IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2021] EWHC 1653 (Ch)

No. CR-2021-000909

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 28 May 2021

IN THE MATTER OF **NATIONAL CAR PARKS LIMITED**
A N D
IN THE MATTER OF **THE COMPANIES ACT 2006**

Before:

MR JUSTICE TROWER

I N T H E M A T T E R O F :

NATIONAL CAR PARKS LIMITED

MR T. SMITH QC and MR H. PHILLIPS and MR D. JUDD (instructed by Kirkland & Ellis International LLP) appeared on behalf of the Plan Company.

MR P. ARDEN QC (instructed by Hogan Lovells International LLP) appeared on behalf of the HL Landlords.

MR D. ALLISON QC (instructed by DLA Piper) appeared on behalf of ESG Impact Ltd and Aberdeen Worldwide Group Ltd.

J U D G M E N T
(V i a M i c r o s o f t T e a m s)

MR JUSTICE TROWER:

1 This is an application by National Car Parks Limited ("the Company") for an order pursuant to section 901C of the Companies Act 2006, convening meetings of certain of its creditors for the purposes of considering and, if thought fit, approving a restructuring plan between the Company and its plan creditors. The Company was represented at the hearing by Mr Tom Smith QC, Mr Henry Phillips and Mr Daniel Judd. The Company is part of the NCP Group, which is the largest single car park operator in the United Kingdom, with over 12 per cent market share. It operates and manages 568 car parks and over 200,000 car park spaces in towns, city centres, airports and railway stations. It has over 1,000 employees. The group's revenue derives from the operation of car parks from sites which are either leased by the Company or managed by the Company on behalf of third parties in return for a management fee.

2 A group of landlord creditors represented by Hogan Lovells, which I will call "the HL Landlords," appeared by Mr Peter Arden QC and put in evidence from their solicitor, Matthew Ditchburn. Another landlord creditor, ESG Impact Limited, appeared by Mr David Allison QC. ESG owns four car park sites leased to the Company in Southport, Worcester, Bristol and London SW1. Mr Allison also appeared for a company connected to ESG, Aberdeen Worldwide Group Limited, which is an interested purchaser of the Company or its business.

3 Aberdeen put in evidence from a managing director, Mr Justin Woo, who explained that Aberdeen is a family investment office headquartered in Hong Kong, which, with its partners, has made investments across several industry sectors, totalling over £1 billion. In short summary, Aberdeen's position is that it has offered to purchase the Company on terms which will give a better return to its creditors than the restructuring of which this plan forms part.

4 Both of these groups express concerns about their ability to absorb and make sensible submissions on the materials, including the draft explanatory statement, and the witness statement evidence which have been produced by the Company for the purposes of the hearing. It was apparent from their submissions, however, that they had some, if not many, of the same concerns about the structure of the plan and the process, including the timetable for the holding of the plan meetings and any sanction hearing in due course.

5 The evidence is that the Company has for some time faced a challenging trading environment caused by, amongst other things, changing attitudes towards traffic and pollution control, manifest by way of example by the introduction of the Central London congestion charge zone in 2003 and the ULEZ in 2019, in circumstances in which it continues to be required to meet its rental obligations under its leases, many of which have upwards only rent reviews. This challenging environment has been accelerated by the Covid 19 pandemic which has had, on the evidence, a dramatic impact on the Company's revenue stream while at the same time its operating costs, including in particular rent, service charge, insurance, business rates and some wages' liabilities, have continued to accrue. In very broad terms, the initial decline in revenue in April 2020 was approximately 95 per cent, year on year, while in subsequent periods of lockdown, the decline has been broadly 80 per cent year on year, with the Company making a partial recovery outside lockdown periods to approximately 50 per cent down year on year.

6 The steps that the Company has taken to deal with the consequences of the Covid 19 pandemic on its business have included the furloughing of approximately 87 per cent of its employees, making redundancies, cutting the remuneration of its remaining employees and reducing pension contributions. The Company's evidence is that it does not have sufficient liquidity to support its current liabilities beyond the week commencing 28 June 2021 and is forecasting a funding shortfall of in excess of £116 million in the week ending 2 July 2021 because of the need to pay rent and business rates that are overdue. In that context, the Covid-related moratorium on rent payments is due to end at the end of June and that date is a driver of real significance, behind the Company's need to obtain sanction for the plan as a matter of real urgency.

7 Against that background, the Company's directors have formed the view that in the absence of a restructuring of its liabilities, combined with an injection of new capital, it is likely that the Company will have to go into administration. It is their view that this, combined with a possible pre-pack sale, would result in a worse outcome for the Company's creditors than under the proposed restructuring plan.

8 This conclusion and the approach adopted by the Company's board is not accepted by the HL Landlords or by Mr Allison QC's clients, nor do they accept that there is the immediate apparent urgency asserted by the Company, although I think it is fair to say that both of them accept that as matters presently stand, the end of the Covid moratorium at the end of June is of itself a significant factor.

9 I have also read evidence which outlines the HL Landlords' case, which is very critical of the proposals. In broad summary the structure of those proposals is that the group's principal shareholder will introduce new funding, that existing rent arrears will be deferred or compromised and that amendments will be made to the terms of leases going forward. In particular, the HL Landlords have criticised the Company for the way in which it has gone about obtaining an injection of further financial support and why it is that the landlords whose claims are being compromised should not be entitled to share the benefit of the future surplus that the Company is forecasting, including any material future equity value. That value is apparent in their view from the projected EBITDA that would be generated going forward. Similar points are made by Mr Allison's clients.

10 Against that background, I turn next to explain the Company's existing ownership structure and the next and the nature of the debt sought to be rearranged . The entirety of the Company's issued and outstanding share capital is ultimately held by Park24 Company Limited, a Japanese entity listed on the Tokyo Stock Exchange, which indirectly owns 51 per cent of the Company's share capital. The remaining 49 per cent is held by Development Bank of Japan, a Japanese government owned financial institution.

11 The group's principal financial arrangements comprise two unsecured term loans, borrowed by other group companies but not on lent to the Company, and a £225 million RCF, part of which has been drawn down and the proceeds of which were originally on-lent by the group to the Company. However, as a result of the rationalisation of inter-company balances within the group, the amount now owed by the Company is approximately £700,000 and the absence of finance debt within the Company itself is one of the factors that may or may not be relevant in due course.

12 The creditors with whom the Company proposes a compromise or arrangement under Part 26A fall into two broad categories. The first group are landlords under various leases, some but not all of which are guaranteed by other members of the group. Many of these

leases are long leases with extended periods still to run. The second category is creditors in respect of certain other unsecured liabilities. Initially, the proposals contemplated that some but by no means all of the Company's landlord creditors should be treated as falling into five classes, sub-categorised by reference to the leases they hold into class A1, A2, B1, B2 and C.

13 There is a detailed description in the evidence and the draft explanatory statement of the criteria for categorising individual sites. The classification of particular leases and sites as falling into each of the five classes has changed during the course of the preparation of the plan, and that is one of the factors that has generated some criticism from Aberdeen, ESG and the HL Landlords. The position has now changed as between the A1 and the A2 classes, which, in the light of discussions during the course of the hearing, the Company now accepts should go into a single class.

14 I will describe the original position anyway as it helps to give a complete picture of the issues which I have considered in reaching the conclusions that I have. Under the Company's original proposals, there were 62 class A1 leases and one class A2 lease. All of these leases are economically viable on their existing terms or relate to operationally or strategically important sites. There is a detailed description in the explanatory statement of how that is computed but in broad summary, economic viability is tested by whether a site has generated at least 10 per cent profit margin on a pre-pandemic trading basis. This test is applied to both individual sites and to portfolios of which individual sites form part. Class A1 also includes some sites which are still profitable but where less than a 10 per cent profit margin is generated.

15 The original proposal for a separate A2 class was said to be appropriate because the relevant lease was on turnover terms. By that, I mean the majority of the rent is variable, based on the tenant's turnover, which was said to justify what I am now satisfied is no more than a minor difference in treatment. As I indicated that point is no longer pursued by the Company but I will come back to it briefly in due course.

16 Turning to the next two classes, there are twenty-one class B1 and nine class B2 leases which are capable of being rendered viable by bringing the rent into line with market rates. These sites are unprofitable but the profit margin will be 5 per cent or greater after re-basing the rent to an estimated rental value or ERV. The distinction between these two categories, is that the class B2 leases relate to premises which are, anyway in part, sub-let or suitable for sub-letting for external use and can generate external use income.

17 There are then forty-one class C leases which are uneconomic on their current terms and which will continue to be uneconomic for the Company's car park business even at market rent levels. These include sites where, even after re-basing the rent to ERV, the site profit margin would be less than 5 per cent or there will be a substantial dilapidations claim.

18 The second broad category of plan creditors is described in the papers as "the other plan creditors." These comprise inter-company balances, local authorities in respect of arrears of business rates, liabilities arising from a guarantee given by the Company to the landlord of the lease held by an entity that operated a joint venture with Manchester City Council, to which I will come back, and certain other specific property liabilities and contingent property liabilities. Specific property liabilities include liabilities arising out of any legacy leases which have expired or been assigned by the Company prior to the effective date, liabilities arising out of the transfer of certain leases to the Company, contingent liabilities in respect of authorised guarantee agreements and sub-tenants arising after the effective date as

a consequence of any forfeiture or termination by a landlord resulting from an inability to comply with the terms of the underlease.

19 The contingent property liabilities include contingent liabilities to a previous tenant, a guarantor of a previous tenant or previous landlord under a lease which expires or is assigned prior to the effective date. The category of other plan creditors also includes certain general unsecured liabilities of the Company but it excludes trade creditors in the normal course of business and liabilities to employees.

20 The Company also has a significant number of landlord creditors with leases, the liabilities under which have been excluded from the restructuring plan altogether. As the HL Landlords point out, the number of sites that are to be excluded from the plan has increased significantly since the proposals were first put forward. As I understand it, at the end of March 2021, slightly less than thirty sites were excluded, amounting to approximately 11 per cent of the Company's portfolio, but that number has now increased to 117, amounting to about 47 per cent. For present purposes, I do not think it is necessary for me to say any more about the details of the excluded leases, although it is possible that their identity will form part of the submissions at the sanction hearing.

21 Excluded creditors also include all tax and employee related liabilities and the trustees of the National Car Parks Pension Fund, to which the Company has a liability to fund a deficit currently estimated to be approximately £8.5 million. The Company has already agreed a new funding arrangement with the trustees whereby, subject to sanction of the plan, the existing schedule of contributions will be amended so that the Company makes a £5.5 million contribution as soon as practicable following the effective date and a further £3 million contribution on or before 31 October 2023.

22 On the face of it, I can see that the grounds for excluding those creditors of the Company who are not bound by the plan have sound commercial justification. However, I am not in a position today to put it any higher than that. As evidence put in by Mr Arden's clients makes clear, there have been significant changes made both to the number of landlords intended to be bound by the plan and the composition of the landlord classes during the course of March and April and there are real doubts in his clients' view as to whether the objective criteria for exclusion have been consistently applied.

23 In my view, these concerns add some substance to what I would have concluded in any event, namely that it seems to me that the question of whether or not creditor exclusions have been agreed for good commercial reasons, is a matter for any sanction hearing in due course. This was the approach adopted by Snowden J in *Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) at para 259ff, where having referred to the well-established Part 26 scheme test derived from *SEA Assets Ltd v PT Garuda Indonesia* [2001] EWCA Civ 1696, he considered the position of the excluded creditors at the sanction hearing. Apart from saying that the approach taken by the Company does not seem to me to be an obvious impediment to the sanction of the plan, and I certainly go that far, I say no more about it.

24 Turning then to the development of the plan during the period from the start of the first lockdown in March 2020 to March 2021, the Company has engaged in discussions with a number of its landlords in attempts to restructure its liabilities through consensual arrangements. By March 2021, however, it had appeared that an insufficient number of them were prepared to agree to a consensual restructuring and the Company therefore informed its landlord of the proposal to promulgate a plan.

25 The initial categorisation of leases into three classes was presented at a webinar on 23 March 2021 to which all landlords were invited. The webinar was attended by fifty-eight out of the ninety-three landlords then categorised as falling within class A, twenty-four out of the twenty-seven then categorised as falling within class B, and thirty-one out of the thirty-five then categorised as falling within class C. This categorisation was then later adjusted in light of reports prepared by CBRE in relation to estimated rental values of the Company's leases and another report in relation to dilapidations. Further question and answer sessions were held on 29 March 2021 and 1 April 2021, followed by a Q&A document and further sessions for the class B landlords.

26 During this period, the Company's solicitors, Kirkland & Ellis, have also been in correspondence with a number of firms of solicitors instructed by landlords or groups of landlords and the Company has received a large number of questions from landlords about the plan through its Q&A portal. It is plain that this is a case in which the Company has sought to engage with its creditors extensively during the period prior to the application for the convening of a scheme meeting. The HL Landlords and Mr Allison QC's clients have complaints which I have dealt with during the hearing about the provision of the detailed information which they sought, but, in broad terms, this is not a case in which the Company has declined to make efforts to apprise those interested creditors in the detail of its proposals in circumstances in which attempts to obtain those details were justified.

27 The restructuring plan itself forms part of a wider restructuring, the most significant aspect of which is that Park24 will provide additional funding to the Company by way of a new £120 million RCF, bearing PIK interest at a rate of 1.4 per cent above LIBOR per annum. It is available to be drawn down in tranches to provide the funding for rent going forward and for payments to be made to plan creditors shortly following the effective date and in respect of rent and other arrears in relation to the excluded leases.

28 The Company has also received approaches by third parties expressing an interest in submitting alternative financing proposals. The absence of any detail as to what those approaches may have been was the subject of considerable criticism, I think particularly by Mr Arden QC's clients, and I shall return to their concerns in short outline a little later. For present purposes it suffices to note that the Company's restructuring committee, formed for the specific purpose of considering alternative options for financing, concluded, anyway initially, that it was unlikely that the third party funding would be available on equal or more favourable terms than that proposed as part of the broader restructuring advanced by the Company.

29 The Company has though recently received a further funding offer from Aberdeen, who were represented by Mr Allison at the hearing. The Company's advisors have been instructed to take immediate steps to consider that offer and, as part of that consideration, they have made clear that they will be looking at the feasibility of any amended restructuring proposal in the available timeframe. The way it was put in evidence in support of the application is as follows:

> "The restructuring committee intends to engage fully with the Aberdeen offer in the coming weeks, including by ensuring that the counterparty and their advisors have received all information necessary to substantiate the offer beyond what is current outlined and, as requested by the 24 May Aberdeen offer letter, to assess whether the Aberdeen offer represents a better alternative to the shareholder contribution."

There is a dispute, which I should record for present purposes, although saying little more about it, as to whether that statement reflects the attitudes that the Company has in fact adopted to Aberdeen's offer. I am far from saying that it does not.

30 There is also an operational restructuring proposal which I do not need to deal with for the purposes of the present application. It involves, largely speaking, what is described as an intensification exercise for the provision of additional services on some of the sites.

31 The essential elements of the restructuring plan itself are to deal with arrears, as I indicated, and to restructure the leases for the rent concession period and to deal with claims of other creditors and their position going forward. To that end, I think I can summarise its provisions in this way. Firstly, no interest will be payable on any contractual rent or rent arrears for any of the class A or class B landlords but amounts payable in respect of service charge and insurance will be paid in full for the period of occupation by the Company.

32 Secondly, so far as the class A1 landlords are concerned, arrears for the period from 1 April 2020 to 31 March 2021 will be paid as to 73 per cent within five business days of the effective date and as to 25 per cent approximately three months later. The remaining 2 per cent will be compromised and released in full unless the relevant landlord has entered into a lock-up agreement, in which event the 2 per cent will be paid by way of early bird fee. There is also provision for payment of the full contractual rent from 1 April 2021 within five days of the effective date. Otherwise, the terms of the class A1 leases will remain unaffected by the restructuring plan.

33 The treatment of what is called the class A2 landlord will be the same as all of the other class A landlords save that 98 per cent of the arrears due for the period prior to 31 March 2021 will be paid within five business days of the effective date.

34 As to the class B landlords, both categories, i.e. B1 and B2, will be given an option to serve a notice terminating their leases within sixty days from the effective date. Their treatment under the restructuring plan depends on whether or not they exercise this right. If the class B landlords of either category exercise the sixty-day break right, the Company will pay contractual rent under the relevant lease for the duration of the notice period, but otherwise the landlords will be restricted to what is called the plan entitlement. This plan entitlement is receipt, within thirty days of the effective date of 110 per cent of the creditors' estimated return in the relevant alternative.

35 So far as the class B1 landlords are concerned, if they do not exercise the sixty-day break right, 40 per cent of the arrears due for the period 1 April 2020 to 31 March 2021 will be paid within five business days of the date on which it is clear that the relevant landlord will not exercise the sixty-day break right. Thereafter, 20 per cent will be paid on a monthly basis in equal monthly instalments, during what is called the rent concession period, and the remaining arrears will be compromised and released in full save for the payment of an additional 2 per cent by way of early bird fee in relation to those who sign the lock-up agreement. There are then certain provisions for variation of the leases during the rent concession period, at the end of which rent will continue to be paid at the greater of market rent or ERP.

36 So far as the class B2 landlords are concerned, if they do not exercise the sixty-day break right, the terms of the proposal include an entitlement for them to receive 90 per cent of amounts received by the Company from sub-tenants in respect of the relevant premises, net of various costs. Otherwise, the rearrangement of their rights is similar to those of the

class B1 landlords. In all cases, the category B landlords will be entitled to a minimum payment equal to 110 per cent of their estimated return in the relevant alternative within thirty days of the effective date. This is a right to which all class B landlords are entitled, but in practice, as I understand it, it is only likely to apply to six class B1 landlords.

37 So far as the class C landlords are concerned, they will receive a payment of 110 per cent of the amount they would receive in the relevant alternative and 2 per cent of the outstanding rent arrears in respect of the period prior to 31 March 2021. The remaining arrears will be compromised and released in full. They will also be deemed to have received a notice to terminate on the effective date, giving notice of the Company's offer to relinquish occupation of the premises at the end of a ten-day period. They will also be offered the option to enter into a management service agreement under which the Company will continue to operate the site without charging a fee for a three-month period.

38 The restructuring plan also includes proposals for the compromise and variation of guarantees of leases given by other group companies to class C and class B landlords.

39 The treatment of the other plan creditors under the terms of the restructuring plan is more straightforward, anyway in concept. There are approximately 350 creditors which fall into this category and many of their claims are contingent in nature. The proposal is that their claims will be released and discharged in full in exchange for a right to receive the plan entitlement, i.e. 10 per cent more than they would receive in the event of the relevant alternative. The right is to be calculated and quantified in accordance with the claims determination procedure, the details of which are set out in the explanatory statement.

40 The practice statement applicable to applications of this sort requires any applicant under Part 26A to draw to the attention of the court any issues as to the constitution of the meetings sought to be called, any issues as to the existence of the court's jurisdiction to sanction the scheme, any issues relevant to satisfaction of the condition under section 901A, and any issues not going to the merits or fairness of the scheme but which might lead the court to refuse to sanction it in due course. The applicant must also take all reasonable steps to notify any person affected by the scheme that it is being promoted, the purpose which the scheme is designed to achieve, and the meetings of creditors which the applicant considers will be appropriate and their composition. The creditors must also be informed of the date and place fixed for the convening hearing, that they are entitled to attend it, and how they may make further enquiries about the plan.

41 The appropriate period of notice is a fact-sensitive question which will be affected by a number of matters, including the complexity of the scheme, the degree of consultation with creditors prior to its launch, and the urgency of the scheme. In the present case, a practice statement letter was distributed to known plan creditors on 30 April 2021, some twenty-eight days before this hearing. It was also advertised in **The London Gazette**, **Property Week** and **The Estates Gazette** at the beginning of May. The advertisements encouraged any potential but unknown plan creditors to access the plan website, through which they would be directed to request password details from the information agent.

42 There was then a supplemental practice statement letter, circulated on 15 May which informed creditors that the Company was not proposing to commence the marketing of any part of its business or assets. This was described in the Company's skeleton argument as a correction from what had originally been said in the first practice statement letter, but the evidence is also consistent with it being a change of heart in the light of further advice.

43 There was one omission from the notification that took place, which was that the practice statement letter was not initially circulated to the Company's sixty-eight sub-tenants, whose rights against the Company will be compromised under the plan. Furthermore, a former landlord under a terminated lease was also omitted from the list of those circulated. The first of these omissions was rectified on 13 May and the second on 21 May, the day after it was identified. None of these creditors have notified the Company complaining that they had been given insufficient time to consider the proposals.

44 In all the circumstances, I am satisfied that the notifications which have been given to plan creditors in the present case are sufficient to enable those affected by the scheme to consider what is proposed anyway in general terms and to attend this convening hearing. To that extent, I am satisfied that the requirements of the practice statement have been complied with. However, that does not mean to say that the Company has given sufficient notice of the detail of the proposals so as to enable all creditors who wish to attend fully to absorb what is said and then to make meaningful submissions on the jurisdiction and class issues to be determined at the convening hearing.

45 The relative complexity of the arrangements and the extent to which they have changed during the course of the preparation for this hearing together mean that I do not consider that it has. In these circumstances, it seems to me that the Company was wise to accept, as it proactively did in para.17.2 of the practice statement letter, that if any creditor has concerns about the issues referred to in para.6 of the practice statement itself, the Company will not seek to preclude them for doing so at the sanction hearing. This approach was regarded as acceptable by Snowden J in the recent Part 26A case of *Virgin Active Holdings* [2021] EWHC 814 (Ch) at paras 47 to 52 and I agree.

46 Turning to matters of more substance to be determined at the hearing, it is well-established that this is not the occasion for looking at issues going to the fairness of the plan. It is unnecessary to refer to authority to demonstrate that this is as much the case with the restructuring plan under Part 26A as it is with a scheme of arrangement proposed under Part 26. There are a number of other matters which I must consider.

47 I must first be satisfied that the threshold conditions contained in section 901A are met. In light of their late receipt of the hearing bundle and the draft explanatory statement, Mr Arden's clients do not consider they were in a position to make submissions on whether or not this was the case, but I am satisfied that they are.

48 The first such condition is that because the Company is incorporated in England and Wales, it is liable to be wound up under the Insolvency Act 1986 and is therefore a company within the meaning of section 901A(1) of the 2006 Act.

49 The next question is whether condition A in section 901A(2) is satisfied. Has the Company encountered, or is it likely to encounter, financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern? The concept of financial difficulties is a broad one which is intended to be expansively construed (see the convening judgment in *Re Virgin Atlantic Airways Limited* [2020] BCC 997 at para.39). In my judgment, the evidence that the Company's business has run into serious difficulties as a result of the Covid 19 pandemic is compelling. The HL Landlords do not accept that the Company's options are as bleak as it says they are, but that does not of itself affect my conclusion that condition A is met, not least because, on the basis of cashflow forecasts that I have seen, the Company is likely to run out of cash by the end of June.

50 As to satisfaction of condition B, (section 901A(3)), the first question is whether the proposal put forward is a compromise or arrangement between the Company and any class of its creditors. This was the question that was also considered in the convening judgment in *Re Virgin Atlantic Airways Limited*, applying the well-established test for Part 26 schemes. Is there a sufficient element of give and take between the Company and the scheme creditors? In my view, this aspect of the test is satisfied as well, notwithstanding and having particular regard to three aspects of the proposal which have been drawn to my attention by the Company.

51 The first is that the plan is designed to ensure that it only affects the rights of plan creditors in their capacity as such and, in particular, does not prevent a landlord from exercising an accrued right to forfeit the lease on the grounds of insolvency, nor does it purport to provide the involuntary termination or surrender of any lease.

52 The second is that the plan seeks to vary the rights of certain landlords who hold the benefit of guarantees against other companies in the group. In my view, this falls within the scope of a compromise or arrangement since the guarantor would otherwise have a ricochet claim against the plan company which would tend to defeat the purpose of the plan. The third is that the plan provides for a release of third parties, in the form of professional advisors, directors and various others involved in the process, from any liability arising out of the negotiation and implementation of the plan. A provision of this sort is permissible as part of a compromise or arrangement between a company and its creditors in their capacity as such (see, for example, *Re Noble Group Limited* [2019] BCC 349 at paras.20 to 30).

53 I should make clear that in concluding that these aspects of the plan are capable of forming part of a compromise or arrangement between the Company and its plan creditors, I am not to be regarded as having decided the question of whether, in the particular circumstances of this case, the form and nature of these provisions are fair. That is a question for the sanction hearing.

54 The second part of the satisfaction of condition B is that the purpose of the plan must be to eliminate, reduce or prevent or mitigate the effect of any of the financial difficulties. The issue here is whether any one or more of those results is the purpose for which the plan is proposed. The court is not concerned at this stage with the prospect of one or more of those results being achieved, save possibly where the improbability of achievement is sufficiently clear to undermine the applicant's assertion that one or more of them is the purpose of the plan.

55 In the present case, I am satisfied that this aspect of condition B is met as well. The purpose behind the proposal is to enable the Company to continue to trade as a going concern, which it is otherwise unable on the evidence to do. On the face of it, that would achieve each of the results referred to in section 901A(3)(b).

56 The next question relates to class constitution. The starting point is that the same broad approach is to be adopted on an application for the court's sanction of a Part 26A restructuring plan, as is adopted on an application for the court's sanction of a Part 26 scheme (see *Virgin Atlantic Airways* [2020] BCC 997 at paras 44 to 48 and *Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) at paras 181 to 182), recognising all the while, (as Snowden J did in *Re Virgin Active Holdings* [2021] EWHC 814 (Ch) at para 62) that the power to bind dissentient creditors in the context of a Part 26A plan does not only derive from the vote of the statutory approval of the majority in each class, it may also derive from the court's cram down power under section 901G.

57 This is a point on which Mr Allison made submissions in relation to the class A landlords, the result of which is no longer contested by the Company. He said that the subdivision into class A1 and class A2 was wrong and gave rise to a question of class manipulation.

58 The underlying test in relation to classes is that a class of creditors must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. As Chadwick LJ said in *Re Hawk Insurance* [2002] BCC 300 at para.30:

> "In each case the answer to that question will depend upon an analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."

59 In the present case, it is certainly not necessary to review the wealth of further authority on the application of this well-known test but it is right to stress two points. The first is that the court is concerned with the legal rights of creditors, not their separate commercial or other interests. Those only come into the equation when considering questions of fairness at the sanction stage. The second is that a difference in legal rights is not of itself sufficient to require separate classes. The difference must be sufficiently material to make it impossible for the creditors to consult together with a view to their common interest.

60 To this end, the useful question will sometimes be, as David Richards J said in *Re Telewest Communications Plc no.1* [2004] EWHC 924 (Ch) at para.40, whether there is more that unites the creditors than divides them. This indeed was a question that Zacaroli J asked himself when considering class issues in a leasing context, i.e. one which has at least some similarities to the present case, in *Re MAB Leasing Limited* [2021] EWHC 152 (Ch) at para.33.

61 One of the questions which is always critical in this context is an identification of the correct comparator for class composition purposes. In practice, this is likely to be the same as or very similar to the relevant alternative which is necessary for the Company to identify if and in so far as it seeks to invite the court to exercise the cram down jurisdiction for which provision is made by section 901G, an issue which may arise at the sanction hearing.

62 For class composition purposes, in the absence of proper identification of the correct comparator, the court cannot be satisfied of the nature and extent of the rights which are to be released or varied under the scheme. In the context of this, as in many other cases, one of the critical questions will be whether the proper comparator is a likely insolvency, because if that is the case, the rights to be compared may well be different to the rights to be compared if the proper comparator is not insolvency (see the detailed explanation given by Hillyard J in *Re Apcoa Parking UK Limited* [2014] Bus LR 1358 at para. 32 and following).

63 Mr Peter Arden QC submitted that his clients had some real doubts that the correct comparator in the present case was a pre-packaged sale in administration. He said that they were not in a position to reach a clear view but pointed to a number of considerations which he said indicated that the court may not be satisfied that the correct comparator had indeed been identified by the Company. He accepted that the Company had been suffering from serious cashflow difficulties but said that its business appeared to be fundamentally sound and that it was difficult to see why funding should not be available on terms which would meet the Company's liquidity requirements without impairing its landlords. He said that the evidence that the Company had been looking for alternative finance apart from that to be

provided under the terms of the restructuring plan, or in conjunction with the restructuring plan by its parents, were thin. Likewise, he said that if the business was fundamentally sound, it was difficult to see why the Company had not actively sought to explore the possibility of a sale.

64 In making that submission, Mr Arden said that it was an important feature of the present case that the Company has virtually no secured debt. The consequence of this is that the value breaks at unsecured creditor level, which means that issues would arise as to the different treatment afforded to different groups of unsecured creditors and the basis for that treatment. Nonetheless and despite Mr Arden's submissions, I am satisfied that, for present purposes, and more particularly because the Company accepts that it is open to creditors to revisit questions of class constitution at the sanction hearing, the approach now adopted by the Company as to the correct comparator at this stage of the proceedings is justified.

65 Mr Allison also had a more general criticism of the Company's proposals for the five landlord classes and the single other creditor class. He contended that his clients needed the information they had requested to enable them to make sensible submissions on class constitution and complained that until that was available, it would be unfair for his clients to be bound by any decision made at this stage. He also relied on the fact that if the court was going to be asked to exercise its cram down power under section 901G, it would have to determine the question of the relevant alternative at that stage, which was a very similar question to the appropriate comparator for class constitution purposes.

66 In my judgment, similar considerations to the submissions made by Mr Arden apply to Mr Allison's submission. I accept that his clients are not in a position to reach a final conclusion on how it is that they will wish to argue in due course, or may wish to argue in due course, that, for class constitution purposes, the appropriate comparator has not been identified by the Company. To the same extent, I accept that his clients do not yet have sufficient information to argue, if that is what they choose to do at the sanction hearing, that the relevant alternative is not the relevant alternative presently identified by the Company. However, as the Company accepts that creditors will be able to re-argue the question of class constitution at the sanction hearing, it seems to me that it is appropriate for me to proceed for present purposes on the basis of the Company's own evidence as to the proper constitution of classes based on a comparator that presupposes insolvency in the form of administration combined with the pre-packaged administration sale is the correct one to adopt.

67 Mr Allison also had a more specific criticism of the Company's decision to split the class A landlords into class A1 and class A2, which I have already mentioned at the beginning of this judgment. In short, he reminded me of the need for the court to approach with caution the creation of what he described as an artificially large number of classes, less that provide an inappropriate foundation for the court at the sanction hearing to be satisfied that condition B, as described in section 901G(5) of the 2006 Act, had been met. In a number of respects, this concern has been met by the decision of the Company that it would proceed with an application for the convening of plan meetings in relation to a single A class rather than splitting it between the A1 and the A2.

68 Nonetheless, because it is incumbent upon me to satisfy myself that the Company has proposed the correct constitution of the classes, I should briefly deal with the concerns that have been expressed both in relation to the question of whether or not a sufficient number of classes have been created and in relation to the question of whether too many classes have

been created. The concern that arises in these circumstances can I think be summarised by what Snowden J said in *Virgin Active Ltd* [2021] EWHC 814 (Ch) at para. 62:

> "By contrast, in a Part 26A plan, the power to bind dissentient creditors may also derive from the court's 'cram down' power under section 901G. It follows that, whilst in relation to a Part 26 scheme it is necessary to take care about placing creditors into the same class when they have materially different rights, in relation to a Part 26A plan it may be necessary to take care not to place creditors into an artificially large number of classes in order to provide a basis for invoking the cram down power."

69 The way Mr Allison originally put his submission was to say that there was no sufficient difference between the position of the class A1 and the class A2 landlords because the only distinction in their rights going into the scheme was that the class A2 landlord had a variable rent component which was of no real relevance in circumstances in which the Company also contended that the appropriate comparator was an insolvency. This point was given some weight, so he submitted, by the Company's acknowledgement of the fact that some of the class B landlords also had leases on turnover rent terms but they had not been put in a separate class.

70 This is not of course a complete answer because it is also necessary to consider by way of comparison the rights which are given to the class A1 landlords and the class A2 landlords under the scheme. As to that, what he submitted was that the only distinction between the class A1 landlords and the class A2 landlords was that the A2 landlords' receipt of 90 per cent of the relevant rent arrears was to be five business days after the effective date, while the class A1 landlords' receipt of the relevant rent arrears was to be in two tranches, 73 per cent within five business days of the effective date and 25 per cent within five days of the three-month period thereafter. He also pointed out that the absence of any material difference between their position is plain from the Company's own evidence, which is to the effect that the class A1 landlords will receive 99.5p in the pound under the plan, while the class A2 landlord will receive 99.2 per cent in the pound under the plan, which is an immaterial distinction between the result which is achieved for each of them.

71 In my view, there was always real force in Mr Allison's submission on this point. In light of the test established in the Part 26 authorities, I am satisfied that it is not impossible for the class A1 landlords and the class A2 landlord to consult together with a view to their common interest. In consequence of that, I am in agreement with the convening of only a single class in the form of class A in which both the class A1 landlords and what was the class A2 landlord will vote.

72 As I mentioned a little earlier when describing the nature of the arrangements proposed for the various categories of landlord creditor, there is a lock-up agreement in place which is available for signature by any landlord and that gives rise to the next question in relation to class constitution. A fee equivalent to 2 per cent of the rent arrears due to any landlord creditor signing up to the lock-up agreement was payable if the landlord accepted the terms prior to an acceptance deadline. I think initially this was 13 April but it was then extended to 11 May and has been further extended to 15 June. The present position is that some 73 per cent of the class A landlord creditors have signed the lock-up agreement but not, as I understand it, the creditor that was in the A2 group. The question which arises is whether the existence of the agreement fractures the class between those who sign the lock-up agreement and those who do not.

73 The law in this area has recently been reviewed by Snowden in *Re Port Finance Investment* [2021] EWHC 378 (Ch) at paras 83ff. I agree with the submission made by the Company that the principles explained in *Port Finance* support a conclusion that a fee of this character is unlikely to be class creating, providing two requirements are met. The first is that the fee is made available to all creditors within the relevant class and that they have a realistic opportunity to qualify. The second is that no amount of the fee should be so large that it might have a material influence on the decision of a reasonable creditor as to whether or not to support the proposed plan.

74 Applying those principles to the present case, the first requirement is satisfied, in my view, because the fee has been made available to all the landlord creditors. The fact that it has not been made available to the other plan creditors is not relevant because they fall into another class in any event. As to the second requirement, I am satisfied that, objectively speaking, the amount is not of such a size as to be a material influence on the decision of any landlord creditor to support the plan.

75 The next, and I think final, specific issue in relation to class constitution, is that there is one creditor which the Company proposes to place in the proposed other creditor class but which considers that it should fall into class C. This was the creditor to which I referred earlier in my judgment in relation to the joint venture with Manchester City Council. That creditor has not appeared at this hearing but Mr Smith took me to a letter from DLA which explains its position. I have read and given careful consideration to what is said. The substance of the matter raised is whether DLA's client, which is the landlord of the Manchester Printworks site, is properly to be treated in the same way as the class C landlords, despite the fact that the relationship between it and the Company is one of principal creditor and guarantor, not one of landlord and tenant.

76 In my view, based on the information with which I have been presented, the Company has adopted a justifiable approach in relation to the treatment of this particular creditor. It may well be in any event that the issue which is raised by DLA in its letter is an issue which does not of itself go to questions of class constitution but is more concerned with the issue of whether or not, once the classes have been properly described, the creditor concerned fulfils the characteristics of the relevant member of the applicable class.

77 Having regard to all of those considerations, I am satisfied that the classes which have been proposed by the Company are classes in respect of which it is appropriate for the court to convene class meetings for the purposes of considering and, if thought fit, approving the restructuring plan that is proposed by the Company.

78 I should add that, during the course of the hearing, there has been a considerable amount of debate in relation to the provision of information by the Company to those creditors who have appeared today and also in that context to the timetabling of the sanction hearing. In the course of those discussions I expressed my views in relation to the information that needs to be provided by the Company to those creditors who may wish to oppose the application for sanction in due course. However, I have not at this hearing been asked to make any orders or give any directions in relation to the provision of any such further information. The Company is well aware that the nature and extent of the information it has provided to plan creditors is a matter to which the court will have regard at the sanction hearing in due course.

79 In all those circumstances, I shall make the order that is sought by Mr Smith, subject to the amendments we have already discussed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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****This transcript is approved by the Judge****