Clients&FriendsMemo

The 2023 Restructuring Market Wrap-Up

11 January 2024

As 2024 gets underway, 2023 will be remembered as the year that King Charles III's coronation captured our attention with its many (and occasionally bizarre) storied traditions and customs and, of course, for the passing of the Irish singer and poet Shane MacGowan.[1] Turmoil in the European banking sector early in the year set the tone for a challenging year, while across the Atlantic, a number of regional US banks had their deposits guaranteed by the government and entered into hastily arranged asset transfers reminiscent of the worst days of the global financial crisis of 2007-8. And while the year ended on a more positive note with signs that inflation appeared to have been tamed and central banks signalled rate cuts in the not-too-distant future, investors (and restructuring professionals) remain alive to the volume of corporate credit to be refinanced in 2025 and 2026.[2]

The English courts were a popular destination for forum-shopping debtors in 2023 with a number of overseas companies choosing the UK to implement their restructuring. CVAs seem to have been almost completely supplanted by part 26A restructuring plans as the proceeding of choice for compromising leasehold liabilities. Meanwhile, a number of important insolvency cases came before UK courts.

Lessons Learnt From 2023's Most Closely Followed Restructuring Plan: Adler Real Estate

Real estate featured heavily in 2023's list of restructuring candidates, and perhaps the most hotly anticipated and controversial decision of the year was Adler Real Estate's restructuring plan. In April, Mr Justice Leech gave his written reasons for sanctioning the novel plan following a fully contested three-day hearing, involving valuation evidence and extensive cross-examination of witnesses. In a lengthy judgment, the Court provided vital insight into its approach to the use of its cross-class cram-down power to sanction the plan in the face of fierce opposition from an *ad hoc* group of 2029 noteholders. Controversially, the plan afforded differential treatment to otherwise *pari passu* creditors. Ultimately, the Court found the company's valuation evidence more persuasive and, on that basis, held *pari passu* was not infringed. For our in-depth review of the judgment, see here.

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[1] https://www.theguardian.com/music/2023/nov/30/shane-macgowan-obituary.

[2] See for instance, courtesy of M&G: https://bondvigilantes.com/blog/2023/10/high-yield-maturity-walls-are-steep-but-not-unclimbable/?utm_source=pocket_saves.

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At the time of writing, an appeal brought by the 2029 noteholders is awaiting judgment – watch this space.

The Healthcare Sector Dips its Toes into the Restructuring Plan Through Lifeways Group

In February, we saw the first sanctioning of a restructuring plan involving a UK-regulated healthcare business. The Lifeways Group ("**Lifeways**") is the UK's largest healthcare provider, delivering supported living and specialist care services to residents with diverse and complex health needs. The High Court sanctioned comprehensive restructuring plans encompassing seven companies within the group.[3] The transaction involved a £100 million reduction of Lifeways' senior secured debt in exchange for the consensual transfer of the group's ownership to the lenders and for the provision of a new £15 million super-senior facility. Certain leases of the Group were also compromised by the plans.

The case provides useful guidance around creditor meeting procedures when the cross-class cram-down power is invoked. In some of the creditor meetings only a single creditor attended, and indeed in one of the classes (comprising landlords), no creditors attended. Despite this, the Court held that there was no procedural irregularity regarding these meetings, as the Companies Act 2006 only requires that a meeting of the creditor class be summoned. The Act does not expressly require a meeting to be held. As such, the rule set out in *Re Altitude Scaffolding*[4] – that in a scheme of arrangement a "meeting" of creditors must have at least two participants unless there is only a single creditor in the class – should not apply to a restructuring plan where cross-class cram-down is engaged. As such, the meetings were valid and the restructuring plan was approved.

Goodbox Opens an Avenue for Creditors to Have Their Say

H1 2023 continued to see restructuring plans being deployed for small - to medium-sized enterprises ("**SMEs**"). The Good Box Co Labs[5] ("**Goodbox**") restructuring plan concerned an SME business and was the first creditor-proposed restructuring plan. Goodbox, a business which provides payment terminals to fundraising organisations, had been in administration since mid-2022. Goodbox's principal shareholder, NGI Systems Limited ("**NGI**"), proposed a restructuring plan as an administration exit route, arguing that it offered a going concern rescue alternative to creditors. The administrators, however, wanted to transition the company to liquidation.

Despite some creditor dissent, HHJ Davis-White KC approved the use the cross-class cram-down and sanctioned the plan which provided for new funding from a consortium of "rescue funders" (including NGI). The judge also made an order directing the administrators to consent to the sanctioning of the plan. *Goodbox* shows that a restructuring plan can be a powerful tool in the hands of creditors in an insolvency proceeding, particularly where a proposed course of action is opposed by administrators.

Houst Line is it Anyway: *GAS* and *Nasmyth* Plans Defeated by HMRC

In May 2023, two restructuring plans came before the Courts pitting the company against the UK tax authority, His Majesty's Revenue and Customs ("**HMRC**"). At the sanction hearing for the

[3] *Re Listrac Midco Ltd and others* [2023] EWHC 460 (Ch).

[4] *Re Altitude Scaffolding Ltd* [2006] EWHC 1401 (Ch).

[5] *NGI Systems & Solutions Ltd v The Good Box Co Labs Ltd* [2023] EWHC 274 (Ch).

Great Annual Savings Company ("**GAS**") restructuring plan, HMRC opposed the plan, arguing that it stood to only gain "marginally" under the proposed restructuring plan compared to what it stood to recover under the relevant alternative, being an administration, given its statutory priority over unsecured creditors. Further, HMRC argued that if GAS's valuation figures were even slightly wrong, HMRC would actually be better off in the relevant alternative.[6] Mr Justice Adam Jones refused to sanction the plan on the basis that the conditions for cram-down were not met; GAS had not proven to the civil standard that HMRC would be no worse off under the plan.

Also in May, UK engineering company Nasmyth Group Limited ("**Nasmyth**")[7] proposed a similar plan. In *Nasmyth*, even though the statutory conditions for the exercise of the cram-down power had been met (i.e. HMRC was no worse off in the relevant alternative), the proposed plan was conditional upon the company agreeing upon a Time to Pay arrangement ("**TTP**") with HMRC; this had not been agreed. Leech J noted that:

> *"The directors and secured creditors appear to have seen the plan as a convenient opportunity to eliminate [the] HMRC debts [...] for a nominal figure and to use the plan to put pressure on HMRC to agree new TTP terms. In my judgment this is not a purpose for which Part 26A should be used."*

These cases are noteworthy as we see HMRC actively opposing restructuring plans, in contrast to its ambiguous stance taken last year in *Houst*.[8] HMRC has laid down the marker and the market appears to be heeding the call. That said, in the subsequent *Prezzo*[9] restructuring plan, the Court sanctioned the company's plan despite a challenge from HMRC. The sanctioned plan resulted in HMRC receiving 33.5% in respect of its preferential claims and zero for its small unsecured debt.

Fitness First

Following in the footsteps of *Virgin Active,*[10] which memorably used a restructuring plan to trim its capital structure in the financial turmoil of lockdown back in 2021, *Fitness First*[11] found itself in similar (gym) shoes! After a two-day hearing, the UK fitness company's restructuring plan was sanctioned, imposing a 61.5% cut on rent arrears owed to landlords and rent reductions for a period of three years. Green J was satisfied that the relevant alternative in this matter would be an administration or accelerated M&A process and rejected the complaints from a group of dissenting landlords that these outcomes were artificially contrived. That being said, the judge did note that the company showed a "certain lack of reasonableness in responding to requests for information" from landlords.[12]

Here Comes the WHOA!

Despite its acronym sounding like the noise one makes when riding a rollercoaster, or perhaps someone frantically imploring a reversing car driver to cease backward movement, 2023 was the year that the use of the Dutch *Wet Homologatie Onderhands Akkoord* ("**WHOA**") restructuring

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[6] *Re Great Annual Savings Co Ltd* [2023] EWHC 1141 (Ch) (sanction hearing).

[7] *Re Nasmyth Group Ltd* [2023] EWHC 988 (Ch) (sanction hearing).

[8] *Re Houst Limited* [2022] EWHC 1941 (Ch) (sanction hearing).

[9] *Re Prezzo Investco Limited* [2023] EWHC 1679 (Ch).

[10] *Re Virgin Active Holdings Ltd* [2021] EWHC 1699 (Ch) (sanction hearing).

[11] Re Fitness First Clubs Ltd [2023] EWHC 1699 (Ch) (sanction hearing).

[12] *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch) (sanction hearing).

tool gained traction in the market, often in combination with a parallel English scheme of arrangement. Shipping business Vroon Group pursued a restructuring after it had found its liquidity squeezed from 2016 and had also been facing falling demand for shipping since the COVID-19 pandemic. The cross-border restructuring involved rearranging the group's senior secured debt via a "debt-for-equity swap", using a combination of these two restructuring tools. Their combined use was necessary to ensure the effectiveness and enforceability of the restructuring across the group's multiple jurisdictions, as well as enabling the group to benefit from the flexibility and swiftness of the WHOA and the established track record of the English scheme of arrangement.

The Italian Job

We also saw two Italian companies utilise a restructuring plan to implement the same proposals as those that had already been ordered in Italy by way of *concordato preventivo* proceedings.[13] Interestingly while most of the group's creditors had claims which were not governed by English law (being a mix of Italian and other Member State law), the Court still considered that the companies were within the jurisdiction of the English restructuring plan. The Court stressed that what was important was to be vigilant against improper forum shopping. The Court considered that was not the case in these instances as the sanctioning of the restructuring plan was key to ensuring the effectiveness of the group's financial restructuring. The restructuring was sought following financial distress, which arose from claims arising under foreign exchange derivative contracts.

Old Faithful: the Scheme of Arrangement

While 2023 demonstrated the flexibility of the UK Part 26A restructuring plan, the old-fashioned scheme of arrangement proved that it still has its place in the restructuring lawyer's toolbox. A number of foreign companies used the procedure to implement a restructuring (*Lecta Paper,*[14] *Haya Holdco* (again!),[15] and *Hilding Anders*[16] to name a few) by changing the governing law of their debt instruments to English law and/or incorporating an English company guarantor in order to create the necessary jurisdictional nexus.

The First "Unsecured Credit Bid"

Moving away from the restructuring plan decisions (but keeping on the theme of "*firsts*") – another "first" in 2023 was the High Court approving an "unsecured credit bid" in relation to the special administration of Sova Capital Limited ("**Sova**"). Sova was a regulated and FCA-authorised UK wholesale securities broker, providing trading and execution services to its clients. It was heavily involved in the Russian market. Amid the Russian invasion of Ukraine and related market turmoil, the reliance on Russian assets caused the company financial distress, which ultimately led to it entering special administration in March 2022.[17] The sanctioning of various of the company's investments complicated the special administration, making it difficult for the

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[13] *Re Cimolai SpA and another* [2023] EWHC 1819 (Ch) (convening hearing) and *Re Cimolai SpA and another* [2023] EWHC 2193 (Ch) (sanction hearing).

[14] [2023] EWHC 2908 (Ch) (convening hearing).

[15] [2023] EWHC 2192 (Ch) (sanction hearing).

[16] [2023] EWHC 1513 (Ch) (convening hearing) and [2023] 7 WLUK 200 (sanction hearing).

[17] *Re Sova Capital Limited* [2022] EWHC 814 (Ch).

special administrators to realise the assets of the business through conventional means (such as marketing the business for sale).

With 87% of Sova's estate consisting of illiquid or unrealisable Russian securities, in March, the High Court approved an "unsecured credit bid", granting the joint special administrators permission to enter into the sale of the company's Russian portfolio to an unsecured creditor and the consideration for that sale involved the creditor releasing their c.£233 million unsecured claim against the company.[18] The application was opposed by another unsecured creditor of Sova that also wished to acquire the relevant portfolio. However, this party's proposed transfer strategy was considered to involve an unacceptable level of execution risk. The judgment provides exhaustive guidance around the methodology used to price the unsecured credit bid, as well as the circumstances in which administrators are entitled to seek court approval of a transaction that they wish to enter into.

The Struggle of Survival for Britain's Last Doorstop Lender, Morses Club

The steady decline of the "doorstop lending" market had seen the last major lender standing, Morses Club, adopt a "fight or flight" approach to the tightening regulatory environment. Towards the end of last year, Morses proposed a scheme of arrangement to combat its mounting financial difficulties stemming from a number of financial redress compensation claims. The proposed restructuring involved a £20m equity injection and the incorporation of a new SPV to assume the redress liabilities of Morses Club and thus implement the scheme. This proposal was contested by the FCA, who appeared at the convening hearing in March and opposed it on the basis that the proposed equity funding was not committed, and that the extended backstop date for a cash injection created too much risk for creditors, as opposed to an immediate administration. Notwithstanding this, and after some amendments to the proposal, the FCA did not oppose the scheme at the sanction hearing in May this year, and the scheme was ultimately sanctioned.

What's a Fixed (or Floating) Charge These Days?

It had been some time since the Appellate Courts last considered the differences between fixed and floating charges.[19] In *Re Avanti Communications Ltd (in administration)*,[20] the High Court provided a thorough analysis of the distinction between fixed and floating charges and the degree of control necessary to create fixed charge security. Avanti operated communications satellites and had granted charges over the satellites themselves, its network and ground stations, orbital slots and other related assets. It went into administration in April 2022 and following a sale of certain assets, the joint administrators applied to the Court for a determination as to whether these assets were secured by fixed or floating charges. The proceeds available to the company's secured lenders, preferential creditors and "prescribed part" unsecured creditors turned on this determination. It was held that the charges were fixed. The judgment is exhaustive in its examination of the law, but key to the Court's findings that the charges were fixed are that: *firstly*, there is no rule that a charge can only be fixed if there is a total prohibition on dealings with the asset, and *secondly*, the nature of the assets and whether they are circulating in nature (stock, for instance), in which case it will be easier to conclude that the ability to deal with them is inconsistent with the creation of a fixed charge.

[18] *Re Sova Capital Limited* [2023] EWHC 452 (Ch).

[19] The classic case of *Re Spectrum Plus Ltd* [2004] EWHC 9 (Ch), having been decided way back in 2005.

[20] [2023] EWHC 940 (Ch).

The Court will undertake a two-stage analysis to determine the nature of the charge: *firstly*, construing the security document to determine the parties' intentions as to the nature of the charge and *secondly*, whether the chargor's rights granted under the terms of the documents are inconsistent with creation of a fixed charge, irrespective of the parties' intentions and any labels given to the charge.

Comet

Earlier this year, we looked at the Court of Appeal's *Comet* decision considering the law on unlawful preferences. In a rare example of the Court of Appeal overturning a finding of fact by a trial judge, the Court stressed that when considering whether a transaction is challengeable as a preference, it is important to analyse *when* the decision (to prefer) was made by the insolvent company. For practitioners, the key takeaway is that it is only the point of an operative decision that is relevant; an agreement or understanding to do so – or a decision that is conditional on something else happening, such as board approval – is not sufficient.

Creditor Successfully Challenges CVA on Grounds of Unfair Prejudice

In *Re Mizen Design/Build Ltd*,[21] a creditor successfully established that it would be unfairly prejudiced in a proposed company voluntary arrangement ("**CVA**"). The applicant was a creditor of the CVA company and had the benefit of guarantees granted by a shareholder of the CVA company. The CVA company proposed to release these guarantees to prevent future "ricochet claims" against the guarantor shareholder. However, the Court found that the CVA company had failed to disclose sufficient information regarding the shareholder. The absence of these key disclosures amounted to material irregularities and the applicant creditor was thereby unfairly prejudiced in the CVA proposal.

Administrators Are Not Company Officers!

In a decision that provided comfort to UK insolvency practitioners around town, the UK Supreme Court ruled that administrators should not be considered as "officers" of a company, within the meaning of the 1992 Trade Union and Labour Relations (Consolidation Act) 1992. The decision is important as it means that administrators will not be the subject of criminal sanction if they fail to submit the required forms when a collective redundancy is proposed as part of an administration. That said, administrators should still ensure that they comply with the myriad of employment law-related obligations that rear their head in these situations.

Galapagos – the Origin of the Specious Releases

For the first time since the 2012 *Stabilus* case,[22] an English court considered the "distressed disposal" provisions of an English law intercreditor agreement in the context of a non-consensual release of structurally senior but contractually subordinated guarantees for high-yield notes effected as part of the restructuring of the Galapagos group in 2019. Signal, a HY noteholder, embarked on multi-jurisdictional litigation seeking to undermine the group's restructuring. Its arguments before the Court centred on whether conditions to the exercise of the security agent's release powers had been valid. The conditions were, in broad terms, that the sale of the secured assets was made for consideration "in cash (or substantially in cash)" and that the claims of the other financial creditors were "unconditionally released and discharged" and "not assumed by

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[21] *Newlon Housing Trust v Mizen Design/Build Ltd* [2023] EWHC 127 (Ch).

[22] *Saltri III Ltd v MD Mezzanine SA Sicar & Ors* [2012] EWHC 3025.

the purchaser or its affiliates" and that the security for the senior secured debt was "simultaneously and unconditionally released". As expected, the Court concluded that the set-off in part of the obligation to pay the purchase price did amount to cash and that the simultaneous refinancing of the group with new money meant that the "old" financing had been repaid. Effectively, the Court respected the form of the arrangements given effect to in the restructuring over the substance of them.

European Round-Up: the Continent Seems so...British!

As noted above, the Dutch WHOA has been employed in a number of cases this year on a standalone basis and was used to cram down dissenting lenders in Royal IHC's plan. Following on Royal IHC's heels, Steinhoff's WHOA was duly sanctioned in June in the face of concerted opposition from shareholders closing a chapter on one of the longer-running European restructuring transactions.

In France, the first major test of its *accelerated safeguard* restructuring regime played out through the Orpea restructuring which was approved in late July. The approved plan allows Orpea to significantly reduce its financial debt by almost 60% through the contribution of new secured debt and equity injections. The procedure was also used in the restructurings of *Pierre Et Vacances* and *Casino*.

Meanwhile in Spain, in contrast with many of its neighbours on the Continent, the changes to its insolvency regime in line with the EU-wide reforms have resulted in heavily contested litigation. Most notably, *Celsa*'s creditors launched a restructuring plan on the day the new legislation came into force as a reminder of how, in line with other European regimes, creditors of Spanish companies are now able to impose a non-consensual restructuring. Interestingly, the new proceeding has replaced all other pre-insolvency restructuring mechanisms (including refinancing agreements/*acuerdos de refinanciación* and schemes of arrangement/ *acuerdos de homologación*), as well as liquidation plans, leaving a reduced insolvency law "toolkit".

As for Germany, we've seen increasing willingness to embrace StaRUG with a number of companies choosing to use the proceeding to restructure their debts. Whether it will emerge as a serious contender for German companies, requiring a large multi-jurisdictional restructuring remains to be seen.

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