find it necessary to decide the point.

[119] I take the same approach here. Even if the meeting of the Class B3 creditors was "technically" or "strictly" defective (on which I express no concluded view) it makes no difference; they are a dissenting class whether by reason of the non-approval of the scheme by the one creditor who did attend, or by dint of the fact that they are not an assenting class. I will leave for further consideration on another day the issue of whether, where the court authorises the convening of a meeting of a class in which there is only one creditor, the subsequent attendance of that creditor at the due time and place can constitute a meeting or not.

[120] However, the issue of what is a meeting arises much more acutely in relation to the secured creditors, which was the only class to approve the plan. All nine secured creditors provided a proxy to the chairperson that she vote in favour of the plan, resulting in 100% approval. Thus, only the chairperson, as proxy, was physically in attendance at the meeting (or at least, she was the only person representing the class which had been summoned to the meeting: other persons were physically present). In this regard, senior counsel drew my attention to the recent English case of *Revolution Bars Ltd* [2024] EWHC 2949 (Ch) in which, after observing at [5]b that two classes of creditors had held "quorate" meetings (although the statute does not provide for a quorum), Richards J said the following, at [5]c:

> "The Class B1 Landlords and General Property and Business Rate Creditors, approved the Plan by the statutory majority, but at least arguably did not do so at 'meetings' since only one person was <u>physically</u> present at each apparent 'meeting' even though the chair held proxies issued by different creditors in each case. Although *Re Attitude Scaffolding*...did not expressly deal with this situation, the judgment of David Richards J suggests that it is appropriate to proceed on the basis that there was no 'meeting of Class B1 Landlords or of General Property and Business Rate Creditors.'" (emphasis in original)

Despite having said that it was only "arguable" that there had been no meetings of the relevant classes, Richards J went on to proceed on the basis that those classes of creditor, in addition to two other classes were all dissenting classes. I do not have that luxury, since in the present case the secured creditors were the only assenting class. Senior counsel submitted that this approach was not correct, and that all nine of the secured creditors were, for the purposes of section 901G, to be treated as having been present "in person or by proxy"; in this case, by proxy.

[121] I agree with senior counsel. The matter must be approached as one of statutory interpretation. There is nothing in the language of section 901G to suggest that a meeting can take place only if two or more natural persons come together. On the contrary, the section expressly provides for two methods by which a person may attend a meeting: "in person or by proxy". Those words appear in subsection (1), and again in subsection (5) which requires agreement of the compromise or arrangement by: "a number representing 75% in value of a class of creditors...present and voting **either in person or by proxy** at the meeting summoned under section 901C" (emphasis added). The words "either in person or by proxy" clearly qualify the words "present and voting", both as a matter of grammar and common sense: it would make no sense that a creditor be present in a physical sense, but vote by proxy (even if that were competent), the very purpose of a proxy being to exercise *all* of the rights of a creditor to attend, speak at and vote at the relevant meeting. Even allowing that a meeting requires the coming together of two or more persons, at least for the purposes of section 901G that can be achieved either by two or more creditors attending or being represented in person (in the case of a company, through a corporate representative), or by proxy, or by a combination of the two. To hold otherwise would be to ignore the plain wording of the section.

[122] It follows that there is, with respect, no logic to the view that a meeting which is attended by two or more creditors by proxy, is not a meeting simply because both or all have appointed the same person to act as their proxy. The requirement, if it be a requirement, that two or more creditors must participate in order for there to be a meeting is satisfied by the appointment, by two or more creditors, of a proxy who is in attendance. The section does not require that at least two proxies must be so appointed. That would also be illogical and, indeed, unworkable in practice. Illogical, because, there being nothing to prevent a proxy representing more than one creditor, why then should the proxy not represent all? And unworkable, because it would in effect result in a race to instruct the chair first; moreover, a creditor would not know if its vote would count, lest all other creditors had attempted to appoint the same proxy.

[123] I therefore find that the meeting of the secured creditors, at which all nine secured creditors appointed the chairperson to act as their proxy, was a valid meeting at which the Restructuring Plan was unanimously approved by that class, which paves the way for further consideration of section 901G.

Are the jurisdictional requirements of section 901G satisfied?

[124] For section 901G to operate, conditions A and B must both be satisfied. As regards condition A, the "no worse off" test in the relevant alternative, I place reliance on the Grant Thornton and FTI reports. I have already found that the relevant alternative is the administration of the company, with the consequences described at paras [39] and [40] above. As the reporter has observed, the evidence as to what would then happen is necessarily forward-looking, and is based on assumptions rather than arithmetically exact calculations. However, those assumptions are in my view reasonable. Further, the plan

allows for a margin of error in the figures by providing that the compromised payment which each dissenting plan creditor is to receive is 150% of that creditor's estimated return in the relevant alternative, subject to a minimum of £1,000 or £2,000 depending on whether or not a Parent guarantee is held. Insofar as the Landlords are to receive 3 weeks contractual rent (less than that, if the remaining contractual term is shorter than 3 weeks), that equates to the 3 weeks rent they would receive in an administration, the administrators having insufficient cash to trade for longer. The estimated returns in the relevant alternative are based upon the FTI report. FTI have prepared an Estimated Outcome Statement showing the estimated outcome for each class of creditor in the relevant alternative in comparison with the consideration they would receive under the plan. In each case, the class is better off under the plan. The company has lodged a spreadsheet showing the relative outcomes for each individual plan Landlord, and all are demonstrably better off, in some instances materially so. The reporter has also appended a helpful table to his report, summarising the outcomes for each class in the relative alternative, and under the plan, an abridged version of which is as follows:

Class	**Return on RP (£'000)**	**Return on RA (£'000)**	**Return on RP (p/£)**	**Return on RA (p/£)**
Secured Creditors	102.1	54.4	100.00	51.97
Class B1 Landlords	5.2	0.2	23.88	0.87
Class B2 Landlords	2.9	0.1	17.23	0.86
Class B3 Landlords	1.4	0.1	14.44	0.89
Class C Landlords	0.9	0.5	1.19	0.65
General Property Creditors	0.1	0.0	0.66	0.23
Business Rates Creditors	0.0	0.0	0.81	0.20

[125] On the basis of all of this material, I conclude that it has been shown that no dissenting Plan Creditor will be worse off under the plan than under the relevant alternative. Condition A is therefore satisfied.

[126] As regards condition B, as noted above, the court meeting of secured creditors unanimously approved the plan. Given the 100% turnout and the 100% vote in favour, those who attended and voted in favour were necessarily a true representation of the class as a whole. The estimated recoveries of the secured creditors are set out in the Explanatory Statement, and shown in the reporter's table referred to above, and as a class, the secured creditors would both receive a payment from, and have an economic interest in, the company, in the relevant alternative. I therefore conclude that condition B is also satisfied.

Is the Restructuring Plan fair to the creditors as a whole?

[127] Having found that the cross-class cram down power is available, the key question, and the nub of the petition, is to decide whether it should be exercised. Ultimately, as the Court of Appeal made clear in *Adler*, that turns on whether or not the plan is fair to the creditors as a whole, which will always be a question of circumstances; but in considering that question, *Adler* gives guidance as to which factors are, and are not, relevant. The first point is that it is not appropriate to apply some form of rationality test based upon the level of voting in an assenting class, or upon the overall value of claims voted in favour of the plan across the assenting and dissenting classes as a whole (*Adler*, para [134]). However, the fact that an "out of the money" class voted against the plan should not weigh heavily or at all in the decision whether to sanction the plan: *Virgin Active Holdings* [2021] EWHC 1246, Snowden J at [24]9]. Second, it is appropriate to carry out both a vertical and a horizontal comparison (*Adler,* para [149] *ff*). A vertical comparison - that is, of the return to a creditor

under the plan with the return in the relevant alternative - will already have been carried out in finding that condition A in section 901G is satisfied, but that raises no presumption of fairness in favour of sanction (*ibid,* paras [153] to [154]. A horizontal comparison requires the court to identify whether the plan provides for differences in treatment of the different classes of creditors *inter se* and, if so, whether those differences can be justified. An obvious reference point for this exercise is the position of creditors in the relevant alternative (*ibid*, para [159]). This involves consideration of whether the restructuring surplus is fairly distributed among the creditors; or whether any class of creditor is getting "too good a deal" (*ibid,* para [161]). It may be justifiable that creditors who provide new money to facilitate a restructuring plan should be entitled to receive full repayment of the new money under a plan, in priority to pre-existing creditors (*ibid*, para [168]). Finally, the court should ask itself whether a better or fairer plan is available (*ibid,* paras [173] to [182]).

[128] Applying that approach to this case, there are clear differences in treatment of the classes here particularly as regards the secured creditors and all other Plan Creditors. In the relevant alternative, the Plan Creditors do not rank *pari passu* with each other. The secured creditors have the benefit of their security which results in their achieving an enhanced recovery in that scenario. By contrast, the return to the unsecured creditors is limited to a very small share in the prescribed part - they are effectively "out of the money". It is also relevant that the secured creditors are to provide additional funding of £23 million, which is critical to achievement of the plan. I am of the view that the already enhanced status of the secured creditors under the relevant alternative by virtue of their security and the provision of additional finance to allow the plan to proceed at all, amounts to sufficient justification for their enhanced return under the plan in comparison with the other Plan Creditors.

[129] Further, the overall effect of the plan is not to treat the rights of any Plan Creditor, of any class, in a way which is materially different from its treatment of the rights of any other Plan Creditor in that class. The commercial advantages of the Restructuring Plan are described above. As regards the dissenting Plan Creditors, the plan does provide for a fair distribution of the restructuring surplus. All are to receive 150% of their estimated insolvency returns. It is also fair that the Class B Landlords should receive a payment equivalent to 3 weeks of contractual rent. As regards whether a better or fairer scheme could have been devised, none has been suggested, and it is not appropriate for the court to go off on a frolic of its own, or to speculate, as to what other schemes there might have been. As senior counsel submitted, some regard must be paid to the urgency of the situation, and the company's imminent insolvency if this plan is not sanctioned. Further, the secured creditors' willingness to advance further funds is conditional on this plan, not some other one, being approved. In all the circumstances, I have reached the view that the plan is fair to all creditors.

Blot or defect

[130] There is no blot or defect in the plan.

Overall exercise of discretion

[131] Having decided that there has been compliance with the 2006 Act, that the procedure has been regular and that the plan is both fair and blot-free, the question remains as to whether there is any other factor which might make it appropriate, or not appropriate, to grant sanction. The only additional observation I have is that the company has made every effort to ensure that creditors have been kept fully informed, and to address the informal

objections which it received, and to reach an accommodation with individual creditors (which it has achieved in a small number of cases). There are no contra-indications to the granting of sanction. I therefore consider that it is appropriate that the power in section 901G be exercised, and that I should exercise my discretion by granting sanction.

Other matters

[132] I should mention several matters for the sake of completeness.

Power of Attorney

[133] Following sanction of the Restructuring Plan, a provision of the plan grants a power of attorney to the company to sign the relevant transaction documents on behalf of the Plan Creditors, who will thereby become bound to the plan.

The effective date

[134] The Restructuring Plan is not subject to conditions precedent and so, now that it has been sanctioned, it will have become effective on the date on which the certified copy Court Sanction Order was delivered to the Registrar of Companies in Scotland for registration (the Restructuring Effective Date).

Recognition of the Restructuring Plan

[135] The company sought legal advice in England and Wales, as the jurisdiction which is significant in the context of the Restructuring Plan. In particular, the vast majority of the Leases relate to properties in England which are governed by English law. The company has received an Opinion from English Counsel, Jeremy Goldring KC, confirming that the

Restructuring Plan will be effective under English law. No difficulty is anticipated, in so far as the Restructuring Plan is to apply to those obligors which are incorporated in England and Wales.

[136] The company also has one Lease in Northern Ireland. It has no other assets in that jurisdiction. The company's advisers have advised it that no difficulty is anticipated insofar as the Restructuring Plan is to apply to this Lease.

Postscript

[137] As a result of the company's solicitors lodging copies in process (very properly, in the interests of full disclosure), I became aware of a series of detailed notes the company's English solicitors had sent to the reporter while he was engaged in carrying out his enquiries. I fully accept that these were well intentioned, and in so far as they properly updated the reporter with regard to discussions between the company and certain of its creditors, and drew to his attention authorities of which he might otherwise have been unaware, they were both appropriate and, in the latter case, possibly helpful.

[138] Nonetheless, to an extent, at least on one reading, the notes at times strayed into the realm of attempting to persuade the reporter of the merits of the petition, rather than simply providing him with information which he might reasonably require. I have in mind particular elements of the note of 15 November 2024 which speculated as to what the outcome of one meeting would have been had a certain creditor abstained instead of voting against. I do not consider that it is appropriate that communications of that nature should be sent to a reporter, who is, after all, there only to report to the court on the facts and circumstances set forth in the petition and on the regularity of the proceedings, rather than to reach any decisions or to form a view on the law, which is, after all, the province of the

court. I am conscious that other interested parties, at least those who are not legally represented, do not have the opportunity (or at any rate, are unlikely) to write to the reporter. Given that the practice of appointing a reporter is in part to avoid the need for a detailed examination of the evidence by the court at the sanction hearing, it is essential that the process is perceived as fair by all those affected by the outcome of the petition. The place for making submissions as to the law is in court, through counsel. No harm was done in the present case as the reporter has sufficient experience and independence of mind not to have been influenced. However, agents should take care that they do not cross the line between supplying the reporter with information in order to update him on the factual position as outlined in the petition, and being seen (rightly or wrongly) to be attempting to persuade him to reach a certain conclusion in his report. If there is a need to update the reporter, an approach which could not attract criticism would be to lodge supporting documentation in process, and forward that to the reporter with a minimum of comment. I say all this not to censure the company's solicitors, who have after all endeavoured to be helpful and have provided Plan Creditors with full information throughout the process, but for the guidance of practitioners in future cases.