Case No: CR-2024-003742

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

NCN: [2024] EWHC 2949 (Ch)

7 Rolls Building
Fetter Lane
EC4A 1NL

Thursday, 8 August 2024

BEFORE:

THE HONOURABLE MR JUSTICE RICHARDS

IN THE MATTER OF REVOLUTION BARS LIMITED

-and-

IN THE MATTER OF THE COMPANIES ACT 2006

TOM SMITH KC AND JON COLCOUGH instructed by **DLA Piper UK LLP** appeared on behalf of Revolution Bars Limited

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JUDGMENT
(Approved)

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1. MR JUSTICE RICHARDS: This is my judgment on the application of Revolution Bars Limited ("the Plan Company") for an order sanctioning a restructuring plan (the “Plan”) between the Plan Company and eight classes of its creditors (“Plan Creditors”) under Part 26A of the Companies Act 2006 (“CA 2006”).

INTRODUCTION AND OVERVIEW

2. The Plan Company is a subsidiary of Revolution Bars Group plc (“PLC”), which is the AIM-listed parent of a group of companies (the “Group”) that operates bars and pubs.

3. The Plan Company operates predominantly under the “Revolution” trading name. It holds 48 leases in respect of 43 sites across the United Kingdom. The Plan Company and the Group are in financial difficulties. Those difficulties started with the COVID-19 pandemic. They resulted in a creditors’ voluntary arrangement (“CVA”) of the Plan Company being approved by the Plan Company's then creditors in November 2020. Since then, inflationary pressures, labour shortfalls, and the trends towards working from home have continued to place the Plan Company and Group under financial pressure.

4. On 2 July 2024, Sir Alistair Norris made an order giving the Plan Company liberty to convene eight meetings (“Plan Meetings”) of Plan Creditors:

   a. National Westminster Bank plc (the “Primary Secured Creditor”) which is a contingent creditor under a guarantee (the “Guarantee”) that the Plan Company has given of PLC's obligations under a facilities agreement (the “2022 Facilities Agreement”);

   b. The “Secondary Preferential Creditor”, namely HMRC;

   c. “Class A Landlords” being landlords of the Plan Company’s most profitable sites (the “Class A Sites”), which the Plan Company wishes to retain;

d. "Class B1 Landlords", being landlords of the Plan Company's next tier down of sites ("Class B1 Sites") which the Plan Company considers could make a positive contribution to EBITDA with a 20% reduction in rent;

e. "Class B2 Landlords", being landlords of the Plan Company's next tier down of sites ("Class B2 Sites") which the Plan Company considers require a much greater rent reduction, in the order of 50%, to deliver a sustainable contribution to EBITDA;

f. "Class C Landlords", being landlords of sites that the Plan Company considers are economically unviable ("Class C Sites");

g. Other creditors who have money claims in respect of sites from which the Plan Company has already exited and local authorities with claims for business rates (together "General Property Creditors" and "Business Rate Creditors" respectively).

h. Inventive Service Company Limited ("Service Co") a member of the Group to whom the Plan Company owes £48 million which I will explain later.

5. The Plan Meetings took place on 26 July 2024. At those meetings:

a. the Primary Secured Creditor, the Secondary Preferential Creditor, the Class A Landlords and Service Co all passed the resolution at meetings by the requisite statutory majorities.

b. The Class B2 and Class C Landlords had quorate meetings consisting of two or more people being present in person but the statutory majority was not met at those meetings.

c. The Class B1 Landlords and General Property and Business Rate Creditors, approved the Plan by the statutory majority, but at least arguably did not do so at "meetings" since only one person was <u>physically</u> present at each apparent

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"meeting" even though the chair held proxies issued by different creditors in each case. Although *Re Altitude Scaffolding* [2006] BCC 904 did not expressly deal with this situation, the judgment of David Richards J suggests that it is appropriate to proceed on the basis that there was no "meeting" of Class B1 Landlords or of General Property and Business Rate Creditors.

6. I therefore proceed on the basis that the Class B1, B2 and C Landlords and the General Property and Business Rate Creditors are all dissenting classes. In those circumstances, I am asked to sanction the Plan on the basis of a "cross-class cram down" under Section 901G of CA 2006. No Plan Creditor has put in any appearance either today or at the convening hearing to object to sanction. I am satisfied that Plan Creditors were told, in the Explanatory Statement relating to the Plan, of the date and place of today's court meeting and of their right to object if they choose to.

7. FTI Consulting LLP ("FTI") has produced a table showing interactions with Plan Creditors. Of course, a number of Plan Creditors did not support the Plan, but none of them has articulated any basis, in correspondence with FTI or indeed before me today, as to why the Plan is unfair. My overwhelming impression from the analysis that FTI have put forward together with the second witness statement of Ms Davies, the CFO of PLC, is that there has been substantial engagement with Plan Creditors in all classes. No Plan Creditor said in those discussions that they consider the Plan to be unfair. There appears to be no groundswell of opposition to the Plan, but Business Rate Creditors have shown some tendency not to respond to FTI's emails.

The Group's business

8. The Group operates at the following sites:

   a. "Revolution" branded sites, leases of which are held by the Plan Company. Three leases for "Revolution" branded sites are held in a company called Revolution Bars Number Two Limited, ("Number Two"). The Plan has no effect on creditors of Number Two.

b. “Revolucion de Cuba” branded sites, leases of which are held in a company called Revolucion de Cuba Limited (“de Cuba”). The Plan does not affect creditors of de Cuba.

c. “Peach Pub” branded sites, leases of which are held within a separate part of the Group headed by Peach Pub Holdings Limited ("the Peach Group"). The Plan does not affect creditors of the Peach Group.

9. PLC is the borrower under the 2022 Facilities Agreement which provides for a revolving credit facility of around £30 million, which is fully drawn down. The Plan Company and other members of the Group are guarantors of the 2022 Facilities Agreement and have given a floating charge as security for their obligations under the guarantee. PLC has also given a floating charge as security for its own obligations as principal debtor under the 2022 Facilities Agreement. In consequence, most of the Group’s assets are encumbered by the security constituted by these floating charges.

10. All members of the Group are members of the same VAT group with a result that they are all jointly and severally liable for VAT due to the Secondary Preferential Creditor.

11. The majority of the Plan Company's revenue is paid into, and the majority of its expenses are paid out of, bank accounts operated by Service Co, its sister company. As its name suggests, Service Co provides services to the Group as a whole, including receipt and payment services. Service Co pays debts of members of the Group from its bank accounts. Service Co also receives payments due to members of the Group into its bank accounts. The difference between Service Co’s receipts attributable to the Plan Company and payments that Service Co makes on behalf of the Plan Company is treated as an intercompany balance owed by the Plan Company to Service Co. That intercompany balance currently stands at the £48 million figure that I have mentioned, on the basis that the Plan Company has paid some £48 million less into Service Co’s accounts than Service Co has paid out on the Plan Company’s behalf.

12. The Plan Company has entered into a “Deed of Contribution” with PLC, under which the Plan Company agrees to contribute to PLC's obligations to the Primary Secured

Creditor, as if the Plan Company were the principal obligor. That means that any claims that the Primary Secured Creditor has against PLC under the 2022 Facilities Agreement will create "ricochet" claims by PLC against the Plan Company. The existence of those ricochet claims is relied upon as giving the court the power to sanction a Plan that makes changes to the terms of the 2022 Facilities Agreement.

Financial problems facing the Plan Company and the Group

13. The operating business of the Plan Company is currently unprofitable and profitability is continuing to deteriorate. The Plan Company forecasts a £15 million loss in its financial year to 29 June 2024.

14. The Plan Company is currently reliant on funding from the Group. That situation is unsustainable. The Group is forecast to run out of cash in the week ending 24 August 2024. The concern, at a high level of generality, is that the "Revolution" business could fail and take the whole Group down with it.

15. Some £3.9 million of VAT was due on 31 January 2024. The Group's financial difficulties meant that it had to enter into a "time to pay" arrangement with the Secondary Preferential Creditor as regards to that liability.

The efforts to sell, or refinance, the Group and its business

16. PLC has engaged in some market testing to see if there is some way of dealing with its financial difficulties other than the Plan. In particular, it investigated whether any purchasers were interested in acquiring either its shares, or shares or assets of other members of the Group.

17. That market testing attracted some interest in the form of a bid for (i) around £16 million for the business of Peach Group and (ii) around £10 million for some of the Group's more profitable sites and associated assets within the Plan Company and in de Cuba. However, those sums would not be enough to pay to repay NatWest under the 2022 Facilities Agreement.

18. There was also some interest from a company called Nightcap plc, which operates a competitor business. Nightcap plc articulated some proposal to buy shares in PLC, which the Group considered was not deliverable for two principal reasons:

    a. It would be dependent on implementing some form of the proposed Plan, but the Takeover Panel were unlikely to regard the approval of such a plan as an acceptable conditional precedent to an offer by Nightcap Plc.

    b. Nightcap plc sought to delay implementation of the Plan. However, that led to the problem of who was going to fund the business until the Plan or takeover was implemented which ultimately proved insuperable.

19. The Group has also engaged in a fund-raising exercise. It has raised some £12.5 million of new equity which is conditional on the Plan being implemented. If that goes ahead, it will result in the dilution of existing equity by around 85%. Existing shareholders have been free to participate in the equity raise if they wish.

The Plan

20. The Plan has three basic features:

    a. It amends, extends and reduces the liability owed to the Primary Secured Creditor pursuant to the 2022 Facilities Agreement.

    b. It extends time to pay VAT obligations due to the Secondary Preferential Creditor.

    c. It adjusts, or in the Plan Company's words "right-sizes", the Plan Company's liabilities under its various leases.

21. As regards the Primary Secured Creditor, if sanctioned, the Plan will:

a. write off some £4 million in principal amount of the 2022 Facilities Agreement;

b. push out the repayment date under the 2022 Facilities Agreement from 10 October 2025 until 10 October 2028, albeit with the size of the commitment gradually ratcheting down from 2026 onwards;

c. provide PLC with an interest holiday throughout 2024 with interest under the 2022 Facilities Agreement not being paid in cash, but being added to the principal amount of the debt;

d. provide the Primary Secured Creditor with warrants over 10% of the enlarged share capital in PLC; and

e. make certain other amendments to financial covenants under the 2022 Facilities Agreement.

22. As regards the Secondary Preferential Creditor, the Plan seeks to defer some £2 million of VAT that would otherwise have fallen due for payment on 31 July 2024 until 6 September 2024.

23. As regards the Class A Landlords, under the Plan:

a. They will be paid 100% of arrears and will continue to be entitled to receive 100% of their contractual rent, except that their leases will be varied so that rent is paid monthly in advance. After 3 years (the "Rent Concession Period"), this variation will be unwound so that existing contractual terms will be reinstated.

b. They will not have any automatic exit rights (as distinct from a right to forfeit their leases), since the Plan proceeds on the basis that the Class A Sites are assets that are crucial to the Plan Company's future.

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c. Class A Landlords, however, retain their existing rights to forfeit the Plan Company's leases. If a Class A Landlord does take "Landlord Determination Action" to determine a lease prior to expiry of its contractual term, for example, by taking forfeiture proceedings based on the occurrence of an event of default consisting of the Plan Company proposing the present Plan, the Plan Company will be released from its obligations in return for payment of (i) six weeks of contractual rent and (ii) 120% of the "Estimated Administration Return", minus any rent received since the date the Plan is sanctioned (the "Restructuring Effective Date"). The Estimated Administration Return, as its name suggests, is an estimate of the return a Plan Creditor would obtain in the administration of the Plan Company. For a Class A Landlord, the figure in (ii) above is likely to relate primarily to claims in respect of dilapidations (since Class A Landlords are expected to receive 100% of their contractual rent pursuant to the Plan).

24. As regards Class B1 Landlords, under the Plan:

a. where a lease is not terminated or otherwise determined, a Class B1 Landlord will be paid 100% of arrears of rent. Going forward, the Class B1 Landlord will be entitled to 80% of the existing contractual rent payable under the relevant lease of the Class B1 Site, and 100% of other contractual amounts until expiry of the Rent Concession Period at which point a Class B1 Landlord's existing contractual rights under the relevant lease will be reinstated.

b. Each Class B1 Landlord will be given a right to terminate their lease by delivering a notice within 60 days of the Restructuring Effective Date with any termination taking effect 90 days after the Restructuring Effective Date.

c. If a landlord exercises this termination right, the Plan Company will be released from its obligations under the relevant lease in return for (i) the landlord retaining 80% of contractual rent for the 90-day period of occupation; (ii) an additional six weeks of contractual rent; (iii) 120% of the Estimated

Administration Return plus or minus (iv) an "Adjustment Amount" which is intended to top up the rent received and retained to the contractual level.

d. If a Class B1 Landlord takes Landlord Determination Action, the Plan Company will be released from its financial liabilities to that Class B1 Landlord in return for payment of (i) six weeks of contractual rent (ii) 120% of the Estimated Administration Return; minus (iii) any rent received since the Restructuring Date.

e. The main component of the Estimated Administration Return in the case of a Class B1 Landlord is likely to consist of claims for dilapidations plus claims in the administration for the difference between what the Class B1 Landlord can obtain by reletting the property to a new tenant and what the landlord could have obtained had the original lease continued.

25. As regards Class B2 Landlords, under the Plan:

a. Rent arrears will be discharged in return for payment of 120% of the Estimated Administration Return.

b. Where a lease is not terminated or otherwise determined, a Class B2 Landlord will be entitled to 50% of contractual rent and 100% of other amounts contractually due under the relevant lease until the Rent Concession Period expires at which point the existing contractual entitlements will resume.

c. The Class B2 Landlord will have a right to terminate the lease in question. If the Class B2 Landlord does so, rights against the Plan Company will be released in return for a payment calculated in a manner similar to that applicable to Class B1 Landlord (see paragraph 24.c. above). However, the payment due in respect of the 90-day occupation period referred to in that paragraph will be 50% of contractual rent rather than 80%, reflecting the different deal on offer to Class B2 Landlords and the Plan Company's perception that Class B2 Sites are less valuable than Class B1 Sites.

d. If the landlord takes Landlord Determination Action, the Plan Company will be released from its obligations in return for a payment calculated in the same way as for a Class B1 Landlord (see paragraph 24.d above).

e. The Plan Company will have the right to terminate a lease of a Class B2 Site on the third anniversary of the Restructuring Effective Date on payment of a sum calculated pursuant to methodology specified in the Plan. Payment of that sum will release the Plan Company from all its obligations under the lease in question except for claims in respect of dilapidations.

26. As regards Class C Landlords, under the Plan:

a. The Plan Company will be released from its obligations in relation to unpaid arrears of past rent, and its obligation to pay future rent in return for a payment of 120% of the Estimated Administration Return..

b. Each Class C Landlord will be given a rolling right to terminate the relevant lease on 14 days' notice. It might be wondered why a Class C Landlord would not inevitably exercise that right since the Plan Company will not be offering any rent. Class C Landlords may well wish to exercise the termination right. However, there may be some benefit to a Class C Landlord of having the Plan Company in occupation for a period at least, even if it is not paying any rent, because in that case only the Plan Company would be liable for business rates.

27. As regards General Property Creditors, under the Plan the Plan Company will be released from its obligations in return for a payment of 120% of the Estimated Administration Return.

28. As regards Business Rate Creditors, under the Plan:

a. Where the business rates liability concerns a Class A, B1 or B2 Site, the Plan Company will be released in respect of any arrears in return for a payment of 120% of the Estimated Administration Return. The Plan Company will

continue to be liable to pay the pro-rated liability for the current rating year in respect of the period after the Restructuring Effective Date.

b. Where the relevant business rates liability concerns a Class C Site, or a site over which the Plan Company previously enjoyed a lease which has been determined, the Plan Company will be released from its obligations for the current rating year in return for payment of 120% of the Estimated Administration Return.

29. As regards Service Co, the Plan Company will be released from its liability in return for payment of 120% of the Estimated Administration Return.

30. Some creditors of the Plan Company are not "Plan Creditors" and so liabilities owed to them are excluded from the scope of the Plan. Employees are not Plan Creditors. Nor are trade creditors. However, the latter point is more apparent than real because the Plan Company itself does not have any trade creditors given the arrangement with Service Co which I have described above.

Statutory Provisions

31. Section 901A of CA 2006 provides that:

> **901A Application of this Part**
>
> (1) The provisions of this Part apply where conditions A and B are met in relation to a company.
>
> (2) 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.
>
> (3) Condition B is that—
>
> (a) a compromise or arrangement is proposed between the company and—
>
> (i) its creditors, or any class of them, or
>
> (ii) its members, or any class of them, and

(b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2).

32. Section 901C provides so far as material as follows:

901C Court order for holding of meeting

(1) The court may, on an application under this subsection, 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) An application under subsection (1) may be made by—

(a) the company,

(b) any creditor or member of the company,

(c) if the company is being wound up, the liquidator, or

(d) if the company is in administration, the administrator.

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

(4) But subsection (3) does not apply in relation to a class of creditors or members of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company.

(5) An application under subsection (4) is to be made by the person who made the application under subsection (1) in respect of the compromise or arrangement.

33. Section 901F deals with the situation (which is not the case with the present Plan) where all classes of creditor or member approve a Part 26A plan by the requisite majority. In that case, the court is given a discretion to approve the Plan in the following terms so far as material:

901F Court sanction for compromise or arrangement

(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case

> may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

34. However, a Part 26A Plan can be sanctioned even if some classes of creditor or member failed to approve it by the requisite majority. Section 901G permits the court to effect what is commonly known as a "cross-class cram down" as follows:

> **901G Sanction for compromise or arrangement where one or more classes dissent**
>
> (1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

The relevant alternative

35. It will be seen from the above statutory provisions that the concept of the "relevant alternative" is central not least to the jurisdictional requirements for a cross-class cram

down. By s901G(3), I need to consider whether dissenting classes are any worse off than they would be in the relevant alternative. That necessarily invites consideration of what the relevant alternative is and what returns under the relevant alternative would be or could be expected to be.

36. The relevant alternative is, by s901G(4) of CA 2006 whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned. As Snowden J, as he then was, explained in *Re Virgin Active Holdings* [2021] EWHC 1246 (Ch) ("*Re Virgin Active (Sanction)*") at [107]:

> [107] It is important to appreciate that under the first stage of this approach, the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than not that a particular alternative outcome would occur. The critical words in the section are what is "most likely" to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two

37. It is appropriate for the court to bear in mind that the Plan Company's directors and professional advisors will have a good insight into what the relevant alternative is likely to be. As Trower J said at [39] of his judgment in *Re ED & F Holdings Limited* [2022] EWHC 687 (Ch):

> In my view, the court should recognise that the directors are normally in the best position to identify what will happen if a scheme or restructuring plan fails. Where the evidence appears on its face to reflect a rational and considered view of the company's board, the court will require sufficient reason for doubting that evidence. As no creditor or member appears today to challenge the director's conclusion on this aspect of the test and as the evidence appears to reflect a rational and considered view by the board, there is no basis on which I can or should doubt it

38. The conclusion of Ms Davies, having taken advice from her professional advisors, FTI, is that if the Plan is not sanctioned, the Group is likely to run out of money in the week beginning 24 August 2024. In those circumstances, her evidence is that the following is the most likely outcome:

a. The Plan Company, PLC, de Cuba, Number Two and Service Co would all go into administration.

b. The Peach Group would not itself go into administration but shares in the Peach Group would be sold as one of PLC’s assets in PLC's administration.

c. The administrators of the Plan Company would exit loss making sites immediately and pay landlords and rating authorities for two days to allow assets on those sites to be removed.

d. The administrators would then trade in the remaining sites in the administration for six weeks, so as to retain customer goodwill, not lose alcohol licences, and matters such as that. During those six weeks, the administrators would carry out an accelerated M&A process to try to realise value from assets of companies in administration. They would realise that value by selling Class A sites, some Class B1 Sites and some Class B2 Sites out of the Plan Company, by selling assets of de Cuba and selling shares in the Peach Group.

e. When the M&A process concludes, the administrators would then grant a licence to occupy to a successful purchaser of relevant sites for a further 90 days to enable them to make arrangements with landlords. The administrators would do so expecting that the purchasers would pay the contractual rent in that 90-day period to landlords.

39. FTI in their report on the relevant alternative have explained why they have considered and rejected other possibilities. Putting PLC and/or its assets up for sale would not realise enough money to repay the Primary Secured Creditor as I have already explained. The Nightcap proposal was considered not to be capable of execution for reasons that I have explained. A liquidation was considered and rejected as being unduly value destructive.

40. In discussions with Mr Smith KC, I also canvassed the question of whether a relevant alternative might be a "more generous Plan", namely a Plan that gives a higher return to the Class B2 and Class C Landlords, for example. However, Mr Smith rightly pointed me to the evidence of the Plan Company to the effect that with the Group due to run out of money in the week beginning 24 August, the prospect of putting together a different Plan that is more attractive to Class B2 and Class C Landlords in that time can safely be discounted. Even if the Plan Company had the financial resources to offer a "more generous Plan", which I doubt, I accept the Plan Company's evidence, which has not been challenged that, unless this particular Plan is implemented, the most likely outcome is an administration of the kind summarised in paragraph 38 on 24 August 2024.

41. Sometimes under plans like these one sees a situation where a particular stakeholder, often shareholders, retain a large part of their stake in the company involved. For example a plan under Part 26A can result in shareholders' equity benefiting from ostensibly higher ranking liabilities owed to creditors being released. In such a situation, if the relevant alternative is said to be some kind of insolvency process in which shareholders would obtain no return at all on their shares, it is legitimate to ask whether that insolvency process really is the relevant alternative. When asking that question it can be relevant to consider whether the shareholders concerned might have some incentive to propose a different or varied plan under which they give up a good part of their equity to creditors so as to prevent the insolvency event which would result in their equity being completely wiped out.

42. No class of creditor has suggested that the "relevant alternative" might be a different Plan under which they are given a share in the Plan Company's equity in return for compromising their claims. However, I have considered the matter for myself. As I have explained, the process of raising new equity will result in the existing shareholders in the Group being diluted by up to 85%. Accordingly, I will not conclude, without any suggestion from objecting creditors, still less an objection grounded in evidence, that the relevant alternative is a different Plan that results in

shareholders retaining even less equity. Put shortly, it is far from clear that there would be enough equity to go around.

43. It will be seen from my description of the Plan set out above that the Plan seeks to factor in the returns that Plan Creditors can expect in an administration by incorporating the concept of the Estimated Administration Return. By providing returns to Plan Creditors calculated by reference to 120% of the Estimated Administration Return, the Plan seeks to ensure that all classes of Plan Creditor are better off than they would be under the relevant alternative.

44. FTI have also modelled the returns that can likely be achieved under both the Plan and the relevant alternative and have summarised their conclusion in the following table:

Creditor class	Relevant alternative (p/£)	Plan (p/£)
Primary Secured Creditor	57.8	87.3
Secondary Preferential Creditor	100.0	100.0
Class A Landlords	84.0	100.0
Class B1 Landlords	80.9	96.6
Class B2 Landlords	59.2	84.4
Class C Landlords	57.5	57.9
General Property Creditors	0.36	1.3
Business Rates Creditors	37.1	48.5
Service Co	0.36	0.43

45. FTI have approached that calculation as follows:

a. They have factored in liabilities owed to landlords of all classes including arrears of rent (where applicable), the Plan Company's ongoing obligation to pay rent and to deal with dilapidations past and future.

b. They have reflected on the likely outcome of the M&A process that is assumed to take place in the relevant alternative. So, for example, if a successful bidder is assumed to be prepared to take on a lease of a particular

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Class A Site and pay rent going forward, the ongoing receipt of rent is assumed to be a return available to the Class A Landlord in question in the relevant alternative. In my view that is appropriate. If likely returns that could be achieved from third parties (such as an incoming purchaser) are completely ignored in the calculation, the comparison with the relevant alternative would be much too flattering to the Plan.

c. FTI's methodology also reflects the possibility of sites being relet if the Plan Company goes into administration. So, for example, a Category C Landlord might not expect a bidder for the business in the M&A process to be interested in taking on the Category C Lease. Nevertheless, the Category C Landlord might expect to be able to relet the site in question (perhaps at a different rent) to a third party. Revenue from an anticipated or possible relet is factored into the calculation of the return under the relevant alternative.

46. FTI's calculations of returns under the Plan assumed that the Category B1, B2 and C Landlords do not exercise the break right that the Plan affords them as FTI conclude that not exercising that break right is likely to be the economically rational thing to do. However, this is not a particularly sensitive assumption, since as I explained in my summary of the terms of the Plan, if a break right is exercised pursuant to the Plan, the amount payable is 120% of the Estimated Administration Return. The point is that even if break rights are exercised, the return due under the Plan has been fixed at a level that it can be expected to be higher than in the relevant alternative of an administration.

47. I have looked carefully at Ms Davies' witness statements and at FTI's report. Both set out rational and coherent conclusions. The evidence demonstrates that the Plan Company is experiencing acute financial difficulties and has been relying on wider Group support, but the wider Group is about to run out of cash. Possible M&A activity, such as putting PLC and/or its assets up for sale would not produce enough to repay the 2022 Facilities Agreement. I consider it realistic to conclude that the Nightcap transaction is not executable. In those circumstances, I consider the overall formulation

of the relevant alternative that the Plan Company puts forward to be reasonable and sensible.

48. There has been no challenge to Ms Davies' factual evidence. No landlord has appeared today to make submissions identifying a logical flaw in the analysis either of what the relevant alternative is or the returns it will produce. In the relatively short time available to me for pre-reading, I have myself read the reports critically to seek to ascertain whether there is any such flaw and I have identified none. I raised some questions on the report in my discussions with Mr Smith KC but I see no reason to reject the evidence of the Plan Company.

49. Accordingly, I will accept the Plan Company's conclusion, both as to what the relevant alternative is and the returns that Plan Creditors could expect in that relevant alternative.

Overall approach to the application for sanction

50. I will consider the following matters:

    a. the general threshold matters going to my jurisdiction,

    b. constitution of the classes who voted on the Plan,

    c. compliance with the convening order and Explanatory Statement,

    d. the votes in the assenting classes to make sure I am satisfied that there has been fair representation, no coercion of the minority by the majority, and that the Plan is a fair Plan that a creditor could reasonably approve,

    e. the threshold jurisdictional requirements for the cross-class cram down,

    f. whether there are any blots on, or defects in, the Plan.

51. Finally, having considered those matters, I will stand back and consider whether to sanction the Plan. In doing so, I will consider whether the Plan offers each member of a dissenting class a fair share of the benefits of the restructuring.

General jurisdictional requirements

52. The Plan Company is an English company. It 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 the Plan involves a compromise or arrangement with each class of Plan Creditor.

53. Sir Alistair Norris was satisfied on these matters at the convening stage and I am as well. I also note that the Plan does not go beyond releasing or dealing with Plan Creditors' rights as creditors or stray into the territory of interfering with proprietary rights. For example, landlords' rights to forfeit leases of the Plan Company are not removed or excluded by the Plan in any way.

Constitution of classes

54. This issue was considered by Sir Alistair Norris at [27] to [32] of his convening judgment. I see no reason to disagree with his analysis of the appropriate classes and no Plan Creditor has suggested that I should do so.

Compliance with the order convening meetings of Plan Creditors

55. Ms Hallam's second witness statement of 5 August 2024 satisfies me that the requirements of the convening order have been satisfied both as regards notice and the way the meetings were held.

Votes in the assenting classes

56. There is no suggestion that the majority in the assenting classes were oppressing the minority, and I am quite satisfied that the majority were acting bona fide. This is quite clearly the sort of Plan that an intelligent and rational investor could approve.

57. Turnout in the assenting classes was 100% in the single member classes and 71.2% in the Class A Landlords. That is a good turnout that does not cause me to doubt fair representation at those meetings.

Threshold requirements for a cross-class cram down

58. I have accepted the Plan Company's submissions as to what the relevant alternative is, and I have accepted the Plan Company's and FTI's calculations as to what returns would be in that relevant alternative.

59. That means that Condition A in s901G of CA 2006 is met. I am satisfied that the dissenting classes would all be no worse off under the Plan than under the relevant alternative since that is the conclusion of FTI's calculations which I have accepted.

60. Condition B in s901G is met as well. Whoever one categorises as an out of the money class, the Primary Secured Creditor at least is in the money and has voted in favour of the Plan.

61. I note in passing that the court has jurisdiction to effect a cross-class cram down even in circumstances where there was no meeting of dissenting classes (see paragraphs [32] to [40] of Adam Johnson J's judgment in *Re Listrac Midco Limited and others* [2023] EWHC 460 (Ch)).

Whether there are any blots on the Plan

62. I have already noted the Deed of Contribution in paragraph 12. This could arguably be categorised as an artificial device intended to create ricochet claims against the Plan Company so that the Plan Company can then promptly rely on those ricochet claims as a lever for the courts to exercise discretion to sanction the Plan resulting in the release

of some of PLC's liabilities under the 2022 Facilities Agreement. I do not consider that the Deed of Contribution represents any such a "blot". The Plan Company was already a guarantor to the Primary Secured Creditor. The use of a deed of contribution in this way is now a familiar technique. The Primary Secured Creditor has voted in favour of the Plan in the clear knowledge and expectation that its rights under the 2022 Facilities Agreement will be amended.

63. Five of the Plan Company's leases are governed by Scots law. The Plan Company has advanced a number of bases on which the Plan, if sanctioned, can be effective under Scots law. I do not need to decide which, if any, of these bases is bound to succeed as it is sufficient for me to conclude that there is a good prospect of the Plan taking effect in Scotland for me to be satisfied that there is no "blot" in this regard. Moreover, it is for the courts in Scotland, not the English court, to decide whether the Plan is effective in Scotland.

64. It seems to me that there are three good arguments in this regard. First, CA 2006, applies throughout the UK. Alternatively, any order sanctioning the Plan is at least arguably an order on an insolvency matter which would also take effect in Scotland. Alternatively, the Plan Company is entitled to request a Scottish court to register any English court's order sanctioning the Plan so that it takes effect in Scotland.

Discretion and fairness

65. That leads to the central and final question of whether I should sanction the Plan. In addressing that, it is appropriate to consider whether the Plan fairly shares the benefits of the restructuring that are hoped to accrue by implementing the Plan rather than allowing the relevant alternative to occur. That is sometimes referred to as the "restructuring surplus" and I will use that expression as well, although I acknowledge it is something of a shorthand that glosses over the fact that in reality there is no "surplus" as the Plan involves many creditors not being paid fully in accordance with their current contractual entitlements.

A question of principle?

66. The Plan Company invited me to determine the question of a fair share of the restructuring surplus largely at a level of pure principle. It submits that Plan Creditors should be divided into those that are “in the money” (i.e. those who would receive some payment in the relevant alternative) and those who are “out of the money” and would receive no payment in the relevant alternative. That distinction between “in the money” and “out of the money” creditors does matter for the purposes of Condition B in s901G of CA 2006 for reasons I have explained: at least one class of “in the money” creditors has to vote in favour of the Plan if it is to be capable of sanction.

67. The Plan Company says that the distinction goes further, submitting that it does not really matter greatly whether an “out of the money” class is sharing fairly in the restructuring surplus. This matter was considered extensively *in Re Virgin Active (Sanction)*. With detailed recourse to the explanatory notes when Part 26A was enacted, Snowden J (as he then was) reached a conclusion that the views of an “out of the money” class as to what amounts to a fair share of the restructuring surplus count for very little. He reached that conclusion for the following reasons:

a. Section 901C(4) of CA 2006 permits creditors without a “genuine economic interest” in the Company to be “disenfranchised by order of the court”.

b. The question whether a particular class of creditor has a “genuine economic interest” is to be determined by reference to outcomes in the relevant alternative (see [247] of the judgment). Therefore, creditors who are “out of the money” have no “genuine economic interest” in the company.

c. A Part 26A plan can take effect against creditors who are disenfranchised pursuant to s901C(4), even though they have, by definition, not voted in favour of the plan without any need for a cross-class cram down (see [249] of the judgment).

d. Therefore, the views of an “out of the money” class on the fair sharing of the restructuring surplus count for relatively little as conceptually that class could have been disenfranchised and not invited to vote on the Plan at all.

68. My own judgment in *Re Project Lietzenburger Strasse Holdco* [2024] EWHC 468 (Ch) is cited as case following this line of reasoning. I do not quite agree with that since the central point on which the analysis hinges, namely the interpretation of s901C(4) to the effect that an "out of the money creditor" has no "genuine economic interest", was common ground in that case (see paragraph [212] of my judgment). In any event, applying Snowden J's line of reasoning, the Plan Company invites me to conclude that the Class B2, Class C and General Property and Business Rate Creditors are "out of the money" so that any question whether they are sharing fairly in the restructuring surplus can safely be ignored.

69. There are two planks to the conclusion that these classes of creditor are "out of the money":

   a. first, that their share in the "prescribed part" (i.e. that part of the Plan Company's assets that are by statute available to unsecured creditors despite the presence of the floating charge) does not count when determining whether they are "in the money" or not; and

   b. second, that returns from persons other than the Plan Company (for example sums that creditors could expect to receive if and when premises are re-let to third parties who go on to pay rent and business rates) do not count in that determination either.

70. It is submitted that the judgment of Michael Green J in *Re Fitness First* [2023] EWHC 1699 (Ch) is authority for both propositions and their effect is that the Class B2 and Class C Landlords and the General Property and Business Rate Creditors should be treated as receiving nothing under the relevant alternative for the purposes of determining whether they are "out of the money".

71. I certainly do not intend to signal any doubts as to Snowden J's analysis and reasoning summarised in paragraph 67 above. I comment only that this is not a case like *Re Project Lietzenburger Strasse* in which the interpretation of s901C(4) summarised in paragraph 67 was expressly accepted by dissenting creditors. Here, it is not even clear

whether it is meaningful to speak of "dissenting creditors" as no-one has attended today to oppose sanction of the Plan and so they cannot signal agreement, or disagreement, with that interpretation. It follows that I have heard no argument as to the significance or otherwise of the fact that s901C(4) does not expressly refer to the "relevant alternative" by contrast with s901G(5). In a similar vein, I have not heard any contested argument as to whether *Re Fitness First* does lead to the conclusion in paragraph 70 above and whether an application of the approach in paragraph 70 is at odds with the way the calculation of returns in the return has been performed as set out in paragraph 45 above.

72. Moreover, the Plan Company's principled answer to the question of fair distribution of the restructuring surplus cannot be a complete answer in this case. The Plan Company accepts that the Class B1 Landlords are "in the money" but are being treated as a dissenting class. Accordingly, even on the Plan Company's principled approach it would be appropriate to consider whether Class B1 Landlords are sharing fairly in the restructuring surplus.

73. Therefore, I consider that there are reasons in particular circumstances of this case why I should consider the fairness of the Plan in relation to all of the dissenting classes. That analysis will necessarily be high level for reasons explained in the next section.

Fairness analysed

74. When I analyse the fairness of the Plan, I can have some regard to the fact that there were some votes in favour in the dissenting classes. However, that is of limited value given that Parliament has specified a statutory majority which has not been reached in many of the dissenting classes.

75. In my judgment, it is a very important feature of today's hearing that there has been no articulation from any member of any dissenting classes as to:

   a. why their current share of the restructuring surplus is unfair,

b. what a “fairer” sharing would be, or

c. whether that “fairer” sharing could actually be delivered given the interests of other stakeholders instead of the relevant alternative.

76. That is important. Although my role is to sanction or withhold sanction of the Plan, the legal tradition in this country is of adversarial proceedings. Anyone objecting to the Plan should, in the words of Snowden J in *Re Smile Telecoms Holdings Limited* [2022] Bus LR 591 "step up to the plate". Dissatisfied creditors should not leave it to a judge to identify possible objections themselves. It would be quite wrong in my judgment for me to form some impressionistic views about “fairness” and having done so decide to withhold sanction.

77. I will therefore explain at a high level the aspects of the Plan that have that caused me to conclude that it is not unfair.

78. I acknowledge that trade and other creditors and employees are excluded from the Plan. The hope therefore is that, under the Plan, these creditors will be paid in full. If that is achieved, it might produce a better outcome for those creditors than under the relevant alternative: an administration of various Group companies in which they might not be paid in full. Of course, that better outcome might not arise. The Plan might not work out as expected, and ultimately, an employee might get less in an administration in a year's time than today. However, the possibility of a better result is there and it could mean that trade creditors and employees, despite ranking *pari passu* with the dissenting classes in the relevant alternative, obtain a better outcome than those dissenting classes under the Plan.

79. That said, there is in my judgment nothing fundamentally unfair in treating an employee or trade creditors differently given their central role in the future of the Group. The whole point of the Plan is to rescue the Group going forward.

80. I see nothing obviously unfair in the Primary Secured Creditor obtaining a return of 87.3% in the pound. That is clearly a negotiated compromise with the Primary Secured

Creditor giving up some rights and obtaining some rights as part of an overall package of compromise that pays due regard to the secured nature of its debt.

81. I see nothing unfair in the Plan providing for the Secondary Preferential Creditor to retain a right to 100% of amounts the Plan Company owes. HMRC are, after all, a preferential creditor.

82. The Class B1, B2, and C Landlords and the General Property and Business Rate Creditors are doing worse than Category A Landlords on a horizontal comparison even though they would rank *pari passu* with Category A Landlords in the relevant alternative. However, in my judgment, there are justifiable reasons for this. The Category A Sites are the best sites, are central to the future viability of the Group and I have noted the whole rationale of the Plan being to rescue the Group so that it can continue going forward. I do not consider that there is anything obviously unfair in giving a better return to landlords of Class A Sites.

83. I observe that the Category B1 Landlords are not obviously dissatisfied with their lot. Even though they may not have voted at a "meeting" for the purposes of CA 2006, proxies show a high level of engagement in that class and a high level of approval in that class.

84. The Class B1, B2 and Class C Landlords will clearly do worse under the Plan than the Class A Landlords with whom they would rank *pari passu* in the relevant alternative. More generally, each class of landlords obtains a lower overall return than landlords of Sites in "higher" classes. However, that differential in treatment is not arbitrary, but mirrors what is likely to happen in the relevant alternative. In an M&A process taking place in the context of the relevant alternative of an administration, bidders could expect to offer to pay more for leases of sites in a "higher" class than for leases of sites in a "lower" class. Bidders might not be interested at all in Class C sites leaving Class C Landlords to take their chances in the general letting market.

85. Accordingly, even if the Plan does result in some creditors obtaining higher returns under the Plan than creditors with whom they would rank *pari passu* in the relevant

alternative, I do not consider that makes the Plan unfair. I have explained why the differential in treatment is justified.

86. The General Property and Business Rate Creditors certainly are in a comparatively unfavourable position, obtaining a lower rate of return than other categories of creditor with whom they would rank *pari passu* in the relevant alternative. However, I consider that to be justified by the relative lack of contribution to the future of the Group. General Property and Business Rate Creditors are still doing better under the Plan than they would under the relevant alternative and none of them have made any positive case as to why their share of the restructuring surplus is unfair.

87. The existing shareholders in the Group retain 15% of their equity. I consider there are adequate reasons for this that Ms Davies has explained in her witness statements. In short, considerations of pragmatism and practicality are in play. The Plan Company needs to deliver this restructuring very soon because the Group is about to run out of cash. In the circumstances, I do not consider it obviously unfair that the Plan does not to seek to remove every last penny of existing shareholders' equity entitlement.

88. My overall conclusion is that the Plan should be sanctioned. I propose to make an order to that effect.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the judge