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Case No: CR-2022-LDS-000923

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

Leeds Combined Court Centre
1, Oxford Row, Leeds LS1 3BY

Date: 14/02/2023

IN THE MATTER OF THE GOOD BOX CO LABS LIMITED (In administration)
AND
IN THE MATTER OF THE COMPANIES ACT 2006

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

NGI SYSTEMS & SOLUTIONS LIMITED	**Claimant**
- and -	
THE GOOD BOX CO LABS LIMITED (in administration)	**Defendant**

- -
- -

Mr Matthew Maddison (instructed by **Walker Morris LLP**) for the Claimant
Mr Neil Berragan (instructed by **Carrick Read Leeds**) for the join administrators of the Defendant

Hearing dates: 16 January 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 14 February 2023

HH Judge Davis-White KC :

1. On 16 January 2023 I made an order sanctioning a restructuring plan made between the defendant company, The Good Box Co Labs Limited (the "Company") and its members and separate classes of its creditors pursuant to section 901F of the Companies Act 2006. At the time I said that I would give my reasons later. These are those reasons. This judgment should be read with my earlier judgment on the directions hearing for the convening of court meetings.

The parties

2. The Company was incorporated in July 2016. It carries on business as a provider of bespoke payment terminals for the benefit of charities and fundraisers. Donors make payments through the relevant payment terminals, without cash, on a digital basis utilising contactless devices. The company receives the relevant funds, and then transmits them to its respective clients. The Company also provides an online platform through which the terminals can be configured and their performance monitored. The Company's primary sources of income are hardware sales and leasing fees, fees charged on donations as processed, and monthly subscription fees in respect of each donation point.

3. The Company has over 2,200 clients in the UK and over the years has facilitated significantly over £10 million in donations to charities and other organisations.

4. The Company is regulated by the Financial Conduct Authority (the "FCA") as a small payment institution.

5. The Company entered administration in June 2022. The two joint administrators are represented before me by Mr Neil Berragan of Counsel, instructed by Carrick Read Leeds. As well as making representations on behalf of the Company and as officers of the court, the Administrators have also issued an application for directions that they should sell the Company's business and assets. That application, having been adjourned previously, was also before me at the hearing on 16 January 2022.

6. The claimant is a shareholder, supplier and creditor of the Company. Its debts break down into: pre-administration debts of just over £914,000 and an administration debt in the order of £475,000 arising from it having provided funding to the Company in administration to enable it to continue to trade whilst rescue options were explored. As regards the administration funding provided by NGI, it has been acting as lead creditor/shareholder for a number of other shareholders and investors in the Company.

7. As regards the pre-administration debts owed to NGI, these arise from the supplier relationship that NGI has with the Company. In broad terms, NGI provided and provides the Company's technological support, ranging from systems design and build to maintenance and roll out. Its majority shareholder and sole director is a Mr Tibor Barna. He was also the Company's Chief Technology Officer (but not a director). As I have indicated, NGI is also a shareholder of the Company. It holds some 36,737 (0.02%) of the 1,398,231 issued Ordinary Shares of 0.005p each in the capital of the Company.

The Company and its entry into administration

8. The Company experienced the difficulties of a start up company that needed further capital to expand and become profitable. Further capital was raised over time but it proved insufficient. Statutory accounts of the Company for the year ended 31 August 2020 showed a net loss after tax of over £3.3 million.

9. By the Summer of 2022, the directors of the Company had reached the conclusion that the Company might be insolvent and were exploring various options. NGI considered that a restructuring plan was the best outcome whereas the directors of the company appeared more attracted by a pre-pack sale. Further, certain shareholders, holding between them a majority of shares in the Company, were not happy with any continued involvement of NGI with the Company.

10. By order of this court dated 28 June 2022 the Company was placed into administration on the application of NGI. The administrators appointed were Mr Jeremy Frost and Mr Stephen Wadsted (the "Administrators"). NGI agreed to provide certain funding during the administration to enable the Company to continue trading which was secured by a debenture, containing fixed and floating charges over the assets of the Company, and registered at Companies House on 5 August 2022.

11. The Administrators issued their proposals to creditors in a document issued on 18 August 2022. Of the hierarchy of objects comprising the statutory purpose of an administration, the Administrators indicated that their primary intention was to pursue objective (a), namely the rescue of the Company as a going concern. This was on the basis of an anticipation that, following a short period of trading, funded primarily by NGI, it should prove possible to restructure the Company and secure further financing thereby enabling the rescue of the Company by way either of a company voluntary arrangement ("CVA") or a restructuring plan under part 26A of the Companies Act 2006.

12. In the event that objective (a), could not be achieved by way of a CVA or restructuring plan, the Administrators indicated that they would seek to secure a sale of the business as a going concern. In the event that administration objective (a) could not be achieved by way of such sale then it was anticipated that a sale of the business and assets of the Company would take place thereby achieving objective (b) of the purpose of administration, namely the achievement of a better result for creditors as a whole than would be likely if the Company were to be wound up without first being in administration.

13. The proposals included an estimated outcome statement. The statement of affairs showed a deficiency as regards creditors of over £10.047 million. There were three estimated outcomes by reference to liquidation, an administration sale and restructuring. On liquidation, there was an estimated deficiency as regards creditors of in excess of £15.7 million, with a return to creditors of 0.003p in the pound. On an administration and sale, with an estimated sale of assets for a consideration of just over £611,000, there was an estimated deficiency as regards creditors of over £15.6 million with an estimated dividend for creditors of 0.004p in the pound. On a restructuring, the company was estimated to be in a positive balance sheet position with net assets of over £35,000.

14. On 5 September 2022, a meeting of the Company's creditors approved the Administrators' proposals and set up a creditors' committee.

15. For the purposes of continued trading in administration, the FCA had prohibited the Company from taking on new business. It was hoped that this restriction would be removed in due course and that that, of itself, would enable the Company to raise additional capital. The FCA have not revealed their hand as to what approach they will take if the Restructuring Plan is sanctioned nor, as far as I can see, have they engaged with the Administrators or NGI on the matter.

16. Meanwhile, although the Administrators have not produced any revised estimated outcome statement it is clear that the position has deteriorated substantially. The return on an administration and sale of about 0.004p in the pound to creditors was dependent on a number of factors.

17. First, a sale (in administration) at a price of £611,625 was anticipated. The sale now anticipated is a sale at a price of £375,000. That does not include the sale of software and related intellectual property, but the Administrators are now (over 6 months since appointment) no more able than they were when they released their proposals to provide any estimate of the value of the same. There is no buyer lined up for the same. The Administrators consider that there is no room for continued trading and that the administration must be brought to a close once the sale has taken place and that trading cannot continue with a view to a further extended marketing period. Any further realisations therefore seem extremely speculative and unlikely.

18. Secondly, the estimated outcome was dependent on the administration funding to be repaid to NGI being some £200,000. For various reasons, that funding now stands in the region of £475,000.

19. Accordingly, on a sale in administration the position appears fairly clear. The realisations form the proposed sale will be insufficient to meet the secured administration claim of NGI and no other person will receive any return.

The Restructuring Plan

20. The main elements of the proposed restructuring scheme (the "Restructuring Plan") before me are as follows.

21. The "Plan Administrators" are two licensed insolvency practitioners, Mr David Buchler and Ms Joanne Milner, respectively Chairman and managing director of the well-known firm of Buchler Phillips. As it happens, Mr Buchler was also the chairperson of the meetings of creditors and shareholders convened by an earlier order that I made pursuant to s901C of the Companies Act 2006.

22. The Administrators suggested that other insolvency practitioners had refused to act as Plan Administrators and that somehow this was a reason why, or a factor in reaching a conclusion that, sanction of the Plan should be refused. I do not accept this submission.

23. Two of the important functions of the Plan Administrators are as follows. First, to administer the "Adjudication Process", by which creditor and shareholder claims are determined, but with an ultimate ability in the creditor/shareholder to apply to the court

if it disagrees with the Plan Administrators' determination. Secondly, the Plan Administrators have the power to terminate the Restructuring Plan if in their reasonable opinion, having consulted the board of directors, they consider that the Company has no reasonable prospect of avoiding an insolvent administration or liquidation. On such a termination, the Company is to take all reasonable steps to procure that the Company is put into administration or liquidation.

24. The "Rescue Funders" are a consortium of investors, including NGI, who have joined together to make available funding to the Company. NGI acts as the agent of the other Rescue Funders in relation to all matters relating to or connected with the Restructuring Plan. The available funding is defined under the Restructuring Plan as being the "Rescue Funding". It amounts to a total funding of £800,000. This sum comprises the total sums lent by NGI for the purposes of the administration together with a further sum necessary to pay all of the Restructuring Plan Expenses. As at October 2022, these restructuring expenses amounted to just under £273,000, though it is envisaged that they could increase after that date. In the event that the full £800,000 is not used for such purposes the balance will be deposited with the Company in cash. NGI's proportionate provision of this Rescue Funding is some 9.11%.

25. Although the Company is not bound to pay the costs incurred by NGI on preparing and promulgating the Restructuring Plan, such costs are brought within the Plan as the Company would, in the normal course, have had to pay them and it w\s a matter of convenience that the Administrators did not prepare the plan but left that job to NGI.

26. In addition, once the Restructuring Plan becomes effective, a Debt Facility is made available to the Company. This is a secured syndicated 3-year term loan. The terms of this funding are set out in a facility agreement scheduled to the Restructuring Plan. It is entered into by (among others) the Rescue Funders, NGI as arranger, security trustee and lender, and the Company. There are provisions for other parties to participate. Interest accrues on the outstanding amounts as provided for by the facility agreement. During the first 12 months no repayments are required. Thereafter a minimum repayment of £15,000 per month is required and at the end of the term the full amount owed is repayable. Whenever equity is raised, some 15% of the amount raised must be allocated towards repayments under the Debt Facility.

27. The sums to be lent under the Debt Facility amount to £1,100,000 to meet what are described as "historical" claims under the Restructuring Plan. If this proves insufficient there is an indication that this element of the funding could be increased to £1,300,000. In addition, £500,000 of funding is available under the Debt Facility to provide continued working capital and to meet trading costs. Some of this working capital funding may also be applied to cover any shortfall of funding to cover the historical claims.

28. Further, once the Restructuring Plan is in force, NGI is required to enter into a "Services Cost Reduction Agreement" with the Company whereby commercial concessions are granted by NGI with the effect of reducing costs to the Company. A form of that Agreement is scheduled to the Restructuring Plan. In very broad terms, the level of costs overall should be about 50% lower than it would have been for the remainder of the contractual commitment as it existed prior to the Restructuring Plan.

29. A new constitution for the Company (comprising new Articles of Association) is adopted and a new shareholders' agreement put in force.

30. The Company's board of directors is reconstituted.

31. One of the constitutional changes is to attempt to cater for the need for regulatory approvals by the FCA. Directors who are not FCA approved are not permitted to act in respect of FCA regulated matters and shareholders requiring FCA approval that do not obtain such approval are prevented from exercising their voting rights until approval is obtained.

32. There are a number of detailed provisions changing the current position with regards to, for example, the structure of the board of directors, decision making at board and shareholder level and the like.

33. New share issues, with a view to obtaining further equity investment, are made simpler, removing the ability of shareholders to prevent new share issues. Shareholders are protected by the existence of pre-emption rights applying in such circumstances (though if an existing shareholder does not take up pre-emption rights its holding will be diluted if the issue goes ahead).

34. As regards creditors and shareholders, the position under the Restructuring Plan is as follows.

35. Administration Creditors are constituted as a class of creditor for the purposes of s901C of the Companies Act 2006. This class comprises those creditors with claims in the administration which would rank as an administration expense under paragraph 99 of schedule B1 to the Insolvency Act 1986 and/or Rule 3.51 of the relevant Insolvency Rules. It includes NGI as the person providing funding during the administration. Other than NGI, whose debt would be converted into shares of the Company, this class of creditor would be paid in full. However, that payment would be made with a delay of up to 6 months, or, if later, once the adjudication process was complete. The adjudication process is a process by which claims are agreed or otherwise determined by the Plan Administrators as set out in detail in the Restructuring Plan. If the determination of the Scheme Administrators is disputed then ultimately the relevant creditor has the ability to apply to the court for determination of the amount of its claim.

36. Notwithstanding that the Administrators as Administration Creditors voted against the Restructuring Plan they did not submit that the class of Administration Creditors was incorrectly constituted as a class for voting purposes.

37. So far as NGI is concerned, with regard to its claim to Restructuring Plan Expenses, this claim too is subject to the adjudication procedure. These expenses would not as a matter of law (without court order) be a liability of the Company However rather than the claim being paid, new shares in the company are allotted instead and the rights under the existing funding arrangements then come to an end.

38. The same position regarding conversion into shares also applies to the Restructuring Plan Expenses.

39. As regards trade creditors the position under the Restructuring Plan is as follows. They are regarded as key creditors the support of whom is essential to the continued trading and survival of the Company. They are defined under the Restructuring Plan as a residual category by way of excluding other categories of creditor. The Restructuring Plan provides for the payment of such creditors in full, but with the six-month time lag that applies to Administration Creditors. The overall value of such creditors is estimated to be about £207,832 (excluding the trade creditor claims of NGI in the sum of approximately £914,000). The adjudication process also applies to such claims with one exception. The exception relates to what is defined as the "Baseline Amount" and which relates to the pre-administration claims of NGI. The Baseline Amount is a sum of £485,826.74. In broad terms, this is the sum which NGI says is due to it by way of normal trading under the contractual arrangements it has with the Company for the period up to administration, but excluding certain further sums falling due by way of contract as a result of what might be described as matters outside the normal course of trading between the two parties. Under the Restructuring Plan, the Baseline Amount is not subject to further determination or challenge. The remaining part of the estimated debt of about £914,000 will be subject to adjudication under the Restructuring Plan.

40. There is a category of creditor referred to as "Convertible Loan Holders". This category includes those who have participated in the Government Future Fund financing round for the company in the first quarter of 2021. The creditors in question are four in number. Their debts, as shown on the Statement of Affairs lodged for the purposes of the administration are as follows:

Q-Invest Limited	£4,500,000
The British Business Bank plc	£4,500,000
Mark Kimber	£50,000
Seedrs Nominee Limited	£63,990

41. As regards these Convertible Loan Holders, the British Business Bank plc claims that its debt is now over £9.5 million. Its claim was admitted to voting at the relevant court convened meeting in a sum of £9,519,781. Q-Invest Ltd is incorporated in Guernsey. The funding that it provided was conditional on the Company buying a £5.2 million payments gateway software package. It is asserted by NGI that the software was delivered late, that it fails to meet key contractual capabilities and that it was not usable by the company in the manner presented to its shareholders. There is a question to whether the Company has a cross claim for return of the contractual consideration or some lesser sum.

42. Under the Restructuring Plan, the Convertible Loan Holders receive a new allotment of shares with the effect that they will hold up to 14% of the issued share capital of the company once the Restructuring Plan is given effect to. These shares will be allocated, within this category, pro rata to the debts as set out in the Statement of Affairs. However, in the event that the sums found due to any one or more of them are found to be less than the amounts set out in the Statement of Affairs, then the relevant shareholding will be reduced accordingly and the shares in question re-allocated proportionately to all the shareholders in the Company.

43. Finally, there are the shareholders of the Company as at the date the Restructuring Plan takes effect. After the Plan takes effect they remain with 1% of the shares of the Company.

44. With the Historical Shareholders retaining 1% of the issued share capital of the Company and the Convertible Loan Holders receiving up to 14% of the issued share capital, the remaining 85% falls to be distributed amongst the Rescue Funders as directed by NGI. In broad terms, this share allocation is effected in consideration of a discharge of the liabilities of the Company in respect of the administration funding and also as a credit for the incurring of the Restructurin Plan Expenses. As regards those expenses, those would normally have been incurred by the Company but in this case the Administrators and NGI agreed, for perfectly good reasons, that it would be sensible if NGI were to act as the drafter and propounder of the Plan.

45. In *Re Amicus Finance* [2021] EWHC 3036 (Ch), Sir Alastair Norris, sitting as a High Court Judge, addressed the following in considering an application for a cross-class cram-down under Part 26A of the Companies Act 2006. Mr Maddison adopted that as his structure for his submissions and I do the same. The structure was:

(1) Jurisdiction (para 23);

(2) Compliance with the statutory conditions under s901D and the terms of the convening order? (para 24)

(3) The constitution of the scheme meetings (para 25)

(4) Were the statutory majorities obtained? (para 33)

(5) Were the meetings fairly representative of the class? (para 34)

(6) Can the court safely rely on the outcome of the meetings, taking into account:

(a) the explanatory statement;

(b) the arrangements for holding and ascertaining the wishes of attendees (in person or by proxy); and

(c) whether any oppressive conduct occurred, or whether stakeholders exercised their votes in bad faith otherwise than by reference to their interests as class members? (paras 35 and 40)

(7) Is the Restructuring Plan one that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision from the standpoint of his or her ordinary class interests? (para 41)

(8) Are the two threshold conditions for a cross-class cram-down satisfied? (para 46)

(9) Should the court exercise its discretion to sanction the RP and override the views of the dissenting class? (para 49).

46. In addition, Sir Alastair Norris noted at [22]:

> *"the scheme jurisdiction is not adapted to the final determination of the multiple detailed issues that might lie between the scheme company and its creditors (and the outcome of which might affect persons not before the court and who have no standing in the scheme jurisdiction). The utility of the jurisdiction in the context of creditor schemes is that it enables realistic scrutiny of the proposed scheme (albeit on limited material and requiring sensible projections) by an independent tribunal within a tight time frame with the object of producing a fair outcome for creditors of a company in distress"*

47. I was referred to a number of other cases for particular insights into the relevant requirements of Part 26A of the Companies Act 2006 and the exercise of the court's discretion under the Companies Act provisions. I need not cite the relevant passages but have them well in mind. The authorities in question included *Re Castle Trust Direct plc* [2020] EWHC 969 (Ch); *In re DeepOcean* [2021] BCC 483; *Virgin Active Holdings Ltd* [2021] EWHC 1246; *Re Hurricane Energy plc* [2021] BCC 989; *Re Houst Ltd* [2022] EWHC 1941 (Ch).

(1) Jurisdiction

48. The court only has power to sanction a scheme or plan where the jurisdictional requirements of s901A are met.

(1) First, the conditions in s901A must be met in relation to a "company", being one liable to be wound up under the Insolvency Act 1986 (or the equivalent Northern Ireland statutory provisions). The Company is incorporated in England and Wales and this requirement is clearly met.

(2) Secondly, 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. Given the entry into administration and the ramifications of the administration and what has since emerged, there is no question but that this condition is met.

(3) Thirdly, there must be a compromise or arrangement proposed between the company and its creditors, or any class of them, and its members 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 in question. Again, this condition is clearly met insofar as the Restructuring Plan amounts to a compromise or arrangement as between creditors and members of the company and the company and that its purpose falls within the statutory purpose.

49. There is however a dispute as to whether there is inherently a fourth condition which applies under s901A. That is broadly whether there is a fourth condition which is that

the company itself (by its directors or shareholders or, where the company is in an insolvent regime, by the relevant officeholder (e.g. liquidator or administrator)) must consent to and agree to enter into the relevant scheme of arrangement and/or compromise. The existence of such a condition would be crucial in this case because the Administrators have indicated that, without a court order, they are not prepared to give consent, on behalf of the Company, or to cause the Company to enter into the Restructuring Plan in this case. They further say that the effect of the refusal by the Company to enter into or agree to the relevant plan means that the court cannot sanction it under s901A.

50. In the well-known case of *Re Savoy Hotel Limited* [1981] 1 Ch 351, Nourse J (as he then was) refused to sanction a scheme of arrangement under what was then section 206 of the Companies Act, 1948.

51. Sub-sections (1) and (2) of section 206 of the 1948 Act provided:

> *" (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.*
> *(2) If a majority in number representing three fourths 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, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."*

52. Having determined that the proposed scheme did involve a relevant arrangement between the company and its members, the remaining question before Nourse J was whether the court had jurisdiction to sanction an arrangement which did not have the approval of the company. Having considered the relevant legislative history of the provision and case law, he came to the conclusion, in the case of a company not currently the subject of a formal insolvency regime, that "the court has no jurisdiction to sanction an arrangement under section 206 which does not have the approval of the company either through the board or, if appropriate, by means of a simple majority of the members in general meeting." That conclusion depended not just on the history and case law but also on the wording of the section:

> *"If you were to find an Act of Parliament which referred to an arrangement " proposed between" a person who was adult and sui juris and his creditors, you would assume, first, that that person would have to be a party to the arrangement and, secondly, that he would have to consent to it. And you would not think that there was any the less need to obtain his consent if you found that it was expressly provided that the arrangement should be binding on the creditors " and also on that person." You might think that the last words had been inserted to make the position clear on both sides or you might think that they were not really necessary. But, whatever you thought, you would not think that they could disturb*

> *the assumptions which had been forced upon you by the words " proposed between " and the fact that the person concerned was adult and sui juris. Nor would you think that those assumptions were any the less valid because there was no express provision for the consent to be obtained. Next, one of the essential features of the Act of 1862, without which its cardinal objective of limited liability could not have been achieved, was that a company should have a legal personality distinct from that of its members and for most purposes capable of acting on its own. I therefore start from the position that the rights of a company cannot be overridden in the absence of a provision, express or implied, to that effect. The undoubted purpose of section 2 of the Act of 1870 having been that which eminent judges of the time consistently said that it was, I cannot read that section or its successors as having been a provision to that wider effect. To do so would, I think, offend the general principle in our law that the rights of a person whom it regards as having the status to deal with them on his own behalf will not (save in special circumstances, such as those for which provision is made by R.S.C., Ord. 15, r. 13) be overridden."*

53. Two important points from the judgment are worth emphasising. First, that Nourse J considered and rejected the argument of Mr Morritt QC (as he then was) relying on sub-section (2) providing for the binding nature of the scheme once sanctioned:

> "*Mr. Morritt relied most strongly on that part of section 206 (2) which provides that the arrangement shall be binding on the members " and also on the company" as showing that the section embraced an arrangement which did not have the approval of the company. Mr. Morritt said that those words are entirely unnecessary if the company's consent is a prerequisite to the sanctioning of an arrangement. However, Mr. Nicholls pointed to the original wording of section 2 of the Act of 1870 which expressly provided that the arrangement or compromise should be binding on the creditors "and also on the liquidator and contributories of the said company." Mr. Nicholls said that the decision in In re International Contract Co. (Hankey's Case) was arrived at in the face of those words and that neither they nor their successors can have, or for that matter need have, the significance for which Mr. Morritt contends*."

54. Secondly, that the authorities supported the proposition, put forward by Mr Nicholls QC (as he then was) that the purpose of the provisions leading up to s206 of the 1948 Act had been:

> "*to prevent a dissentient minority of a class of first creditors and then members from holding the majority to ransom and, conversely, that the court had never concerned itself with the interests of the company. That shows, argued Mr. Nicholls, that the status of the company on an application under section 206 is that of an independent party whose approval is necessary and whose interests cannot be overridden*."

55. Mr Maddison adopted the argument advanced by Mr Morritt before Nourse J, but in my judgment that argument fails for the same reasons as given by Nourse J.

56. Mr Maddison also submitted that s901A of the 2006 Act is to be read differently to the predecessor sections of the Companies Act 2006 (dealing with schemes of arrangement) and the former Companies Acts going back to that of 1870. However, he was driven to accept that the language is, so far as relevant, in effect the same. Normally, one would expect that the same construction would be given to that language, especially when that construction had been well known and generally accepted since 1981 and which Parliament could be expected to have taken into account when framing the legislation as inserted by the Corporate Insolvency and Governance Act 2020. In common with Nourse J I cannot find any language overriding the Company's right to join in or not join in the Plan as it (separately) considers appropriate nor, put another way, any language on which it is possible to pin the concept that the court can provide sanction which will bind the Company without its consent.

57. Mr Maddison pointed to the cross-class cram down provisions of Section 901G as providing a reason why consent of the Company was no longer needed, suggesting that such provision could be defeated if the Company withheld its consent. The short answer to that is that cross-class cram down just provides a further mechanism to bind in a wider class of creditor, namely dissentient members of a specific class (or classes). As such, in my judgment, it is no different in kind to the previous standard provisions applying to schemes of arrangement where the statutory mechanism enables dissentient members of a creditor or member class to be bound but which have been held not to provide a mechanism overriding the company's right to have the say in whether it will or will not join in and agree to a scheme otherwise agreed to by the majority of creditors/members and which binds dissentient members of any relevant class.

58. I considered the Company Law Review Steering Group's recommendations regarding schemes of arrangement and could not see that they provided any basis for suggesting a disquiet about the requirement of a separate consent from the company. I was told that there had been insufficient time for counsel to consider any reviews or proposals prior to the enactment of the relevant provisions in the Corporate Insolvency and Governance Act 2020. There is nothing in the departmental explanatory notes to that Act suggesting a change to the requirement that the company consent to a scheme. Indeed, rather the reverse because as paragraph 16 says:

> *" While there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."*

59. I have had a quick look at "Insolvency and Corporate Governance: the Government Response" (2018) being a response to both the consultation on insolvency and corporate governance and also to the "Review of the Corporate Insolvency Framework" consultation set out in a document in May 2016. Neither the May 2016 consultation nor the government response suggest any change to the position as determined by the ruling in *Re Savoy Hotel* or that it will not apply to the (then) proposed new reconstruction scheme provisions with their included cross-class cram down provisions. Indeed, paragraph 5.136 of the Response is as follows:

> *"5.136 The Government thinks it unlikely that viable proposals could be put forward (in the first place) by anyone other than the company acting through its directors (or a statutory office-holder acting in an insolvency procedure). The proposal will need to contain information, such as detailed valuation data, that others would not have access to (for both legal and commercial reasons). Accordingly it will only be possible for the company to instigate a restructuring plan proposal. Creditors and shareholders will, however, have the ability to submit a counter-proposal if they disagree with the directors' proposal and the court may permit any such counter-proposal to be put to creditors and shareholders."*

60. The relevant Explanatory Notes to the 2020 Act regarding the new scheme of reconstruction provisions, in large part, pick up and mirror points made in the earlier consultations and the Government Response.

61. Accordingly, I find that the position remains that the consent of the Company to join in the Scheme is a requirement under Part 26A of the 2006 Act. As I shall explain, that then leads onto the question as to whether (a) as a matter of jurisdiction the court can direct the insolvency officeholder to provide such consent on behalf of the Company and (b) whether it should do so on the facts of this case. I deal with those issues towards the end of this judgment.

(2)-(7) The Class Meetings and sections 901C, 901D, 901F of the Companies Act 2006

62. There are essentially five jurisdictional issues:

(1) Were the classes properly constituted/identified?

(2) Were the meetings properly convened?

(3) As part of (2), was a satisfactory explanatory statement sent or made available as required by s901D?

(4) Were the meetings properly held?

(5) Did the relevant required majorities vote in favour?

63. So far as the class compositions are concerned, the Administrators did not identify any relevant issue that they felt that they should raise. I remain of the view that I took at the earlier hearing at which I convened the meetings of creditors and members namely that the classes were correctly composed. As regards the class of trade creditors it is true that as regards part of the claim of NGI (the Baseline Amount) that that amount will not be subject to adjudication (though the remainder of NGI's relevant claim will be) and that this is a different treatment under the Restructuring Plan compared with the other trade creditors, but I consider that the respective rights of the Trade Creditors under the Restructuring Plan are "*not so dissimilar as to make it impossible for them to consult together with a view to their common interest".* The same applies as regards the class of Administration Creditors.

64. As regards the convening of the meetings there was an unfortunate slip in the terms of the order that I made which, as drawn, in its body switched the times of the meetings of two of the classes from the times set out in the schedule to the Order and elsewhere

in the documentation. At the hearing before me I corrected the error under the slip rule, there being no evidence that any person seeking to attend a meeting had turned up at the wrong time and been unable to attend at the correct time.

65. As regards the notice of the meetings, that was, as ordered, by uploading the relevant documents to a Restructuring Plan website that had been maintained by NGI, to the website maintained by the Administrators and by email. Otherwise, service was, subject to what I say below, by email and in accordance with my earlier order. The details of service were provided somewhat belatedly and should properly have been explained at the time of the application to convene the meetings and then, by confirmation of what had actually happened, by evidence filed for the final hearing seeking court sanction.

66. I am satisfied on the evidence that creditors were duly notified of the meetings. So far as members are concerned, emails were sent out (with no bounce-backs) as regards shareholders holding some 93% or so of the Company's shares. Email addresses were not available regarding holders of the remaining 7% of the shares, although it is likely that, of these, shareholders holding about 1% of the overall shareholdings in the Company had the meetings brought to their attention by reason of their close connection with creditors. It is unfortunate that the unavailability of email addresses was not made clear at the convening hearing. However, I am satisfied that any failure of service should in effect be waived. It is unusual, at least where there are many shareholdings, for all shareholders in fact to receive notice of company meetings because there are invariable problems regarding deceased members, members who have moved address without notifying the company and so on. Actual notice to shareholders holding 93% of the issued shares, seems to me a very good percentage in terms of actual notice being received. The Administrators did not feel that this matter was such as to cause them to raise an issue about the validity of the meetings.

67. The explanatory statement was slightly amended following the hearing at which I ordered the convening of the court meetings.

68. The Administrators raised a question as to whether the explanatory statement adequately explained the issue of FCA authorisation, particularly in the light of an earlier statement in a revised "Practice Statement Letter" dated 25 November 2022 sent out at an earlier stage by NGI.

69. That letter was sent out pursuant to the requirement of the Practice Statement dated 26 June 2020, issued by the then Chancellor of the High Court, Sir Geoffrey Vos. The key aim of the requirement is to enable those who may attend meetings to understand the then state of the Plan and to raise at the hearing to deal with the convening of meetings any relevant matter. Such matters could extend to the composition of the proposed class meetings or other jurisdictional points. The November letter itself referred to the fact there would be an explanatory statement.

70. The explanatory statement sets out clearly that both the board and the shareholders will require FCA approval and the risk that such approval may not be forthcoming and the relevant consequences. It makes clear that Mr White is not a director and that he will need such authorisation when appointed as such to that office. The stated expectation is that in light of the FCA being content that he carries out the role currently being

carried out by him, such authorisation will be forthcoming. I did not understand the Administrators to suggest that the description in the explanatory statement is inaccurate or misleading. However, their point is that it may not have been clear enough to dissipate any possible misconception arising from the statements in the November 2022 Practice Statement Letter. I am satisfied that class members considering whether to vote at a relevant meeting would have been aware that they should consider the explanatory statement and that the explanatory statement is clear. The earlier Practice Statement letter may have amounted to overgeneralisation as regards FCA consent but I am satisfied that taken as a whole it was not inaccurate and that the more precise explanation in the explanatory statement is consistent with it.

71. No other points were raised by the Administrators about the explanatory statement. Having read it myself, I consider that it complies with the requirements of the 2006 Act and that it fairly and accurately identifies the Restructuring Plan and its effects and the risks arising.

72. A further point made by the Administrators is the lack of detailed financial forward projections in the explanatory statement. This is likely to be a product, at least in part, of NGI not being directly involved in the Company and not having the relevant information and detail. This will often be a reason why a creditor promoted scheme will not get off the ground. Nevertheless, it seems to me at the end of the day that it is for the members of the relevant classes to decide if they have sufficient information to vote in favour at the relevant meetings. There is no indication that specific forecasts were discussed as wanting at any meeting. Furthermore, no member of any class has complained to the court about the matter. I reconsider this point when considering what I would classify as discretionary factors (correlating to issues 7 and 9).

73. As regards the conduct of the meetings, for the reasons given in my judgment at the convening stage of the application, I ordered that there be hybrid meetings, that is those where members of the relevant class could attend the class meeting either virtually or in person. The report of the Chairman of the meetings, Mr Buchler, makes clear that there was compliance with my order as regards the conduct of the meetings and that, importantly, notwithstanding technology the members of each class, whether present in person in virtually, were able fully to participate in the relevant meeting.

74. I turn to the votes cast. I deal in more detail with the meeting of the Convertible Loan Holders later in this judgment. That meeting voted against the Restructuring Plan. As regards the other class meetings, the relevant required majority of votes in favour were achieved and the turnout shows that the meetings were representative of the classes concerned. The position is as follows:

Class Meeting	% of the class by value represented by those attending (whether voting or abstaining)	% of overall votes at the meeting cast <u>in favour</u> of the Plan	% of overall votes at the meeting cast against the Plan

Administration Creditors	79.9%	94.42%	5.58%
Trade Creditors	98%*	96.62%	3.38%
Convertible Loan Holders	67.8% (0.4 % of the total value abstained)	0	100%
Historical Shareholders	61.6%	96.36%	3.64%

Notes:

* (including NGI votes but NGI did not vote regarding the Baseline Amount which is excluded)

75. The votes of NGI amounted to the following percentage of votes cast at the meetings set out below:

Meeting	% of total votes voted held by NGI
Administration Creditors	58%
Trade Creditors	67%
Historical Shareholders	6.6%

76. As regards the Convertible Loan Holders' meeting, The Future Fund/British Business Bank (admitted for £9,159,781) voted against. Seedrs, admitted for £63,990 abstained. Q-Invest (thought to have a claim of £4.5 million) did not attend or vote. The Future Fund wrote to the court through their representatives, Ashurts LLP, prior to the earlier directions hearing in this matter. However, the Future Fund/British Business Bank neither appeared nor were represented nor made any further written submissions. The last point about the Future Fund/the British Business Bank applies also to the shareholders who previously wrote to the court through Squire Patton Boggs and Q-Invest, which also sent a letter to the court prior to the convening hearing in this case.

77. I turn to the consider factors which inform the exercise of the court's discretion. These encompass issues (5) to (7) identified by Sir Alastair Norris.

78. As regards fair representation of the classes at the various meetings, I am satisfied that there was a fair representation. That is based largely on the statistics that I have already cited.

79. As regards the question of whether the court can safely rely upon the outcome of the meetings taking into account the explanatory statement; the arrangements for the holding and ascertaining the wishes of the attendees and whether any oppressive conduct occurred or members exercised their votes in bad faith and other than by reference to their interests as class members, I can take the matter shortly.

80. The explanatory statement was, I have found, satisfactory in that it identified the main risks and concerns regarding future trading and its success such as the risks of not getting FCA approvals; the risks of a payment processing service provider to the company called Monek Services ("Monek"), discontinuing its services (as explained in my earlier judgment) and the general risks of future trading in terms of the identities of the new board, the relationship with NGI, future expansion of business and the like. There may be a complaint that detail was limited and, for example, financial estimates in terms of figures were sparse, but it seems to me that the explanatory statement identified the risks and it was clear how far the information provided was limited.

81. The other side of the coin is the question of the possible alternative of a pre-pack sale and/or liquidation. As regards the alternative of a sale in administration of the business and assets of the Company realising some £375,000, excluding intellectual property ("IPR"), this in the considered opinion of the Administrators having been in office for several months and having been exploring offers, is the best realistic alternative. The possible value of IPR was not raised by the Administrators as a major issue prior to the final hearing and the estimated outcome statements do not ascribe any value to IPR. The Administrators have been unable to place any evidence before the court at all as to any value to be ascribed to IPR. They have been in office for over six months. If there had been real value there one would have expected the Administrators to have had some idea by now at least in broad terms of whether there was any value and what sort of value is in question. I can only draw the inference that the value of IPR is entirely speculative. The classes would have been aware that there was an issue about IPR. The other issue relates to possible claims against Q-Invest and/or NGI. Again, the possibility of such claims was made clear in the explanatory statement as was the point that on the face of it there was no funding in place for the investigation, assessment and, if appropriate, prosecution of such claims. As Sir Alastair Norris put it in the *Amicus Finance* case, being a pithy statement of my own conclusion in this case:

> *"Of course, more specific information could have been provided. But the touchstone is not whether the fullest specific information reasonably obtainable was included in the explanatory statement: it is whether what was provided was sufficient to enable the creditors to make an informed decision whether to accept the risks inherent in the scheme in place of the risks inherent in a liquidation. In my judgment the explanatory statement enabled that to be done."*

82. I should however stress that I am not making a finding that existing information was held back nor am I suggesting that on the facts before me NGI could necessarily have provided more information, just that in an ideal world with full access to all company information and all of NGI's proposals and the consideration given to them, it is possible that more information could have been made available. I also rely upon the point made by Sir Alastair Norris that the detail of the information that should be expected in an explanatory statement must be judged in the context, including the urgency and the size and nature of the Company's business and the state of information readily available at the time.

83. I deal with these issues further in relation to the issue of whether the Restructuring Plan is one that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision from the standpoint of his or her ordinary class interests.

84. I have dealt with the meetings and my assessment that they were conducted in a manner enabling the class members properly to participate in the meetings. There is a potential issue regarding the comparatively short notice given of the meetings but that has to be balanced against the urgency of the matter and the fact that the Restructuring Plan and the Administration were both the subject of separate websites and that information (including draft Plan documents) were being disseminated for some weeks before the notices for the meetings would have been received. I am satisfied that nothing as regards the meetings or their convening causes me to consider that the voting results are not a reliable outcome.

85. There is no evidence of oppressive conduct or anything like it nor of any bad faith in terms of the casting of votes. The Administrators refer to connections between NGI and other funders for whom NGI was, in effect, the agent and between NGI and other creditor suppliers but it is unclear to me in what respect any such connections might have influenced them in agreeing to let NGI vote on their behalf in any improper manner (i.e. otherwise than in accordance with class interests). That there are connections with creditor suppliers is asserted but not further developed.

86. I turn to the question of whether the Restructuring Plan is one that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision from the standpoint of his or her ordinary class interests. In this, I leave out of consideration for the moment the special position of the Convertible Loan Holders so far as cross-class cram down is concerned.

87. The overall position is that the creditors and shareholders are faced with a situation where they run various risks whether they vote for the Restructuring Plan or against it.

88. On a sale in administration the sums which would be realised would not cover the secured administration expenses of NGI let alone provide a return to the remaining members of the class or any other class of creditor or any shareholder. In addition, there is a speculative prospect of further recoveries being made from a sale of IPR and from various speculative causes of action which have barely begun to be investigated and where there is, on the face of things, no immediate funding to undertake the same.

89. On the other hand, under the Restructuring Plan, albeit with a 6 month delay and the risks that that entails, the Administration Expense Creditors (other than NGI) should get paid in full, the trade creditors should get paid in full and the Convertible Loan

Holders and the existing shareholders receive an equity stake in the company which may become of value.

90. The risks are spelled out though there may be a question as to how much information there is. In my judgment, an intelligent and honest class member has to weigh up the risks (including the risks flowing from any lack of information) and come to a view. I cannot say that such a class member, of each of the classes, would not be acting reasonably in voting for the Restructuring Plan.

91. As Sir Alastair Norris said in the *Amicus Finance* case, in words that reflect my conclusion in this case:

> *"Creditors are the best judges of their own interests. But they may be expected to act rationally. It seems to me that this scheme is a rational one and that it is understandable why it is attractive to most creditors".*

92. In this context I finally consider whether there is any "blot" on the Restructuring Plan. The only possible one that I have identified is the submission of the Administrators that the Restructuring Plan, as a matter of law, cannot require the Administrators to proceed through the Restructuring Plan process of adjudication before approaching the court to assess their costs. He suggests that that would be to circumvent the statutory process for the approval of the Administrators' fees. No authority was produced to me on this issue. I do not accept the submission. It seems to me that the Administrators could agree to what is in effect an alternative dispute resolution system if they wished to and their ultimate right to apply for court determination if dissatisfied is preserved by the Restructuring Plan.

(8) Are the two threshold conditions for a cross-class cram-down satisfied?

93. Under s901G the court, if satisfied two conditions are met, is not prevented by the fact that a particular class meeting did not result in the required majority vote in favour of a restructuring plan from sanctioning that plan.

94. The first condition is that the court is satisfied that, if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (s901G(3)). For these purposes the "relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the plan were not sanctioned.

95. In this case, on the evidence before me, if the plan were not sanctioned then there would be sale of relevant business and assets for £375,000 and the administration would then rapidly come to an end and the company move into liquidation. Without any evidence of a realistic prospect of a realistic level of funding and given the absence of any real evidence as to the value of the remaining IPR and the scant evidence about potential causes of action, it is most likely that that would be the end of recoveries. In that situation NGI would obtain repayment of some of its secured lending in the administration. The Convertible Loan Holders would get nothing.

96. The comparator is that under the Restructuring Plan, the Convertible Loan Holders would obtain an equity stake in the Company which would carry a prospect of achieving value if the Company trades successfully. I cannot say whether the Company will trade successfully but the prospects of it doing so seem much greater than the prospects of the Company making large recoveries to distribute in a liquidation.

97. If the "value" of the prospective outcomes to the Convertible Loan Holders is balanced, on the limited information before me, it seems to me that the value to the Convertible Loan Holders of an equity stake in the restructured company will be no worse, and will in fact be greater, than the prospects of a recovery in a liquidation. In those circumstances, and on the evidence before me, I am satisfied that the Convertible Loan Holders will be no worse off if the Restructuring Plan is sanctioned.

98. The second condition is that the plan has been agreed by a number representing 75% in value of a class of creditors present and voting at the relevant meeting summoned under s901C, who would receive payment, or have a genuine economic interest in the company in the event of the relevant alternative. That condition is met, the Administration Creditors are such a class.

(9) The court's discretion to override the wishes of the dissenting class

99. That leaves the question of the discretion of the court to override the wishes of the dissenting class and to sanction the plan. As it was put by Sir Alastair Norris at paragraph [38] of his judgment in the *Amicus Finance* case:

> *"As Trower J observed in In re DeepOcean [2021] BCC 483, para 44, if Condition A and Condition B are both satisfied then the scheme will have "a fair wind". But he did not say that satisfaction of the conditions was sufficient, and it is still necessary to exercise the discretion taking account of the individual features of the particular scheme."*

100. A general factor, but subject to principles, is whether the restructuring plan is fair as between the different classes and whether there has been a fair distribution of the benefits of the restructuring between the classes agreeing to the restructuring plan and those who have not.

101. In this case, the main factors pointing to sanctioning of the Restructuring Plan have already been considered. As regards the payment of trade creditors in full, as compared with the position of the Convertible Loan Holders, that is justified on the practical grounds that the goodwill of trade creditors is essential to the continued trading of the Company and the debts as a whole are significantly smaller. Further, and significantly, although NGI will receive its trade debt back and part of that trade debt will not be subject to challenge, it (as agent for a number of funders) is providing significant funding for the Company going ahead, is turning its secured debt arising as an administration debt into equity and is agreeing to revised terms of business with the Company. I accept that the size of the equity to be received by NGI (but in fact by the funders of which NGI is but one) is considerably more than that which the Convertible Loan Holders receive but the relevant business and assets of the Company (stripped of their liabilities) must be regarded as currently worth little more than the value that would be achieved on the possible sale identified by the Administrators. Once

liabilities are taken into account the Company is hopelessly insolvent. Any future value of the Company will be achieved through the efforts of the new board, continued trading and the relevant injections of capital.

102. Although at an earlier stage, correspondence was raised suggesting that the allocation of equity was unfair given the explanations of value set out in various documents released by NGI, relevant values have since changed and the matter has not been pursued before me. The correspondence did not in terms explain how the various assumptions were reached. The absence of actual opposition is, it seems to me, a factor the court is entitled to take into account.

103. In short, on the evidence before me I was and am satisfied that it is appropriate to sanction the scheme, invoking the cross-class cram down provisions of s901G of the Companies Act 2006, but subject to the jurisdictional issue of whether the Company provides consent to the scheme, which depends upon whether it is right to direct the Administrators to provide such consent. I turn to that issue.

Company consent, directions to the Administrators

104. At the hearing I gave direction to the Administrators to provide the consent of the Company to the Scheme. The reasons for that decision are as follows.

105. First, there is a procedural issue. No formal application had been made for directions. However, I was prepared to consider the matter on the basis that that the Administrators were prepared to proceed and that all relevant material was before the court. Normally, I would expect there to be a formal application with proper evidence and the absence of the same is likely to be fatal in most if not all cases.

106. Secondly, the Administrators identified all their particular concerns. With one possible exception, all these concerns related to the points relevant to one or more classes of creditor and to whether the Plan should be sanctioned. I did not consider that any of those reasons were such as to prevent me sanctioning the Restructuring Plan.

107. The one possible exception was a point made regarding employees. It was said that on a sale by the Administrators employees would transfer under TUPE and their jobs would then be secured, whereas under the Restructuring Plan some employees would lose their jobs. However, it seemed to me that on the sale the protection was only for the immediate future. There was no certainty that jobs would be protected once the sale had taken place and, on specific enquiry by me, it was not suggested that redundancy measures might not be implemented after the sale nor that they would not be able to be effected. This matter is not one that of itself would cause me not to give the relevant direction to the Administrators.

108. Fourthly, this is not a case where the Administrators identified to me any other interests of the Company above and beyond those of its shareholders and creditors, all of whose interests are protected and considered under the Part 26A process. Having decided under that process that sanction should be given (subject to the jurisdictional issue of company consent), I do not consider that there remains any separate company interest needing protection and which might justify the Administrators refusing to give consent for the Company.

109. Finally, this is not a case where the Administrators actively opposed the order being sought. Rather, they sought to remain neutral whilst drawing relevant matters to the court's attention. This has also to be considered against the background that the Joint Administrators left the drafting and (where necessary) the determination of the terms of the draft Restructuring Plan largely if not entirely to NGI on the basis (among other things) that NGI was far better placed than the Administrators to carry out that function. This is not a case where an outside creditor is simply proposing a restructuring plan without reference to the Company through its officeholders or where the officeholders have not themselves proposed that there should be a restructuring plan.

Conclusion

110. For the foregoing reasons, I therefore directed the Administrators to provide the Company's consent to the Restructuring Plan and upon their so doing then sanctioned the same and made relevant consequential orders with regard to ending the administration. It followed that the Administrators' outstanding application for a direction to effect the sale that they had identified was dismissed.