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Case No: CR-2018-011034

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

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL

Date: Monday 9 August 2021

Before :
MR JUSTICE SNOWDEN

- -

IN THE MATTER OF AMICUS FINANCE PLC
(in administration)

AND IN THE MATTER OF PART 26A OF THE COMPANIES ACT 2006

- -

Marcus Haywood (instructed by **Pinsent Masons LLP**) for **Amicus Finance plc**
Andrew Mace (instructed by **Shakespeare Martineau LLP**) for **Crowdstacker Corporate Services Limited**
William Willson (instructed by **Brown Rudnick LLP**) for **HGTL Securitisation Company Limited** and the **Hartford Entities**

Hearing dates: 2, 5 and 8 – 9 July 2021

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on Monday 9 August 2021.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. This is an application brought by administrators on behalf of Amicus Finance plc ("Amicus"), a company which has been in administration since 20 December 2018. The application seeks an order pursuant to section 901C of the Companies Act 2006 (the "CA 2006") convening meetings (the "Plan Meetings") of creditors (the "Plan Creditors") for the purpose of considering and, if thought fit, approving a restructuring plan in respect of Amicus (the "Restructuring Plan"). Amicus appeared by Mr. Haywood.

2. The hearing before me was the second convening hearing in connection with the Restructuring Plan. On 10 June 2021, Trower J adjourned the first hearing in light of certain objections raised by Crowdstacker Corporate Services Limited ("Crowdstacker"). The parties filed updated evidence and Amicus made amendments to certain terms of the Restructuring Plan and the Explanatory Statement which accompanies it, including to address observations made, and indications given, by Trower J.

3. At the adjourned convening hearing, Crowdstacker maintained its objections and appeared before me by counsel (Mr. Mace) to make submissions in opposition to the Restructuring Plan generally and, relevantly for present purposes, to the adequacy of the Explanatory Statement and the proposed composition of voting classes. Certain supporting creditors also appeared before me by counsel (Mr Willson), namely, HGTL Securitisation Company Limited ("HGTL Securitisation") and certain entities known as the Hartford Entities.

4. On 9 July 2021, I made an Order convening Plan Meetings and I indicated to the parties that my more detailed written reasons would follow. This judgment sets out those reasons. I also deal with the question of costs on the basis of written submissions filed by the parties.

Background to Amicus

5. Amicus was incorporated in England and Wales on 19 August 2009. Its core business was the provision of short-term property finance, together with other forms of secured corporate and development finance.

6. The majority of loans made by Amicus were funded through a trust structure known as "Amicus Mortgage Trust" ("AMT"), which operated by enabling a variety of funding vehicles (the "Funders") to fund loans on terms whereby the Funders retained the beneficial interest in the loan and Amicus held legal title to the loan. Amicus would earn fees for originating the loans and servicing them (e.g. by collecting repayments). Amicus also generated income by funding loans on its balance sheet as an acceding Funder in the AMT in its own right.

7. In 2018, Amicus began to experience financial difficulties. On 20 December 2018, Mark Fry, Kirstie Provan and Jamie Taylor of Begbies Traynor were appointed as administrators (the "Administrators") over the company, with responsibility for the conduct of its business, property and affairs.

8. Two directors of Amicus remain in post, namely, Elissa Von Broembsen-Kluever (appointed on 3 October 2017) and Steven Clark (appointed on 19 August 2009). The shareholders of Amicus are: (i) Amicus Investment Holdings Limited (85%); (ii) Omni Partners LLP ("Omni Partners) (7.5%); and (iii) Keith Aldridge (7.5%). Omni Partners is an investment management company of which Mr Clark is a director. Mr Clark is also a director of Amicus Investment Holdings Limited.

The Administration of Amicus

9. The Administrators' proposals for the conduct of the administration required them to perform their functions with the objective of achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration. This is the second statutory purpose prescribed by paragraph 3 of Schedule B1 ("Schedule B1") to the Insolvency Act 1986 (the "1986 Act").

10. Since their appointment, the Administrators have been operating the business of Amicus and running off its loan book. Amicus has continued lending by procuring that the Funders provide further financing to borrowers via the AMT structure. The total sums recovered by Amicus under the AMT from 20 December 2018 to 30 April 2021 was approximately £402 million, a substantial sum (albeit, under the trust structure, Amicus is mainly entitled to origination and service fees in respect of those sums). As of 30 April 2021, the remaining loan book serviced by Amicus under the AMT comprises 70 "legacy loans" (the "Legacy Loans"). As matters stand, servicing the Legacy Loans comprises substantially the whole business of Amicus.

11. To date, the administration has been funded from the following sources: (i) service and other fee income paid by the Funders under the AMT; (ii) administration funding agreements between Amicus, the Administrators and Hartford Growth (Trading) Limited ("Hartford Growth"), pursuant to which Hartford Growth has made available the total sum of £1,647,412.34; and (iii) retained loan redemptions.

Reasons for the Restructuring Plan

12. Mr Fry explained in his evidence that, for a variety of reasons, the Administrators consider that it is no longer financially viable, or in the interests of creditors, for Amicus to remain in administration, principally because the loan portfolio has proven to be considerably more challenging and more expensive to service and realise than had been anticipated by the Administrators. Mr Fry gave three main reasons for this.

13. First, the company has faced increased costs associated with Brexit and the Covid-19 pandemic, including a reduction in the value of security held by Amicus and a general contraction of the property finance market. Second, the company has suffered higher costs and greater difficulty in servicing and realising the Legacy Loans (many of which are in default) than had been anticipated at the outset of the administration. Third, the company has incurred significantly higher legal costs than had been anticipated due to disputes with debtors (some of which, Mr Fry suggested, might give rise to claims in negligence in favour of the company against certain surveyors or advisers and their insurers).

14. Moreover, Hartford Growth is not willing to provide further administration funding (and is not obliged to do so).

15. I was shown a cashflow forecast prepared by the Administrators which indicated that Amicus will not have sufficient funds to enable it to meet its ongoing liabilities (including wages and general overheads, but with the majority comprised of the professional fees of the Administrators and their legal advisers) in the short-term.

16. The forecast showed a positive opening cash balance as at week commencing 24 May 2021 of £543,946 and a negative closing cash balance as at 7 July 2021 of -£609,997, with the company operating at a significant loss throughout the whole period. The largest projected items of expenditure were the Administrators' professional fees together with certain other legal and professional fees, which accounted for the large majority of outgoings throughout the period. I was also shown an updated forecast dated as of 5 July 2021, which illustrated that Amicus was projected to go cash negative in week commencing 12 July 2021, and to operate at a loss in the short term. The updated forecast also indicated that the company had drawn down funds due to be provided to it by Twentyfour Asset Management LLP ("24AM") (one of the participants in the AMT structure) pursuant to the Restructuring Plan.

17. The short point is that Amicus is, or will imminently be, cashflow insolvent, and it is only able to operate at all due to a combination of the forbearance of its professional advisers in not demanding payment of fees that have accrued due and the early draw down of funds provided by 24AM.

18. The Administrators have concluded that a Part 26A restructuring plan is the only alternative to placing Amicus into liquidation, which is said to be the relevant alternative to the sanction of the Restructuring Plan. The Administrators' position is that the Restructuring Plan will provide creditors with a better return than would be achieved in liquidation. It will, moreover, enable Amicus to be rescued as a going concern, which is the first statutory purpose of administration under paragraph 3(1)(a) of Schedule B1. To that end, as I shall explain further below, the intention is that if the Restructuring Plan is sanctioned, Amicus will exit administration and be returned to the control of its directors and be able to trade for the benefit of its shareholders.

19. Absent significant new funding, the Administrators' view is that Amicus cannot continue in administration for any further significant period and Mr Fry's evidence was that, if the Restructuring Plan is not sanctioned by the court, the Administrators intend to place Amicus into liquidation, resulting in a materially worse outcome for creditors as a whole.

The Restructuring Plan

Overview

20. The basic purpose of the Restructuring Plan is to compromise the liabilities of Amicus to allow it to be returned to solvency, and for creditors to receive more than they would if Amicus were placed into liquidation.

21. In summary, the Restructuring Plan consists of three key elements:

    i) First, the injection of funding of £3.1 million by Omni Partners (as noted above, a minority shareholder of the company) and/or funds managed by Omni Partners

(the "Omni Funds") and £640,000 from 24AM under a facility pursuant to an existing cash administration agreement (the "Restructuring Plan Funding").

ii) Second, the making of certain lump sum payments to creditors (the "Lump Sum Payments") out of the Restructuring Plan Funding.

iii) Third, a waterfall of payments from the proceeds of the Legacy Loans to which Amicus is entitled (the "Waterfall") during the "Waterfall Period" (which runs from the sanction of the Restructuring Plan to 31 December 2022).

22. There are four groups of creditors under the Restructuring Plan, namely, Expense Creditors, Preferential Creditors, Secured Creditors and Unsecured Creditors. Each group is considered further below.

Expense Creditors

23. Expense creditors are those creditors of Amicus that are owed a liability that would be treated as an expense of the administration of Amicus under paragraph 99 of Schedule B1 and/or rule 3.51(2) of the Insolvency (England and Wales) Rules 2016 (the "IR 2016") ("Expense Creditors").

24. The most significant creditor which will fall into this category is Hartford Growth in respect of the funding it has provided under the administration funding agreements (which funding, as I have said, amounts to approximately £1.647 million). Excluding Hartford Growth, which is treated separately under the terms of the Restructuring Plan (see below), there are approximately 34 Expense Creditors with claims in the total sum of about £1.145 million as at 30 June 2021.

Preferential Creditors

25. Preferential creditors are those creditors of Amicus which would be treated as such pursuant to sections 386 and 387, and Schedule 6 of the 1986 Act ("Preferential Creditors"). The Administrators estimate that the claims of Preferential Creditors total approximately £110,449 as at 30 April 2021, and that there are 49 such creditors. I was told by Mr Haywood that this class is made up primarily of employees of the company.

Unsecured Creditors

26. Unsecured creditors are those creditors of Amicus which have unsecured claims against it as at the date of administration, which are neither expense claims nor preferential claims ("Unsecured Creditors"). The Administrators estimate that the claims of Unsecured Creditors total approximately £2.964 million as at 20 May 2021, and that there are 186 such creditors.

Secured Creditors

27. All of the documents and most of the evidence produced by the parties proceeded on the basis that there were two relevant secured creditors under the terms of the Restructuring Plan whose rights were to be compromised by it: Crowdstacker and HGTL Securitisation. On closer analysis, however, the position was rather different.

28. The draft Restructuring Plan that was originally before me at the hearing included the following definitions:

> "Crowdstacker means Crowdstacker Corporate Services Limited … For the avoidance of doubt, references to Crowdstacker in this Restructuring Plan include references to individuals who have made loans to the Plan Company using the Crowdstacker lending platform […]
>
> Secured Creditors means those creditors of the Plan Company whose claims rank as secured claims in the Administration of the Plan Company being the Secured Claims of Crowdstacker and HGTL Securitisation […]"

29. The evidence of Mr Patel of Crowdstacker included the following (albeit addressing a different point),

> "[Crowdstacker] is not a secured creditor in its own right but is a security trustee for 418 individual lenders to Amicus. All 418 have individual and direct loan contracts with Amicus and are individual creditors of Amicus".

30. Thus, rather than itself being a creditor, Crowdstacker was simply the security trustee for a large number of individual lenders who had advanced loans to the company using the Crowdstacker lending platform. Properly analysed, those individual lenders were secured creditors of Amicus.

31. This gave rise to two potential issues. First, as a practical matter, although the 418 individual lenders were the secured creditors of Amicus with whom the compromise constituted by the Restructuring Plan was to be made, it appeared that they had not been given any notice of the hearing or informed about the proposed restructuring at all. Mr Haywood told me that the Administrators had proceeded on the assumption that Crowdstacker would operate as a conduit for the provision of information to those underlying lenders, and expressed some doubt as to whether the Administrators had up-to-date contact details for the underlying lenders in any event. There was, however, no evidence that the underlying lenders had, in fact, received notice via Crowdstacker or otherwise.

32. Second, and perhaps more fundamentally, there was a question as to whether the proposals for the Plan Meetings and the arrangements for voting were correct. Mr Haywood again explained that the Administrators had assumed that there would be a single vote exercised by Crowdstacker on behalf of all of the individual lenders, and that it had been understood that Crowdstacker had the authority to bind those individual lenders. That assumption appears to have been incorrect.

33. After I raised the issue with Counsel and invited the parties to consider the position over the weekend, Mr Mace informed me on instructions that Crowdstacker had decided to exercise what it contended was its right under the arrangements which it had with the individual lenders to novate the individual loan contracts with Amicus to a company in the Crowdsacker group. This would have the intended result that Crowdstacker would become the legal and beneficial owner of the loans, with an

obligation to make payments to its underlying investors from any recoveries it obtained pursuant to the terms of the Restructuring Plan. Although I was shown a draft deed of novation, I did not hear submissions, and therefore give no indication, as to whether such purported novation would have the intended effect.

34. In any event, Crowdstacker's intention was reflected in the terms of an amended Restructuring Plan prepared by the Administrators, which Mr Haywood said was designed to cater for a situation in which some or all of the individual loan contracts could not be novated in the time available for any reason, contrary to Crowdstacker's expectations. The revised definitions included the following:

> "Crowdstacker means Crowdstacker Corporate Services Limited … acting in its capacity as security trustee of the Individual Crowdstacker Lenders and/or in its own capacity to the extent loans to the Plan Company have been novated and/or assigned to Crowdstacker by any Individual Crowdstacker Lenders. Where any loans to the Plan Company by Individual Crowdstacker Lenders have been novated and/or assigned to an entity within the same corporate group as Crowdstacker … references to Crowdstacker will include such an entity […]
>
> Individual Crowdstacker Lenders means individuals who have made loans to the Plan Company by means of the Crowdstacker lending platform.
>
> Secured Creditors means those creditors of the Plan Company whose claim rank as secured claims in the Administration of the Plan Company being the Secured Claims of the Individual Crowdstacker Lenders, Crowdstacker and HGTL Securitisation …"

35. On that basis, references hereinafter to the "Secured Creditors" are to HGTL Securitisation, the Individual Crowdstacker Lenders (to the extent their claims are not novated to Crowdstacker) and the Crowdstacker entity to which the claims of individual lenders are validly novated.

36. Further, for simplicity, and as the context requires, I shall simply use the expression "Crowdstacker" to include Crowdstacker, the Individual Crowdstacker Lenders and/or whichever Crowdstacker entity is the acquirer of the claims of the Individual Crowdstacker Lenders by novation.

37. The amounts outstanding as at 30 April 2021 to each of the Secured Creditors is as follows:

    i) £4,736,275 plus fees to be agreed is owed to Crowdstacker. Mr Haywood indicated that the fees were expected to be relatively small (in the region of £50,000) and would have little if any impact on the voting outcome at Plan Meetings; and

    ii) £21,213,734 is owed to HGTL Securitisation.

38. There was a dispute as to the relative ranking of the security held by the Secured Creditors. The position of the Administrators is that there is an agreement between the Secured Creditors and the Administrators as to the ranking of the security, the effect of which is that HGTL Securitisation and Crowdstacker have a first equal charge in respect of their respective debts up to the value of the aggregate sums outstanding to the Crowdstacker lenders, and that HGTL Securitisation has a junior ranking security in respect of the balance of the sums owed to it.

39. The arrangements between the parties can be found in three documents. First, a Deed of Priority dated 6 November 2015 between Crowdstacker, Hartford Growth Limited and Amicus. Second, a Deed of Variation dated 23 August 2018 between the same entities and HGTL Securitisation, by which HGTL Securitisation agreed to provide new funding in exchange for taking security over the assets of Amicus. The third and final agreement is said to have been recorded in correspondence between the solicitors for the Administrators (Pinsent Masons LLP) and the solicitors then acting for Crowdstacker (Edwin Coe LLP) on 23 January 2019. The purpose of the correspondence appears to have been to clarify what had been agreed in the Deed of Variation.

40. The letter from Pinsent Masons LLP to Edwin Coe LLP, which is countersigned by Reed Smith LLP on behalf of HGTL Securitisation, states relevantly as follows:

> "4. On 6 November 2015, Hartford Growth and Crowdstacker entered into a Deed of Priority (the "Original Deed of Priority") to amend the statutory ranking and priority of the QFCs. On 23 August 2018, Hartford Growth, Crowdstacker and [HGTL Securitisation] entered into a Deed of Variation (the "Deed of Variation") which amended clause 2.3 of the Original Deed of Priority. …
>
> …
>
> 6. Following discussions between the parties, our clients, [HGLT Securitisation] and Hartford Growth agree the following:
>
> 6.1 the Deed of Variation should be interpreted by the Joint Administrators as providing for the ranking of debt and security equally between your client, Hartford Growth and [HGTL Securitisation] to the extent of the debt owed by Amicus to Crowdstacker. For the avoidance of doubt, the practical effect is that [HGTL Securitisation]/Hartford Growth will have an equal ranking of debt and related security equal to the sum outstanding to Crowdstacker. For the avoidance of further doubt, save as to this clarification of the Deed of Variation, the Original Deed of Priority remains in full force and effect;
>
> 6.2 he Deed of Variation does not affect Crowdstacker's security position as a senior first ranking secured creditor of Amicus (subject to 6.1 above), noting that the Deed of Variation does alter the security position of HGTL and Hartford Growth to

> also be equal senior first ranking secured creditors to the limited extent of the debt set out in 6.1 above;… "

41. By a letter of the same date, Edwin Coe LLP responded on behalf of Crowdstacker in the following terms:

> "… Our client agrees with the contents of your letter and, particularly, it agrees with the interpretation of the Deed of Variation set out in paragraphs 6.1 and 6.2 of your letter."

42. On their face, the various contractual arrangements to which I have referred above mean that Crowdstacker and HGTL Securitisation have equal first-ranking security up to the value of the debt owed to Crowdstacker (i.e. "senior debt" up to the sum of £4,736,275 plus fees), and that HGTL Securitisation has junior-ranking security for the balance of the amount it is owed (i.e. "junior debt" of approximately £16.477 million). Although Mr Mace's skeleton argument sought to raise certain doubts about whether the position is as I have just described (for example, because Crowdstacker has made certain allegations that it was induced to alter the priority of its security by misrepresentations), those points were not pursued in oral submissions, and I attach no weight to them for the purposes of determining class composition (see below).

43. For completeness I note that there are three other current or former secured creditors of Amicus whose interests are unaffected by the Restructuring Plan and who do not therefore fall within the class of Secured Creditors (as defined) because the sums outstanding to them either have been or will be satisfied prior to the Plan Meetings. These are Hartford Growth Limited, Honeycomb Investment Trust PLC and Pollen Street Capital Limited.

Proposed treatment of creditors under the Restructuring Plan

44. If the Restructuring Plan is approved, the Restructuring Plan Funding will be made available to Amicus by Omni Partners and 24AM to enable it to meet its ongoing operating costs.

45. The Plan Administrators will make the following lump sum payments upon approval of the plan:

    i) £1,145,708 or such other sum as to enable payment of all Expense Creditors (other than Hartford Growth) in full.

    ii) £110,449 or such sum as to allow the payment of all Preferential Creditors in full.

    iii) £150,000 to be paid to the Secured Creditors, to be apportioned 50/50 between Crowdstacker and HGTL Securitisation.

    iv) £75,000 such as to allow a payment to be made to the Unsecured Creditors of approximately 2.3p in £.

46. During the Waterfall Period (i.e. the period from the date on which the Restructuring Plan is sanctioned until the end of 2022), Amicus will make payments in respect of any receipts, recoveries, repayments, realisations or proceeds that are legally and

beneficially due to it relating to the Legacy Loans in the following order of priority (the "Waterfall"):

i) First, to meet any liabilities arising under an indemnity to be provided by Amicus to the Administrators upon their vacation of office (the "Indemnity"). The Indemnity is intended to reflect the statutory charge that would ordinarily be available to an administrator under paragraph 99 of Schedule B1, and which would rank ahead of distributions to creditors. If Amicus receives a call under the Indemnity during the Waterfall Period, it will be able, acting in good faith, to delay any distribution under the Waterfall unless and until such claims have been determined and satisfied, up to a cap of £1 million.

ii) Second, a fixed sum of £3,730,218 to be retained by Amicus to cover the costs of implementing the Restructuring Plan. Those costs are said to be a realistic estimate of the costs to be incurred by Amicus in collecting the Legacy Loans during the Waterfall Period. If the costs are higher than the fixed sum, no further sums will be available under the Waterfall; if the costs are lower, Amicus will retain the whole sum.

iii) Third, payment to Hartford Growth in respect of its expense claim. This is intended to reflect the fact that Hartford Growth is an Expense Creditor which is not being paid from the lump sum payments referred to above and which, in an administration or liquidation, would receive payment in priority to Secured Creditors under paragraph 99 of Schedule B1.

iv) Fourth, payment equally to Crowdstacker on the one hand, and to HGTL Securitisation on the other, in each case up to the amount owing to Crowdstacker. This is intended to reflect the arrangements between the Secured Creditors and the Administrators as to the relative ranking of the Secured Creditors' security: see above.

v) Fifth, payment to HGTL Securitisation of the balance of its debt. HGTL Securitisation will only receive payments under this limb of the Waterfall if all of the sums outstanding to Crowdstacker have been discharged.

The Administrators' evidence is that no sums are expected to be recovered under item (v) in the Waterfall unless there are significant recoveries in relation to certain professional indemnity claims in respect of the Legacy Loans. Rather, the expectation is that value will break at level (iv) of the Waterfall and that the senior secured claims of Crowdstacker and HGTL Securitisation will not be met in full.

Other material terms of the Restructuring Plan

47. If the Restructuring Plan is sanctioned, the Administrators will seek an order under section 901F(4)(a) of the CA 2006 that their appointment shall cease to have effect. The terms of the Restructuring Plan provide that the Administrators will be appointed as Plan Administrators. Among their duties will be to carry out the assessment and calculation of creditor claims, and to make the Lump Sum Payments under the plan (but not any payments which fall due under the Waterfall).

48. Broadly speaking, the Plan Administrators will have the same rights, powers and discretion to admit or reject claims as an administrator would have in an administration under the 1986 Act and the IR 2016. Following the Final Claims Date (as defined in the Restructuring Plan), the Plan Administrators will be required as soon as reasonably practicable to admit or reject any claims notified to them. Should the Plan Administrators reject a claim, they must notify the relevant creditor and provide a written statement of reasons for so doing. Any claim which is not allowed (in whole or in part) will be treated as a "Disputed Claim".

49. In the case of a Disputed Claim, the Restructuring Plan prescribes a procedure for the resolution of the dispute. In brief, the relevant creditor will have a period of 21 days in which to raise an objection to the decision and/or reasons given by the Plan Administrators. The Restructuring Plan then provides for the Plan Administrators to consider any representations made by the relevant creditor to determine whether to allow the disputed amount. If the relevant creditor and the Plan Administrators are unable to agree on the correct outcome, provision is made for the matter to be referred to an independent third-party chartered accountant to resolve the matter.

50. The Restructuring Plan also prescribes a bar date, defined as the "Final Claims Date", by which creditors will be required to submit a notice of any claims to the Plan Administrators in order to participate in the payments to be made under the Restructuring Plan. The bar date is the date three months after the sanction of the Restructuring Plan.

51. Save in respect of Disputed Claims and payments to be made under the Waterfall (where the plan provides for longer periods), payments to creditors will be payable:

    i) In the case of the sum of £150,000 to be paid to the Secured Creditors, within 60 days of the effective date of the plan.

    ii) In the case of payments to Expense Creditors (other than HGTL), within 60 days of the effective date.

    iii) In the case of the allowed claims of Preferential Creditors and Unsecured Creditors, within six months of the effective date.

The Relevant Alternative to the Restructuring Plan

52. As I have said above, the Administrators' evidence was that they have carefully considered the options available to them and have concluded that, should the Restructuring Plan not be sanctioned, the only viable option will be to place Amicus into liquidation.

53. The original evidence filed by the Administrators in this respect was light on detail. At the hearing on 10 June 2021, Trower J indicated that it would be helpful for further detail to be provided as to what alternatives (other than liquidation) the Administrators had considered, and the Administrators have accordingly filed updated evidence addressing that question.

54. The Administrators' evidence was that the original exit route proposed by them involved an exit via a company voluntary arrangement ("CVA"), which ultimately

proved not to be viable because Crowdstacker was unable consensually to agree to the write-down of its individual investors' debt or the release of any security without the requisite consents from those individual lenders.

55. The other alternatives considered by the Administrators concerned the sale of the business of Amicus, either in its entirety or in part through the sale of the Legacy Loans portfolio, but neither route was considered likely to generate significant returns given the nature of the business (i.e. in run off with a significant proportion of loans in default).

56. Having identified liquidation as the relevant alternative, the Administrators concluded that it would result in a materially worse outcome for creditors than if the Restructuring Plan is approved. I set out below a table produced by the Administrators, and included in the Explanatory Statement, showing their estimated comparison of returns under the Restructuring Plan, on the one hand, and liquidation, on the other, in respect of each proposed class of creditor:

Creditor Class	**Restructuring Plan**		**Liquidation**
	Lump Sum Payments	**Waterfall Payments**	
Expense Creditors	100p/£ (other than Hartford Growth)	100p/£ for Hartford Growth	52p/£
Preferential Creditors	100p/£	N/A	Nil
Secured Creditors	£75,000 each	c. £1,267,796 each	Nil
Unsecured Creditors	2.3p/£	N/A	Nil

57. I should record at this point that Mr Mace made a number of submissions in relation to the Administrators' identification of liquidation as the relevant alternative. I will return to those submissions below.

Notice of the convening hearing

58. The Administrators submitted that adequate notice of the convening hearing had been given in the present case, having regard to the relative simplicity of the Restructuring Plan and what is said to be the urgency of its implementation.

59. The Practice Statement Letter ("PSL") was sent to creditors on 7 May 2021, and directed creditors to a website maintained by the Administrators on which documents relating to the Restructuring Plan would be uploaded. On 3 June 2021, an update to the PSL was sent to creditors in hard copy and again made available on the website. The update notified creditors of certain changes to the proposed Restructuring Plan that were, it is said, intended to simplify its structure, and notified creditors of the hearing before Trower J.

60. On 7 June 2021, drafts of the Explanatory Statement and the Restructuring Plan were made available on the website. Following the hearing before Trower J on 10 June 2021, creditors were notified on 16 June 2021 of the date of the adjourned hearing, and they

were told that hard copies of the relevant documents would be provided on request. Revised drafts of the relevant documents were uploaded to the website on 23 June 2021.

61. Subject to the point that no notice was given to the Individual Crowdstacker Lenders, I am satisfied that adequate notice of the convening hearing was given and parties had sufficient time in which to prepare their evidence and submissions. In that regard, as I have explained, the Administrators had operated on the assumption that Crowdstacker was, in effect, a conduit for the individual lenders on its platform and would provide the necessary information to them, in addition to voting on their behalf. Although that was not an accurate assumption, I do not consider that this should cause me to decline to convene the Plan Meetings, for the following reasons.

62. First, Crowdstacker has indicated its intention to novate the loan contracts of Individual Crowdstacker Lenders. If such novation is valid, Crowdstacker will be entitled to attend the Plan Meetings and vote up to the full amount of the aggregate debt and no Individual Crowdstacker Lenders will remain as creditors of Amicus.

63. Second, even if the proposed novation is invalid, as a result of the way in which the hearing before me played out, any points relating to class that might have been taken by any Individual Crowdstacker Lenders are very likely to have been canvassed by Crowdstacker itself.

64. Third, any Individual Crowdstacker Lender who wishes to appear and make submissions at the sanction hearing will be entitled to do so in any event and will not be bound by the decisions made in their absence.

Threshold conditions under Part 26A

65. The first jurisdictional issue that it is necessary to decide at the convening stage is whether the threshold conditions under section 901A of the CA 2006 for proposing a compromise or arrangement are satisfied.

66. Section 901A provides, so far as relevant:

> "(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).
>
> (4) In this Part ... "company" ... means any company liable to be wound up under the Insolvency Act 1986 ..."

67. An application under section 901C for an order convening a meeting or meetings of creditors may be made by the administrators of a company if the company is in administration: see section 901C(2)(d). As I have said, the present application has been brought by the Administrators on behalf of Amicus.

68. Turning to apply the jurisdictional requirements prescribed in section 901A, Amicus is incorporated in England and is therefore liable to be wound up in England. Accordingly, it is incontrovertibly a "*company*" within the meaning of section 901A.

69. In order to satisfy Condition A, it must be shown that Amicus 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.

70. Mr Haywood submitted on behalf of Amicus that Condition A is met simply by virtue of Amicus being in administration. I accept that it will be a rare case in which the fact of being in administration will not mean that a company is experiencing financial difficulties, particularly (as in the instant case) where the administrators are pursuing the second statutory purpose of achieving a better result for creditors as a whole than would be likely in an immediate liquidation.

71. However, administration does not appear to me a complete answer to the question of whether, at the time a plan is proposed, a company has encountered or is likely to encounter financial difficulties that are (currently) affecting or will or may (in the future) affect its ability to carry on business as a going concern. For example, one could easily envisage an administration which was entered into as a result of temporary cashflow problems, which are being addressed and in which there is a surplus of assets over liabilities, such that the company is not and will not in the future face any difficulties in carrying on business as a going concern. In those circumstances, there would be a real question as to whether Condition A was satisfied.

72. In this case, however, Condition A is satisfied – not (or not only) by virtue of the administration, but rather by virtue of the circumstances in which the company finds itself. The cashflow forecast prepared by the Administrators shows that the company is expected to operate at a loss for the foreseeable future due to the relatively low amount of income generated by its loan portfolio as against a comparatively high level of outgoings. I accept the evidence of the Administrators that, absent significant new funding (which it appears is unlikely to materialise), it will not be viable to continue to operate the business of the company. I accept that the only reason Amicus does not currently have a negative cash balance is due to the forbearance of its professional advisers in respect of fees which are accrued due and payable.

73. As to Condition B, the Restructuring Plan is plainly a compromise or arrangement with the company's creditors or a class of them. Those concepts are to be given a similarly broad meaning as in the context of Part 26: see, for example, the comments of Trower

J in Virgin Atlantic Airways Ltd [2020] BCC 997 (Ch) at [38]. Fundamentally, the entire premise of the Restructuring Plan in the instant case involves payments made to creditors by the company in exchange for the compromise of those creditors' claims against the company.

74. It is also the case that the purpose of the Restructuring Plan is to enable Amicus to exit administration and return to solvency where it can be operated as a going concern (subject to what I say below as to the precise meaning of this and the intentions for the company post-administration). On its face, therefore, the purpose of the plan is to eliminate the company's financial difficulties.

75. Conditions A and B are therefore satisfied.

Class composition

Legal principles

76. Although the same general principles of class composition apply to Part 26A plans as apply to Part 26 schemes, a rigid application of those principles might not always be appropriate in the different context of a Part 26A plan: see, e.g. Re Virgin Atlantic Airways [2020] BCC 997 (convening judgment) at [44]-[48], Re Gategroup Guarantee Ltd [2021] EWHC 304 (Ch) at [181]-[182], and Virgin Active Holdings Ltd [2021] EWHC 814 (Ch) at [61]-[62].

77. In Virgin Active, I said as follows about the principles to be applied to class composition at [63]-[69]:

> "63. The basic principle that applies under Part 26 is that a class "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": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 (Bowen LJ) and Re UDL Holdings Ltd [2002] 1 HKC 172 at [27] (Lord Millett NPJ).
>
> 64. As Chadwick LJ said in Re Hawk Insurance Co Ltd [2002] BCC 300 at [30]:
>
> > "In each case the answer to that question will depend upon 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."
>
> 65. It is the legal rights of creditors or members, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests can be taken into account when considering whether, as a matter of discretion, to sanction the scheme or plan. See Lord Millett NPJ's judgment in Re UDL at 184-5:

> "The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their own private interests not derived from their legal rights against the company is not a ground for calling separate meetings … The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class."

66. It is also clear that the rights of creditors included in a single class can be different in material respects, provided that they are not "so dissimilar as to make it impossible for them to consult together with a view to their common interest". So, for example, in Re Telewest Communications plc [2004] BCC 342 at 354, David Richards J said that:

> "… a broad approach is taken and that the differences may be material, certainly more than de minimis, without leading to separate classes."

67. The decision in Hawk demonstrates that the first element of the class analysis in relation to schemes under Part 26 requires the court to identify the substance of the relevant rights possessed by scheme creditors by reference to the counterfactual comparator to the scheme. Accordingly, where a scheme is proposed as an alternative to a formal insolvency procedure, it is necessary to identify the rights that the creditors would have in that formal insolvency proceeding. In the case of a formal insolvency, unsecured creditors would all have rights to participate in a process of proof of debts, whether their claims were present, future or contingent. Hence, as Hawk illustrated, unsecured creditors with present claims and those whose claims are merely contingent may be regarded as having sufficiently similar rights against the company for the purposes of the class analysis.

68. I consider that the concept of identifying the substance of the rights that creditors would have in the relevant counterfactual comparator is equally relevant to the question of class composition for a restructuring plan under Part 26A. Although Part 26A contains no express requirement upon the court to identify a counterfactual when determining class composition at the convening hearing, a statutory counterfactual has been introduced in relation to one of the conditions that must be satisfied before the court can exercise its (cram-down) power under section 901G to sanction a plan notwithstanding that a dissenting class has not agreed the plan. That statutory

> counterfactual is called the "relevant alternative" and is defined in section 901G(4) as,
>
> > "whatever the Court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned".
>
> 69. The counterfactual comparator and the relevant alternative are clearly equivalent concepts. In practice there may, however, be a difference between the evidence available to the court when determining the question of class composition at the convening hearing, and when determining the relevant alternative for the purposes of any cram down argument at the sanction hearing …"

78. Many of the same principles are directly relevant to the instant case. It is particularly important to bear in mind that the starting point in the analysis is to identify the substance of the relevant rights possessed by creditors. If the creditors' relevant rights are very different pre-plan or in the relevant alternative, or would fall to be treated very differently pursuant to the terms of the plan, that will tend to point to a conclusion that those creditors could not consult together with a view to their common interest.

79. I turn now to apply those principles to this case.

Proposed classes

80. The Administrators originally proposed to divide creditors into four classes for the purposes of the Plan Meetings and to hold a single meeting in respect of each of them. The four classes would comprise Expense Creditors, Preferential Creditors, Unsecured Creditors and Secured Creditors.

81. No issue was taken with the first three proposed classes. Hartford Growth will be treated differently from other Expense Creditors by virtue of receiving its payment under the Waterfall (which is in certain respects contingent upon recoveries from the Legacy Loan portfolio) whereas other creditors in the class will receive payment as part of the lump sum payments (which, assuming the plan is sanctioned, is not contingent on any such recoveries). The Administrators submitted that the difference in rights is not sufficiently material to make it impossible for Hartford Growth to consult with the other Expense Creditors with a view to their common interest, and I accept that submission.

82. The Administrators' proposal for a single class of Secured Creditors was, however, opposed by Crowdstacker. Mr Mace submitted that it was appropriate that Crowdstacker should form a class of its own or, alternatively, that HGTL Securitisation should be entitled to vote in the same class as Crowdstacker only to the extent that its security interest ranks equally with that of Crowdstacker's interest (i.e. up to the value of Crowdstacker's outstanding debt).

83. On behalf of the Administrators, Mr Haywood (with whom Mr Willson agreed) submitted, in essence, that there was far more to unite Crowdstacker (in respect of its senior debt) and HGTL Securitisation (in respect of both its senior and junior debt) than there was to divide them, such that it was appropriate for them to form part of the same

class to the full extent of their claims. To the extent that there were differences in rights between the senior and junior debt, even material differences, they submitted that those differences were insufficient to justify excluding HGTL Securitisation from the same class as Crowdstacker, either at all, or in respect of its junior debt.

84. Mr Haywood submitted in this regard that I should have in mind the comments of David Richards J in Re Altitude Scaffolding Ltd [2006] B.C.C. 904 at [18] to the effect that it is only in exceptional cases that the Court will direct there to be a meeting of a class comprising a single creditor, and my own comments in Re Noble Group Ltd [2019] B.C.C. 349 at [87], observing the trend (at least in Part 26 cases) of avoiding any unnecessary proliferation of classes.

85. Mr Haywood drew attention to a number of specific features of the instant case which he said justified convening a single class of the Secured Creditors in respect of the entirety of their claims. First, he said that Crowdstacker and HGTL Securitisation benefit from substantially the same security granted by Amicus, namely a debenture. Second, he said that there is an express agreement that the Secured Creditors rank equally up to the value of the sums owing to Crowdstacker. Third, he said that if the Restructuring Plan becomes effective, the rights of each Secured Creditor will be treated in the same way – only once the sums outstanding to Crowdstacker have been paid will HGTL Securitisation be entitled to receive additional payments under the Waterfall over and above those paid to Crowdstacker. Fourth, the return of the Secured Creditors in a liquidation would be the same, namely a nil return.

86. I do not accept Mr Haywood's submissions in this respect.

87. It is clear that the existing rights of Crowdstacker and HGTL Securitisation against the company are similar, but only up to a point. Although Crowdstacker and HGTL Securitisation stand shoulder to shoulder in respect of their senior debt up to the value of the amount owing to Crowdstacker, there is a clear distinction between their rights thereafter. Once Crowdstacker has been paid in full, it has no further rights and nothing to compare with HGTL Securitisation's rights to receive a further payment in respect of the balance of its debt, in respect of which it only has a junior charge.

88. That difference in existing rights is reflected in the structure of the Waterfall under the Restructuring Plan and the anticipated returns to the Secured Creditors in respect of the different tranches of debt. As I have said, the senior ranking debt sits at the fourth limb of the Waterfall and must be satisfied in full prior to any payments being made to HGTL Securitisation in respect of its junior ranking debt. According to the Administrators, value is expected to break within that fourth limb, such that the senior ranking debt will not be satisfied in full, and it is unlikely that there will be any payment in respect of the junior ranking debt.

89. Such difference in existing rights and their treatment under the Restructuring Plan means that there is little or no commonality of commercial interest as regards the holders of those different rights in their capacity as such. In truth, the only common feature is that one creditor – HGTL Securitisation – has an interest in both sets of rights. But to focus on the identity of the creditor, rather than the rights which the creditor possesses, is not the correct approach. That can be illustrated by the many cases in which, for example, the same financial institutions hold debt in a variety of different syndicated loans or under different debt instruments issued by the same debtor, and

may be required to vote in respect of their different claims in different classes if the terms and treatment of the debts are materially different. Or cases in relation to insurance companies, in which policyholders with similar policies may have different categories of claim (e.g. admitted claims or IBNR) and may therefore be required to vote separately in respect of the different types of claim that they hold depending on how such claims are treated under the scheme.

90. The point can also easily be tested by asking whether, if the balance of HGTL Securitisation's debt forming the junior debt had been held by a completely unrelated third party, rather than by HGTL Securitisation, it would have been possible for that third party to be put into the same class as Crowdstacker and HGTL Securitisations in respect of their senior debts so as to be able to discuss the merits of the Restructuring Plan together. The answer is plainly "no", since the different ranking of the claims in the relevant alternative and the treatment of the claims under the Restructuring Plan would mean that the third party would have no prospect of being paid anything in respect of its junior claim unless and until Crowdstacker and HGTL Securitisations had been paid in full in respect of their senior claims.

91. The point is further illustrated by the fact that Crowdstacker and HGTL Securitisation will share the lump sum payment of £150,000 to be made under the Restructuring Plan equally rather than proportionately to the full amount of their claims. That seems to attribute no value to the residual portion of HGTL Securitisation's debt.

92. I will therefore direct that Crowdstacker and HGTL Securitisation should form a single class in respect of their respective secured claims up to the value of Crowdstacker's senior debt, and that HGTL Securitisation should form a separate class in respect of the balance of its claim.

The Explanatory Statement and defects in the terms of the Restructuring Plan

93. At the hearing on 10 June 2021, Trower J made various observations in relation to the draft Explanatory Statement. In response to those observations, a revised Explanatory Statement was prepared, and I was shown a redline copy of it making clear the changes that had been made.

94. In the course of the hearing before me a number of further points emerged – some of which were based on Mr Mace's submissions and others that I identified in the course of reviewing the plan documentation and hearing argument from counsel. These points required further changes to the Explanatory Statement and, in some cases, to the terms of the Restructuring Plan itself. The most material of those points are summarised below.

95. For the avoidance of doubt, I should indicate that I thought that most (but not all) of these changes were significant and that it was important to ensure that they were addressed before convening the Plan Meetings, rather than such matters only being brought up at a sanction hearing. However, given the limited role that the court plays at the convening stage, I must emphasise that nothing that I say in any of these respects should be taken as a definitive ruling on any point or as precluding a creditor from relying on such points when objecting to the Restructuring Plan being sanctioned on the basis either that the Restructuring Plan contains a fatal flaw, or of fairness, or because of a contention that the Explanatory Statement was inadequate.

Returns in the relevant alternative (liquidation)

96. As I have said, the Administrators identified compulsory liquidation as the relevant alternative to the Restructuring Plan. The basis on which they reached that conclusion is described above but, in short, the Administrators contend that they have no funds with which to continue to operate Amicus in administration and consider that none of the other exit routes from administration (e.g. a CVA or a sale of the business) are viable.

97. On behalf of Crowdstacker, Mr Mace suggested that there was little in the original plan documents by way of considered assessment of the returns in liquidation. Given that the premise of the Restructuring Plan is that it offers a better return for creditors than they would obtain in a liquidation, that was (he said) an important omission.

98. The returns that the Administrators expect the company to achieve in liquidation were set out in an estimated outcome statement ("EOS"), which was appended to the draft Explanatory Statement. The EOS set out estimated receipts and payables on two bases, namely, if the Restructuring Plan is sanctioned, on the one hand, and if Amicus is placed into compulsory liquidation, on the other hand.

99. The overall conclusion of the EOS showed that the Administrators consider that, for each category of creditors, the Restructuring Plan will achieve a better return for them than they could expect to receive in a liquidation. For example, the return to Unsecured Creditors in a liquidation is nil (with no prescribed part available from which a distribution could be made) whereas the effect of the Restructuring Plan will be to offer a small dividend of 2.31p in £ to such creditors. The EOS was accompanied by a set of notes which purported to explain various parts of the EOS.

100. At the hearing, I accepted Mr Mace's submission that the EOS did not, in the draft form originally before the Court, adequately explain the nature of some of the entries in the EOS or the reasons for the specific figures attributed to them by the Administrators. I indicated that I thought it would be necessary for further detail to be provided to enable creditors to understand the basis upon which the Administrators had reached the overall conclusions set out therein.

101. To take just one example (which could stand for several), one of the line items under the heading "*Receipts*" was for "*Recoveries other than via CBFL Junior Loan including via PI claims*". The explanatory notes to that line item simply said that it, "*Includes loan redemptions and other recoveries vested in Amicus (HC) Ltd and directly by the Plan Company*" and that it is "*Based on orderly run-off. Includes one right of action/recovery claim that vests directly with the Plan Company*". Under the Restructuring Plan, the estimated recovery under that line item was £3,219,344, whereas in a liquidation the estimated recovery was significantly lower, £1.5 million. No further explanation for the difference was provided and, as Mr Mace rightly observed, even creditors which are familiar with the administration and might understand what is meant by the "*CBFL Junior Loan*" are unlikely to understand why the Administrators expect that any recovery in a liquidation will be so much lower than under the Restructuring Plan.

102. Mr Haywood submitted in argument that the Administrators had tried to make the EOS concise and accessible rather than overloading creditors with information. Doubtless

that was the intention but, on this occasion, the initial draft did not strike the balance correctly. The guidance I gave in Re Sunbird Business Services Ltd [2020] Bus LR 2371 at [59]-[62] (in the context of a Part 26 scheme) and subsequently applied in the context of a Part 26A plan in Re Virgin Active Holdings Limited [2021] EWHC 814 (Ch) (convening) at [95]-[100] explains the level of detail required in an explanatory statement. Those principles apply just as much when those proposing the scheme or plan are professional office-holders. It is not enough for office-holders simply to state their conclusions as to the estimated outcome and implicitly to invite creditors to assume that because they are professionals that they will have got it right.

103. In light of my indication, the Administrators amended the relevant parts of the Explanatory Statement, and I was shown a revised draft in which additional paragraphs had been inserted to explain the reasons why the Administrators considered realisations would be lower in liquidation than under the Restructuring Plan (essentially because any liquidator would not have funds to pursue potential claims, which was the largest asset available to the company). The notes to the EOS had also been expanded upon significantly to ensure that creditors could understand each line item.

104. Although, as Mr Haywood acknowledged, it is not the function of the Court at the convening stage to review the contents of the Explanatory Statement line-by-line, nor to verify the accuracy of its contents, I am satisfied based on the amendments I have seen to the Explanatory Statement and the EOS that, *prima facie*, there is sufficient information to enable creditors to take a view on the merits of the proposed Restructuring Plan. But that does not, of course, prevent a creditor who takes a different view arguing to the contrary at sanction.

Potential antecedent transaction

105. Mr Mace raised a second objection to the detail provided as to the expected return in the relevant alternative of liquidation, namely, that the Administrators had ignored the possibility that the company or a liquidator might be entitled to bring claims in respect of a pre-administration transaction, which Mr Mace suggested had involved the disposal of certain assets of Amicus for no or minimal consideration prior to administration.

106. Mr Mace submitted that Crowdstacker took the view that if such claims could be pursued, the returns in the relevant alternative of a liquidation might be significantly higher than suggested by the Administrators. However, he was unable to articulate with any clarity the nature, subject or basis of any claim based on the pre-administration transaction. He suggested that this was because the Administrators' role had only become apparent to his client very recently (i.e. upon the service of evidence in support of the Restructuring Plan), notwithstanding that Crowdstacker has been aware of the transaction itself for almost three years.

107. Upon their appointment, the Administrators issued a "ratification letter", indicating that they had inquired into the transaction and confirming that they would not challenge it. Consistent with that, they have not done so during the administration. However, although they did not accept that Crowdstacker's points had any merit or foundation, the point having been identified, the Administrators considered it prudent to insert additional language into the Explanatory Statement to explain that Crowdstacker had

raised the possibility of an antecedent claim, and to reiterate the Administrators' position that no such claim exists or should be attributed any value in the EOS.

108. I am in no position to express any view on the merits of these arguments at this stage. They are clearly a matter for the sanction hearing. At that stage, Crowdstacker will have the opportunity to raise the issue if it wishes to do so, either as to the adequacy of the Explanatory Statement or as a matter going to the accuracy of the Administrators' opinion as to the outcome for creditors in the relevant alternative, and hence to the overall fairness or merits of the Restructuring Plan.

The Indemnity owed to the Administrators

109. It will be recalled that the Indemnity in favour of the Administrators ranks first in the order of priority under the Waterfall. Mr Mace's objections to the adequacy of the information provided in respect of the Indemnity were, at least initially, twofold.

110. First, he said that no copy of the Indemnity had been provided so as to enable creditors to assess whether the Explanatory Statement fairly summarised its terms. That concern was addressed following the first day of the hearing before me, when Crowdstacker was provided with a draft copy of the Indemnity. The Administrators also indicated that they would append a copy to the Explanatory Statement. That course, of making the Indemnity a document available for inspection prior to the Plan Meetings, is what would ordinarily be required given that the terms of the Indemnity are directly relevant to the returns that creditors might expect to achieve under the Restructuring Plan.

111. Second, upon receipt of the Indemnity, Mr Mace observed that although it was subject to an absolute cap of £1 million, that cap included a carve-out for the remuneration and disbursements the Administrators will receive in their capacity as Plan Administrators upon their vacation of office. Mr Mace's objection was that this was not adequately explained in the Explanatory Statement. The Administrators accordingly made certain revisions to make the position clearer, including appending to the Explanatory Statement a copy of the engagement letter by which they will be appointed as Plan Administrators if the Restructuring Plan is sanctioned. The engagement letter indicates that the Plan Administrators will be entitled to remuneration of £60,000 plus VAT and disbursements for carrying out their work.

112. Mr Mace made various other observations about the terms of the Indemnity. If and to the extent that those observations have any force, they go to the merits of the Restructuring Plan and are matters that can be raised at sanction rather than dealt with as part of the convening hearing. I did not consider that any further amendments were required to the Explanatory Statement in this respect.

Payments under the Waterfall

113. In argument, I observed to Mr Haywood an apparent discrepancy between the terms of the Restructuring Plan and the description given in the Explanatory Statement insofar as it related to payments due under the Waterfall during the Waterfall Period. It will be recalled that payments under the Waterfall are contingent upon any recoveries achieved by Amicus after its exit from administration from its ongoing servicing of the Legacy Loans portfolio during the Waterfall Period.

114. After setting out, at Clause 10.4, the order of priority under the Waterfall, Clause 10.5 of the draft Restructuring Plan provided, relevantly, that:

> "The *payment* of Waterfall Creditors by the Plan Company pursuant to Clause 10.4 above *shall … be made at the discretion of the Plan Company, acting in good faith,* from any available Plan Company Realisations received during the Waterfall Period …"
>
> (my emphasis).

115. The Explanatory Statement appeared to summarise the position rather differently, omitting any mention of any discretion of the Plan Company to make payments. Paragraph 11.9 of the Explanatory Statement stated that:

> "The *timing* of payment of Waterfall Creditors by the Plan Company … shall be made at the discretion of the Plan Company, acting in good faith, from any available Plan Company Realisations received during the Waterfall Period …"
>
> (my emphasis)

116. Mr Haywood clarified that the intention was as set out in the Explanatory Statement, namely, that the Plan Company (acting through its directors) would have discretion as to *when* to make payments to creditors under the Waterfall, but would have an absolute obligation to make those payments (subject to the availability of funds and the need to satisfy any claims under the Indemnity, which ranked first in the Waterfall).

117. Following this exchange, the Administrators amended the terms of the Restructuring Plan and the Explanatory Statement to make clear that the company had no discretion as to whether to make payments under the Waterfall and that such payments had to be made as soon as practicable (again, subject to the availability of funds and the Indemnity).

118. I also suggested, and Mr Haywood accepted, that it would be appropriate to include a term in the Restructuring Plan to make clear that the company and its directors should exercise reasonable endeavours to gather in funds and pay them to creditors under the Waterfall prior to the end of the Waterfall Period. That was to address the potential conflict that might otherwise result from the fact that it might be in the interests of the company as an entity engaging in new business to allow the Waterfall Period to lapse before collecting in monies on the Legacy Loans, given that such recoveries will accrue to the benefit of the company after the Waterfall Period expires. The Administrators amended the terms of the Restructuring Plan accordingly to make clear that Amicus would, in good faith, use reasonable endeavours to collect in the Legacy Loans for the duration of the Waterfall Period for the purpose of making payments to creditors under the Waterfall.

119. Mr Mace raised a further, connected, point concerning the definition of "Legacy Loans", which is linked to the matters I have already addressed. In essence, his concern was to ensure that the loan agreements which currently fall within the meaning of "Legacy Loans", the servicing of which will generate the funds to pay creditors under

the Waterfall, could not fall outside of the meaning if the loans were (for example) refinanced.

120. Mr Haywood submitted that the amendments I have just described, which impose an obligation on the company to act in good faith and use reasonable endeavours to make payments, adequately addressed this concern in so far as it might relate to any extensions. He further pointed out that if any of the Legacy Loans were refinanced in a conventional way, it would involve the repayment of the Legacy Loan from the proceeds of a new loan, and hence the obligation to pass money down the Waterfall would come into play. And finally Mr. Haywood pointed out that it is very unlikely that the company will need to refinance what are largely defaulting loans.

121. Those submissions appeared at first blush to be accurate, and I certainly accept that they are not so obviously wrong as to require the Restructuring Plan to be amended in such respects before being put to creditors.

Segregation of funds owed to creditors under the Waterfall

122. As I have indicated above, in the course of the hearing it became very clear that the post-administration plans of the company included at least the possibility of the company pursuing new business rather than simply servicing the Legacy Loans portfolio in order to make the payments due under the Waterfall.

123. In light of this possibility, I observed to Mr Haywood that there was no provision under the Restructuring Plan (as originally drafted) either to prevent the company from using realisations from the Legacy Loans in the course of its new business; or to provide security for payment of the Waterfall monies; or (if no such provisions were included) to warn Plan Creditors that their payments under the Waterfall would be at risk of the company incurring losses in new trading activities and becoming insolvent. The risks to Plan Creditors in this respect appeared to be confirmed by clause 10.4 of the Plan which provided that such receipts, recoveries, repayments, realisations or proceeds from the Legacy Loans were to be "*legally and beneficially due to the Plan Company*…".

124. To address these concerns, the Administrators made further amendments to the terms of the Restructuring Plan and the Explanatory Statement including, critically, to insert a clause providing for the segregation of any receipts from servicing the Legacy Loans portfolio. Accordingly, any such funds recovered by the company during the Waterfall Period are to be held on trust for creditors pending payment in accordance with the order of priority prescribed by the Waterfall.

Sums to fund the operation of the company

125. Mr Mace observed that there was some uncertainty as to the use to which the fixed sum of £3.73 million will be put which, it will be recalled, falls at the second limb of the Waterfall (and is therefore paid in priority to the claims of creditors). Mr Mace submitted that because the directors of Amicus might pursue new business post-administration, the fixed sum arguably represented an undisclosed benefit to shareholders in that the costs of running the business as a going concern – including the pursuit of new business from which creditors would not benefit – was to be funded by creditors.

126. I observed that the Explanatory Statement did state, in terms, that the fixed sum represented "*the estimated costs that will be incurred by the Plan Company in realising and collecting the Legacy Loans for the duration of the Waterfall Period*", and that it did not appear to be intended that the fixed sum of £3.73 million was to be used to fund new business in the way that Mr Mace appeared to fear. Mr Haywood confirmed that this was the case and the Administrators made further amendments to the terms of the Restructuring Plan and the Explanatory Statement to make the position abundantly clear. As part of those amendments, the Administrators disclosed that a proportion of the funding to be advanced under the Restructuring Plan had been drawn down early to enable them to operate until the sanction hearing.

Unwind on insolvency

127. A further issue requiring clarification concerned Clause 7 of the Restructuring Plan which provided, in short, that if the company becomes insolvent after the effective date of the plan, the compromises and releases effected by the plan will be unwound, with creditors only entitled in any insolvency to what they would have been entitled to pre-plan (save that creditors would not be entitled to recover twice in respect of the same debt if they had already received payments pursuant to the Restructuring Plan).

Conclusion

128. On the basis of the amendments made to the draft documents, and subject to the caveat at the start of this section, I consider that the draft Restructuring Plan and Explanatory Statement *prima facie* appear to provide sufficient information to enable creditors to form a view as to their interests and the way in which they should vote, and that there is no longer any obvious flaw or deficiency in the drafting of the Restructuring Plan which would prevent me from convening Plan Meetings at this stage.

The Plan Meetings and timetable to sanction hearing

129. In light of what I have said about class composition, I directed that there be five Plan Meetings as follows:

    i) Expense Creditors;

    ii) Preferential Creditors;

    iii) Unsecured Creditors;

    iv) Secured Creditors, save that HGTL Securitisation shall be entitled to vote in the class only up to the value of its debt in respect of which it has a first-ranking charge;

    v) a class comprising a single creditor, HGTL Securitisation, in respect of the balance of its debt over which it has junior-ranking security only.

130. Given the ongoing Covid-19 pandemic, it was proposed that the Plan Meetings will be held virtually on a video conference platform, as has been done successfully in relation to a number of other schemes and plans in accordance with guidance provided by Trower J in Re Castle Trust Direct plc [2020] EWHC 969 (Ch). I am satisfied that that is an appropriate course.

131. The Administrators intend, immediately following this hearing, to provide creditors of Amicus with copies of the notice convening the meetings, together with details of how to access the Restructuring Plan, the Explanatory Statement and voting instructions on the website maintained by them.

132. Mr Haywood invited me to direct, and I did direct, that to the extent it is necessary to give notice to any Individual Crowdstacker Lenders (because, contrary to expectations, Crowdstacker is unable to effect the novation of those contracts), notice is to be given by Crowdstacker and the individual lenders should be directed to the website maintained by the Administrators on which creditors can access the relevant documentation. The parties agreed a form of wording to be communicated by Crowdstacker to those individuals.

133. It was originally proposed that the meetings take place virtually on 21 July 2021 with the sanction hearing proposed to take place on 11 August 2021. In light of this hearing taking significantly longer than the parties estimated, and the revisions that have been made to the Explanatory Statement and the terms of the Restructuring Plan, I directed that the meetings take place on 28 July 2021 to ensure that Plan Creditors had adequate notice of them and sufficient time in which to consider the revisions. The date of 11 August, which falls during the long vacation, is provisionally held for the sanction hearing.

134. The parties also agreed a timetable for the service of evidence in support of their respective positions at sanction, with the Administrators given the opportunity to file responsive evidence should they wish to do so. I am satisfied that the timetable is sensible and fair. I also directed that any application for disclosure by any party should be made in good time, and in any event should be heard before the end of the Court term.

Costs

135. At the conclusion of the hearing, I invited the parties to make short written submissions on costs. Crowdstacker sought payment of all of its costs of preparing for and attending the hearings before Trower J and myself in the total sum of £137,507.50 plus VAT (a total of £165,009 including VAT). Of that, solicitors' costs were said to be £100,507.50 and counsel's fees of £37,000 (excluding VAT). Amicus resisted an immediate order for payment and submitted that the issue of costs should be reserved until after the sanction hearing.

136. In Virgin Active Holdings Limited [2021] EWHC 911 (Ch), I considered the principles applicable to the payment of costs in relation to scheme cases under Part 26. I summarised the principles as follows at paragraph [29],

> "i) In all cases the issue of costs is in the discretion of the court.
>
> ii) The general rule in relation to costs under CPR 44.2 will ordinarily have no application to an application under Part 8 seeking an order convening scheme meetings or sanctioning a scheme, because the company seeks the approval of the court, not a remedy or relief against another party.

> iii) That is not necessarily the case (and hence the general rule under the CPR may apply) in respect of individual applications made within scheme proceedings.
>
> iv) In determining the appropriate order to make in relation to costs in scheme proceedings, relevant considerations may include,
>
> a) that members or creditors should not be deterred from raising genuine issues relating to a scheme in a timely and appropriate manner by concerns over exposure to adverse costs orders;
>
> b) that ordering the company to pay the reasonable costs of members or creditors who appear may enable matters of proper concern to be fully ventilated before the court, thereby assisting the court in its scrutiny of the proposals; and
>
> c) that the court should not encourage members or creditors to object in the belief that the costs of objecting will be defrayed by someone else.
>
> v) The court does not generally make adverse costs orders against objecting members or creditors when their objections (though unsuccessful) are not frivolous and have been of assistance to the court in its scrutiny of the scheme. But the court may make such an adverse costs order if the circumstances justify that order.
>
> vi) There is no principle or presumption that the court will order the scheme company to pay the costs of an opposing member or creditor whose objections to a scheme have been unsuccessful. It may do so if the objections have not been frivolous and have assisted the court; or it may make no order as to costs. The decision in each case will depend on all the circumstances."

137. Given the similarities of the procedures, at least at the convening stage, I consider that these principles are also an appropriate starting point for consideration of costs under Part 26A.

138. In Virgin Active I reserved the question of payment of the costs of the main opposing creditors of the convening hearing until after the sanction hearing. I reached that decision in circumstances in which (i) the opposing creditors had not contested the composition of classes proposed by the plan companies, but had advanced substantial argument at the convening hearing on the adequacy of the information to be provided in the explanatory statement and (ii) sought (and obtained some) disclosure of information to enable them to mount a challenge at sanction to the plan companies' determination of the likely outcome for creditors in the relevant alternative and to resist any attempt to "cram-down" the plan on them using the power in Section 901G. In those circumstances I considered that I would be better placed after the sanction hearing to assess matters such as the nature of the role that the opposing creditors had played in

relation to the plans, the manner and extent to which they had assisted the court in its scrutiny of the plans, and the overall justice of ordering the plan companies to bear their costs having regard to the interests and support (or otherwise) of other stakeholders for the plans.

139. In contrast, in the instant case, Crowdstacker appeared at the convening hearing and made submissions opposing the composition of classes proposed by Amicus. The question of class composition is a discrete, and central, issue for consideration at the convening hearing. Although Crowdstacker did not succeed on its main class argument (that it should form a class of its own), it did persuade me to adopt its alternative approach (that HGTL Securitisation should vote only up to the value of its senior debt), and that the company's approach to the composition of the class of Secured Creditors was wrong. To that extent Crowdstacker plainly materially assisted me in the task that I had to perform at the convening hearing. This is a weighty factor in support of an order in Crowdstacker's favour in relation to the costs of the convening hearing, irrespective of the ultimate outcome of its other arguments in relation to the Restructuring Plan.

140. Crowdstacker also highlighted a number of areas of legitimate concern over the drafting of the Explanatory Statement and the Restructuring Plan itself. Although some had not been raised earlier in correspondence (which plainly would have been desirable), as I have indicated, many of those points were well made at the hearing by Mr. Mace and resulted in changes to the Restructuring Plan and the Explanatory Statement. Although the overall shape of the Restructuring Plan did not change, the drafting and other changes included changes that were substantive and potentially avoided significant issues arising at the sanction stage when it might have been too late to correct the position.

141. Although Mr. Haywood objects that a number of the issues which were raised and dealt with were the result of my own scrutiny of the Restructuring Plan and the draft Explanatory Statement rather than being directly the result of points taken by Mr. Mace, I do not think that fully reflects the dynamics of the hearing. The presence and contribution of Mr. Mace to the wider debate at the hearing was of real assistance in prompting thoughts that might not otherwise have occurred to me if faced with having to scrutinise the company's proposals alone.

142. For these reasons, I consider that it is right in principle that I should make a costs order in favour of Crowdstacker to reflect its success on the class question, and its contribution to the task that I performed at the convening hearing. It is also right, in my judgment, to make such order now rather than put the decision off until after sanction, given that for the most part the issues raised and resolved at the convening hearing were discrete and will not be affected by decisions made at sanction.

143. I do not, however, consider that it would be appropriate to order the company to pay all of Crowdstacker's costs in relation to the convening hearing. A significant part of the costs claimed by Crowdstacker related to the preparation of evidence, which included, in particular, evidence setting out the background to a number of issues that either did not arise for consideration at the convening hearing, or which were not pursued. These included, for example, (i) evidence as to the issue of priority between the claims of Crowdstacker and HGTL Securitisation, raising an argument that Mr. Mace did not press in oral submissions that the Deed of Variation did not create any priority rights in

favour of HGTL Securitisation; (ii) an argument that HGTL Securitisation should not be included in the same class as Crowdstacker because it was not an "independent" creditor; (iii) arguments that the Restructuring Plan favoured connected creditors and was not the best option for creditors on the merits; and (iv) arguments based upon the failure (as Crowdstacker would have it) of the Administrators to include reference to the potential antecedent transaction in the Explanatory Statement and the EOS. The vast majority of this evidence was irrelevant and of no assistance to me in the determination of the issues that fell for decision at the convening stage, and I consider that it would not be appropriate or just to require the company to pay for its preparation.

144. I propose to assess the costs summarily in accordance with that approach, but to give the parties the opportunity to apply if they consider that a more detailed assessment is required. The easiest way in which I can reflect the points made above, albeit in a necessarily rough and ready way, is to take the costs breakdown provided by Crowdstacker's solicitors, and to exclude from it the costs of the solicitors in preparing the evidence on behalf of Crowdstacker and considering the company's evidence in response. This would result in reduction of £52,300, leaving a figure of about £85,000 (excluding VAT). I would also impose a further, smaller, reduction to reflect the fact that at least some part of counsel's fees must have included work done on such matters.

145. The consequence is that I would summarily assess the costs payable to Crowdstacker at £75,000 (excluding VAT). Crowdstacker's solicitors have provided confirmation that those costs do not exceed the costs that Crowdstacker is liable to pay, and that Crowdstacker is liable to pay VAT. The total costs ordered to be paid by the company should therefore be £75,000 plus VAT. Such costs should be paid as an expense of the administration.