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

No. CR-2022-004557

NEUTRAL CITIATION NUMBER [2023] EWHC 1026 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 17 February 2023

Before:

MR JUSTICE TROWER

IN THE MATTER OF THE GREAT ANNUAL SAVINGS COMPANY LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

MR M WEAVER KC (instructed by Shoosmiths LLP) appeared on behalf of the Company

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J U D G M E N T

MR JUSTICE TROWER:

1 This is the second hearing of a claim form seeking the sanction of a compromise arrangement in the form of a restructuring plan proposed to be made between Great Annual Savings Co Ltd ("the Company") and its plan creditors. The relief to be sought in due course is pursuant to s.901C of the Companies Act 2006.

2 The principal purpose of this hearing is for the court to give directions to convene class meetings. The first hearing was held last week but was adjourned in the following circumstances.

3 The Company originally sought four class meetings, each of which comprised a single plan creditor. It also sought relief under s.901C(4) to the effect that a number of classes of creditor, whose rights would be affected by the compromise or arrangement, need not be permitted to participate in a meeting to be summoned under s.901C(1) on the grounds that none of the members of that class has a genuine economic interest in the Company.

4 Although the evidence adduced by the Company at the first hearing was admirably clear and concise, I was not satisfied that the explanation given of the steps that had been taken to notify plan creditors of the proposed plan was sufficiently detailed. I took that view, having particular regard to the fact that the Company was seeking relief under s.901C(4) which would have required the court to reach a determination on the balance of probabilities that a large number of potential plan creditors had no genuine economic interest in the Company.

5 In light of the view I took on the evidence as to notice, and another point which I will mention in a moment, the Company said that it wished to reconsider whether to continue to

seek relief under s.901C(4) at this stage, or whether it was more appropriate for it to rely at the sanction hearing on the court's cram down power under s.901G in the event that any class, whether or not out of the money in the sense contemplated by s.901C(4), were to vote against the plan. The Company has now decided to take the latter course, which has had the effect of simplifying this hearing, although it does so without resiling in any way from its case that the creditors concerned are in fact out of the money.

6 The other point which arose, and to which Mr Weaver KC (who also appeared for the Company at the first hearing), wished to give further consideration related to the treatment of contingent creditors under the plan. At that stage, it was proposed that those creditors should receive payment of a nominal £1 in exchange for the release of all claims against the Company. I expressed the view that this gave rise to a potential point on jurisdiction, because it is well established that, for the purpose of a Part 26 scheme of arrangement, a surrender or expropriation of the rights of some creditors or members without compensating advantage will not involve a sufficient element of give and take, to amount to a compromise or arrangement within the meaning of s.895 (see *Re NFU Development Trust Ltd* [1972] 1 WLR 1548 ("*NFU*") at p.155C/D). I thought it was quite possible that the same principle might apply to a restructuring plan.

7 The Company is a subsidiary of Project Byron Newco Ltd, the majority of the shares of which are held by Mr Bradley Groves, who is also a director and the group's founder. Its primary business is to procure energy supply contracts for business users.

8 The principal source of the Company's income consists of commissions received from the energy suppliers to whom it introduces its customers. Those energy suppliers are also amongst its more significant creditors, because many are paid commission up-front and have claims to claw back excess paid commission, either when the contract does not commence

or when it terminates part way through, or when the customer's consumption is lower than the original contracted amount.

9 The Company's evidence is that it is in serious financial difficulties caused by a combination of factors including the impact of the Covid-19 pandemic on its business and the volatility in the energy pricing market. It has introduced what it has called cost saving measures, including a deferral of payment of VAT and payroll taxes. But these will not enable it to continue to trade for longer than the very short time. Furthermore, on 21 October 2022, HMRC issued a winding up petition based on non-payment of the debt which now exceeds £6.5 million. The petition has been adjourned pending determination of the current proceedings and the next hearing date is 22 March 2023.

10 The evidence is that the Company does not have sufficient liquidity to pay its outstanding debts as they fall due and there is no viable proposal for it to be recapitalised in order to enable it to do so. Its current secured lender is not prepared to make further advances. It is already owed in excess of £28 million. The Company's case is that the relevant alternative for the purposes of s.901C(4) is an administration. It also submits that administration is the appropriate comparator for class purposes.

11 I turn to summarise the terms of the plan. It is more convenient to do so by reference to the various classes of creditor identified in the Company's evidence. I should stress that this is only a very short summary. The Company has now identified 15 classes of creditor, all of whom are now proposed to be summoned to a separate meeting. It continues to maintain that 11 of these classes are out of the money, but it does not ask the court to determine at this hearing that that is the case.

12 The first class of plan creditor is the secured creditor. The precise details of how its indebtedness is to be rearranged does not matter for present purposes. But the effect of the plan is, in broad terms, a partial debt for equity swap and a reduction of the secured liabilities from £28 million to £4.5 million. It has always been recognised that the secured creditor has a genuine economic interest in the Company and that it is necessary for it to be summoned to a plan meeting. It is proposed that there will be a plan meeting at which it will be the sole member of the class.

13 The second class of creditor comprises HMRC, who is described as the secondary preferential creditor, doubtless in recognition of its status as such in a formal insolvency (section 386(1B) of Insolvency Act 1986). Under the terms of the proposed plan, HMRC's debt of some £6.4 million will receive a dividend of 9p in the £ payable over two years. It has always been recognised that HMRC has a genuine economic interest in the Company and that it is necessary for it to be summoned to a plan meeting. It is proposed that there will be a plan meeting at which HMRC will be the sole member of the class. It is said that a separate plan meeting is required, because HMRC's current rights as a secondary preferential creditor within the meaning of section 386(1B) are materially different from those of any other creditors and it will be receiving terms under the plan which are materially different from any other creditors.

14 There are then three classes of energy supply creditors whose status as creditors arises primarily out of their claw back claims. They are described as the category one energy suppliers, the category two energy suppliers and the category three energy Suppliers. The category one energy suppliers are said to be critical to a continuation of the Company's business and will (ultimately anyway) be paid in full. The category two energy suppliers are not considered critical but are considered to be revenue generative and will have different

terms, including the ability to set off future commission against claw backs, but otherwise will only receive an estimated 2p in the £ on their outstanding debt. The category three energy suppliers are not businesses with which the Company wishes or in any way needs to continue to trade. They will only receive an estimated 2p in the £ on their outstanding debt but no alternative terms will be offered.

15 There are then three different categories of other plan creditors which are specifically identified in separate schedules to the plan**.** They will be granted different terms depending on whether either they are essential or critical to the Company's business or their contracts are revenue generative, or no future relationship with them is envisaged. In broad terms, the way they have been distinguished as between each other is similar to the approach that has been taken to the three categories of energy supply creditors.

16 There are then three classes of property-related creditor which can, broadly speaking, be considered together. Each of these three classes comprises a single creditor: the head office premises plan creditor, which is the landlord of the premises the Company wishes still to occupy; the vacant premises plan creditor, which is the landlord of premises the Company no longer needs, and the rating authority plan creditor being the local authority in respect of those premises. Each of these categories of creditor will receive a different deal under the plan.

17 Class meetings are also sought in relation to the guarantee creditor, which is not proposed to receive the basic 2p in the £ credit for other unsecured creditors, because it will also receive extra consideration from the Company in relation to its claim against the group's parent. Class meetings are also sought for the parent company's and connected party claims. They will be compromised, but the exchange will be for a different consideration – the parent

company will be released from its liabilities under the secured loans and in the case of the connected party claims they will be subordinated for the duration of the plan period..

18 I turn finally to the position of those creditors who were called in the plan contingent creditors. They were originally very widely defined but that definition has now been refined to mean "those customers of the [Company] to whom the Company has any contingent Liability arising as a result of any misselling, misrepresentation or secret commission claim, as at the date of the convening hearing". Originally contingent plan creditors were to receive £1 in full and final satisfaction of their claims. The proposal now is that the Company will fund a contingent plan creditor payment fund, from which up to 2p in the £1 will be paid in return for the compromise of their claims.

19 I should add that there are a number of creditors whose claims against the Company will not be compromised by the plan. It is well-established that the question of identifying creditors with whom a plan company wishes to enter into a compromise, is a matter in the first instance for the Company itself although it must act reasonably. The exclusion of a particular group will not normally give rise to a class issue where it is done for good commercial reasons. I have considered the position of the excluded creditors in the present case and in my view there is no reason to consider that the Company's evidence that there are sufficient commercial reasons for the exclusions is flawed. Ultimately however it seems to me that whether or not the Company ought to have excluded particular groups of creditors goes to the fairness of the plan and is a matter for consideration at the sanction stage.

20 Against that background, the matters for the court to consider at the convening hearing are the adequacy of notice to plan creditors, any jurisdictional requirements, including the satisfaction of the threshold conditions A and B, class composition and any other issues not

going to the merits or fairness, which might cause the court to refuse to sanction the plan in due course. The court is also required to consider practical matters in relation to the convening and holding of the proposed plan meetings.

21 As to the adequacy of notice, which was a matter that concerned me at the first hearing, the Company has now filed further evidence explaining its own internal systems for recording details of its customers and its actual and potential creditors. The court's task is to satisfy itself that, in light of that evidence, the Company has taken all reasonable steps to identify its creditors for notification purposes. In doing so the court must have regard to the nature of the Company's business, its record keeping processes and what it is reasonably practicable for the Company to do in the light of those circumstances.

22 The issue in the present case relates exclusively to customers whose claims are only contingent, some of whom the Company accepts that it has been unable to contact. However, as Mr Weaver explained to me, and he took me in detail through the evidence on this point, the potential creditors with whom this issue is concerned are creditors who have had no contact with the Company for the last five years. They are, in any event, substantially out of the money and are very likely to have claims for very small amounts.

23 As to the way in which notification has taken place to those creditors whom the Company has been able to contact, they were first emailed on 1 December 2022. Further circulars were then sent to creditors on 22 December 2022 and 30 January 2023. More recently, on 14 February 2023, creditors were notified that the first hearing had been adjourned and that the position at this second hearing would be that the Company would ask the court to convene meetings for all plan creditors and would no longer be seeking relief under section 901C(4). Having regard to all these circumstances I am now satisfied that the Company has

taken all reasonable steps to identity its creditors for notification purposes and to notify those whom it has been able to identify. I am also satisfied that the requirements of the practice statement with regards to notification for the purposes of this hearing have been met.

24 I now turn to whether the conditions set out in s.901A are met in relation to the Company. The first of these (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. I am satisfied that this condition is met in the present case. It is clear that, if the plan is not approved, the Company's financial difficulties are such that it is likely to go into administration. Its liquidity is severely impaired, its principal source of finance is not prepared to lend any more and it is subject to outstanding winding up petitions in respect of liabilities that it cannot pay.

25 The second condition (Condition B) is that a compromise or arrangement is proposed between the Company and its creditors, or any class of them the purpose of which is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in section 901A(2). Whether it does say in an appropriate manner is a question that goes to the fairness of the plan and will be considered at the sanction hearing. However, I am satisfied that the purpose of the plan is to mitigate the effect of the financial difficulties in the sense that its purpose is to provide a better return for creditors than would be achieved on an administration, and enable the Company to continue to trade going forward.

26 The concern I expressed at the first hearing related to the satisfaction of Condition B, in the sense that it was not clear to me that, as against some of the creditors, it was a plan constituting a compromise or arrangement at all. If it is not, Condition B will not be

satisfied. The basis of the concern was that if the plan were to be a Part 26 scheme of arrangement, the proposal then put forward for a contingent plan for creditors may well not have amounted to a compromise or arrangement which the court had jurisdiction to sanction. As Brightman J explained in *NFU* at p.1555:

> "Section 206(2) of the Act is dealing with what is described as a "compromise or arrangement between a company and its creditors or a company and its members." The word "compromise" implies some element of accommodation on each side. It is not apt to describe total surrender. A claimant who abandons his claim is not compromising it. Similarly, I think that the word "arrangement" in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A number whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression."

27 In *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) at [142], Zacaroli J agreed with a view that I had discussed in *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch) at [38], and that Sir Alistair Norris had expressed in *Re Pizza Express Financing 2 plc* [2020] EWHC 2873 (Ch), to the effect that there was no reason to think that the phrase, "compromise or arrangement" in s.901A was to be construed any differently from its Part 26 meaning to require some element of give and take. However, the context in which the court must consider the ambit of the phrase in *Gategroup Guarantee* was very different to the present context. It was concerned with the extent to which a restructuring plan could affect creditors' rights against third parties.

28 In *Re Smile Telecom Holdings Ltd* [2022] EWHC 740 (Ch), the issue arose in relation to the claims and rights of a particular category of plan participant, which were to be released in

return for merely nominal payments, the amounts of which were very small and were described in the explanatory statement as being *ex gratia*. In the event, Snowden LJ decided that, although described as *ex gratia* payments, the amount to be received by those plan participants were properly to be characterised as payments in return for the modification or extinction of their rights. It was therefore possible to identify some compensating advantage of the character compensated by Brightman J in the *NFU*.

29 However Snowden LJ had said at paras 29 and 30 of his judgment in *Smile Telecom* that, although he did not need to decide, the point, the submission that was made by Mr Smith and recorded in para 29 in the following terms, was one that required consideration. The submission was that:

> "... in contrast to a scheme under Part 26, s.901G permits the court to sanction a restructuring plan which is binding on a class of dissenting creditors under section 901G on the basis that none of the dissenting class would be any worse off than they would be in the event of the relevant alternative. Mr Smith's argument was that if creditors or members in such a case would receive nothing in respect of their existing rights in the event of the relevant alternative, then it must follow that a plan could be sanctioned under section 901G which also provided them with nothing in exchange for the release or cancellation of their existing rights."

30 I have concluded that I do not have to decide this point in the present case, although I will say that it seems to me that the argument that was made by Mr Smith has real substance. The reason I do not have to decide the point in the present case is that I agree with Mr Weaver's submission that the way in which contingent creditors are now treated under the plan are similar to what occurred in *Smile Telecom*. It means that the court can be satisfied that there is a sufficient give and take for what is proposed to qualify as a compromise or

arrangement. There is to be a £14,000 fund which is to be available for the payment of a dividend, albeit a small one, to each of the contingent creditors. Whether it is appropriate for contingent creditors to be dealt with in that way is a matter for the sanction hearing, but I am satisfied that the jurisdictional issue that otherwise might have arisen in relation to the satisfaction of the conditions is satisfied.

31 The next question relates to class composition. As I have said, at the first hearing only four plan meetings were proposed. That has now been changed and class meetings are proposed for 15 separate classes of creditor falling within the categories I have already described.

32 The first question for the court is whether the Company has correctly identified those creditors who can consult together with a view to their common interest, and those categories of creditor for whom the consultation with a view to their common interests is impossible. In carrying out that exercise the court considers the creditors' existing rights having regard to what realistically will incur if the plan is not approved and sanctioned, and compares those existing rights to the rights which creditors will receive under the plan. The court is concerned with rights, not individual personal interests.

33 I agree with the Company's submission that the existing rights of the secured creditor, the secondary preferential creditor, the Head Office creditor and the rating authority plan creditor and the rights given to them by the plan are all sufficiently different from each other and from the position of the Company's unsecured creditors to mean that it is impossible for them to consult together with a view to their common interest.

34 So far as the remaining creditors are concerned, they all have unsecured claims against the Company with no identifiable preferential rights and, if they were to be treated in the same way under the plan, they should all be able to consult together. However, I am satisfied that,

because of the significantly different manners in which the three categories of energy supplier and the three categories of other plan creditors are to be dealt with under the plan, they need to have separate plan meetings. I am also satisfied from the description in the evidence of the contingent claims in respect of which the compromise is now to be proposed, and the rights those creditors are to receive under the plan that creditors with misselling claim are able to consult together amongst themselves but as against the other creditors should be placed in a separate class.

35 The court is also required to consider whether the explanatory statement is in a form and style appropriate to the circumstances of the case. I am not required to approve the explanatory statement at this stage, nor am I required to consider it in detail, but I am required to determine whether there are any apparent issues with it. I had some concerns at the first hearing, which I discussed at that stage with Mr Weaver. But I am now satisfied that, having regard to the changes that have been made by the Company, the explanatory statement provides such information as is reasonably necessary to enable plan creditors to make an informed decision as to how to vote on the plan. This conclusion does not exclude any plan creditor from complaining at the sanction that there were in fact aspects of the plan which were not adequately explained in the explanatory statement.

36 The Company proposes that the plan meetings now be held on 13 and 14 March 2023, which will enable 21 days notice to be given. It intends to notify creditors by email in accordance with the draft order posted on the plan website and also by sending by post to a considerable number of plan creditors. In my judgment, the arrangements that the Company has made for the holding of the plan meetings and for the notification to be given to creditors are sufficient. The form of order does not otherwise raise any questions of principle and I will approve the sealing of an order in the form sought.

CERTIFICATE

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